

European Sports Law and Policy Bulletin

INTERNATIONAL
AND COMPARATIVE
SPORTS JUSTICE

Michele Colucci and Karen L. Jones eds.

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AND COMPARATIVE
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INTRODUCTION

Sports justice is of paramount importance for any club, athlete, and any other person registered with a sports association. They all have rights and obligations that are peculiar in the sense that they are proper to the context of sport, and therefore are most appropriately granted or supervised by sports justice within an autonomous system.

In the name of their autonomy and the specificity of sport many associations around the world developed their own justice bodies. Some of them seem to be more effective than others but all share the same goal: to settle disputes, to mediate and to guarantee the correct interpretation of sporting rules and regulations.

This is not a simple task since the scope of sports justice is not always easy to describe. In fact ordinary justice maintains its role in granting and supervising certain rights and obligations that are not so different from those protected by sports justice.

The lines of distinction become even more blurred when issues of individual or fundamental rights come into play.

This has become an interesting paradox, because sports justice and ordinary justice are not always discernible. One possible explanation may be found in the reality of certain countries where the two systems tend to converge.

This book is unique in that, for the first time, ever the Court of Arbitration for Sport, the sports justice systems of six international federations and twenty-three national federations as well as their relationship with ordinary justice, have been closely analysed.

The authors are all eminent scholars, sports lawyers and arbitrators who provide in-depth review and personal insights into the complexities of the topic.

The book is divided into three parts.

The first covers the major international associations in football, volleyball, basketball, handball, and Formula 1.

The second part focuses on the national sports justice systems and, in particular, on the general principles of sports justice as defined by the national Olympic Committees and by the football federations. Proper attention is given to the rules and procedures of the sports judicial bodies and to the relevant case law.

The last part gives an overview of all justice systems covered in order to identify the critical issues and relevant trends.

The aim is to provide all stakeholders with selected and detailed information in view of raising awareness of existing practices all over the world.

Brussels - The Hague, 30 September 2013

Michele Colucci Karen L. Jones

PART I

INTERNATIONAL SPORTS JUSTICE

**INTERNATIONAL SPORTS JUSTICE:
THE COURT OF ARBITRATION FOR SPORT**

by *Massimo Coccia**

SUMMARY: 1. The Creation and History of the CAS – 2. The Organization of the CAS – 3. Jurisdictional and Admissibility Issues – 4. Appointment and Challenge of Arbitrators – 5. Joinder, Intervention and Other Forms of Third Parties' Participation – 6. Provisional and Conservatory Measures – 7. Evidentiary Issues – 8. Applicable Law – 9. Appeals Against CAS Awards – 10. Concluding Remarks

Abstract:

This article examines the Court of Arbitration for Sport (CAS), dealing first with its history and its organization and then with the most relevant procedural issues that are encountered in CAS arbitration proceedings. In particular, this article explores some of the features which characterize and distinguish the CAS ordinary arbitration procedure, the CAS appeals arbitration procedure and the CAS Olympic arbitration procedure. Important procedural topics such as jurisdictional and admissibility issues, the appointment and challenge of arbitrators, the participation of third parties in CAS proceedings and the granting of interim measures are analyzed in depth. Evidentiary issues are also examined in detail, with particular reference to burden of proof, witness statements and discovery. Finally, the article examines the appeals to the Federal Tribunal against CAS awards and the various grounds for annulment provided by Swiss law.

1. The Creation and History of the CAS

1.1 The Early Days

The idea of an international jurisdiction specialized in sporting matters was first

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launched by the International Olympic Committee (IOC) at the beginning of the 1980s. During the 1981 IOC Session, held in Rome, the IOC member Judge Keba Mbaye – a high-profile jurist from Senegal, then a judge at the United Nations’ International Court of Justice – chaired a working group that started drafting the statutes of an arbitral institution that soon was going to be named Court of Arbitration for Sport (CAS).¹

An important driver of the IOC’s initiative probably was the wish to reduce the risk of litigation before ordinary courts. Indeed, in those years the number of international sports related disputes was increasing and sports organisations often had to defend themselves before various courts in different jurisdictions.

In 1983 the IOC adopted the first statutes of the CAS, which entered into force on 30 June 1984. Not coincidentally, given the position of Judge Keba Mbaye, the first statutes of the CAS set forth a procedural framework that was comparable to that of the International Court of Justice,² providing for (a) an arbitral jurisdiction in contentious cases, based on the acceptance of an arbitration clause by the parties to the dispute and yielding a binding decision, and (b) an advisory jurisdiction, based on a unilateral request submitted by any interested sports body and producing a non-binding advisory opinion.

For several years very few cases were litigated before the CAS, given that sports organisations were not inserting CAS arbitration clauses in their statutes or in contracts they signed. In 1986, the very first case was registered in the CAS docket; it was an entirely Swiss dispute concerning ice hockey. In 1991, the International Equestrian Federation (FEI) was the first international federation to insert in its statutes an arbitration clause accepting the jurisdiction of the CAS on any dispute arising from a decision of its disciplinary bodies. As a consequence, the first batch of disciplinary cases litigated before the CAS concerned equestrian issues, such as horses’ mistreatment or equine doping.

1.2 *The Gundel Case*

In 1992, the arbitral award issued in one of those equestrian disciplinary cases was challenged by the sanctioned rider – Mr Elmar Gundel – before the Swiss Federal Tribunal, that is, the Swiss Supreme Court (hereinafter, the “Federal Tribunal”). Mr Gundel mainly claimed that the award was invalid because the CAS did not meet the requirements of independence and impartiality needed to be deemed as a proper arbitral institution. On 15 March 1993, the Federal Tribunal issued a landmark judgment that was going to revolutionize the CAS.³

¹ See M. REEB, *The Role and Functions of the Court of Arbitration for Sport (CAS)*, *The International Sports Law Journal*, 2002, n. 2, 21-23.

² Cf. J. CRAWFORD, *Brownlie’s Principles of Public International Law*, 8th Edition, Oxford, Oxford University Press, 2012, 721-733.

³ ATF 119 II 271, reprinted in M. REEB (ed.), *Digest of CAS Awards 1986-1998*, Berne, Staempfli, 1998, 561. Cf. L. FUMAGALLI, *La circolazione Internazionale dei lodi sportive: il caso del Tribunale Arbitrale dello Sport*, in *Rivista diritto sportivo*, 1994, 336.

The Federal Tribunal recognized that, as long as the CAS dealt with disputes to which the IOC was not a party, the CAS was a true and independent arbitral institution whose panels were proper arbitral tribunals issuing regular arbitral awards; so, in the Federal Tribunal's view, there was no question that the CAS was sufficiently independent to adjudicate disputes having as a party the FEI or other international federations. However, the Federal Tribunal indicated that the links with the IOC were too meaningful (particularly in terms of financing, rule-making and appointment of arbitrators to the list) to maintain the same position in the event of CAS proceedings involving the IOC itself. The Federal Tribunal thus recommended that a greater independence of the CAS be ensured vis-à-vis the IOC.⁴

1.3 *The Paris Agreement and the ICAS*

As a consequence, on 22 June 1994, the representatives of the highest sports bodies in the Olympic Movement⁵ – the IOC, the Association of the Summer Olympic International Federations (ASOIF), the Association of International Olympic Winter Sports Federations (AIOWF) and the Association of National Olympic Committees (ANOC) – signed in Paris an agreement (now known as the “Paris Agreement”) that established the International Council of Arbitration for Sport (ICAS) as an independent and autonomous foundation constituted pursuant to Article 80 *et seq.* of the Swiss Civil Code, and placed the CAS under its aegis. Since then, the ICAS has been responsible for the administration and funding of the CAS “with the aim of ensuring the protection of the rights of the parties before the CAS and the absolute independence of this institution”.⁶

The ICAS governing body is composed of twenty respected and experienced jurists (for example, judges of high courts) from different jurisdictions, who are appointed in the following manner: four members are appointed by the IOC, three by the ASOIF, one by the AIOWF and four by the ANOC; then, four members are appointed by the twelve ICAS members listed above with a view to safeguarding the interests of the athletes, and four members are chosen by the other sixteen ICAS members from among personalities independent of the above mentioned sports bodies.

The ICAS, among other things, elects among its members the President of the ICAS and of the CAS (who must coincide) and the Presidents of the CAS Divisions, it adopts and amends the arbitration and mediation rules, it appoints the

⁴ ATF 119 II 271, reprinted in M. REEB (ed.), *Digest of CAS Awards 1986-1998*, Berne, Staempfli, 1998, 561, at 570.

⁵ According to Rule 1 of the Olympic Charter, the Olympic Movement is under “the supreme authority and leadership of the International Olympic Committee” and “encompasses organisations, athletes and other persons who agree to be guided by the Olympic Charter”. On the legal and institutional aspects of the Olympic Movement, see A.M. MESTRE, *The Law of the Olympic Games*, The Hague, TMC Asser Press, 2009, 35 ff.

⁶ Preamble of the Paris Agreement, in M. REEB (ed.), *Digest of CAS Awards, II, 1998-2000*, The Hague, Kluwer, 2002, 883.

CAS Secretary General, it appoints the arbitrators to and removes them from the list of CAS arbitrators, it resolves challenges to arbitrators and in general performs any functions needed to oversee the operation of the CAS. In particular, the ICAS is responsible for the financing and the budget of the CAS and, in accordance with the Paris Agreement, is granted an automatic source of funding through a small percentage of the proceeds from the sale of the Olympic Games television rights.⁷

After the 1994 reform, most International Federations recognized the jurisdiction of the CAS as an appeals body for the decisions of last instance of their internal justice bodies. The number of cases brought before the CAS thus gradually increased.

1.4 *The Creation of the CAS Ad Hoc Division for the Olympic Games*

In 1996, on the occasion of the Atlanta Olympic Games, the ICAS successfully established and organized for the first time the CAS Olympic ad hoc Division – entrusted with the resolution on site of all disputes related to the Olympic Games within 24 hours of the request for arbitration – that was to become a staple feature of all the following editions of the Summer and Winter Olympic Games.⁸

1.5 *The Federal Tribunal's Endorsement*

On 27 May 2003, the Federal Tribunal issued a judgment on a challenge brought by two Russian cross-country skiers (Larissa Lazutina and Olga Danilova) against two parallel CAS awards sanctioning them for having used recombinant erythropoietin.⁹ The Federal Tribunal acknowledged that the new institutional framework guaranteed the independence and impartiality of the CAS towards the IOC not only from a formal angle but also from a substantive one, significantly noting that the IOC had lost four of the twelve CAS cases in which it had been a party up to that moment.¹⁰ In its judgment, the Federal Tribunal found that the CAS, “having gradually gained the trust of the sporting world”, had become “one of the main pillars of organized sport”.¹¹ The Federal Tribunal went on to qualify the CAS (quoting the former IOC President Juan Antonio Samaranch) as “a true supreme court of the sports world, and stated that “there appears to be no viable alternative to this institution, which can resolve international sports-related disputes quickly and inexpensively” even though it “could undoubtedly be improved”.¹²

⁷ Article 3 of the Paris Agreement, *id.* at 884.

⁸ See G. KAUFMANN-KOHLER, *Arbitration at the Olympics. Issues of Fast-Track Dispute Resolution and Sports Law*, The Hague, Kluwer, 2001.

⁹ Awards CAS 2002/A/370 *Lazutina v. IOC* and CAS 2002/A/371 *Danilova v. IOC*.

¹⁰ Federal Tribunal, case 4P.267-270/2002, *Lazutina, Danilova v. IOC, FIS, CAS*, at para. 3.3.3.3, translated from the original French text.

¹¹ *Id.*

¹² *Id.*

1.6 *The Role of the CAS in Doping and Football Cases*

In the first years of the XXI century, the above mentioned characterization of the CAS as the “supreme court” of international sports became particularly evident in doping and football matters, due to the acceptance of the CAS as the last instance judge by both WADA, which inserted a CAS arbitration clause in the World Anti-Doping Code, and FIFA, which inserted a CAS arbitration clause in its Statutes. Indeed, most CAS cases are nowadays related to anti-doping rule violations or to football.

Sovereign States have also indirectly recognized the role of the CAS as world court of last resort in doping matters, by adopting within the framework of UNESCO the International Convention against Doping in Sport of 19 October 2005, pursuant to which the contracting States “commit themselves to the principles of the [World Anti-Doping] Code”.¹³

2. *The Organization of the CAS*

2.1 *The Code of Sports-Related Arbitration*

In 1994, as part of the reform prompted by the Federal Tribunal, the ICAS enacted the Code of Sports-Related Arbitration (the “CAS Code”), setting forth the rules governing the organization of the CAS and all jurisdictional and procedural matters. From time to time the ICAS amends the CAS Code, also taking into account input and suggestions coming from the CAS Secretary General and from CAS arbitrators.¹⁴ The latest version of the CAS Code came into force on 1 March 2013 and is applicable to all arbitral proceedings initiated on or after that date (Article R67 of the CAS Code).

2.2 *The CAS Divisions*

The CAS comprises of two permanent divisions, an Ordinary Arbitration Division and an Appeals Arbitration Division, overseeing the two different arbitral procedures governed by the CAS Code (see *infra* at para. 3.1). The CAS also has several temporary *ad hoc* divisions, instituted from time to time to promptly resolve disputes arising during sports events, of which the most prominent is the Olympic *ad hoc* Division, set up every two years to resolve disputes arising on the occasion of the Summer and Winter Olympic Games and governed by the CAS Arbitration Rules for the Olympic Games (the “Olympic Arbitration Rules”).

¹³ The UNESCO Anti-Doping Convention entered into force on 1 February 2007 and, as of 31 January 2013, has been ratified by 173 States.

¹⁴ The current version of the CAS code can always be checked at the CAS website: www.tas-cas.org.

The CAS also administers a mediation procedure governed by the CAS Mediation Rules. The CAS also used to administer a now abolished “consultation procedure”, whereby CAS arbitrators rendered advisory opinions upon the request of international federations or Olympic Committees (former Articles R60-R62 of the CAS Code).

Each Division is chaired, upon ICAS appointment (see *supra* at 1.3), by a President and a Deputy President, who preside over the efficient running of the arbitral proceedings and exert important functions, particularly with regard to the appointment of the arbitrators and to interim measures.¹⁵

2.3 *The CAS Court Office*

The CAS has a Court Office located in Lausanne and performing the functions assigned to it by the CAS Code. It is headed by a Secretary General and composed of several Counsels, who assist and may represent the Secretary General when required (Article S22 of the CAS Code), and of administrative and secretarial staff.

The Secretary General and the various Counsels have legal training and administer all arbitration and mediation procedures, supporting from a procedural standpoint the arbitrators and dealing with the parties. Compared to other arbitral institutions, the CAS Court Office is intensively involved in the day to day administration of arbitration proceedings. Under the supervision of the Secretary General, each CAS arbitration is specifically assigned to a given CAS Counsel, who supervises the proceedings with a view to ensuring as far as possible their swift and smooth progress. In particular, CAS Counsels take part in the arbitrators’ meetings, conference calls and exchange of electronic correspondence. They also take care of all correspondence between the arbitrators and the parties, thus avoiding that arbitrators keep direct contacts with the parties. Indeed, all “notifications and communications that CAS or the Panel intend for the parties shall be made through the CAS Court Office” (Article R31 of the CAS Code) and vice-versa. The old rules that imposed the use of hard mail or facsimile for all communications or notifications have been changed at last and, as of the latest version of the CAS Code, parties are allowed to send correspondence and file submissions by electronic mail (Article R31 of the CAS Code).

In practice, CAS Counsels also have an important role in keeping the arbitrators – and upon request even the parties – knowledgeable about procedural rules and practices and relevant CAS precedents (as, regrettably, not all CAS awards are published on the CAS web site).

2.4 *The Seat of the CAS*

While under the arbitration rules of many arbitral institutions the seat of the arbitration

¹⁵ See *infra* at Sections 4 and 6.

is variable, depending each time on the choice of the parties or of the institution,¹⁶ pursuant to Article R28 of the CAS Code (which is applicable to both ordinary and appeals arbitration proceedings), the “seat of CAS and of each Arbitration Panel (‘Panel’) is Lausanne, Switzerland”. The same is provided by Article 7 of the Olympic Arbitration Rules: “The seat of the ad hoc Division and of each Panel is in Lausanne, Switzerland”.

Such requirement that all CAS arbitrations be seated in Switzerland is particularly important because it is well known that the choice of the place of arbitration establishes a certain relationship between the arbitration and the legal and jurisdictional system of the chosen territory. In particular, the choice of the place of arbitration may be legally relevant to determine issues such as:

- the national courts which have jurisdiction to set aside the award;
- the national courts which may intervene to support the arbitral tribunal for interim or conservatory measures;
- the applicability of certain conflict of law rules;
- the applicability of mandatory rules of the country where the arbitration takes place or of other countries;
- the national law applicable to certain procedural issues and the relevance of public policy;
- the national law governing the arbitrability of a given subject matter,
- the nationality of the arbitral award for the purposes of article I.1 of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

It is well established in international arbitration that the “seat of the arbitration” is a legal concept, which must be clearly distinguished from the geographical location or locations where the arbitrators may actually hold hearings, consultations or other meetings. Indeed, CAS hearings are sometimes held in other locations, as provided by the second part of Article R28 of the CAS Code, according to which “should circumstances so warrant, and after consultation with all parties, the President of the Panel may decide to hold a hearing in another place and may issue the appropriate directions related to such hearing”.¹⁷ The CAS has even two decentralized offices, in New York and Sydney, in order to facilitate the access to CAS by parties from North America and Oceania.

In any event, even when a CAS hearing is not held in Switzerland and even when all elements of the arbitration point to another jurisdiction, from a legal standpoint the arbitration must be considered as taking place in Switzerland. This was notably confirmed on 1 September 2000 by an Australian court in *Raguz v. Sullivan*, a selection case involving two Australian judokas battling for a spot on

¹⁶ See e.g. Article 18.1 of the Rules of Arbitration of the International Chamber of Commerce: “*The place of the arbitration shall be fixed by the Court, unless agreed upon by the parties*”.

¹⁷ The CAS has even two decentralized offices, in New York and Sydney, in order to facilitate the access to CAS by parties from North America and Oceania.

the Australian Olympic squad.¹⁸ The two athletes first litigated before the CAS, in a dispute where every single element of the arbitral proceedings – but for Article R28 of the CAS Code – pointed to Australia: the parties, their counsel and the arbitrators were all Australian citizens residing in Australia, the hearings were held in Sydney and the proceedings were managed from the CAS offices in Sydney. Then, the athlete who lost the arbitration and was excluded from the Australian Olympic judo team, challenged the CAS award before the Supreme Court of the New South Wales Court of Appeal asking to set it aside. However, the Australian court declined jurisdiction to entertain the case because “the ‘seat’ or ‘place’ of arbitration [has] its essential function as a ‘juridical’ concept” and the “unqualified choice of Lausanne as the ‘seat’ of all CAS arbitrations within the scope of the arbitration agreement means that that agreement *did* provide for arbitration in a country other than Australia”.¹⁹

Therefore, whenever there is an agreement to arbitrate a dispute before the CAS, the parties automatically choose Switzerland as the place of arbitration and are pre-empted from selecting another place. It is submitted that, even if the parties were to expressly indicate another seat in their arbitration agreement, such a choice would be pre-empted by their acceptance of the CAS Code, because once the parties choose an arbitration institution they must abide by the arbitration rules of that institution.

The fact that the seat of CAS arbitration proceedings is always in Lausanne implies, in particular, that whenever at least one of the parties is neither domiciled nor habitually resident in Switzerland the arbitration qualifies as a Swiss “international arbitration” subject to Chapter 12 (Articles 176-194) of the Swiss Private International Law Act (*Loi fédérale sur le droit international privé* of 18 December 1987) or “PILA”.²⁰ In fact, the vast majority of CAS cases involve parties from various parts of the world and are thus governed by the PILA.

Should the parties be all domiciled or habitually resident in Switzerland – for example, a Swiss football club acting against FIFA or UEFA – the CAS arbitration would be a Swiss “domestic” arbitration governed by Part 3 (Articles 353-399) of the Swiss Federal Civil Procedure Code (*Code de procédure civile* of 19 December 2008, which came into effect on 1 January 2011), unless the parties expressly agree to submit their dispute to Chapter 12 of the PILA. However, for the purposes of this article, all procedural issues will be only dealt with having in mind CAS international arbitration cases and, thus, it will be only made reference to the PILA.

¹⁸ See *Angela Raguz v Rebecca Sullivan & ORS*, [2000] NSWCA 240; the judgment is reprinted in G. Kaufmann-Kohler, *Arbitration at the Olympics*, *supra* note 9, at 51-78.

¹⁹ *Id.* at 95, 108. Emphasis in the original.

²⁰ Pursuant to Article 176.1 PILA, the “provisions of this chapter shall apply to arbitrations if the seat of the arbitral tribunal is in Switzerland and if at least one of the parties at the time the arbitration agreement was concluded was neither domiciled nor habitually resident in Switzerland”. All Swiss provisions are quoted herein in their English translation; the original texts in the official languages of the Swiss Confederation can be found at www.admin.ch/dokumentation.

Another important consequence deriving from the permanent Swiss seat of all CAS arbitration proceedings is the fact that the ordinary court having jurisdiction to hear actions to set aside international CAS awards is the Federal Tribunal, which (as we have already seen) has thus become a sort of “supervisor” and “controller” of the CAS and the ICAS. Other consequences of the Swiss seat of CAS arbitration proceedings will become apparent during the rest of this article.

2.5 *The Language of CAS Proceedings*

Pursuant to Article R29 of the CAS Code, the official languages of the CAS are English and French; accordingly, a party starting a CAS arbitration must choose either language to file its first submission (the Request for Arbitration in the ordinary procedure or the Statement of Appeal in the appeals procedure). If the respondent answers without raising any objection as to the language, the arbitration will usually proceed in that language. In case of disagreement between the parties, the president of the appointed Panel or, before the appointment, the president of the relevant Division selects either language, taking into account all relevant circumstances. Thereafter, the proceedings are conducted exclusively in the selected language, unless the parties and the Panel agree otherwise.

Sometimes the parties agree to conduct the arbitration in a language other than French or English; pursuant to the second paragraph of Article R29 of the CAS Code, this may be done provided that both the Panel and the CAS Court Office agree. The appointment of arbitrators fluent in the selected language is obviously very relevant to that end. Accordingly, it sometimes occurs in CAS practice that arbitration proceedings are conducted in Spanish, Italian or German, without particular problems.

3. *Jurisdictional and Admissibility Issues*

3.1 *The Ordinary and Appeals Procedures*

The CAS Code governs two types of arbitration proceedings – the “ordinary procedure” and the “appeals procedure”, with partially different sets of procedural rules. Articles R27 to R37 and R63 to R70 of the CAS Code apply to both procedures, while Articles R38 to R46 and Articles R47 to R59 respectively apply to the ordinary procedure and the appeals procedure. In addition, a few provisions inserted among the ordinary procedural rules also apply to appeals proceedings through some express references included in the appeals procedural rules.²¹

²¹ In particular: (a) Article R57 of the CAS Code provides that Articles R44.2, related to the hearing, and R44.3, governing evidentiary issues, also apply in the context of the appeals procedures; (b) Article R54, concerning the appointment of the arbitrators, provides that “Article R41 applies *mutatis mutandis* to the appeals arbitration procedure, except that the President of the Panel is appointed by the President of the Appeals Division”.

Pursuant to the CAS Code, a CAS arbitration falls within the ordinary procedure whenever the arbitration clause pointing to the jurisdiction of the CAS is contained in a contract or in a sports regulation or in an ad hoc arbitration agreement, whereas it falls within the appeals procedure whenever the party requesting the arbitration is challenging a decision rendered by a sports organization and a specific agreement or the rules of such sports organization (directly or through a reference to other sports rules) provide for an appeal to CAS.

Therefore, the essential difference between the two procedures is determined by the existence or not of a challenge against a decision adopted by a sports organization. This is the first element that a party should analyse before deciding whether to file a request for arbitration (the statement prompting the start of a CAS ordinary procedure) or whether to lodge a statement of appeal (the statement prompting the start of a CAS appeals procedure). In addition, when the jurisdiction is based on an arbitration clause included in the rules of a sports organization, the way in which such clause is drafted might also be relevant in order to qualify a case as appellate or ordinary.

Once the initial statement has been submitted to the CAS, it's the CAS Court Office which, regardless of the party's characterization, assigns the case to the appropriate CAS Division, qualifying it as an ordinary or appeals procedure.²² Pursuant to Article S20 of the CAS Code, such Court Office's "assignment may not be contested by the parties nor be raised by them as a cause of irregularity". This assignment may sometimes be switched in the "event of a change of circumstances during the proceedings" and, in such a case, "the CAS Court Office, after consultation with the Panel, may assign the arbitration to another Division", and this "re-assignment shall not affect the constitution of the Panel or the validity of any proceedings, decisions or orders prior to such re-assignment".

This Court Office's qualification of a case as an ordinary or appellate one may have a great relevance in a given case because the right to file an appeal before the CAS against a decision of a sports organization is limited by stringent time-limits (ranging from a few days until a month, depending on the applicable sports rules) whereas, essentially, the right to request an ordinary arbitration is only limited by the applicable statute of limitation (which is usually a matter of years).

Would it be possible for a panel to revise the assignment done by the CAS Court Office if it feels that the Court Office erroneously interpreted the submission filed by the party? A CAS panel has observed that "the decision of the CAS Court Office as to the assignment of a case to either CAS Division is administrative in nature; no arguments are heard, no reasons are given, no appeal is allowed. The Panel must thus disregard the arguments put forward by the parties with respect to the characterization of this arbitration as an 'appeal' or an 'ordinary' arbitration" (CAS 2004/A/748 *ROC, Ekimov v. IOC, USOC, Hamilton*).

²² The CAS Court Office attributes to the new arbitration case a docket number formed by a progressive number, an "O" or an "A" (depending on the ordinary or appellate character of the case) and the year of the filing.

However, if the assignment of the case to a type of CAS procedure or the other involves a decision on jurisdiction, the appointed CAS panel certainly has the power to decide this issue, even revising what was decided by the Court Office, given that under Swiss law an arbitral body “shall rule on its own jurisdiction” (Article 186.1 PILA) on the basis of the “*Kompetenz-Kompetenz*” principle. For instance, in the case CAS 2007/O/1237 *GFA v. UEFA* the panel found that it had “jurisdiction as an ordinary arbitration court pursuant to UEFA Statutes Article 61” (section V.1 of the Award on Jurisdiction dated 3 July 2008) and dismissed UEFA’s argument that the only way in which the CAS could have jurisdiction over the dispute was as an appeals panel. In this case, the issue was one of jurisdiction because UEFA includes in its Statutes two separate arbitration clauses, one conferring upon the CAS an “ordinary jurisdiction” and the other one conferring an “appellate jurisdiction”, and the panel had to decide whether the dispute fell under one or the other arbitration clause (with a very different outcome, because if the panel had found that the CAS had jurisdiction only as an appeals arbitration court, with the consequent application of the rules governing the appeals procedure, the GFA’s initial submission could have been deemed inadmissible for having been filed out of time).

3.2 *The Ad Hoc Olympic Procedure*

The CAS system includes a third arbitration procedure, the ad hoc Olympic procedure (the “Olympic procedure”), governed by the Olympic Arbitration Rules.

The panels (or sole arbitrators) appointed in accordance with the Olympic Arbitration Rules resolve disputes arising during the Olympic Games or during the 10 days preceding the Olympic Games’ opening ceremony. Article 1 of the Olympic Arbitration Rules, combined with Rule 61 of the Olympic Charter, is the basis for the CAS Olympic jurisdiction: “The purpose of the present Rules is to provide, in the interests of the athletes and of sport, for the resolution by arbitration of any disputes covered by Rule [61] of the Olympic Charter, insofar as they arise during the Olympic Games or during a period of ten days preceding the Opening Ceremony of the Olympic Games”.

Most jurisdictional problems at the Olympic Games arise from the temporal requirement that the dispute “arise during the Olympic Games or during a period of ten days preceding the Opening Ceremony”. There have been several Olympic cases where the appointed CAS panel had to determine whether the dispute had arisen within the said 10-day period in order to decide whether it could retain jurisdiction. In the case CAS OG 06/02 *Schuler v. Swiss Olympic & Swiss Ski*, the panel decided that, although the decision excluding the athlete had been published three days before the 10-day period, the dispute had arisen when “Ms Schuler had decided to appeal and had filed notice of her appeal”. This notion was refined in a subsequent Olympic case, when another CAS panel specified that “an applicant to the CAS ad hoc Division cannot rely on the Schuler award to mean that s/he,

through an exploration designed to learn the rationale for a decision with which s/he disagrees, can extend the time when a ‘dispute arose’ into the period identified in Rule 1 of the Ad Hoc Rules”, and that it is not up to the athlete to decide when the issue arose but rather that the facts must be “examined in each case based on the good faith understanding of the athlete or other aggrieved party and the relevant facts giving rise to when the dispute arose” (CAS OG 12/02 *Ward v. IOC & AIBA*).

3.3 *The Arbitration Agreement*

As with any arbitration, CAS may have jurisdiction over a given dispute only if there is an arbitration agreement. In other words, the disputing parties must consent to have their dispute resolved by an arbitration administered by the CAS. Pursuant to Article R27 of the CAS Code, the procedural rules included therein “apply whenever the parties have agreed to refer a sports-related dispute to CAS. Such reference may arise out of an arbitration clause contained in a contract or regulations or by reason of a later arbitration agreement (ordinary arbitration proceedings) or may involve an appeal against a decision rendered by a federation, association or sports-related body where the statutes or regulations of such bodies, or a specific agreement provide for an appeal to CAS (appeal arbitration proceedings)”.

The peculiar aspect of CAS arbitration depends on the fact that in most cases, in particular appeals arbitration cases, athletes or clubs are bound by an arbitration clause that is inserted into the statutes or regulations of the sports organization with which they have registered in order to compete. This has sometimes been criticized in the legal literature, as athletes and clubs are automatically bound to the arbitration clause if they wish to compete at high level. However, the situation does not seem to be very different from what normally happens to consumers or small businesses in everyday life with the so-called “adhesion contracts”; they must sign standard contracts with, say, a bank or an insurance company and are forced to accept clauses – including arbitration clauses – that they would not otherwise accept.²³

The situation gets a little trickier when there is a so-called “arbitration clause by reference”.²⁴ In this case, the CAS arbitration clause is not even included in the rules of the sports organization with which the athlete or club is registered – usually a national federation – but is incorporated therein by way of a general reference to the relevant international federation’s statutes or regulations that include a CAS arbitration clause. CAS panels have retained jurisdiction on several occasions on

²³ The recent judgment of the US Supreme Court in the American Express case is a good example of a situation where the weaker parties (merchants who accept American Express cards) are obliged to comply with the arbitration clause inserted in their contract with American Express, and are thus required to resort to individual arbitration and are prevented to litigate their claims on a class action basis (US Supreme Court, judgment of 20 June 2013, *American Express Co. et al. v. Italian Colors Restaurant et al.*, at www.supremecourt.gov/opinions/12pdf/12-133_19m1.pdf).

²⁴ Cf. S. NETZLE, *Arbitration Agreements by Reference to Regulations of Sports Organisations*, in *Arbitration of Sports-Related Disputes*, ASA Special Series No. 11, Basel, 1998, 45-58.

the basis of such arbitration clauses by reference, and the Federal Tribunal has upheld such CAS jurisprudence, adopting a “benevolent” and “flexible” approach to this issue.²⁵

For example, in the *Roberts* case the Federal Tribunal stated that “the reference need not explicitly cite the arbitration clause, but may include by way of general reference a document containing such a clause” and that it “can also be assumed that a sportsman recognizes the regulations of a federation with which he is familiar if he applies to that federation for a general competition or playing license”.²⁶

In the *Dodô* case,²⁷ the CAS panel ascertained that since the statutes of the Brazilian Football Confederation, of which the player Dodô was a member, provided that all athletes had to comply with FIFA rules, the player was bound by the arbitration clause in the FIFA statutes providing that FIFA and WADA could appeal against national federations’ anti-doping decisions. The Federal Tribunal upheld the *Dodô* award,²⁸ stating that its decision was in line with “the case law which holds valid the global reference to an arbitration clause contained in the statutes of an association”.²⁹

However, the reference to the document containing the arbitration clause must be clear-cut, as it cannot be assumed lightly on the basis of imprecise wording. Indeed, the Federal Tribunal annulled the *Busch* award because the CAS panel had erroneously retained jurisdiction on the basis of an imprecise reference.³⁰

3.4 *The Sports-Related Requirement*

The CAS Code provides that CAS arbitration is only available to solve “sports-related disputes” (see Articles S1, S2, S6 and R27). Accordingly, should a dispute not related to sport be brought before the CAS, the appointed panel should decline jurisdiction, even if both parties have agreed to submit the dispute to the CAS. Obviously, even a loose connection to sport would be sufficient to establish jurisdiction, and this renders this issue mostly theoretical.

The Olympic Arbitration Rules have a different language, insofar as Article 1 requires that CAS Olympic arbitration may be resorted to “in the interests of the

²⁵ Federal Tribunal, Judgment 4A_428/2011 of 13 February 2012, *Wickmayer/Malisse*, at 3.2.3: “the Federal Tribunal reviews with ‘benevolence’ the consensual nature of sport arbitration with a view to enhancing speedy disposition of disputes by specialized arbitral tribunals presenting sufficient guarantees of independence and impartiality, such as the CAS. The liberalism of its jurisprudence in this respect clearly appears in the flexibility with which it treats the issue of the arbitration clause by reference” (citations omitted).

²⁶ Federal Tribunal, Judgment 4P.230/2000 of 7 February 2001, *Roberts*, at 2.a.

²⁷ CAS 2007/A/1370-1376 *FIFA & WADA v. STJDF, CBF & Ricardo Lucas Dodô*, award of 11 September 2008.

²⁸ Federal Tribunal, Judgment 4A_460/2008 of 9 January 2009, *Dodô*.

²⁹ *Id.*

³⁰ Federal Tribunal, Judgment 4A_358/2009 of 6 November 2009, *Busch*, annulling CAS 2008/A/1564 *WADA v. Busch & IIHF*, award of 23 June 2009.

athletes and of sport". This wording induced the CAS Olympic Division in Salt Lake City to decline jurisdiction on an application filed by the animalist association PETA against the IOC in order to stop the holding of a rodeo that had been organized as a side event to the Winter Olympic Games.

3.5 *The Arbitrability of Disputes Before the CAS*

The arbitrability of disputes brought before the CAS must be evaluated under the Swiss legal system, whose approach is very favourable to arbitration.³¹ Pursuant to Article 177.1 PILA, all "pecuniary claims may be submitted to arbitration".

Swiss jurisprudence interprets this requirement in the sense that it is enough that at least one of the parties has some economic interest at stake in the dispute. This basically means that under Swiss law all CAS disputes are arbitrable; indeed, even in disciplinary cases, the sanctioned athlete certainly has some economic interest at stake in fighting against a sanction temporarily banning him or her from competitions.³²

3.6 *The Appealability of Decisions to the CAS*

The CAS appeals arbitration procedure has some peculiar issues of its own, in particular with reference to "appealability".

Article R47 of the CAS Code provides as follows: "An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body".

Accordingly, in order to bring an appeal to the CAS, an appellant needs to demonstrate that the sports organization against which it is acting has issued (i) a true *decision* and (ii) one that is considered *final*, i.e. that any and all available stages of appeal within that sports organization have been exhausted.

In this regard, a CAS panel stated that the CAS "does not have the power to adjudicate an appeal if there is no true decision or if the decision is not final, or if the applicable statutes, regulations or agreements do not allow the appellant to bring an appeal against the decision".³³

The jurisprudence of the CAS illustrates what constitutes a true appealable "decision".

³¹ See A. RIGOZZI, *L'arbitrabilità des litiges sportifs*, in *Bulletin ASA*, 2003, 501.

³² See Federal Tribunal, Judgment 4P.230/2000 of 7 February 2001, *Stanley Roberts c. FIBA*, reprinted in *Bulletin ASA*, 2001, 523, at 526: "the appellant has a pecuniary interest in his application for the ban to be lifted". On the arbitrability of anti-doping disputes, cf. M. COCCIA, *Questioni in tema di arbitrato sportivo internazionale e norme antidoping*, in *Rivista dell'arbitrato*, 2001, 779-787

³³ See award CAS 2004/A/748 *Russian Olympic Committee & Ekimov v. International Olympic Committee, United States Olympic Committee & Hamilton*, at para. 84.

First of all, it is evident from the CAS awards that ruled on this issue that the form of communication alone is insufficient to determine whether a true decision exists.³⁴ Thus, the form used by a sports organization to convey a given communication – letter, email, press release, etc. – does not exclude the possibility that that communication be considered a “decision” and, as such, be subject to appeal to the CAS (obviously, provided that such sports organization has accepted the jurisdiction of the CAS). As a CAS panel stated, “the form of the communication has no relevance to determine whether there exists a decision or not. In particular, the fact that the communication is made in the form of a letter does not rule out the possibility that it constitute a decision subject to appeal”.³⁵

Secondly, CAS jurisprudence makes clear that a communication from a sports organization might be characterized as a “decision”, in principle appealable to the CAS, if (i) it is not of a mere informative nature and (ii) it contains a ruling which intends to affect the legal situation of the addressee(s) or of other concerned parties. Accordingly, a decision is “a unilateral act, sent to one or more determined recipients and [...] intended to produce legal effects”,³⁶ and “for a communication to be a decision, this communication must contain a ruling, whereby the body issuing the decision intends to affect the legal situation of the addressee of the decision or other parties”.³⁷

Thirdly, from a reading of CAS cases it is evident that where a sports organization refuses to issue or delays the issuance of a decision beyond a reasonable period of time, there may be a “denial of justice”, opening the door for the CAS to hear the dispute even though no formal decision was ever taken: “if a body refuses without reason to issue a decision or delays the issuance of a decision beyond a reasonable period of time, there can be a denial of justice, opening the way of an appeal against the absence of a decision”.³⁸

In conclusion, as explained by a learned commentator, “an appealable decision of a sport association is normally a communication of the association directed to a party and based on an ‘*animus decidendi*’, i.e. an intention of a body of the association to decide on a matter, being also only the mere decision on its competence (or non-competence). A simple information, which does not contain any ‘ruling’, cannot be considered as a decision. Under certain circumstances, ‘negative decisions’ or ‘refusals to decide’ can be considered as appealable decisions. However, courts and CAS Panels are well advised not to accept easily the existence of a denial of justice: sport associations must be able to operate, and this principle would be put at risk if basically each letter or fax of an association could be appealed. Simple information or the communication of a mere intention cannot be considered as a

³⁴ *Id.* at paras. 90-91.

³⁵ Award CAS 2004/A/659, *Galatasaray v. FIFA, Club Regatas Vasco da Gama & F. J. Loureiro*, at para. 63.

³⁶ *Id.* at para. 36.

³⁷ Award CAS 2005/A/899, *FC Aris Thessaloniki v. FIFA & Panionios*, at para. 61.

³⁸ *Id.* at para. 62.

decision, and are not appealable”.³⁹

Furthermore, as already mentioned, in order to lodge an appeal with the CAS, the appealed decision need be *final*. As stipulated in Article R47 of the CAS Code, a party may not appeal to the CAS until it has “exhausted the legal remedies available to him prior to the appeal”.

This means that the CAS may adjudicate an appeal only if the statutes or regulations of the concerned sports organization “do not provide any internal stage of appeal and do not set forth any legal remedy other than an appeal to the CAS”.⁴⁰

However, not every conceivable internal remedy can be deemed as a true “legal remedy” that must necessarily be exhausted before appealing to the CAS. The internal remedy must be truly available to the interested party and it must be governed by specific procedural rules that allow a prompt decision. In this respect, a CAS panel ruled that an international federation’s rule granting to a national federation the opportunity to submit a given matter to the international federation’s Congress is not “an actual ‘remedy’ in the strict legal sense, because it does not grant to an individual [...] member the right to call an extraordinary Congress. Nor waiting a couple (or more) years for the next ordinary Congress, with no specific procedure, may amount to a ‘remedy’. To be such, the internal remedy must be readily and effectively available to the aggrieved party and it must grant access to a definite procedure”.⁴¹

3.7 *The De Novo Character of the Appeals Procedure*

Pursuant to Article R57 of the CAS Code, CAS arbitrators have “full power to review the facts and the law”.

As repeatedly stated in CAS jurisprudence, this provision means that an appeal to the CAS against a decision adopted by a sports organization entails a *de novo* review on the merits of the case, which is not confined to deciding whether the body that issued the appealed ruling was correct or not but it requires making an independent determination as to whether the parties’ contentions are inherently correct: “the CAS does not act as an administrative court reviewing an act of an administrative authority where, usually, the scope of review is characterised by minimum standards of scrutiny, mostly procedural, and the administrative court may not substitute its own judgement for that of the administrative authority. Typically, administrative courts may only control the fairness and correctness of the previous procedure, the way in which the decision was arrived at, the reasons given for the decision, the competence of the body adopting the decision and the

³⁹ M. BERNASCONI, *When is a «decision» an appealable decision?*, in A. Rigozzi, M. Bernasconi (eds.), *The Proceedings before the Court of Arbitration for Sport*, Berne, editions Weblaw, 2007, 261-274, at 273.

⁴⁰ Award CAS 2004/A/748 *Russian Olympic Committee & Ekimov v. International Olympic Committee, United States Olympic Committee & Hamilton*, at para. 96.

⁴¹ Award CAS 2003/O/466 *NISA vs. ISU*, in *International Sports Law Review*, 2004, vol. 4, no. 4, SLR-48, at para. 6.12.

like. In contrast, it is the duty of a CAS panel in an appeals arbitration procedure to make its independent determination of whether the Appellant's and Respondent's contentions are correct on the merits, not limiting itself to assessing the correctness of the previous procedure and decision".⁴²

The main consequence of such approach is that any procedural deficiency occurred during the previous intra-association proceedings is cured by the appeal to the CAS and does not necessarily yield the annulment of the appealed decision: "the CAS appeal arbitration procedure cures any infringement of the right to be heard or to be fairly treated committed by a sanctioning sports organization during its internal disciplinary proceedings. Indeed, a CAS appeal arbitration procedure allows a full *de novo* hearing of a case with all due process guarantees, granting the parties every opportunity not only to submit written briefs and any kind of evidence, but also to be extensively heard and to examine and cross-examine witnesses or experts during a hearing".⁴³

As a result, CAS panels need not analyse any possible infringements of due process rights committed by the sports body issuing the appealed decision and may proceed to fully review the facts and legal arguments submitted by the parties and, on that basis, definitively rule on the merits of the case.

3.8 *Standing to Sue and to Be Sued*

A party wishing to be heard in CAS arbitration proceedings must have *locus standi*, i.e. it must be legally entitled to appear before the CAS. A party wishing to bring a case before the CAS must have "standing to sue" (and, in particular, "standing to appeal" if it pursues an appeals arbitration), and it must summon to the CAS a respondent that has standing to be sued.

The notion of standing to sue is characterized by both a substantive element and a formal one. The substantive element must always be present and applies to all CAS procedures (ordinary, appellate and Olympic); it requires that the claimant/appellant has a concrete interest at stake in the outcome of the arbitration.

Some CAS panels, in reference to the appeals procedure, have defined this notion as an *aggrievement requirement*, stating that "only an aggrieved party, having something at stake and thus a concrete interest in challenging a decision adopted by a sports body, may appeal to the CAS against that decision"⁴⁴ or, in other words, that a party has no standing if it "is not directly affected by the decision appealed from".⁴⁵ Indeed, "the above described 'aggrievement requirement' is an essential element to determine the legal interest and the standing of a party to appeal before the CAS a sports body's decision, because the duty assigned to a panel by the CAS

⁴² Final Award CAS 2009/A/1880-1881 *FC Sion & El-Hadary v. FIFA & Al-Ahly SC*, at para. 146.

⁴³ Final Award CAS 2009/A/1545 *Anderson et al. v. IOC*, at para. 78; see also CAS 2003/O/486, at para. 50; CAS 2008/A/1594 *Sheykhov v. FILA*, at para. 109.

⁴⁴ Final Award CAS 2009/A/1880-1881 *FC Sion & El-Hadary v. FIFA & Al-Ahly SC*, at para. 153.

⁴⁵ Award CAS 2006/A/1206 *Zivadinovic v. IFA*, at para. 31.

Code rules governing the appeal arbitration procedure is that of solving an actual dispute and not that of delivering an advisory opinion to a party that has not been aggrieved by the appealed decision”.⁴⁶

Then, in appeals and Olympic procedures, there is often also a formal aspect of the standing requirement to be complied with. Indeed, if the regulations of the sports body adopting the contested decision include rules specifying who may and who may not appeal, those rules determine who has standing to sue.

The typical example of this is the WADA Code rule providing that a competitor to the athlete accused of doping may not appeal to the CAS the decision imposing or not imposing a doping sanction (see Article 13.2.3, listing the “persons entitled to appeal”).

This is illustrated by a CAS case where the panel declined to adjudicate the case upon its merits because both appellants (an athlete and its National Olympic Committee) lacked standing to appeal as they were not mentioned in the applicable anti-doping rules (identical to the WADA Code) listing the parties entitled to appeal a doping decision to the CAS: “It is evident that neither a competitor (of the athlete subject to an anti-doping decision) nor his National Olympic Committee are among the individuals or organisations listed therein. This interpretation is confirmed by the Comment on the WADA Code [...] which unambiguously states that such list of persons or organizations having standing to appeal ‘does not include Athletes, or their federations, who might benefit from having another competitor disqualified’. If the appeal had been brought by parties who were entitled to bring it, the CAS would have adjudicated upon the merits”.⁴⁷

A similar situation occurred in an Olympic case decided by a panel of the CAS ad hoc division of Beijing, where the Azerbaijan National Olympic Committee, the Azerbaijan Field Hockey Federation and the players of the Azerbaijan National Field Hockey Team were unsuccessful in bringing a case against the International Hockey Federation attempting to have the Spanish team excluded from the Olympic Games, since they failed to demonstrate that they had standing to sue under the applicable rules.⁴⁸ In particular, the CAS panel cited that Article 13.2.3 of the FIH Anti-Doping Policy had an exhaustive list of parties that could appeal a decision of the Disciplinary Commission and that this list included the accused athletes, the FIH, the IOC and WADA, but made no room for an appeal from the Appellants: “the Applicants were not a party, nor were they entitled to be an interested party before the Disciplinary Commission. Once the Disciplinary Commission has issued its Decision [...] the Applicants have no rights of appeal under Article 13, and more particularly, under the applicable Article 13.2.3. The Panel must conclude that the Applicants have no standing to make this Application to the CAS ad hoc division”.⁴⁹

⁴⁶ Final Award CAS 2009/A/1880-1881 *FC Sion & El-Hadary v. FIFA & Al-Ahly SC*, at para. 154.

⁴⁷ Award CAS 2004/A/748 *Russian Olympic Committee & Ekimov v. International Olympic Committee, United States Olympic Committee & Hamilton*, at para. 119.

⁴⁸ Award CAS OG 08/01 *ANOC, AFHF, et al. v. FIH, RFEH, IOC, WADA & Spanish Olympic Committee*.

⁴⁹ *Id.* at paras. 3.10-3.12.

Obviously, exactly as the claimant/appellant must have standing to sue, the respondent must have standing to be sued. In particular, the respondent must have a stake in the dispute.

For example, in the case CAS 2006/A/1189 *IFK Norrköping vs. Trinité Sports FC & Fédération Française de Football*, the Swedish club *Norrköping* lodged an appeal with the CAS against a FIFA decision, naming as Respondents both the French club *Trinité* and its national federation (the “FFF”). The FFF asked to be excluded from the case and the panel remarked that the FFF was not a party to the case before FIFA and, moreover, that “the Appellant is not claiming anything against the FFF and that the FFF has nothing at stake in this dispute”. As a consequence, the respondent FFF was excluded from the case as it did not have standing to be sued.

3.9 *Lis Pendens*

The concept of *lis alibi pendens* (meaning “suit pending elsewhere”), or simply *lis pendens* as is commonly referred to, is also applicable in the context of CAS proceedings. This principle might sometimes prevent the CAS from hearing a dispute where the same case is already pending before another court or arbitral body.

According to Paragraph 1bis of Article 186 PILA,⁵⁰ a CAS panel is required to stay an arbitral proceedings on the basis of *lis pendens* only if three conditions are cumulatively met: (i) another litigation between the same parties and having the same object must be pending before a State court or another arbitral tribunal; (ii) the other case must be already pending when the arbitration claim is lodged with the CAS; and (3) the party raising the exception of *lis pendens* must prove the existence of serious reasons requiring the stay of the arbitral proceedings.

A notable CAS case in which a panel had to deal with the issue of *lis pendens* is CAS 2009/A/1881 *El-Hadary v. FIFA & Al-Ahly*. On 12 June 2008, the Egyptian club Al-Ahly lodged a claim with FIFA against the Egyptian goalkeeper El-Hadary and FC Sion for breach of contract and inducement of breach of contract, respectively. On 16 April 2009, the FIFA DRC rendered a decision which adjudged FC Sion and the player to have breached the FIFA Regulations on the Status and Transfer of Players and imposed on the Player a sanction of four months ineligibility as well as an obligation to pay a compensation of EUR 900,000 to Al-Ahly. On 18 June 2009, the player filed an appeal with the CAS, requesting an interim stay of the effects of the DRC decision and in any event contesting the jurisdiction of the CAS, and specifying that he was appealing to the CAS only to safeguard his rights by complying with the 21-day deadline. On 29 June 2009, Mr El-Hadary filed a civil law suit with the District Court of Zurich against FIFA and Al-Ahly, contesting

⁵⁰ Paragraph 1bis was inserted in Article 186 PILA by the Swiss legislator as a reaction to the legal uncertainty on the issue of *lis pendens* determined by the Federal Tribunal’s judgment of 14 May 2001, *Fomento*, ATF 127 III 279.

the FIFA decision and requesting annulment on the basis of Article 75 of the Swiss Civil Code. On 10 July 2009, the player submitted its appeal brief in which it requested the panel to suspend the CAS arbitration proceeding on account of *lis pendens*.

On 7 October 2009, the appointed panel issued a “partial award on *lis pendens* and jurisdiction” by which it denied the player’s request for the application of *lis pendens*, pointing out that the civil law suit commenced after the player had filed an appeal with the CAS requesting for interim stay of the DRC decision and contesting jurisdiction. The Panel stressed that even a “conditional” claim to the CAS (i.e. requesting that the CAS suspend the proceedings and, in any event, decline jurisdiction), triggers the procedural “pendency” of the arbitration in view of Article 181 PILA, under which an arbitration is pending “from the moment [...] one of the parties institutes the procedure for the appointment of the arbitral tribunal”. Indeed, the CAS panel stated that “the Player had the right to lodge his appeal to the CAS with the sole purpose of asking the Panel to suspend the arbitration and decline its jurisdiction. However, even merely asking the Panel to adjudicate the preliminary issues in his favour (i.e. requesting that the CAS suspend the proceedings and, in any event, decline jurisdiction), the Player has nonetheless instituted the procedure for the appointment of the arbitrators and has asked the Panel to deal with those preliminary issues, thus determining inexorably the pendency of the arbitration from the date of the filing”.

With regard to the third condition set forth by Article 186 PILA, the panel stated that, in order to demonstrate the existence of “serious reasons”, the Appellant should have proven, but it did not, that the stay was necessary to protect his rights and that the persistence of the arbitration would have caused him some serious inconvenience.

3.10 *Res Judicata*

The principle of *res judicata*, which is Latin for “a matter already adjudged”, is also applicable in CAS proceedings. Indeed, a CAS award was annulled by the Federal Tribunal due to the violation of this principle.⁵¹

It is discussed in the legal literature whether a well-founded exception of *res judicata* implies the lack of jurisdiction or the inadmissibility of the claim. In the *Final report on res judicata and arbitration* of the International Commercial Arbitration Committee of the International Law Association, the following can be read: “In this respect, the Committee does not express an opinion as to the question whether preclusive effects of a prior arbitral award go to jurisdiction or to admissibility. Jurisdictions give different answers to this question and the Committee

⁵¹ Federal Tribunal, Judgment 4A_490/2009 of 13 April 2010, *Atlético/Benfica*, which annulled the award CAS 2009/A/1765 *Benfica Lisboa v. Atlético Madrid & FIFA*, because the CAS panel disregarded a previous judgment rendered by the Zurich Commercial Court on the same matter on an application filed pursuant to Article 75 of the Swiss Civil Code.

prefers to leave this question to the applicable law. On the other hand, the question is to a large extent moot since under both characterizations a preclusion defense is to be raised early in proceedings”.⁵²

Under Swiss law it is unsure whether *res judicata* implies the lack of jurisdiction or the inadmissibility of a claim, as the Federal Tribunal has not clarified the issue.⁵³ Anyway, in either case the practical result would be the same, as the arbitral tribunal would be prevented from dealing with the merits of the case.

An example of the application by the CAS of the *res judicata* principle can be found in CAS 2010/A/2091 *Dennis Lachter v. Derek Boateng Owusu*. In that case, to determine whether it was truly confronted with a question of *res judicata*, the CAS used the so called “triple identity” test. According to this test, one must analyze whether the proceeding involves the same parties, deals with the same subject matter, and is based on the same legal issues as a case that has already been litigated by the same parties and adjudged by another court or arbitral body. If all three prongs are met, the CAS, based on the principle of *res judicata*, is not at liberty to rehear the case.

In that case, the agent, Mr. Lachter, and the player, Mr. Boateng, signed a representation contract. After a dispute broke out concerning the contract, the agent on 4 March 2007 decided to submit a claim against Mr. Boateng to FIFA, requesting that he “fulfill all his contractual obligations, under the Representation Contract”. On 21 June 2007, Mr. Boateng lodged a claim with the Arbitration Institute of the Israeli Football Association (“IFA”), asking for declaratory relief ascertaining that he did not owe anything to the Mr. Lachter. On 22 October 2007, the IFA Arbitrator issued an arbitral award in favour of Mr. Boateng. Mr. Lachter appealed this decision with no success to the District Court of Tel Aviv-Jaffa and then to the Israeli Supreme Court, the latter which issued its final decision on 4 November 2009. In the meantime, the FIFA case continued and finally ended on 17 March 2010, when the Single Judge ruled that although he had jurisdiction to hear the dispute, he would reject the claim of Mr. Lachter on the merits. Upon appeal to the CAS, the Panel ruled that *res judicata* applied because the triple identity test had unquestionably been met: “The Panel has no doubt, and it is common ground between the parties, that the merits of the dispute before it – does the Player owe money or not to the Agent on the basis of the Contract in relation to the Agent’s alleged work in promoting the Player’s transfer to and employment with Beitar FC? – were already litigated by the same parties in Israel and dealt with and adjudicated by an Israeli arbitral tribunal. In other words, these arbitral proceedings involve the same subject matter, the same legal grounds and the same parties as the Israeli arbitral proceedings terminated with the award issued on 22

⁵² See www.ila-hq.org/en/committees/index.cfm/cid/19, Toronto Conference [2006], para. 68.

⁵³ In the already quoted *Fomento* judgment of 14 May 2001 the Federal Tribunal appears to make reference to *res judicata* as a matter of jurisdiction (ATF 127 III 279, at 283), whereas in a judgment of 3 November 1995 the Federal Tribunal appears to make reference to *res judicata* as an exception rendering the claim inadmissible (ATF 121 III 474 at 477).

October 2007. The Panel thus finds that the so-called ‘triple identity’ test – used basically in all jurisdictions to verify whether one is truly confronted with a *res judicata* question [...] is indisputably met”.

Finally, it is also important to note that, as a further preliminary consideration, the Panel held that *lis pendens*, which has already been discussed, did not apply. According to the Panel, once a parallel case ends with a final award, the issue must center only on *res judicata*, and no longer around *lis pendens*. Specifically, the Panel was of the opinion that the fact that the FIFA proceeding started before the IFA arbitration and that the cases were for some time running parallel is completely irrelevant since the Israeli arbitral award had been rendered before the commencement of the CAS arbitration.

4. Appointment and Challenge of Arbitrators

4.1 The Closed List of Arbitrators

The CAS is characterized by the fact that arbitrators can only be chosen from within a list of individuals nominated by the ICAS. Arbitrators are appointed by the ICAS to be on the CAS list for a mandate of four years, which can be renewed without limits (Article S13 of the CAS Code). To be on the list, arbitrators should have “appropriate legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language” (Article S14 of the CAS Code). When nominating the arbitrators, the ICAS must “consider continental representation and the different juridical cultures” (Article S16 of the CAS Code). Indeed, about 300 arbitrators are currently on the list, coming from all continents and representing a wide variety of legal, cultural and professional backgrounds.

Article S14 of the CAS Code also provides that “ICAS may identify the arbitrators with a specific expertise to deal with certain types of disputes”. This provision permits the creation of separate lists of arbitrators specialized in certain areas (for instance, in doping or in a given sport). Currently, for historical reasons,⁵⁴ the CAS website shows a “football list” of arbitrators who are supposed to be particularly knowledgeable about football. However, this list is advisory and not mandatory, given that parties to a football case may discretionally appoint a CAS arbitrator who is not on the football list – and they often do it. It is submitted that any future specialized list should also be of a merely advisory nature, as the parties should have as wide a choice of arbitrators as possible.⁵⁵

Upon their appointment to a given case, CAS arbitrators must sign a

⁵⁴ When FIFA accepted the jurisdiction of the CAS, it requested the CAS to accept as arbitrators, to be inserted in a special football list, the individuals who had already been selected to be in the list of the (aborted) FIFA arbitration tribunal.

⁵⁵ Cf. A RIGOZZI, E. HASLER, B. QUINN, *The 2011, 2012 and 2013 revisions to the Code of Sports-related Arbitration*, in *Jusletter*, 3 juin 2013, <http://jusletter.weblaw.ch>, 4-5.

declaration “undertaking to exercise their functions personally with total objectivity, independence and impartiality, and in conformity with the provisions of this Code” (Article S18 of the CAS Code). It is submitted that, besides the obvious requirements of independence and impartiality, CAS arbitrators should accept a case only if they truly have the necessary time to devote to the case and if they are able to effectively work in the language of the arbitration.

The closed-list system has both detractors⁵⁶ and supporters.⁵⁷ It must be said that the Federal Tribunal has stated that the resort to a closed list does not imply that CAS arbitrators should be held to a different standard of independence and impartiality, be it higher or lower, than that normally used in international arbitration.⁵⁸

In any event, with a view to avoiding some criticism⁵⁹ and to further promoting the independence and impartiality of the arbitrators nominated to the CAS list, since 2010 the ICAS has amended the CAS Code so that CAS arbitrators “may not act as counsel for a party before the CAS” (Article S18), thus avoiding the switching of roles between arbitrator and counsel that sometimes occurs in commercial arbitration. In addition, the “ICAS may remove an arbitrator [...] from the list of CAS members, temporarily or permanently, if he violates any rule of this Code” (Article S19 of the CAS Code).

In the Olympic procedure there is a “special list” of arbitrators selected by the ICAS among the arbitrators already present in the general list (Article 3 of the Olympic Arbitration Rules). For each edition of the Olympic Games a dozen arbitrators are selected and must be present on site during the Games (and, as seen, even ten days before), ready to hear cases and to “give a decision within 24 hours of the lodging of the application” (Article 18 of the Olympic Arbitration Rules).

4.2 *The Appointment of Arbitrators in CAS Proceedings*

Normally, CAS cases are dealt with by panels composed of three arbitrators. However, in both the ordinary and the appeals arbitration procedures, a sole arbitrator may be appointed if the parties so expressly agree, or if the President of the relevant CAS Division so decides “taking into account the circumstances of the case” (Articles R40.1 and R50 of the CAS Code). In practice, sole arbitrators are usually appointed either to reduce the costs of the arbitration (typically in cases of minor importance) or to deal with cases that need an expedite resolution (for example, because the case affects the chance of an athlete or a team to participate

⁵⁶ See e.g. A.A. SANTENS, *The Move Away from Closed-List Arbitrator Appointments: Happy Ending or a Trend to Be Reversed?*, in *Kluwer Arbitration Blog*, 28 June 2011, <http://kluwerarbitrationblog.com>.

⁵⁷ See e.g. J. PAULSSON, *Moral Hazard in International Dispute Resolution*, in *Transnational Dispute Management*, 2011, 2, www.transnational-dispute-management.com, at 11-12.

⁵⁸ Federal Tribunal, Judgment 4A_506/2007 of 20 March 2008, *Biolley*, at 3.1.1.

⁵⁹ See for instance the arguments put forward by the appellant in the *Sheikh Hazza* case decided by the Federal Tribunal with Judgment 4P.105/2006 of 4 August 2006.

in a competition that is going to start soon).

In the Olympic procedure, the parties may not choose to have a sole arbitrator instead of a panel, but the President of the ad hoc Division may appoint a sole arbitrator “in his discretion” (Article 11 OG Arbitration Rules). This, for example, occurred in the last case heard at the London Olympic Games, when a decision was needed in a matter of hours (being relevant to a sail race that was going to be held four hours after the application) and, clearly, a sole arbitrator could manage to do it more efficiently than a panel.⁶⁰

The appointment of the three-arbitrator panel is different in the three CAS arbitration procedures. In any event, as said, all arbitrators must be chosen from within the CAS list. Whenever a party nominates for a case an arbitrator who is not on the list, the CAS Court Office treats this situation as if no arbitrator had been chosen and invites the interested party to choose an arbitrator from the CAS list.

In the ordinary procedure, each party selects one arbitrator and the two appointed arbitrators choose the president of the panel by mutual agreement (Article R40.2 of the CAS Code). If the claimant does not choose an arbitrator, the arbitration does not start, whereas if the respondent fails to appoint an arbitrator or if the two party-appointed arbitrators do not agree on the president the missing arbitrator is chosen by the President of the Division. Pursuant to Article R40.3 of the CAS Code, the appointment of the party-appointed arbitrator and of the president of the panel must be ratified by the President of the Ordinary Division, who checks whether the arbitrators comply with the requirements of impartiality and independence set forth by Article R33 of the CAS Code.

In the appeals procedure, each party appoints an arbitrator and the President of the CAS Appeals Division appoints the president of the panel (Article R54 of the CAS Code). The two party-appointed arbitrators must be confirmed by the President of the Appeals Division, who checks whether they appear to be independent and impartial.

In the Olympic procedure, all three arbitrators are appointed by the President of the Ad hoc Division among those who have been previously selected and are on site. Customarily, the President of the Ad hoc Division does not appoint arbitrators of the same nationality as one of the parties to the dispute. This is different from the ordinary and appeals procedures (or even from commercial arbitration), where it often happens that one or more arbitrators (and even the president of the panel) possess the same nationality of one of the parties. This difference (not provided by any rule) can be explained by the circumstance that at the Olympic Games the nationalistic aspect tends to be very important, both in the eyes of the competitors and in those of the public opinion.

⁶⁰ CAS OG 12/11 *Russian Olympic Committee v. International Sailing Federation & Spanish Olympic Committee*, award of 11 August 2012; in this case, the application was lodged on 11 August 2012 at 8.00 am and the operative part of the decision was notified to the parties on the same day at 11.40 am, with the complete award with reasons notified later on the same day.

4.3 *Relationship between a Party and the Arbitrator it Appoints*

In choosing an arbitrator for a case, a party and its counsel should know that it is appropriate for them to contact beforehand a prospective arbitrator to check whether s/he is available or has any conflict of interest or any other reason to decline the appointment. For example, if a party has an interest in a speedy resolution of the dispute, it should check before the appointment whether that arbitrator has a personal schedule which is compatible with such swift resolution.

However, when contacting an arbitrator before the appointment, the party should limit itself to giving to the arbitrator some basic information in general terms about the dispute, such as the names of the parties and of the lawyers, the language of the procedure and the general subject-matter of the case. The appointing party must avoid to discuss with the prospective arbitrator the details – either procedural or on the merits – of the case or, even less, to seek the arbitrator’s advice. Furthermore, after the appointment, it is improper to have contacts or communicate with the party-appointed arbitrator (or any other arbitrator) in relation to the case. Indeed, Article R31 of the CAS Code provides that all “communications that CAS or the Panel intend for the parties shall be made through the CAS Court Office”; this provision, as constantly interpreted in CAS practice, means also the opposite, in the sense that during the case parties may not directly get in contact with arbitrators.

When parties choose an arbitrator, it is advisable that they look for fairness, expertise and hard work, rather than for partisanship. Parties and their counsel should understand that ultimately they are better off with an arbitrator who is well prepared, has the respect of his colleagues and defends the integrity of the arbitral process than with “their arbitrator” (i.e., someone whom they would expect to constantly inform them and obstinately advocate their cause). Obviously, this is not to deny that a party-appointed arbitrator has an important role for the party who has appointed him/her. Indeed, the appointing party may legitimately expect that the appointed arbitrator studies the file in earnest, fully knows and understands the submissions, listens carefully to the oral presentation, and ensures throughout the proceedings that the panel considers carefully that party’s arguments and evidence, grants a fair hearing and issues a considered decision.⁶¹

Parties should also make sure before the appointment that their perspective arbitrator is truly proficient in the language to be used in the proceedings (beyond the formal requirement of Article R33 of the CAS Code), because an arbitrator that may work easily in the language of the arbitration (and, if different, in the language of the evidentiary materials and of the witnesses) is able to fully grasp all the nuances of the case and make sure that the other arbitrators grasp them too. Before

⁶¹ Cf. A. LOWENFELD, *The Party-Appointed Arbitrator in International Controversies: Some Reflections*, in *Texas International Law Journal*, 1995, vol. 30, 59-69; *Id.*, *The Party-Appointed Arbitrator: Further Reflections*, in L.W. Newman and R.D. Hill (eds.), *Leading Arbitrators’ Guide to International Arbitration*, 2nd edn., New York, Juris Publishing, 2008.

the appointment, a party could also check the arbitrator's stance, if any, in other cases with comparable issues; indeed, many CAS awards are available on the internet or in legal publications.

4.4 *The Challenge against an Arbitrator for Lack of Independence and Impartiality*

A CAS arbitrator must at all times remain impartial and independent of the parties. Once an arbitrator is appointed to sit in a CAS arbitration proceeding, s/he is required to sign a declaration whereby s/he pledges to exercise her/his "functions personally with total objectivity, independence and impartiality, and in conformity with the provisions of this Code" (Article S18 of the CAS Code). After this moment, the parties will have the opportunity to challenge the arbitrator's appointment.

Pursuant to Article R34 parties only have seven days, after the ground for the challenge has become known, to bring the challenge. This short time limit is particularly important because the Federal Tribunal (which has the last word on this matter) has repeatedly stated that, in accordance with the principle of good faith and the prohibition of abuse of rights set forth in Article 2 of the Swiss Civil Code, a challenge against an arbitrator for lack of independence or impartiality is admissible only if the grounds of challenge were timely submitted during the arbitration proceedings:⁶² "it is not allowed for formal means to be brought forward after an unfavourable result when they could have been raised earlier in the proceedings".⁶³

Hence, if a party to a CAS arbitration has reasons to challenge the appointment of an arbitrator, it should act quickly and submit within a week the matter to the ICAS Board, which is competent to rule on the challenge or to discretionally refer it to the *plenum* of ICAS; before the ruling, the other party (or parties), the challenged arbitrator and the other arbitrators are invited to submit written comments on the challenge (Article R34 of the CAS Code).

According to Article 180.1 PILA: "An arbitrator may be challenged: a. if he does not possess the qualifications agreed upon by the parties; b. if there exist grounds for challenge in the arbitration rules adopted by the parties; or c. if the circumstances permit legitimate doubts about his independence". Article R34 of the CAS Code permits a party to challenge the appointment of an arbitrator to the ICAS where "the circumstances give rise to legitimate doubts over his independence or over his impartiality".

The difference between the notions of independence and impartiality has frequently been discussed in the literature devoted to international arbitration. The lack of *independence* of an arbitrator has often been described in terms of an arbitrator's particular link or relationship with one of the parties or with anyone

⁶² Federal Tribunal, Judgment 4A_234/2010 of 29 October 2010, *Valverde I*, at 4.2; Federal Tribunal, Judgment 4A.234/2008 of 14 August 2008.

⁶³ Federal Tribunal, Judgment 4A.528/2007 of 4 April 2008, at 2.5.1.

else involved in the arbitration, whereas the lack of *impartiality* has usually been associated to the arbitrator's bias or preconception in relation to the dispute or to the issues to be adjudged. However, in the jurisprudence of the Federal Tribunal "no strict distinction is drawn between the concepts of independence and impartiality";⁶⁴ nor a clear distinction seems to have been persuasively drawn in the legal literature.⁶⁵ As a consequence, the requirements of independence and impartiality may be jointly treated as a combined concept.

In order to verify the independence and impartiality of arbitrators, the Federal Tribunal has underlined the relevance of the IBA Guidelines on Conflicts of Interest in International Arbitration (the "IBA Guidelines"),⁶⁶ considering them "a precious instrument [that] should not fail to influence the practice of arbitral institutions and tribunals".⁶⁷ Indeed, these guidelines are not binding *per se* but do constitute a widely accepted standard in the international arbitration community. The IBA Guidelines set forth some General Standards and include three illustrative lists of specific situations which may or may not give rise to justifiable doubts, from an objective point of view, as to the arbitrator's impartiality and independence. Accordingly, there is (i) a "red list", setting out an inventory of situations of conflicts of interest where an arbitrator is required to recuse her/himself (although in some situations the requirement is waivable by the parties), (ii) an "orange list", setting forth situations where an arbitrator should disclose the potential conflict but is not supposed to automatically resign, and (iii) a "green list", indicating situations where there appears to be no conflict of interest and, thus, where no disclosure is required.

The ICAS has made it clear that in the assessment of an arbitrator's independence and impartiality the nationality or domicile are in principle irrelevant; rather, the arbitrator's independence and impartiality must be assessed according to the specific circumstances of the case and "not on the basis of general and subjective assumptions which are not objectively verified".⁶⁸ In order to take into account a subjective impression, therefore, there must exist concrete facts that "are by themselves susceptible to justify objectively and reasonably such an impression by a person acting normally".⁶⁹ For instance, lack of independence can be proven where there exists a direct link between the challenged arbitrator and one of the parties involved in the dispute. This link can be for example an economic dependency (employment relationship, etc), or a family or personal link.

⁶⁴ Federal Tribunal, Judgment 4A_234/2010 of 29 October 2010, *Valverde I*, at 3.3.1.

⁶⁵ See C. PONCET, *The independence of the Court of Arbitration for Sport*, in *European International Arbitration Review*, 2012, vol. 1, 31-56, at 40.

⁶⁶ The IBA Guidelines were approved on 22 May 2004 by the Council of the International Bar Association and can be found at www.ibanet.org. Cf. O.L.O. DE WITT WIJNEN, N. VOSER, N. RAO, *Background Information on the IBA Guidelines on Conflicts of Interest in International Arbitration*, in *Business Law International*, 2004, vol. 5, 433, at 454. A new version of the IBA Guidelines is currently being drafted.

⁶⁷ Federal Tribunal, Judgment 4A_506/2007 of 20 March 2008, *Biolley*, at 3.3.2.2.

⁶⁸ ICAS Board, 2007/A/1322 *Giannini et al. vs. SC FC 2005*.

⁶⁹ *Id.*

If the ICAS upholds the challenge against an arbitrator, that arbitrator will step down and another one will be appointed following the usual appointment procedure. If the ICAS rejects the challenge against an arbitrator, the interested party may submit the matter to the Federal Tribunal; however, the ICAS decision may not be directly appealed to the Federal Tribunal.⁷⁰ Rather, the CAS proceedings go ahead and eventually, if the award is unfavourable, the interested party may challenge the whole award before the Federal Tribunal invoking the first ground for annulment provided by Article 190.2 PILA (“a. if a sole arbitrator was designated irregularly or the arbitral tribunal was constituted irregularly”).⁷¹

5. Joinder, Intervention and Other Forms of Third Parties’ Participation

5.1 Common Features of Joinder and Intervention

The rules of the CAS Code on joinder and intervention are dictated for the ordinary arbitration procedure, but they are also applicable to the appeals arbitration procedure through the reference found in the last paragraph of Article R54 (“Article R41 applies *mutatis mutandis* to the appeals arbitration procedure [...]”).

A third party which is not among the parties to a CAS arbitration proceeding may be summoned into the arbitration (“joinder”) or may decide to participate in it (“intervention”) only “if it is bound by the arbitration agreement or if it and the other parties agree in writing” (Article R41.4 CAS Code). In other terms, the rules on joinder and intervention cannot be used to circumvent the first and foremost condition of any arbitration – that all parties have agreed to have their dispute decided by a given arbitral tribunal: “a third party can participate as a party to the arbitration proceedings already pending among other subjects in two situations, joinder or intervention, but subject to a common condition: that it is bound by the same arbitration agreement binding the original parties to the dispute or that it agrees in writing to such participation”.⁷²

Joinder and intervention share a second common condition: that any third party entering into the arbitration proceedings must have *locus standi*, i.e. it must have something at stake in the dispute. Indeed, “the scope of such right is subject to the proof, by the applicant, of the existence of a clear and concrete interest to participate in the pending arbitration”.⁷³

Pursuant to the first paragraph of Article R41.4 of the CAS Code, the decision on the participation of a third party, either via a joinder or via an intervention, can be taken by the President of the relevant Division or, after it is appointed, by the

⁷⁰ Federal Tribunal, Judgment 4A_644/2009 of 13 April 2010, *Valverde*. The Federal Tribunal stated that the direct appeal against a decision on a challenge taken by a private body, such as the ICAS, is not admissible.

⁷¹ See *infra* at Section 9.1.

⁷² CAS 2006/A/1155 *Giovanella v. FIFA*, at para. 54.

⁷³ Order on Request for Intervention, CAS 2004/A/748 *Russian Olympic Committee & Ekimov v. International Olympic Committee, United States Olympic Committee & Hamilton*, at para. 84.

arbitral panel; in any event, the ultimate decision lies with the panel, which may even revise a previous decision adopted by the President of the Division.

5.2 Joinder

A party before the CAS may request that a third party be summoned into the proceedings. In essence, under Article R41.2 of the CAS Code, if a respondent wishes to join a third party to the arbitration proceedings, it must include its request to do so in its answer, together with the reasons for requesting a joinder. Faced with a request for a joinder, the CAS Court Office shall communicate such request to the third party whose participation is requested and fix a time limit for such third party to state its position on its participation and submit a response. The CAS Court Office shall also ask the claimant/appellant to express its position on the requested joinder.

It must be noted that a request for a joinder must necessarily come from a respondent and not from a claimant/appellant. The reason for this rule is simply that a claimant/appellant has the possibility to name as many respondents as it wishes to involve in the proceedings when it files the request for arbitration or the statement of appeal. As a CAS panel has stated, “the joinder of a third party in the proceedings is possible only upon the request of the respondent, and not of the appellant. The Appellant, in fact, had the possibility to name, in the statement of appeal, a plurality of respondents, if he wished that the proceedings involve all the parties that he might think to be interested in their outcome”.⁷⁴

5.3 Intervention

Under Article R41.3 of the CAS Code, a third party may intervene in a CAS arbitration by requesting to be admitted into the proceedings within ten days after the arbitration has become known to the intervenor. However, the intervenor may be admitted only on condition that the request for intervention be filed prior to the hearing or prior to the closing of the evidentiary proceedings if no hearing is held. The intervenor also needs to make sure that, when it files its application, it provides the reasons for requesting an intervention.

Obviously, a party which had the right to appeal but did not do it within the appeal deadline may not request to intervene once such deadline has expired, unless the interest to intervene was prompted by the appellant’s appeal. In this regard, an order by the President of the CAS Appeals Division dismissed the request for intervention presented by two third parties observing that such parties “were also entitled to appeal the IOC’s decision, but decided not to do it within the time limit for appeal. Should CAS allow them to acquire now the status of full parties, in fact as co-Appellants, CAS would permit them to recover their right to appeal that they have failed to duly exercise. Or, the purpose of the CAS rules for intervention shall

⁷⁴ CAS 2006/A/1155 *Giovanella v. FIFA*, at para. 56.

definitely not be used to correct the failure of an Appellant to submit a case to CAS in a timely manner, no matter if, in fact, the decision to be issued by CAS might undoubtedly affect them”.⁷⁵

5.4 *Claims of and against Third Parties*

Obviously, a third party who is not participating in a case may not circumvent the rules on joinder and intervention by having an actual party to the case claim some rights on its behalf. Indeed, according to CAS jurisprudence, a party may only assert its own rights and may not raise the claims of a third party which is not before the CAS.⁷⁶

Conversely, a party acting before the CAS as appellant/claimant should be very careful to call into the arbitration all the parties against whom it is seeking some redress. Indeed, a party may not ask the CAS to adjudicate claims against third parties who were not summoned before the CAS. For example, in the case TAS 2005/A/812 the Panel rejected the appellant’s request without even examining its merits, ruling that it could never render a decision which could impose an obligation on a third party, as the latter was not a party to the CAS proceedings (nor was a party to the previous FIFA proceedings).⁷⁷

5.5 *Interested Parties*

A third party might sometimes participate in CAS proceedings as an “interested party”, although without being entitled to the rights of a full party.

One of the interesting questions addressed in the case CAS 2004/A/748 was whether a third party not having the right to intervene in a CAS proceeding should be allowed to participate as a mere “observer”, or “interested party”, provided all parties agreed on such limited form of participation. The President of the CAS Appeals Division answered in the affirmative, noting that all the parties to the arbitration had “agreed in writing to the limited participation, as interested parties, of Mr Michael Rogers and AOC. Under such agreement, the scope of such participation may however not go beyond the right of the latter ‘to follow the proceedings as an observer, to have access to the record of the case and to receive copies of the parties’ submissions, [...] to file written statements in support of Appellants or Respondent and take part in the hearing.’ It follows that Mr Michael Rogers and AOC are to be granted the status of interested parties, with the mentioned restrictions”.⁷⁸

⁷⁵ Order on Request for Intervention, CAS 2004/A/748 *Russian Olympic Committee & Ekimov v. International Olympic Committee, United States Olympic Committee & Hamilton*, at para. 84.

⁷⁶ Award CAS 2005/A/889 *Mathare United FC vs Al-Arabi FC*.

⁷⁷ See award TAS 2005/A/812 *Sporting Clube de Lisboa v. J.-J. Misse Misse*.

⁷⁸ *Id.* at para. 36.

This procedural tool is often used in CAS Olympic arbitration proceedings, where third parties who do not have proper standing to sue or be sued but are interested in the outcome of the case are anyways allowed by the CAS, in the absence of objections from the proper parties, to take part in hearings and present their observations. Given the extreme urgency with which Olympic cases are dealt with, this mechanism allows arbitrators to have at the hearing a clearer picture of all the matters at stake. For instance, in a London Olympic arbitration, which opposed a South African rider (as applicant) to the South African Sports Confederation and Olympic Committee and the South African Equestrian Federation (as respondents), the IOC and the competent international federation FEI were admitted into the case as “interested parties”.⁷⁹ In another London Olympic case, where an Irish boxer acted against the IOC and the international boxing federation AIBA requesting to be admitted into the Games, a boxer from Montenegro and his National Olympic Committee were allowed by the CAS panel to take part in the hearing as interested parties because they could be affected by the award had the claim been upheld.⁸⁰

5.6 *Amicus Curiae*

Amicus curiae is a Latin expression meaning “friend of the court”. An *amicus curiae* brief is a submission filed with a court by someone who is not a party to the dispute but who is interested in presenting to the court its opinion on the case. It is a procedural tool largely used in some common law jurisdictions; for instance *amicus curiae* briefs are often submitted to the United States Supreme Court.⁸¹

The last paragraph of Article R41.4 allows the submission of *amicus curiae* briefs to the CAS: “After consideration of submissions by all parties concerned, the Panel may allow the filing of *amicus curiae* briefs, on such terms and conditions as it may fix”. Considering the influence that some CAS awards may have on the whole sports sector, this provision is to be praised.

6. *Provisional and Conservatory Measures*

6.1 *Requesting an Interim Measure*

Article 183 PILA permits an international arbitral tribunal sitting in Switzerland to grant “provisional or conservatory measures” (also known as “interim measures”) at the request of a party. Article R37 of the CAS Code follows Article 183 PILA, by allowing a party to apply for and be granted provisional or conservatory

⁷⁹ See award CAS OG 12/01 *Peternell v. SASCOC & SAEF*.

⁸⁰ See award CAS OG 12/02 *Ward v. IOC & AIBA*.

⁸¹ For example, in the landmark *American Needle* sports law case, decided by the US Supreme Court on 25 June 2010, seventeen *amicus curiae* briefs were filed; 130 S. Ct. 2201 (2010) *American Needle, Inc. v. National Football League, et al.*

measures.⁸² Upon request by one of the parties, the President of the relevant Division or the arbitral panel, if the file has already been transferred to it (i.e., after the constitution of the panel and the payment of the advance on costs), will promptly make an order accepting or dismissing the request for an interim measure.

The application for an interim measure may be lodged even before the start of the CAS case⁸³ but, in case the measure is granted, the applicant must begin the arbitration within a short time limit. More precisely, in case of an ordinary procedure the request for arbitration must be lodged within ten days after the filing of the request for provisional measures, whereas in case of an appeals procedure the statement of appeal must be filed within its normal deadline. Such time limits may not be extended and, if they are not complied with, the granted interim measure is “automatically annulled” (sixth paragraph of Article R37 of the CAS Code).

In agreeing to submit a dispute to the CAS – either an ordinary arbitration procedure or an appeals arbitration procedure – “the parties expressly waive their rights to request any such measures from state authorities or tribunals” (third paragraph of Article R37 of the CAS Code). The validity of such a waiver of the right to resort to a State court depends on State courts and on the law that they apply. For instance, in the context of the *Stanley Roberts* case,⁸⁴ the *Oberlandesgericht* of Munich disregarded such waiver and, applying § 1033 of the German Code of Civil Procedure (ZPO), conferring concurring authority for interim measures to German courts and arbitration tribunals, ordered a provisional measure against the international basketball federation FIBA.⁸⁵ On the other hand, in Switzerland the prevailing view is that such a waiver is indeed valid.

For a provisional or conservatory measure to be granted, the applicant party must demonstrate that it has exhausted all internal remedies under the rules of the appropriate federation or sports body (first paragraph of Article R37). Before the exhaustion of all internal remedies, parties may not ask the CAS to issue a provisional or conservatory measure, despite the great urgency to do so. Moreover, the President of the Appeals Division declared, in an order dismissing an athlete’s request for a stay of a sanction, that a “CAS procedure cannot be initiated to compensate the fact that a stay cannot be granted under the rules of a sports federation”.⁸⁶

Pursuant to the fourth paragraph of Article R37 of the CAS Code, when one party requests that a provisional measure be issued, the other party is given a deadline of ten days (or less if circumstances so require) to comment on the application for provisional measures. In cases of “utmost urgency”, the President

⁸² Cf. I. BLACKSHAW, *Provisional and Conservatory Measures – an Under-Utilised Resource in the Court of Arbitration for Sport*, in *Entertainment and Sports Law Journal*, 2006, vol. 4, no. 2, <http://go.warwick.ac.uk/eslj/issues/volume4/number2/blackshaw>.

⁸³ This is a novelty introduced in the latest revision of the CAS Code.

⁸⁴ See CAS 2000/A/262 *Roberts v. FIBA*, in *Digest of CAS Awards, II, 1998-2000*, The Hague, Kluwer, 2002, 377.

⁸⁵ See OLG München, order 26 October 2000, 3209/00, *Stanley Roberts v. FIBA*, in *SpuRt - Zeitschrift für Sport und Recht*, 2001, n. 2 (March-April).

⁸⁶ See order CAS 2007/A/1347 *Gibilisco vs. CONI*.

of the relevant Division or, after the transfer of the file, the president of the panel may grant an *ex parte* order (i.e., an order based solely on the applicant's submission), but the other party must be subsequently heard. For example, an *ex parte* order was issued by a CAS Olympic panel in the context of the infamous *Salé-Pelletier* case in Salt Lake City. The case arose when, after the pairs figure-skating judges had awarded (in a controversial 5-4 decision) the gold medal to the Russian pair Berezhnaya-Sikharulidze over the Canadian pair Salé-Pelletier, a French figure-skating judge reported of some "pressure" placed upon her to vote for the Russians. Upon application "for extremely urgent preliminary relief" by the Canadian Olympic Committee, the CAS panel immediately ordered *ex parte* the respondent International Skating Union (ISU) to impose on its competition judges not to leave the Olympic Village, and summoned those judges to attend the hearing before the Panel as witnesses "and to bring with them any book, record, document, or paper which may be deemed material as evidence".⁸⁷ In a matter of hours, before the CAS panel could hold the hearing, the IOC and the ISU decided – amid allegations of corruption and outraged press reports describing the case as "skategate" – to award a second gold medal to the Canadian pair; as a result, the Canadians withdrew the application.

It's important to note that the President of the relevant Division, or the arbitral panel if the case has already been transferred to it, before issuing an order on interim measures, must always rule *prima facie* on the jurisdiction of the CAS. Under Article R37 of the CAS Code, the Division President is granted the right to terminate the arbitration proceedings if he believes that the CAS clearly has no jurisdiction over the case.

Obviously, any order issued by the Division President may be superseded by a subsequent Panel's order, with regard both to jurisdiction and to the merits of the provisional measure. This was the case in CAS 2007/O/1440, where the Panel determined that "in deciding on its own jurisdiction, [it] is absolutely not bound by the preliminary determination made by the President of the CAS Ordinary Arbitration Division when it set the arbitration in motion. [...] Such *prima facie* assessment done by the President of the Division must obviously be reconsidered by the appointed panel, which has full authority to take the definitive decision as to the jurisdiction of the CAS. Indeed, this is in conformity with the generally accepted principle in international arbitration that the arbitrators have the inherent authority to decide on their own jurisdiction. It is the so-called *Kompetenz-Kompetenz* principle, to be applied by any international arbitral tribunal sitting in Switzerland".

It must be noted that when a sports organization based in Switzerland (like FIFA and most international federations) orders a party to pay a sum of money to another party (as often happens in transfer cases decided by FIFA), the party appealing to the CAS need not apply for a stay of such decision because in any event such decision is not directly enforceable, as held in CAS 2003/O/486: "The Decision is one made by a Swiss private association, and as such it cannot be

⁸⁷ Order CAS OG 02/04 *COC v. ISU*.

legally enforced, if it is challenged, either before the ordinary courts, pursuant to Art. 75 of the Swiss Civil Code, or, as in the present case, before an arbitral tribunal, such as the CAS”.

6.2 Conditions to Obtain Provisional and Conservatory Measures

The three cumulative conditions to obtain from the CAS a provisional and conservatory measure (such as the stay of a federation’s decision) are (i) irreparable harm, (ii) likelihood of success on the merits and (iii) balance of interests (also known as balance of convenience). This three-pronged test has been applied consistently in countless CAS cases and has eventually been codified in the fifth paragraph of Article R37 of the CAS Code: “When deciding whether to award preliminary relief, the President of the Division or the Panel, as the case may be, shall consider whether the relief is necessary to protect the applicant from irreparable harm, the likelihood of success on the merits of the claim, and whether the interests of the Applicant outweigh those of the Respondent(s)”.

First, to meet the *irreparable harm* prong an applicant must show that the requested measure is useful to protect its position from damages that would be impossible, or very difficult, to remedy a later stage. For instance, it is clear that in sport, the inability of an athlete to participate in a major competition often entails damages that are difficult or impossible to remedy.⁸⁸

Second, to demonstrate a *likelihood of success* an applicant must show that it has a reasonable chance to win the case. Two CAS cases must be cited in the respect. In the first one the CAS panel held that a request for a stay “must give the impression that the facts have a certain probability, and must also make summarily plausible that the rights cited exist and that the material conditions for a legal action are fulfilled”.⁸⁹ In the second case, the CAS panel concluded that where it cannot definitely discount the Athlete’s chances of success without a hearing and without thoroughly examining the pertinent factual and scientific evidence, his chances are *prima facie* reasonable.⁹⁰

Finally, to satisfy the third prong, referred to as the *balance of interests* test, the applicant must establish that its interests outweigh those of the opposite party or of third parties. As a CAS panel stated, it “is necessary to compare the risks incurred by the Appellant in the event of immediate execution of the decision with the disadvantages for the Respondent in being deprived of such execution”.⁹¹

When applying the balance of interests test in disciplinary cases, CAS panels must also consider the interest of the other athletes, who are not parties to the arbitration, given that the “provisional” participation in a competition may irremediably alter that competition because sporting conduct or tactics may vary if

⁸⁸ See order TAS 2009/A/1790 *GM Bikes c RCS & UCI*.

⁸⁹ See order CAS 2001/A/324 *Addo & Van Nistelrooij vs. UEFA*.

⁹⁰ See order CAS 2009/A/1912-1913 *Pechstein, DESG vs. ISU*.

⁹¹ See order CAS 2003/O/486 *Fulham vs. Olympique Lyonnais*.

a given competitor is present or not. In Olympic cases, the rules provide that the interests of “other members of the Olympic Community” must be weighed (Article 14 of the Olympic Arbitration Rules). In doping cases, the interest of clean athletes must be protected: “with specific regard to anti-doping cases, the Panel is of the view that in weighing the balance of convenience a CAS panel must also consider the public interest of the fight against doping”.⁹²

It must be noted that, according to CAS jurisprudence, all of the mentioned factors (irreparable harm, likelihood of success and balance of interests) are relevant, but any of them may be particularly decisive on the facts of a specific case.⁹³

7. *Evidentiary Issues*

7.1 *Limits to the Submission of Evidence*

In CAS appeals arbitration cases, the parties to a proceeding must be prepared to submit all their evidence in one shot at the outset of the case, in the only brief that in principle they are allowed to file. Indeed, Article R56 of the CAS Code provides that, after the submission of the appeal brief and of the answer, “the parties shall not be authorized to supplement or amend their requests or their argument, to produce new exhibits, or to specify further evidence on which they intend to rely”.

There are however two exceptions under this rule.

First, the parties can agree to allow the introduction of new evidence that was not submitted at the outset of the case.

Second, upon a party’s request, the president of the panel may order that additional evidence be introduced on the basis of “exceptional circumstances” (Article R56 of the CAS Code). In practice, to obtain such order the applicant must demonstrate that the new evidence was not available or could not be obtained at the time of the first filing. CAS arbitrators may also recognize the existence of “exceptional circumstances” if it is necessary to protect the equality of the parties and their right to be heard. Thus, the submission of further evidence is likely to be authorized, e.g., if the claimant needs to submit documents in order to refute evidence presented by the respondent, particularly if such evidence was unexpected.

In CAS practice, it is also fairly frequent that the parties are granted another round of submissions if the panel decides not to hold a hearing in accordance with the last paragraph of Article R44.2 of the CAS Code (“After consulting the parties, the Panel may, if it deems itself to be sufficiently well informed, decide not to hold a hearing”).

In the version of the CAS Code entered into force on 1 March 2013, Article R57 provides that the “Panel has discretion to exclude evidence presented by the parties if it was available to them or could reasonably have been discovered by

⁹² Order CAS 2007/A/1370 *FIFA & WADA vs. CBF & Ricardo Lucas Dodó*.

⁹³ Orders CAS OG 02/04 *COC v. ISU*, CAS 2007/A/1370-1376 *FIFA & WADA v. STJDF, CBF & Ricardo Lucas Dodó*.

them before the challenged decision was rendered”. In other terms, if a party withheld some evidence during the previous proceedings within a sports body, it may be prevented to present such evidence before the CAS. This provision appears to excessively limit the right to be heard (which includes the right to submit evidence⁹⁴) and to contradict the *de novo* character of CAS proceedings, by creating an unwarranted link between the evidence presented during the internal proceedings of a sports organization and the evidence presented before the CAS. Given that CAS arbitration is alternative to State jurisdiction, and has thus a legal nature which is very different from that of the intra-association proceedings held within sports organizations, it is submitted that CAS arbitrators should resort to this discretionary power to exclude evidence only in the most extreme case, e.g. when it is utterly evident that a party is acting in bad faith and is ambushing the other party.

7.2 *Burden of Proof*

The CAS recognizes the principle “*ei incumbit probatio qui dicit, non qui negat*”, that is, each party has the burden of proving the facts necessary to establish its claim or defense, not the facts which it denies. This is a general principle of law, accepted in international arbitration as well as in national legal systems (e.g. in Switzerland, it is provided by Article 8 of the Swiss Civil Code). In practice, it means that each party must submit all the written and oral evidence useful to persuade the arbitrators of the truth of its allegations and to refute the opposite party’s contentions.

In appeals arbitration proceedings, since the CAS procedure is wholly distinct from the intra-association procedure below (e.g., the disciplinary procedure before an internal justice body of an international federation), it is advisable that the parties resubmit to the CAS any document or other evidence already submitted below and/or specifically request that the CAS obtain from the relevant federation or sports body a complete copy of the file. Although Article R57 of the CAS Code states that the President of the Panel “may request communication of the file of the federation, association or sports-related body, whose decision is the subject of the appeal”, parties should not take for granted that this will be done without a party’s request.

It is true that a CAS panel has, under Article R44.3 of the CAS Code, the power to ask for evidence *ex officio*: “If it deems it appropriate to supplement the presentations of the parties, the Panel may at any time order the production of additional documents or the examination of witnesses, appoint and hear experts, and proceed with any other procedural step”.

However, a party should not rely on the panel’s exercise of such *ex officio* power to look for evidence. In this regard, the CAS made it clear that such panel’s power is discretionary and not obligatory.

⁹⁴ See Federal Tribunal, Judgment 4A_600/2010 of 17 March 2011, *Chess Federations*, at 4.1.

In the case CAS 2003/O/506, the Respondent invoked Article R44.3 of the CAS Code and argued that “the Panel has an obligation to instruct the case *ex officio* and cannot simply take its decision on the basis of the evidence submitted by the parties, if it deems it insufficient”; it added that it was ready to present evidence “should the Arbitral Tribunal ask for more information or documents”. However, the panel did not accept such argument and stated that, although Article R44.3 empowers the arbitral panel to supplement the presentations of the parties, “in the Panel’s opinion, this is clearly a discretionary power which a CAS panel may exert with an ample margin of appreciation – ‘if it deems it appropriate’ – and which cannot be characterized as an obligation. In particular, the CAS Code does not grant such discretionary power to panels in order to substitute for the parties’ burden of introducing evidence sufficient to avoid an adverse ruling; this is clearly confirmed by the circumstance that, in CAS practice, panels resort very rarely to such power. Indeed, it is the Panel’s opinion that the CAS Code sets forth an adversarial system of arbitral justice, rather than an inquisitorial one. In other terms, in CAS proceedings a party cannot simply declare to be ready to present evidence [...]; if a party wishes to establish some facts and persuade the arbitrators, it must actively substantiate its allegations with convincing evidence”.⁹⁵

The above approach by CAS arbitrators is consistent with the prevailing view in the international arbitration community that there is “much in general to recommend arbitrator passivity as regards the obtaining of factual and legal evidence” and that it “will only be in limited special circumstances where arbitrators will take initiatives in evidence with a view to favouring a more correct award, independently of the parties’ submissions”.⁹⁶

7.3 *Iura Novit Curia*

Another relevant issue concerns the application of the principle *iura novit curia* – more precisely, *iura novit arbiter*⁹⁷ – in CAS arbitration. Whether the substantive law governing the dispute is to be proven by the parties or is to be autonomously investigated by the arbitrators is a very controversial issue in international arbitration.⁹⁸ Arbitrators, depending on their legal culture, tend to work on different assumptions and to approach this issue as they do in their home courts.⁹⁹

⁹⁵ Award CAS 2003/O/506 at para. 54.

⁹⁶ P. LANDOLT, *Arbitrators’ Initiatives to Obtain Factual and Legal Evidence*, in *Arbitration International*, 2012, vo. 28, no. 2, 173-223, at 222-223.

⁹⁷ See G. KAUFMANN-KOHLER, «*Iura novit arbiter*» – *Est-ce bien raisonnable? Réflexions sur le statut du droit de fond devant l’arbitre international*, in A. Héritier Lachat, L. Hirsch (eds.), *De Lege Ferenda – Réflexions sur le droit désirable en l’honneur du Professeur Alain Hirsch*, Geneva, 2004, 71-78.

⁹⁸ Cf. International Law Association, International Commercial Arbitration Committee, *Final Report: Ascertaining the Contents of the Applicable Law in International Commercial Arbitration*, Rio de Janeiro, 2008, L. Radicati di Brozolo, M. Friedman (rapporteurs).

⁹⁹ See G. KAUFMANN-KOHLER, *The Governing Law: Fact or Law? – A Transnational Rule on*

Under Swiss law “the principle ‘*iura novit curia*’, which is applicable to arbitration proceedings, obliges [...] arbitrators to apply the law *ex officio*”¹⁰⁰ and permits arbitral tribunals to “adjudicate based on different legal grounds from those submitted by the parties”.¹⁰¹

In CAS practice, arbitrators tend to scrutinize by themselves the rules of sports organizations – which, although termed ‘rules’, have a contractual nature – while they tend to rely on, but do not feel limited by, the parties’ submissions for the knowledge and appraisal of any national law and related jurisprudence. Indeed, in some CAS cases, parties have presented written and oral evidence by expert witnesses (such as law professors) on issues of national law.¹⁰²

In any event, even if Swiss law authorizes arbitral tribunals sitting in Switzerland to inquire about the applicable law and conduct their own research, CAS arbitrators must always refrain from taking the parties by surprise and may not base their “decision on a provision or legal consideration which has not been discussed during the proceedings and which the parties could not have suspected to be relevant”.¹⁰³ Accordingly, when in the course of the proceedings it appears that some rules of law which the parties have not discussed might affect the outcome of the case, CAS arbitrators should promptly raise such matter with the parties and issue appropriate directions as to how the contents of the law will be ascertained and discussed.

7.4 Discovery

The notion of “discovery” refers to the compulsory disclosure by one party, at the other party’s request, of documents or other evidence related to the dispute. In international arbitration some limited discovery is generally permitted.

Under Article R44.3 of the CAS Code, a panel – upon the other party’s request or even on its own motion – may order one party to produce documents in its custody or under its control. In order for a CAS panel to compel disclosure of evidence, the party requesting discovery must demonstrate that the documents are likely to exist and that they are likely to be relevant. Thus, in practice, CAS arbitrators tend not to allow “fishing expeditions”, i.e. they do not grant discovery if the request is too broad and does not describe in sufficient detail the specific requested documents (or types of documents) and their relevance.

Helpful guidance for the parties on how to draft a request of discovery and for CAS arbitrators on how to administer issues of discovery may be found in

Establishing its Content, in M. Wirth (ed.), *Best Practices in International Arbitration*, ASA Special Series no. 26, 2006, 79-85.

¹⁰⁰ Federal Tribunal, judgment 4P.114/2001 of 19 December 2001, at 3.a.

¹⁰¹ Federal Tribunal, Judgment 4A.400/2008 of 9 February 2009, *Urquijo Goitia*, at 3.1.

¹⁰² For example, this occurred in CAS 98/200 *AEK, Slavia v. UEFA* on issues of US antitrust law, in TAS 2002/A/403-408 *UCI vs. Pantani, FCI* on issues of Italian law, and in CAS 2011/A/2426 *Adamu v. FIFA* on issues of Swiss law.

¹⁰³ Federal Tribunal, Judgment 4A.400/2008 of 9 February 2009, *Urquijo Goitia*, at 3.1.

Article 3 of the IBA Rules on the Taking of Evidence in International Arbitration.¹⁰⁴

Since CAS arbitrators obviously lack the enforcement powers that a State judge can have, when a party is requested to produce documents but does not comply with the CAS order, the panel cannot enforce its order.

In principle, it is possible for the panel to ask for the assistance of the Swiss judiciary under Article 184.2 PILA: “If the assistance of the judicial authorities of the State is needed to take evidence, the arbitral tribunal or, with the consent of the arbitral tribunal, a party may request the assistance of the judge at the seat of the arbitral tribunal who shall apply his own law”. However, with reference to the discovery of documents, this is hardly an effective remedy against a party not willing to comply. A more effective remedy is the arbitrators’ power to draw “adverse inferences” from a party’s unjustified failure to produce evidence. Indeed in practice, CAS arbitrators may issue a new order, threatening the recalcitrant party to draw adverse inferences from its lack of cooperation and most of the time, unsurprisingly, the parties end up complying with the discovery order.

7.5 *Witness Statements*

In international arbitration it is commonly required that testimonial evidence be submitted in writing prior to the hearing. The witness statement can be a summary of the witness’s testimony or a detailed statement serving as a direct testimony. The witness must then give oral evidence at the hearing, submitting to examination, cross-examination by the other party and questioning by the arbitrators. The same applies to both factual witnesses and expert witnesses.

The CAS Code is ambiguous as to whether the filing of witness statements in CAS proceedings is mandatory. It merely states, for the ordinary procedure, that any “witness statements shall be filed together with the parties’ submissions, unless the President of the Panel decides otherwise” (third paragraph of Article R44.1) and, for the appeals procedure, that the “witness statements, if any, shall be filed together with the appeal brief [or the answer], unless the President of the Panel decides otherwise” (Articles R51 and R55).

In CAS practice, it is not considered strictly mandatory to file witness statements, but most CAS arbitrators instruct the parties to file them before the hearing for two reasons: fairness, as it ensures that the parties play with all the cards on the table, and efficiency, as it saves a good deal of time at the hearing.

Article R44.2 of the CAS Code allows the president of the panel to authorize hearing witnesses and experts via tele-conference or video-conference. The president

¹⁰⁴ See International Bar Association, *IBA Rules on the Taking of Evidence in International Arbitration*, 2010. The IBA Rules are considered to codify the status of Swiss arbitration law in this respect. See B. BERGER, F. KELLERHALS, *International and Domestic Arbitration in Switzerland*, 2nd ed., Berne, Stämpfli Verlag, 2010, para. 1200, who emphasize that the IBA Rules of Evidence are used by the arbitrators as a sort of handbook to decide procedural questions for which the applicable arbitration rules do not contain any provision.

of the panel, with the agreement of the parties, may also exempt a witness or expert from appearing at the hearing if the witness or expert has previously filed a written statement.

7.6 Expert Evidence

In some CAS cases expert testimony might be crucial, particularly in anti-doping cases where biological, medical or statistical issues are at stake. Differently from ordinary court cases, in CAS proceedings there is usually no preliminary question of admissibility of the expert evidence; it is rather a matter of plausibility and weight of the expert testimony.¹⁰⁵

In the *Valjavec* case, an international federation that had suspended an athlete on the basis of the scientific opinion of a panel of biological passport experts¹⁰⁶ argued that a CAS Panel should limit itself to check whether the panel of experts “considered the correct issues and exercised its appreciation in a manner which does not appear arbitrary or illogical”.¹⁰⁷ The CAS arbitrators rejected this approach and, even acknowledging their own lack of scientific expertise, stated that a CAS panel “cannot abdicate its adjudicative role”, quoting the Roman law principle *iudex peritus peritorum*, i.e., the judge is the expert on the experts.¹⁰⁸

The *Valjavec* award so described the role of a CAS panel when confronted with expert evidence: “the CAS Panel [must] determine whether the Expert Panel’s evaluation (upon which UCI’s case rests) is soundly based in primary facts, and whether the Expert Panel’s consequent appreciation of the conclusion [to] be derived from those facts is equally sound. It will necessarily take into account, inter alia, the impression made on it by the expert witnesses in terms of their standing, experience, and cogency of their evidence together with that evidence’s consistency with any published research”.¹⁰⁹

In *De Bonis* case the arbitrators reached a similar conclusion in assessing the role of a CAS panel confronted with expert evidence: “This Panel is in a position to evaluate and assess the weight of a (party-appointed) expert opinion submitted to it. It does so by evaluating the facts, on which the expert opinion is based and by assessing the correctness and logic of the conclusions drawn by the experts. In fulfilling this task the Panel takes into account the statements and opinions of (all) the parties. It is on the basis of this evaluation and balancing of the various submissions that the Panel will form its own opinion on the facts and consequences that follow thereof. This opinion may be in line with the evidence provided by a party-appointed expert. However, the contrary may be equally true. The Panel’s

¹⁰⁵ See C. DAVIES, *Expert Evidence and the Court of Arbitration for Sport: A Question of Weight*, in *International Sports Law Review*, 2012, vol. 12, no. 2, 25-31.

¹⁰⁶ See M. COCCIA, *The Athlete Biological Passport: Legal And Scientific Aspects*, in *International Sports Law Review*, 2013, vol.13, no. 1, 9-26.

¹⁰⁷ See award CAS 2010/A/2235 *UCI v Valjavec and OCS*, at para. 78.

¹⁰⁸ *Id.* at para. 79.

¹⁰⁹ *Id.*

activity is, thus, not a ‘pure referral’ to some other’s opinion”.¹¹⁰

Therefore, on the basis of CAS jurisprudence, in assessing expert evidence a CAS panel should particularly consider the following: (i) the expert witnesses’ respective standing, experience and publications, (ii) whether an expert’s opinion is soundly based on the facts, (iii) whether the conclusions derived from those facts are sound, correct and logic, and (iv) the consistency of the expert’s opinion with published research.¹¹¹

7.7 *Evidence Illegally Obtained*

The CAS has ruled that evidence that may have been gathered in violation of some national law does not necessarily violate procedural public policy or personality rights under Swiss law, and may thus be submitted to the CAS, if there is an overriding public interest at stake.

In the groundbreaking *Valverde* case,¹¹² the Spanish police gathered (during the so-called “Operación Puerto”) evidence including a blood bag, which supposedly contained the blood of Mr Valverde. An Italian prosecutor who was pursuing a criminal investigation in Italy, in cooperation with the Italian anti-doping prosecutor of CONI, asked for such evidence through a so-called rogatory commission. The Spanish judge permitted the Italian prosecutor to collect an aliquot of the blood contained in said blood bag and to take it to Italy. Later on, when the aliquot of blood had already been collected and transported to Italy (where a DNA test confirmed that the blood belonged to Mr Valverde), the Spanish judge revoked such permission and issued an order prohibiting to use such evidence in any legal proceedings other than in the Spanish one. This evidence was anyway used by CONI against Mr. Valverde at the Italian disciplinary proceedings and in appeal at the CAS to ban him for two years from Italian competitions, and was later used again by WADA and UCI to extend the sanction at worldwide level.

A first CAS panel ruled that this evidence could be introduced in the case, stating that “the prohibition to rely on illegal evidence in State court proceedings is not binding per se upon an arbitral tribunal. According to international arbitration law, an arbitral tribunal is not bound by the rules of evidence applicable before the civil State courts of the seat of the arbitral tribunal. As seen above, the discretion of the arbitrator to decide on the admissibility of evidence is exclusively limited by procedural public policy. In this respect, the use of illegal evidence does not automatically concern Swiss public policy, which is violated only in the presence of an intolerable contradiction with the sentiment of justice, to the effect that the

¹¹⁰ Award CAS 2009/A/2174 *De Bonis v. CONI & UCI*, at para. 9.4.

¹¹¹ For a slightly different list, cf. C. DAVIES, *Expert Evidence and the Court of Arbitration for Sport: A Question of Weight*, in *International Sports Law Review*, 2012, vol. 12, no. 2, 25-31, at 30.

¹¹² CAS 2009/A/1879 *Alejandro Valverde Belmonte v. CONI*; CAS 2007/A/1396-1402 *WADA & UCI v. Alejandro Valverde Belmonte & RFEC*.

decision appears incompatible with the values recognized in a State governed by of the rule of law”.¹¹³

A second CAS panel dealing with the *Valverde* case stated that even “if the Operacion Puerto evidence should be deemed to have been collected illegitimately (quod non) it is noted that, under Swiss law – as Swiss counsel for the Appellants and the RFEC agreed at the Hearing – such evidence can be used, even if it was collected with violation of certain human rights, if there is an overriding public interest at stake. In the case at hand, the internationally accepted fight against doping is a public interest, which would outweigh a possible violation of Mr Valverde’s personal rights”.¹¹⁴

The same principles were later confirmed in a corruption case concerning the use for disciplinary purposes of video and audio recordings secretly obtained by some journalists and partially published in the paper and electronic versions of a newspaper.¹¹⁵

8. *Applicable Law*

With regard to the law applicable to the merits, Article 187.1 PILA provides that an arbitral tribunal must decide “according to the rules of law chosen by the parties or, in the absence of such choice, according to the rules of law with which the action is most closely connected”.

It must be noted that the primary connecting factor in Article 187.1 PILA is the choice of law by the parties, with the “closest connection” being the subsidiary connecting factor.¹¹⁶ Therefore, if the parties have agreed on arbitration rules which include a choice of law, such as the CAS Code, there is no room for the subsidiary conflict rule set forth by the second part of Article 187.1.¹¹⁷

The rules concerning the law applicable to the merits are different in the ordinary, appellate and Olympic procedures.

8.1 *Applicable Law in CAS Ordinary Proceedings*

With regard to CAS ordinary arbitration proceedings, Article R45 of the CAS Code provides that the “Panel shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to Swiss law. The parties may authorize the Panel to decide ex aequo et bono”.

Therefore, if the parties have expressly chosen a given law in a contract, such law must definitely be applied to decide the merits of the dispute. However,

¹¹³ Award CAS 2009/A/1879 *Alejandro Valverde Belmonte v. CONI*, at paras. 134 ff.

¹¹⁴ Award CAS 2007/A/1396-1402 *WADA & UCI v. Alejandro Valverde Belmonte & RFEC*, at para. 10.5.c.

¹¹⁵ See award CAS 2011/A/2426 *Amos Adamu v. FIFA*.

¹¹⁶ See P. KARRER, *Art. 187*, in S.V. Berti (ed.), *International Arbitration in Switzerland*, The Hague, 2000, 479-531, at para. 59.

¹¹⁷ *Id.* at para. 118.

the contractual choice of law need not be explicit; it is indeed recognised under Swiss law¹¹⁸ as well as CAS jurisprudence¹¹⁹ that the parties' choice of law may also be implicit, provided that it is demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. For example, some contractual clauses or other written evidence (such as exchange of correspondence) making reference to some articles of the civil code of a certain country might indicate that the parties have implicitly agreed on the application of the national law of such country to the merits of the case.¹²⁰

If not even an implicit choice of law can be inferred in a given case, CAS jurisprudence is very clear in stating that arbitrators will have to resort to the choice of Swiss law residually made by Article R45 of the CAS Code, even if the case has no connection whatsoever to Switzerland.¹²¹ Indeed, as a CAS panel has stated, given that "the parties have chosen the CAS to solve their dispute, they have also chosen the CAS Code and thus – in the absence of a different choice of law in their Contract – they have chosen Swiss substantive law".¹²²

This rule of the CAS Code has been understandably criticized by some commentators,¹²³ but at least it has the merit of laying down a clear solution which helps the parties focusing on the merits of the dispute without having to spend considerable time in discussing conflict-of-law issues.

8.2 *Applicable Law in CAS Appeals Proceedings*

With regard to CAS appeals proceedings, Article R58 of the CAS Code provides as follows: "The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

Typically, in appeals arbitration proceedings, the parties are bound by the rules of the competent international sports organization and CAS Panel apply, primarily, the sports organization's rules material to the dispute. Indeed, Swiss law allows the parties to choose even "rules of law" ("*règles de droit*" in French) which are not State laws, such as the private rules and regulations adopted by sports organizations. For example, this is what normally occurs in the many appeals to the CAS against FIFA decisions in matters related to the transfer and status of players.

¹¹⁸ *Id.* at paras 88-89.

¹¹⁹ See, e.g., awards CAS 2002/O/373; CAS 2006/O/1127.

¹²⁰ See award CAS 2010/O/2237.

¹²¹ See awards CAS 96/161 *International Triathlon Union (ITU) v. Pacific Sports Corp. Inc.*, CAS 2003/O/482, CAS 2003/O/486.

¹²² Award CAS 2010/O/2237, at para. 136.

¹²³ See A. RIGOZZI, *L'arbitrage international en matière de sport*, Basel, Helbing & Lichtenhahn, 2005, 596-597.

As many international federations are domiciled in Switzerland, substantive Swiss law is often applied on a subsidiary basis, as “the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled”. However, CAS arbitrators may also apply – giving reasons – other rules of law, the application of which they deem appropriate, such as other national laws, general principles of law or the so-called *lex sportiva*.

For example, a CAS panel ended up applying Paraguayan law, reasoning as follows: “The Panel remarks that the ‘applicable regulations’ are all FIFA rules material to the dispute at stake [...]. As to any applicable State law, pursuant to Article R58 of the Code, the Panel finds that it would be inappropriate to apply substantive Swiss law to the various contracts signed between the Player [...] and the Appellant [...], as they have no connection whatsoever with Switzerland. The Panel remarks that [those] Contracts were drafted and signed in Paraguay between a Paraguayan citizen and a Paraguayan football club, set out the rules for activities mainly taking place in Paraguay and include several explicit references to Paraguayan law [...]. Accordingly, the Panel finds that [those] Contracts are solely connected with Paraguayan law. Taking also into account that in their written submissions, as well as during the hearing, all parties have repeatedly made reference to Paraguayan civil and labour law, the Panel deems appropriate that [those] Contracts be governed by Paraguayan law and not by Swiss law. Further, the Panel finds that, in accordance with Article R58 of the Code, any other aspect of the present dispute which is not covered by the FIFA regulations must be governed by Swiss law [...]. In this respect, the Panel points out that it is certainly appropriate to apply Swiss law to the contract of 21 January 2005 between the Player and St. Gallen, as the Player must perform its activities in Switzerland for a Swiss employer under the rules of the Swiss football federation”.¹²⁴

Then, a CAS panel may decide not to apply some federation’s regulations or foreign laws if it considers them to be incompatible with Swiss “public policy” (“*ordre public*” in French), in accordance with Article 190 PILA, as exemplified in the following CAS award: “The rules of law primarily applicable, such as the FIFA Regulations, cannot validly contradict a mandatory rule of Swiss law if this would result in the impairment of essential and generally recognized Swiss legal values, i.e. Swiss public policy. [...] The reservation of public policy may lead to discard the application of the rules of law chosen pursuant to art. 187 PILA”.¹²⁵

8.3 *Applicable Law in CAS Olympic Proceedings*

With regard to Olympic arbitration proceedings, Article 17 of the Olympic Arbitration Rules provides as follows: “The Panel shall rule on the dispute pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate”.

¹²⁴ Award CAS 2005/A/878 *Club Guarani v. González Ferreira & FC St. Gallen*.

¹²⁵ Award CAS 2005/A/983-984 *Club Peñarol v. Bueno, Rodriguez & PSG*.

Accordingly, CAS Olympic panels have ample latitude in selecting the law to be applied to a given case. Obviously, most Olympic cases are decided on the basis of the Olympic Charter and of the sports regulation of the concerned international federation.

However, various panels have applied general principles of law such as the principle of estoppel¹²⁶ and the principle of *res judicata*.

For example, in the Salt Lake City case CAS 02/06, the panel applied “the doctrine of ‘estoppel by representation’ a doctrine firmly established in common law and known in other legal systems even though under a different heading (e.g. reliance in good faith, *venire contra factum proprium*). This doctrine which the Panel applies as a general principle of law (art. 17 of the CAS ad hoc Rules) is defined as ‘An estoppel that arises when one makes a statement or admission that induces another person to believe something and that results in that person’s reasonable and detrimental reliance on the belief’” (citations omitted).

It is interesting to note that the last part of Article 17 of the Olympic Arbitration Rules (“the rules of law, the application of which it deems appropriate”) permits CAS Olympic panels to resort to a wide variety of rules, such as national laws, public international law and *lex sportiva*.

An illustration of the application of public international law can be found in the *Perez* and *Miranda* cases, decided at the Sidney Olympic Games, where the issues of nationality and citizenship as well as the notion of statelessness were discussed.¹²⁷

8.4 The Application of *Lex Sportiva*

As seen *supra*, both Article R58 of the CAS Code in appeals proceedings and Article 17 of the Olympic Arbitration Rules should be considered to allow CAS panels to apply principles of *lex sportiva* to solve a dispute. However, it is not easy to define what *lex sportiva* is. Indeed, there has been much discussion in the legal literature about the notion of *lex sportiva*,¹²⁸ reminding of the recurring debate

¹²⁶ See D. DI PIETRO, *Rules of Interpretation of International Statutes and Application of Venire Contra Factum Proprium and Estoppel in the Case Law of CAS Tribunals*, in *International Sports Law Review*, 2004, vol. 4, no. 4, 79-84.

¹²⁷ See awards CAS OG 00/01, *USOC & USA Canoe/Kayak v. IOC*, CAS OG 00/03 *Arturo Miranda v. IOC*, CAS OG 00/05 *Angel Perez v. IOC*, CAS OG 00/08 *Arturo Miranda v. IOC*, CAS OG 00/09 in the matter *Angel Perez*.

¹²⁸ With varied conceptions of *lex sportiva*, cf. RC.R. SIEKMANN, J. SOEK (eds.), *Lex Sportiva: What is Sports Law?*, Springer, 2012; F. LATTY, *La lex sportiva. Recherche sur le droit transnational*, Leiden-Boston, Martinus Nijhoff Publishers, 2007; M.J. BELOFF QC, *Is there a Lex Sportiva?*, in *International Sports Law Review*, 2005, vol. 5, no. 3, 49-60; L. CASINI, *The Making of a Lex Sportiva. The Court of Arbitration for Sport «The Provider»*, IILJ Working Paper 2010/5 (Global Administrative Law Series), in www.iilj.org/publications/documents/2010-5.Casini.pdf; J.A.R. NAFZIGER, *Lex Sportiva*, in *The International Sports Law Journal*, 2004, vol. 1-2, 3-8; K. FOSTER, *Lex Sportiva and Lex Ludica: The Court of Arbitration for Sport’s Jurisprudence*, in I.S. Blackshaw, R.C.R. Siekmann, J. Soek (eds.), *The Court of Arbitration for Sport 1984-2004*, The

among commercial arbitration specialists about *lex mercatoria*.¹²⁹

The term *lex sportiva* has become quite successful, despite its being an odd mixture of a Latin word (*lex*) and an Italian one (*sportiva*). Besides the terminology, the concept of *lex sportiva* has been characterized in different manners, on the one hand being stretched to the point of including in it all the written rules issued by international sports organizations¹³⁰ and, on the other hand, confining it to CAS awards.¹³¹

It is submitted here that, as already remarked a few years ago,¹³² *lex sportiva* is constituted by a set of unwritten legal principles of sports law, deriving from the interaction between sports rules and general principles of law, developed and consolidated along the years through the arbitral settlement of sports disputes, both at the CAS and at other dispute settlement institutions specialized in sports.¹³³

An illustration of an important principle of *lex sportiva* can be found in the various CAS cases – especially Olympic cases – where the so-called “field of play” doctrine was developed.¹³⁴ Indeed, “pursuant to the long-established line of CAS jurisprudence, the CAS will only review a field-of-play decision in circumstances of the decision having been taken arbitrarily or in bad faith”.¹³⁵

It is not a matter of lack of jurisdiction but it is rather an exercise of self-restraint by CAS arbitrators, who do not want to alter a decision taken by a referee or a judge on the field, even when that decision – with the benefit of hindsight – is recognized as wrong, unless it is demonstrated that there has been arbitrariness or bad faith (e.g. due to corruption) in arriving at such decision: “An error identified with the benefit of hindsight, whether admitted or not, cannot be a ground for reversing a result of a competition”.¹³⁶ Evidently, the need to prove arbitrariness or bad faith “places a high hurdle that must be cleared by any Applicant seeking to review a field of play decision. However, if the hurdle were to be lower, the flood-gates would be opened and any dissatisfied participant would be able to seek the

Hague, TMC Hasser Press, 2006, 420-440; A. ERBSEN, *The Substance and Illusion of Lex Sportiva*, in I.S. Blackshaw, R.C.R. Siekmann, J. Soek (eds.), *The Court of Arbitration for Sport 1984-2004*, The Hague, TMC Hasser Press, 2006, 441-454.

¹²⁹ For example, cf. Y. FORTIER CC QC, *The New, New Lex Mercatoria, or, Back To The Future*, in *Arbitration International*, 2001, vol. 17, no. 2, 121-128; T. SCHULTZ, *Some Critical Comments on the Juridicity Of Lex Mercatoria*, in *Yearbook of Private International Law*, 2008, vol. 10, 667-710.

¹³⁰ See F. LATTY, *La lex sportiva. Recherche sur le droit transnational*, Leiden-Boston, Martinus Nijhoff Publishers, 2007, 36.

¹³¹ J.A.R. NAFZIGER, *Lex Sportiva*, in *The International Sports Law Journal*, 2004, vol. 1-2, 3-8, at 3.

¹³² See M. COCCIA, *Fenomenologia della controversia sportiva e dei suoi modi di risoluzione*, in *Rivista di diritto sportivo*, 1997, 605-628, at 621.

¹³³ For the first clear reference to *lex sportiva* (although termed *lex ludica*) in a CAS award, see CAS 98/200 *AEK Athens and Slavia Prague v. UEFA*, at para. 188.

¹³⁴ See awards CAS OG 96/06 *Mendy v. AIBA*, CAS OG 00/13 *Segura v. IAAF*.

¹³⁵ See award CAS OG 12/10, *Swedish National Olympic Committee & Swedish Triathlon Federation v. International Triathlon Union*, at para. 7.1.

¹³⁶ Award CAS 2004/A/704 *Yang Tae Young v. FIG*, at para. 4.7.

review of a field of play decision”.¹³⁷ Indeed, sport does not easily tolerate that results obtained on the field are reversed in court, and “any contract that the player has made in entering into a competition is that he or she should have the benefit of honest ‘field of play’ decisions, not necessarily correct ones”.¹³⁸

Another principle of *lex sportiva* which has often been applied by CAS panels, yielding the annulment of several decisions adopted by international sports organizations, is the requirement of “procedural fairness”. It is indeed a fundamental principle accepted by the whole sporting community that participants in sporting events (athletes, clubs, etc.) should be treated fairly by sports regulators and organizers: “under CAS jurisprudence the principle of procedural fairness is surely among the unwritten principles of sports law to be complied with by international federations”.¹³⁹

An illustration of the application of the principle of procedural fairness can be found in CAS 2008/O/1455, where the panel annulled the decision of an international federation to change at a very late stage the Olympic qualification system for the athletes of one continent, to the detriment of some competitors who had already planned their training and competitions on the basis of the previous qualification system: “the Panel is of the opinion that an attempt to alter the Olympic qualification process with retrospective effect at such a late stage – a few months before the Olympic Games – would violate the principle of procedural fairness. [...] The Panel notes that the Olympic Charter requires international federations to propose to the IOC their qualification systems ‘three years before the Olympic Games’. Even if this term was not to be intended as a strict deadline, it is nonetheless a clear indication that crucial considerations of procedural fairness towards its members require international federations to announce at a reasonably early stage the Olympic qualification process and not to alter it when the national federations and their athletes have already started the sporting season leading to the Olympic Games”.¹⁴⁰

9. Appeals against CAS Awards

As already mentioned, since the seat of each CAS arbitration is in Switzerland (Article R28 of the CAS Code), the action to set aside a CAS award must be lodged with the Swiss Supreme Court, i.e. the Federal Tribunal. It must be noted that only true arbitral awards (either partial or final) can be challenged and not mere orders or other procedural instructions issued by the CAS panel or the President of a CAS Division.

¹³⁷ See award CAS OG 02/07 *Korean Olympic Committee v. International Skating Union*, at para. 5.2.

¹³⁸ Award CAS 2004/A/704 *Yang Tae Young v. FIG*, at para. 3.13.

¹³⁹ Award CAS 98/200 *AEK, Slavia v. UEFA*, at para. 190. See also the awards CAS 2002/O/410 and CAS OG 02/006, *NZOC v. FIS, IOC, SLOC*.

¹⁴⁰ Award CAS 2008/O/1455, paras. 6.11 and 6.17.

Pursuant to Article 192.1 PILA, parties might in principle waive their right to challenge a CAS arbitral award by agreeing to exclude the jurisdiction of the Federal Tribunal. However, the Federal Tribunal has specified that a sports organization may not validly insert in its rules such waiver agreement in relation to disputes between the sports organization itself and an athlete – a so-called “vertical dispute” – given that the athlete’s consent to such a waiver of any challenge against a future CAS award would not rest on a completely free will.¹⁴¹

There is a limited number of situations that may allow a party that has received an unfavourable CAS award to try and obtain that the Federal Tribunal set aside such award.¹⁴² Limiting here the analysis to CAS international awards,¹⁴³ a party may only invoke the following grounds for annulment pursuant to Article 190.2 PILA:

“[The award] may be challenged only:

- a. if a sole arbitrator was designated irregularly or the arbitral tribunal was constituted irregularly;
- b. if the arbitral tribunal erroneously held that it had or did not have jurisdiction;
- c. if the arbitral tribunal ruled on matters beyond the claims submitted to it or if it failed to rule on one of the claims;
- d. if the equality of the parties or their right to be heard in an adversarial proceeding was not respected;
- e. if the award is incompatible with public policy”.

It must be noted that the Federal Tribunal does not reopen the case as it issues its decisions only on the basis of the facts that were established by the CAS panel; essentially, the Federal Tribunal merely examines whether or not the arguments raised against the award are well-founded and does not rectify or supplement *ex officio* the findings of the arbitrators, even when the facts were established in a manifestly inaccurate manner or in violation of the law.¹⁴⁴

The five grounds for annulment set forth by Article 190.2 PILA are shortly addressed hereinafter.

9.1 Irregular Constitution of the CAS Panel

Pursuant to Article 190.2(a) PILA, a CAS award may be challenged if the sole

¹⁴¹ Federal Tribunal, Judgment 4P.172/2006 of 22 March 2007, *Cañas*, at 4.3.2.2.

¹⁴² See A. RIGOZZI, *Challenging Awards of the Court of Arbitration for Sport*, in *Journal of International Dispute Settlement*, 2010, vol. 1, no. 1, 217-265; D. AKIKOL, *Review of the Recent Case Law of the Swiss Federal Tribunal*, in C. Müller, A. Rigozzi (eds.), *New Developments in International Commercial Arbitration*, Zurich, 2011, 119-175.

¹⁴³ A CAS arbitration, and thus the ensuing award, is “international” if at least one of the parties to the dispute has neither its domicile nor its habitual residence in Switzerland at the time of conclusion of the arbitration agreement (Article 176 PILA). In such case, the CAS arbitration is governed by Chapter 12 PILA. A CAS “domestic” awards (i.e. with all parties domiciled or habitually resident in Switzerland) must also be challenged before the Federal Tribunal (Article 389 Civil Procedure Code) but on grounds which slightly differ from those listed under Article 190.2 PILA.

¹⁴⁴ Federal Tribunal, Judgment 4A_234/20101 of 29 October 2010, *Valverde I*, at 2.1-2.2.

arbitrator was designated irregularly or, in instances where an arbitral panel is appointed, if the panel was constituted irregularly.

Such ground for annulment may be invoked if (i) the appointment procedure set forth by the applicable rules was not complied with, or if (ii) an appointed arbitrator was not independent or impartial. The first situation is unlikely to occur in CAS proceedings; in fact, only the latter situation can be considered as actually problematic. In any event, even though several CAS awards have been challenged on the basis of lack of independence or impartiality of an arbitrator, thus far the Federal Tribunal has never set aside a CAS award for this reason.

The issue of the independence and impartiality of CAS arbitrators has already been discussed *supra* at 4.4, and it is here made reference to those considerations.

9.2 *Jurisdiction Wrongly Retained or Declined*

According to Article 190.2(b) PILA, a party can appeal an award if it believes that the CAS panel erroneously assessed whether it had jurisdiction. The Federal Tribunal annulled for this reason the following CAS awards: CAS 2008/A/1564 *WADA v. Busch & IIHF*,¹⁴⁵ CAS 2009/A/1767 *Thys v. ASA*,¹⁴⁶ CAS 2010/O/2250,¹⁴⁷ and CAS 2010/O/2197.¹⁴⁸

To challenge a CAS award for having wrongly retained jurisdiction, the interested party must have already raised the jurisdictional issue at the outset of the arbitration proceedings: “the defence of lack of jurisdiction must be raised before any defence on the merits. This is in conformity with the rule of good faith embodied at Article 2.1 CC, which applies to all realms of the law, including civil procedure. Stated differently, the rule at Article 186.2 PILA means that the arbitral tribunal in front of which the respondent proceeds on the merits without reservation acquires jurisdiction from that very fact. Hence he who addresses the merits without reservation in contradictory arbitral proceedings involving an arbitral matter thereby recognizes the jurisdiction of the arbitral tribunal and definitely loses the right to challenge the jurisdiction of the tribunal. However, the respondent may state its position on the merits in an alternate way, only for the case in which the defence of lack of jurisdiction would be rejected, without thus tacitly accepting the jurisdiction of the arbitral tribunal”.¹⁴⁹

Interestingly, in the light of a recent judgment rendered by the Federal Tribunal, it would seem that the non-compliance with the time limit for an appeal to the CAS should not be considered as a jurisdictional issue, but rather as a matter of inadmissibility.¹⁵⁰ Therefore, in case of challenges against a CAS award based

¹⁴⁵ Annulled by the Federal Tribunal, Judgment 4A_358/2009 of 6 November 2009, *Busch*.

¹⁴⁶ Annulled by the Federal Tribunal, Judgment 4A_456/2009 of 3 May 2010, *Thys*.

¹⁴⁷ Annulled by the Federal Tribunal, Judgment 4A_627/2011 of 8 March 2012, *IIHF*.

¹⁴⁸ Annulled by the Federal Tribunal, Judgment 4A_244/2012 of 17 January 2013.

¹⁴⁹ Federal Tribunal, Judgment 4A_386/2010 of 3 January 2011, *Valverde II*, at 5.2.

¹⁵⁰ Federal Tribunal, Judgment 4A_488/2011 of 18 June 2012, *Pellizzotti*., at 4.3.1.

on this point, the Federal Tribunal would probably hold that the expiry of the time limit for the appeal to the CAS is not reviewable under Article 190.2(b) PILA. However, the Federal Tribunal has ultimately left the issue open because it has deemed as “not necessary to issue a definitive decision as to whether or not failure to comply with the time limit affects the jurisdiction of the CAS”.¹⁵¹

The relevant issue of the legitimacy of CAS arbitration clauses “by reference” has already been discussed *supra* at 3.3, and it is here made reference to those considerations.

9.3 Award Ultra, Extra or Infra Petita

Article 190.2(c) PILA allows a party to challenge an award if the arbitrators have made an adjudication *ultra petita* or *extra petita* or *infra petita*. The petitioner must thus demonstrate that the CAS panel adjudicated beyond (*ultra*), or differently than (*extra*), what the parties sought in their motions for relief (*petita*), or that the CAS panel omitted to adjudicate (*infra*) a claim included in the parties’ motions for relief (*petita*).

It must be considered that the challenged award’s ruling must only be compared to what the parties have actually requested in their prayers for relief and not to the legal arguments that the parties have submitted to support their requests. Indeed, arbitral tribunals sitting in Switzerland may rely on legal arguments different than those submitted by the parties: “In application of the principle ‘*jura novit curia*’, insofar as a conclusion is sufficiently reasoned, [an arbitral tribunal] does not adjudicate *ultra* or *extra petita* if it relies on legal arguments that were not invoked, as in such instance it merely gives a different qualification to the facts of the case”.¹⁵²

In any event, it must be noted that, thus far, the Federal Tribunal has set aside no CAS award for this reason.

9.4 Violation of Due Process

Pursuant to Article 190.2(d), the parties may challenge a CAS award if there exists a violation of due process during the arbitral proceedings. To date, the Federal Tribunal has set aside three CAS awards (or parts thereof) for having violated due process rights: CAS 2005/A/951 *Cañas v. ATP*,¹⁵³ CAS 2007/A/1371 *Urquijo Goitia v. da Silva Muñiz*,¹⁵⁴ and CAS 2010/O/2166.¹⁵⁵

One of the due process rights protected by this provision is the principle of *equal treatment*. Under this principle, the parties must be reasonably given the

¹⁵¹ *Id.*

¹⁵² Federal Tribunal, Judgment AFT 120 II 172, at 175. Cf. *supra* at 7.3.

¹⁵³ Annulled by the Federal Tribunal, Judgment 4P.172/2006 of 22 March 2007, *Cañas*.

¹⁵⁴ Annulled by the Federal Tribunal, Judgment 4A_400/2008 of 9 February 2009, *Urquijo Goitia*.

¹⁵⁵ Annulled by the Federal Tribunal, Judgment 4A_600/2010 of 17 March 2011, *Chess Federations*.

same opportunity to present their cases during the arbitral proceedings. In other terms, the arbitrators must treat the parties in a similar manner at every stage of the CAS proceedings.¹⁵⁶

The second due process right that is protected by Swiss law is the *right to be heard in adversarial proceedings*. The requirement that a party be heard gives each party the right to submit evidence and arguments with respect to all the facts which are essential to the judgment, to represent their legal standpoint, to take part in the hearings and to have access to the arbitration file.¹⁵⁷ The requirement of adversarial proceedings (in French “*principe du contradictoire*”) guarantees that the parties will have the right to examine each others’ evidence and arguments, as well as be given the opportunity to rebut them.

The right to be heard also implies that, as already mentioned, a CAS panel cannot take the parties by surprise and must render its ruling only on grounds that the parties had the opportunity to discuss.¹⁵⁸

It is important to point out that the right to be heard does *not* guarantee that a CAS panel’s findings must be correct and not contradict the evidence. In this regard, the Federal Tribunal stated that “a finding that is obviously wrong and in contradiction to the records is not in itself sufficient to set aside an arbitral award. The right to be heard does not contain any right to a substantively correct decision”.¹⁵⁹ Moreover, the right to be heard does not entitle the parties to require that a CAS international arbitral award set out detailed reasons for the decision taken, even though there is a “minimum requirement arising from the principle of the right to be heard to review the issues relevant for the decision and to address them”.¹⁶⁰

Then, the right to be heard does not require that a hearing be public;¹⁶¹ in fact, a public CAS hearing might often pose serious security problems in view of the fact that many parties to CAS cases are clubs or athletes with plenty of supporters, while CAS arbitrators do not dispose of bailiffs or guards for maintaining order and security in the courtroom.¹⁶²

9.5 Violation of Public Policy

Finally, Article 190.2(e) PILA requires that a CAS award be set aside if it is incompatible with “public policy”, which must be distinguished between “procedural public policy” and “substantive public policy”. To date, the Federal Tribunal has

¹⁵⁶ Federal Tribunal, Judgment 4A_488/20111 of 18 June 2012, *Pellizotti*, at 4.4.1.

¹⁵⁷ Federal Tribunal, Judgment 4P.105/2006 of 4 August 2006, *Sheikh Hazza*, at 7.1.

¹⁵⁸ See *supra* at 7.3.

¹⁵⁹ Federal Tribunal, Judgment 4P.105/2006 of 4 August 2006, *Sheikh Hazza*, at 7.4.

¹⁶⁰ Federal Tribunal, Judgment 4A_162/2011 of 20 July 2011, *Milutinovic*, at 2.1.2 (citation omitted).

¹⁶¹ Federal Tribunal, Judgment 4A_612/2009 10 February 2010 *Pechstein*, at 4.1.

¹⁶² The issue of the lack of public hearing in CAS proceedings is currently pending before the European Court of Human Rights, as Ms Pechstein has argued that this is incompatible with Article 6.1 of the European Convention on Human Rights; European Court of Human Rights, Application no. 67474/10, *Claudia Pechstein v. Switzerland*, filed on 11 November 2010.

set aside two CAS award based on this ground for annulment, one for having violated procedural public policy (CAS 2009/A/1765 *Benfica Lisboa v. Atlético Madrid & FIFA*¹⁶³) and one for having violated substantive public policy (CAS 2010/A/2261-2263 *Matuzalem & Real Zaragoza v. FIFA*¹⁶⁴).

A CAS award may be held in violation of public policy whenever it breaches the essential and widely recognized values which, according to conceptions prevailing in Switzerland, should constitute the foundation of all legal systems.¹⁶⁵

Procedural public policy is breached “in case of violation of fundamental and generally recognized procedural principles, the disregard of which contradicts the sense of justice in an intolerable way, so that the decision appears absolutely incompatible with the values and legal system of a state ruled by laws”.¹⁶⁶ For example, an award that disregards the conclusive and preclusive effects of *res judicata*¹⁶⁷ is in clear breach of procedural public policy.¹⁶⁸

Substantive public policy is breached when an award “disregards some fundamental legal principles and consequently becomes completely inconsistent with the important, generally recognized values, which according to dominant opinions in Switzerland should be the basis of any legal order”.¹⁶⁹ As an illustration, the Federal Tribunal routinely puts forward a non-exhaustive list of principles of substantive public policy, such as “the rule of *pacta sunt servanda*, the prohibition of abuse of rights, the requirement to act in good faith, the prohibition of expropriation without compensation, the prohibition of discrimination and the protection of individuals lacking the legal capacity to act”.¹⁷⁰

9.6 Concluding Remarks on Appeals against CAS Awards

The Federal Tribunal operates as a welcome deterrent against possible unsound administration of arbitration proceedings by CAS arbitrators.

However, considering that as of late the number of challenges against CAS awards has exponentially increased, to the point that “almost half of the Supreme Court’s case load relating to international arbitration now concerns CAS awards”,¹⁷¹ the number of annulled CAS awards is statistically aligned with that of annulled

¹⁶³ Annulled by the Federal Tribunal, Judgment 4A_490/2009 of 13 April 2010, *Atlético/Benfica*.

¹⁶⁴ Annulled by Federal Tribunal, Judgment 4A_558/2011 of 27 March 2012, *Matuzalem*.

¹⁶⁵ See Federal Tribunal, Judgment 4P.278/2005 of 8 March 2006, ATF 132 III 389, *Tensacciai*, at 2.2.2.

¹⁶⁶ Federal Tribunal, Judgment 4A_490/2009 of 13 April 2010, *Atlético/Benfica*, at 2.1.

¹⁶⁷ Cf. International Law Association, *Final Report on Res Judicata and Arbitration*, Report of the ILA Seventy-First Conference, Toronto, 2006, International Commercial Arbitration Committee, in www.ila-hq.org/en/committees/index.cfm/cid/19.

¹⁶⁸ See Federal Tribunal, Judgment 4A_490/2009 of 13 April 2010, *Atlético/Benfica*.

¹⁶⁹ Federal Tribunal, Judgment 4A_558/2011 27 March 2012, *Matuzalem*, at 4.1.

¹⁷⁰ *Id.*

¹⁷¹ A. RIGOZZI, *Challenging Awards of the Court of Arbitration for Sport*, in *Journal of International Dispute Settlement*, 2010, vol. 1, no. 1, 217-265, at 217.

awards resulting from commercial arbitration.¹⁷²

In view of that, parties and their counsel should carefully study the legal situation before challenging a CAS award, as the chances of winning an appeal are quite limited, while the costs are unfortunately not negligible.

10. Concluding Remarks

In 2014 the CAS will have been in existence for thirty years. There can be no doubt that in these thirty years the CAS has reshaped sports law through the constant development of a true *jurisprudence*.

Indeed, CAS panels invariably tend to follow CAS precedents, something that is quite unusual in arbitral justice.¹⁷³ Almost all CAS awards include multiple references to previous CAS awards. Unsurprisingly, parties appearing before the CAS regularly invoke the precedential value of earlier CAS decisions or, conversely, distinguish their cases from previous ones.

A prominent commentator submitted that there exists a true *stare decisis* doctrine within CAS arbitration.¹⁷⁴ CAS panels themselves, however, seem more cautious: “in arbitration there is no *stare decisis*. Nevertheless, the Panel feels that CAS rulings form a valuable body of case law and can contribute to strengthen legal predictability in international sports law. Therefore, although not binding, previous CAS decisions can, and should, be taken into attentive consideration by subsequent CAS panels, in order to help developing legitimate expectations among sports bodies and athletes”.¹⁷⁵ Similarly, another CAS panel stated as follows: “In CAS jurisprudence there is no principle of binding precedent, or *stare decisis*. However, a CAS Panel will obviously try, if the evidence permits, to come to the same conclusion on matters of law as a previous CAS Panel”.¹⁷⁶

Accordingly, it does not seem that there is a true *stare decisis* doctrine in CAS arbitration; this is confirmed by the fact that some CAS panels have decided differently from previous panels on the same issue.¹⁷⁷ However, the fact that CAS panels always accord to previous CAS awards a substantial precedential value cannot be underestimated. Indeed, CAS arbitrators follow as much as possible the

¹⁷² See H. STUTZER, M. BÖSCH, *Federal Supreme Court overturns a CAS Award for lack of jurisdiction – has the CAS a quality issue? No!*, in *Arbitration Newsletter Switzerland*, 3 April 2013, in www.thouvenin.com.

¹⁷³ See G. KAUFMANN-KOHLER, *Arbitral Precedent: Dream, Necessity or Excuse?*, in *Arbitration International*, 2007, vol. 23, no. 3, 357-378.

¹⁷⁴ *Id.* at 366.

¹⁷⁵ Final Award CAS 2009/A/1545 *Anderson et al. v. IOC*, at para. 116, quoting CAS 97/176 *UCI v. Jogert & NCF*, at para. 40.

¹⁷⁶ Award CAS 2004/A/628 *IAAF v. USA Track & Field and Jerome Young*, at para. 73.

¹⁷⁷ See for example the contradicting awards issued by CAS panels with regard the application of article 17 of the FIFA Regulations for the Status and Transfer of Players to the issue of compensation for breach of contract due by football players to their former clubs: CAS 2007/A/1298-1299-1300 *Wigan Athletic FC & Webster v. Heart of Midlothian*; CAS 2008/A/1519-1520 *FC Shakhtar Donetsk v. Matuzalem, Real Zaragoza & FIFA*.

solutions arising from CAS precedents and are very reluctant to depart from them, unless there are very compelling reasons to do it. If it is not *stare decisis*, it is not very far from it.

As a result, the most important legacy of the first thirty years of CAS arbitration is the undeniable fact that CAS arbitrators have been building a consistent body of case law and, in doing so, they have given credibility and predictability to the CAS dispute settlement process and contributed to the steadiness and coherence of the whole international sports legal system.

DISPUTE RESOLUTION AT THE FÉDÉRATION INTERNATIONALE DE FOOTBALL ASSOCIATION AND ITS JUDICIAL BODIES

by *Omar Ongaro* and *Marc Cavaliero**

SUMMARY: I. The Dispute Resolution Chamber and the Players' Status Committee of FIFA – II. The judicial bodies of FIFA

Abstract:

FIFA defends the principle according to which, as a general rule, disputes between the members of the football movement should be dealt with and settled within the structures of organised football, i.e. by sporting decision-making bodies. Bearing this principle in mind, in the field of players' status FIFA has created and implemented a successful dispute resolution system that it puts at disposal of the various stakeholders, i.e. member associations, clubs, players, coaches as well as licensed match and players' agents, in order to deal with the various litigations that might arise amongst them, mainly of a contractual nature.

In this contribution the relevant decision-making bodies within the pertinent dispute resolution system shall be briefly introduced, as well as their respective competences. Furthermore, the presentation aims at describing FIFA's competence/jurisdiction to hear a series of specific disputes and at touching on the delimitations with regard to ordinary courts of law and possibly existing national decision-making bodies established within the framework of a member association.

FIFA has also put in place judicial bodies that are capable of imposing a wide range of sanctions in case of breach of the FIFA regulations. The scope of

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The position expressed in this short article reflects the personal opinion of the authors and does not necessarily correspond to the official position of the Fédération Internationale de Football Association (FIFA).

action of these judicial bodies is immense and covers a number of different situations. The scope of action of the FIFA judicial bodies is necessary for a proper functioning of FIFA and for its member associations and officials as well as for a correct and uniform application of the diverse regulations by stakeholders.

Thus, in the second part of the chapter, the three FIFA judicial bodies of FIFA – the FIFA Disciplinary Committee, the FIFA Appeal Committee and the FIFA Ethics Committee – will be briefly introduced, with a focus on the FIFA Disciplinary Committee and the enforcement procedure that has been implemented at FIFA level and the extension procedure of sanctions taken at national level to have worldwide effect.

I. THE DISPUTE RESOLUTION CHAMBER AND THE PLAYERS' STATUS COMMITTEE OF FIFA

1. Introduction

1.1 General remarks

For those involved in sports law and in particular, in football matters, there is most certainly no need to recall that the current dispute resolution system established within the structures of the Fédération Internationale de Football Association (FIFA) is one of the most important outcomes of the complete revision of the various rules pertaining to the international transfer of players carried out back in the year 2000, respectively early 2001. Like most of the principles currently contained in the Regulations on the Status and Transfer of Players (hereinafter: *the Regulations*),² the basis of the relevant system is to be found in the agreement reached between FIFA, Union des associations européennes de football (UEFA) and the European Commission in March 2001. Besides addressing topics of substantive nature, namely the contractual stability,³ the protection of minors,⁴ the training of young players⁵ as well as the solidarity in the football world,⁶ the said agreement also explicitly referred to the creation of a dispute resolution system. It is within the scope of this background that with the coming into force of the 2001 edition of the Regulations on 1 September 2001, FIFA laid the fundament for the implementation of a dispute resolution and arbitration system⁷ that has rapidly become more and more popular

² Available at www.fifa.com/aboutfifa/officialdocuments/doclists/laws.html: Regulations Status and Transfer 2012.

³ Cf. Chapter IV., art. 13 et seq. of the Regulations: Maintenance of contractual stability between professionals and clubs.

⁴ Cf. Chapter VI., art. 19 et seq. of the Regulations: International transfers involving minors; and also Annexe 2 to the Regulations: Procedure governing applications for first registration and international transfer of minors.

⁵ Cf. art. 20 in conjunction with Annexe 4 of the Regulations: Training compensation.

⁶ Cf. art. 21 in conjunction with Annexe 5 of the Regulations: Solidarity mechanism.

⁷ Cf. art. 42 of the 2001 edition of the Regulations.

and today enjoys a high grade of recognition, credibility and acceptance.

The pertinent dispute resolution system provides the various stakeholders with efficient means suitable to settle their mainly contractual litigations within the football family without the need to seek redress before civil courts. The ever-growing popularity of the system in particular also in relation to employment-related disputes between clubs and players of an international dimension weights even more if one is to consider that, in order to satisfy corresponding requests from the European Commission and to respect constitutional rights under certain public legislations, players and clubs are not barred from referring their employment-related litigations to ordinary courts.⁸

While the first edition of the Regulations providing for such a system did not address in detail the question of jurisdiction and thus left a certain space for discussions, with the aim to ameliorate the situation in the 2005 edition of the Regulations that came into force on 1 July 2005 an entire chapter was dedicated to that specific aspect.⁹ Since then, the relevant Regulations provide for clear rules pertaining to both, i) the competence of FIFA to deal with specific disputes between players and clubs, coaches and clubs or member associations, and clubs against clubs,¹⁰ and, ii) the various competences of the different decision-making bodies within FIFA dealing with the relevant disputes, i.e. the Players' Status Committee and its Single Judge, the Dispute Resolution Chamber and the DRC judge.¹¹

The success of this dispute resolution system established within FIFA's regulatory framework can best be endorsed by some figures: during the year 2012, 1787 claims were lodged in front of the various decision-making bodies, i.e. Dispute Resolution Chamber, DRC judge, Players' Status Committee and its Single Judge. During the same period of time, around 450 decisions were passed with respect to disputes falling within the competence of the Dispute Resolution Chamber (approximately 230 by a panel of the chamber, 220 by one of the two DRC judges) and 250 matters were adjudicated with respect to disputes falling within the competence of the Players' Status Committee (approximately 40 by the plenary Committee, 210 by one of its Single Judges). In summary, the competent bodies passed decisions in around 700 litigations. This is again a new top level. Back in the years just prior to the coming into force of the 2001 edition of the Regulations the relevant FIFA services were faced with approximately 400 cases per year. Consequently, we are looking at an impressive increase by more than 400%.

These figures do not include the activity of the sub-committee of the Players' Status Committee dealing with matters pertaining to the protection of minors.¹²

The reasons for this very impressive development are manifold: the creation of the Dispute Resolution Chamber, which, not least thanks to the approach shown

⁸ Cf. art. 22 of the Regulations, as an exception to art. 68 para. 2 of the FIFA Statutes.

⁹ Cf. Chapter VII. of the 2005 edition of the Regulations and Chapter VIII. of the current 2012 edition of the Regulations.

¹⁰ Cf. art. 22 of the Regulations.

¹¹ Cf. art. 23 and 24 of the Regulations.

¹² Cf. art. 19 para. 4 and Annexe 2 of the Regulations.

by all of its members, guarantees fair proceedings and is based on the principle of equal representation of players and clubs; thus, both sides can legitimately confide in an objective and just appreciation and assessment of their disputes; the recognition of the Court of Arbitration for Sport (CAS),¹³ a completely independent arbitration tribunal, the legitimacy and independence of which has repeatedly been confirmed by the Swiss Federal Court; all final decisions passed by FIFA's legal bodies, i.e. in particular those of the Dispute Resolution Chamber, the DRC judge, the Players' Status Committee and its Single Judge, can be appealed against in front of the CAS;¹⁴ furthermore, cost-related aspects¹⁵ the time factor (faster proceedings) and the fact that experts in the field are judging the different affairs, with the constant efforts to seek for just and well-motivated decisions as well as with the firm willingness to create constant jurisprudence and, through this, legal security, undisputedly equally contribute to enhance the decision-making system inside the football structures; and, last but not least, the efficient execution system implemented within the structures of FIFA through its Disciplinary Committee¹⁶ also essentially influences a party's decision to rather refer a matter to FIFA than to ordinary courts.

Finally, in order to complete this general introductory part of the present essay and for the sake of good order and completeness, it appears to be appropriate to recall that since 1 July 2005 the proceedings before the Dispute Resolution Chamber and the Players' Status Committee (respectively their single judges) are governed by a set of clear procedural rules.¹⁷ Actually, the necessity for formal procedural rules was already recognised with the coming into force of the completely revised Regulations in 2001. A first set of pertinent rules was issued in February 2002. Yet, it only governed the procedures of the Dispute Resolution Chamber. In February 2003 a similar set of rules for the practice of the Players' Status Committee was released. Both sets of rules proved to be inefficient in practice and quite complex to be implemented. Equally, they did not meet with the requirements of the procedures they were supposed to regulate. Therefore, on the basis of art. 25 par. 7 of the Regulations and art. 31 par. 1 of the FIFA Statutes, in 2005 the FIFA Executive Committee decided to release a joint set of rules governing the procedures of both the Dispute Resolution Chamber as well as the Players'

¹³ Cf. FIFA circular no. 827 dated 10 December 2002: recognition of the jurisdiction of the CAS as of 11 November 2002; www.fifa.com/aboutfifa/officialdocuments/doclists/circulars.html: Arbitration Tribunal for Football (TAF) Court of Arbitration for Sport (CAS).

¹⁴ Cf. art. 67 para. 1 and 2 of the FIFA Statutes.

¹⁵ Cf. art. 18 in conjunction with Annexe A (and also art. 17 Advance of costs) of the Rules governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber: www.fifa.com/aboutfifa/officialdocuments/doclists/laws.html: Rules governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber.

¹⁶ Cf. art. 64 of the FIFA Disciplinary Code: www.fifa.com/aboutfifa/officialdocuments/doclists/laws.html: FIFA Disciplinary Code – cf. also the second part of the present contribution: “The Judicial Bodies of FIFA”.

¹⁷ Rules governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber.

Status Committee. It was the first practice-oriented, realistic and consistent set of rules governing procedures before the said bodies to be put into force and, apart from some amendments made in 2008, and more recently in 2012, the relevant provisions still correspond to the currently applicable ones. Where indicated, reference to the specific provisions will be made in the following parts of this article.

1.2 Statutory provisions

FIFA promotes the principle according to which disputes between the stakeholders of the football family shall be addressed and settled within the structures of the football/sporting instances. Consequently, as a general rule, recourse to ordinary courts of law is prohibited.¹⁸ Instead, provision shall be made for arbitration.¹⁹ Yet, for certain specific types of disputes, this strict interdiction is not applied. In accordance with art. 68 par. 2 of the FIFA Statutes such exceptions must be explicitly provided for in the respective FIFA regulations. As already mentioned above, employment-related disputes that may arise between professional players and clubs are precisely exempt from the prohibition to be referred to ordinary courts of law.²⁰

It goes without saying that such clear positioning towards having potential disputes handled within the structures of the sporting organisation and obliging the parties to a dispute not to refer their litigations to an ordinary court of law but to arbitration instead, at the same time entails that a well-functioning alternative infrastructure is put at the parties' disposal. FIFA is not disregarding this aspect and its Statutes congruously establish that FIFA shall provide the necessary institutional means to resolve any dispute that may arise between member associations, confederations, clubs, officials and players.²¹

2. The various decision-making bodies

2.1 Overview

For the assessment and settlement of (mainly contractual) disputes between the stakeholders of the football family, the dispute resolution system established within the structures of FIFA puts at disposal of the parties two competent bodies:

- The Players' Status Committee (cf. point 2.2 below); and
- The Dispute Resolution Chamber (cf. point 2.4 below).

Guided by the aim to increase efficiency and bearing in mind that fast proceedings are an important element in arbitration in general, but in particular also for the quickly moving world of football, besides both the aforementioned deciding authorities, single judges were installed (cf. point 2.3 and 2.5 below). This step

¹⁸ Cf. art. 68 para. 2 of the FIFA Statutes.

¹⁹ Cf. art. 68 para. 3 of the FIFA Statutes.

²⁰ Cf. art. 22 of the Regulations.

²¹ Cf. art. 4 para. 2 of the FIFA Statutes.

allows for a higher grade of flexibility, urgent matters can be taken at hand faster and in general, the working rhythm of the deciding authorities can be kept at much higher levels. Indeed, without the various single judges, nowadays it would not be possible to efficiently and properly cope with the existing work load and to guarantee appropriate proceedings anymore.

Prior to introducing the various instances, a few remarks appear to be appropriate with regard to the parties which are admitted in procedures before the Players' Status Committee and the Dispute Resolution Chamber, respectively their single judges. The Rules governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber provide for an exhaustive enumeration in this respect. Parties in procedures in front of the Players' Status Committee and the Dispute Resolution Chamber as well as their single judges can be member associations of FIFA, clubs, players, coaches or licensed match and players' agents.²²

As regards coaches, the competent deciding authorities have established a long-standing and constant jurisprudence, according to which the term "*coach*" needs to be interpreted restrictively and does solely refer to football coaches, including assisting football coaches, however, in particular not to physical trainers. This understanding is based on the fact that it is inherent to the purpose itself of FIFA's existence (cf. art. 2 of the FIFA Statutes, "Objectives") that the abovementioned enumeration includes only parties that practice an activity that is strictly limited and exclusively related to football. In other words, it goes without saying that the dispute resolution system set up under the auspices of FIFA is clearly limited to parties with a football-specific occupation. There are numerous other activities that are performed within the frame of professional football in order to guarantee for the physical and psychological well-being of footballers, such as the work done by nutritionists, advisors, physiotherapists, spokespersons, mental coaches or physical trainers. And nowadays, the pertinent circle tends to become wider and wider. However, the work of these professionals is not strictly and exclusively related to football and could also be performed within the frame of another sport. Accordingly, their work does not fall within the auspices of and is consequently not in any way supervised by FIFA, as opposed to the work carried out by FIFA in order to improve and further develop the activities of football coaches, e.g. through the organisation of coaching seminars. This is due to the fact that the activity of professional football coaches is, in view of the requirements as to the formation and training they must undergo, strictly limited to football and, moreover and most notably, fundamental to the game of football. In fact, football coaches take, unlike the other aforementioned professionals, a proactive and elementary role in developing and deciding on football strategy and the manner football is effectively played.

Equally, it needs to be pointed out that the Players' Status Committee forms part of a private dispute resolution system of a Swiss association, i.e. FIFA,

²² Cf. art. 6 para. 1 of the Rules governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber

founded in accordance with art. 60 et seqq. of the Swiss Civil Code, the scope of jurisdiction of which is strictly limited to its direct and indirect members and cannot simply be extended to third parties even if these so wish. Likewise, the enforcement of the decisions passed by the pertinent bodies within this dispute resolution system can only be secured as regards direct and indirect members of this association, i.e. not towards third parties. Accordingly, FIFA exclusively has jurisdiction over a very limited range of individuals and institutions which are exhaustively enumerated in art. 6 par. 1 of the Rules governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber. Since neither in the mentioned article nor in any other statutory provision in any of FIFA's regulations there is a basis to establish FIFA's competence to hear disputes involving physical trainers, the latter are not admitted to proceedings in front of the Players' Status Committee and the Dispute Resolution Chamber.²³

2.2 *The Players' Status Committee*

The Players' Status Committee is one of FIFA's standing committees.²⁴ Its main objectives are to set up and monitor compliance with the Regulations on the Status and Transfer of Players and to determine the status of players for the various FIFA competitions. Its powers of jurisdiction are governed by the Regulations on the Status and Transfer of Players (cf. point 4.1 below).²⁵

Besides, it is also responsible for the work of the Dispute Resolution Chamber.²⁶ This does, however, not mean that the Players' Status Committee may interfere in the work of the Chamber as regards the assessment and appreciation of the various disputes brought to its attention. It is essential to emphasise that in that regard the Dispute Resolution Chamber is completely independent. The responsibilities of the Players' Status Committee concerning the work of the Chamber are thus limited to ensuring that the latter may perform its activities in the best possible conditions, and concern mainly administrative issues and the formal aspects of the Chamber's work.

Currently the Committee comprises 13 members representing the six confederations.²⁷ Its chairman and the deputy chairman must be members of the FIFA Executive Committee.²⁸ As regards its members, they are designated by the FIFA Executive Committee on the proposal of the member associations of FIFA, the president of FIFA or the confederations. The chairman, deputy chairman as

²³ With respect to the admissibility of claims of physical trainers, cf. CAS 2009/A/2000 Eduardo Julio Urtasun c. FIFA, where CAS confirmed the approach of the Players' Status Committee.

²⁴ Cf. art. 34 para. 1 (t) of the FIFA Statutes.

²⁵ Cf. art. 54 para. 1 of the FIFA Statutes.

²⁶ Cf. art. 54 para. 2 of the FIFA Statutes.

²⁷ Cf. art. 20 para. 1 of the FIFA Statutes: CONMEBOL (South America), AFC (Asia), UEFA (Europe), CAF (Africa), CONCACAF (North and Central America and the Caribbean) and OFC (Oceania).

²⁸ Cf. art. 34 para. 2 of the FIFA Statutes.

well as the members are designated for a term of office of four years and may be re-appointed. Equally, they may be relieved of their duties at any time.²⁹

With respect to the activity of the Players' Status Committee, as a general rule it gathers for plenary meetings twice a year, normally in February/March and October. Like every standing committee it may, if necessary, set up a bureau or a sub-committee to settle urgent matters.³⁰ Regarding its role within the dispute resolution system established under the auspices of FIFA, special provisions apply as to the necessary quorum. When considering disputes between two admitted stakeholders, the Players' Status Committee adjudicates in the presence of at least three members, including the chairman or the deputy chairman, unless the case is of such a nature that it may be dealt with by a single judge (cf. point 4.2. below).³¹

2.3 *The Single Judge of the Players' Status Committee*

With the rapidly increasing number of disputes referred to FIFA following the coming into force of the totally revised 2001 edition of the Regulations and in view of the limited number of plenary meetings of the Players' Status Committee, the necessity for more decision-making capacity was soon recognised. Following the example of various existing national public legislations, the idea of implementing a Single Judge of the Players' Status Committee was put into practice at the beginning of the year 2002.

The advantages of such a figure are obvious: the organisation of a decision-making session is considerably easier; the availability of the competent authority is by far higher than having to convene all the members of the Committee from all over the world; a single judge is in the position to react faster and with more flexibility than the complete Committee, which is of particular importance with respect to urgent matters; the cadence of the working rhythm can be kept at higher levels.

Despite having immediately found his place within the existing structure of the pertinent dispute resolution system and having soon been asked to pass decisions with regard to a considerable amount of disputes, a positive and explicit legal basis for the existence and jurisdiction of the Single Judge of the Players' Status Committee was created and inserted in the relevant regulations only in 2005.³² Prior to that date, the legitimacy of the activity of the Single Judge of the Players' Status Committee was justified by means of the long standing, constant and uniform practice. Such approach is based on and in conformity with Swiss association law, specifically the so-called "*Vereinsübung*" (in short, this is precisely a long standing,

²⁹ Cf. art. 34 para. 3 of the FIFA Statutes.

³⁰ Cf. art. 34 para. 6 of the FIFA Statutes.

³¹ Cf. art. 23 para. 3 of the Regulations.

³² Cf. art. 3 paras 2 and 3 of the 2005 edition of the Rules governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber in conjunction with art. 23 para. 3 of the 2005 edition of the Regulations (both provisions came into force on 1 July 2005 and, as to the substance, have remained unchanged to date).

constant and uniform practice within an association). When the jurisdiction of the Single Judge of the Players' Status Committee was eventually challenged (prior to 1 July 2005, obviously), the aforementioned position was fully backed and confirmed by the CAS.³³

The chairman of the Players' Status Committee may automatically act as a Single Judge. Furthermore, he may appoint any other member of the Committee – non-members are not admissible – as a Single Judge.³⁴ Currently, besides the chairman of the Committee, two members of the Committee have been appointed to act as a Single Judge.

2.4 *The Dispute Resolution Chamber*

The most profound and important novelty realised within the scope of the radical revision of the Regulations with respect to the dispute resolution system established within the structures of FIFA is doubtlessly the creation and implementation of the Dispute Resolution Chamber. The latter is a unique institution for an international sports organisation and ensures that employment-related disputes between professional players and clubs are dealt with and decided upon by a body which, like ordinary labour courts, respects the principle of equal representation of players and clubs.

Abiding by the abovementioned principle, the Chamber consists of equal numbers of club and player representatives and an independent chairman.³⁵ Currently it comprises 24 members – 12 club and 12 player representatives – as well as its chairman. The chairman, deputy chairman (currently vacant) and members of the Dispute Resolution Chamber are chosen by the FIFA Executive Committee, whereas the members are appointed on the proposal of the players' associations and the clubs or leagues.³⁶ Like the members of the Players' Status Committee, also the members of the Chamber, including its chairman, are designated for a term of office of four years and may be re-appointed. Equally, they may be relieved of their duties at any time.

With respect to the activity of the Dispute Resolution Chamber, it operates at a rhythm of at least one meeting per month. It adjudicates in the presence of at least three members (one club and one player representative as well as the chairman or deputy chairman), unless the case is of such a nature that it may be dealt with by a DRC judge (cf. point 4.4. below).³⁷ In practice, the Chamber normally sits in the presence of five of its members (two club and two player representatives as well as the chairman). The members for a specific meeting of the Dispute Resolution Chamber are summoned following a rotation principle and taking into consideration

³³ Cf. TAS 2004/A/589 SK Rapid Wien c/FK Crvena Zvezda & FIFA.

³⁴ Cf. art. 23 para. 3 of the Regulations.

³⁵ Cf. art. 24 para. 2 and 3 of the Regulations.

³⁶ Cf. art. 4 of the Rules governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber.

³⁷ Cf. art. 24 para. 2 of the Regulations.

their availability, the language of the files of the cases to be submitted for consideration and a formal decision and, as far as possible, also the various nationalities of the parties involved in the disputes to be dealt with during a meeting. The parties to a dispute are informed in advance of the composition of the Chamber that will deal with their specific case so as for them to have the opportunity to possibly challenge one of the members if they deem it appropriate. In the latter case, the Dispute Resolution Chamber shall reach a decision on the challenge in the absence of the member concerned.³⁸ To this day, no such decision has ever been necessary since, normally, in case of a challenge the member concerned withdraws from the panel of his own free will.

2.5 *The DRC judge*

Although the DRC judge was already introduced by the Regulations in summer 2005,³⁹ it took more than four years for it to gain on speed and become an active party within the dispute resolution system of FIFA. But now its importance is constantly increasing.

Following the very positive experiences gained with the implementation of the Single Judge of the Players' Status Committee, in particular the significant increase of efficiency pertaining to the decision-making process in relation to disputes falling within the competence of the said committee – as already repeatedly mentioned an absolute necessity in view of the constantly increasing number of incoming complaints – the idea was born to introduce a “single judge” also at the level of the Dispute Resolution Chamber. In this respect, the main point of concern was that a single judge is *per se* in contradiction with the nature of a chamber that respects the principle of equal representation.

After various consultations and discussions with the stakeholders mainly concerned, i.e. players and clubs, an agreement was found to establish the DRC judge. However, in view of its very particular nature, a series of corrective interventions were also imposed: the members of the Dispute Resolution Chamber designate a DRC judge for the clubs and one for the players from among its members;⁴⁰ each of the two DRC judges passes the decisions in the affairs referred to its attention alone. However, its competences were strictly limited to the following matters:

- all employment-related disputes between a club and a player that have an international dimension but only up to a litigious value of CHF 100,000;⁴¹
- disputes relating to the calculation of training compensation;⁴²

³⁸ Cf. art. 7 para. 2 of the Rules governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber.

³⁹ Cf. art. 24 para. 2 of the 2005 edition of the Regulations.

⁴⁰ Cf. art. 24 para. 2 of the Regulations.

⁴¹ Cf. art. 24 para. 2 lit. i) of the 2005 edition of the Regulations.

⁴² Cf. art. 24 para. 2 lit. ii) of the 2005 edition of the Regulations.

- disputes relating to the calculation of solidarity contributions.⁴³

Furthermore, the relevant provision compelled the DRC judge to submit fundamental issues in any case to the Dispute Resolution Chamber.⁴⁴

While the aforementioned second part of the limitation of the competence of the DRC judge has remained unchanged to date, with the aim to increase congruence between the competence of the Single Judge of the Players' Status Committee and the DRC judge, the competence of the latter to deal with specific issues was concretised. The amended provision came into force on 1 October 2010 and since then provides that, apart from being competent to decide on all employment-related disputes between a club and a player that have an international dimension but only up to a litigious value of CHF 100,000, the DRC judge may also adjudicate in disputes relating to training compensation and solidarity contributions without complex factual or legal issues, or in which the Dispute Resolution Chamber already has a clear, established jurisprudence.⁴⁵

Since March 2010 the two DRC judges have passed decisions in approximately 530 affairs (available statistics until the end of March 2013) and, by doing so, have substantially contributed to shorten the duration of the proceedings pertaining to the litigations on which they may adjudicate.

3. *FIFA's jurisdiction*

Not all disputes that may arise between the stakeholders of the football family are admitted for consideration and a formal decision by the Players' Status Committee or the Dispute Resolution Chamber. Like for the parties that may appear in front of the two aforementioned decision-making bodies, the Regulations provide for an exhaustive enumeration of the disputes which FIFA is competent to hear.⁴⁶

3.1 *Employment-related disputes between a club and a player of an international dimension*⁴⁷

Firstly, as a general rule, FIFA is competent to hear employment-related disputes between a club and a player of an international dimension. The latter is given whenever the player holds a nationality different from the country on the territory of which the association at which he is registered for a club is located. This means that an employment-related dispute between, for example, a Greek player and a

⁴³ Cf. art. 24 para. 2 lit. iii) of the 2005 edition of the Regulations.

⁴⁴ Cf. art. 24 para. 3 of the 2005 edition of the Regulations.

⁴⁵ Cf. art. 24 para. 2 of the Regulations; FIFA circular no. 1233 of 12 July 2010: www.fifa.com/aboutfifa/officialdocuments/doclists/circulars.html. Amended Regulations on the Status and Transfer of Players.

⁴⁶ Cf. art. 22 of the Regulations.

⁴⁷ Cf. art. 22 lit. b) of the Regulations.

Greek club will normally not fall within the jurisdiction of FIFA.⁴⁸ Equally, the fact that solely employment-related disputes are addressed by the relevant provision indicates that only litigations involving professional players are being considered.

However, provided certain conditions are met, the same provision limits FIFA's jurisdiction to deal with employment-related disputes between professional players and clubs even if an international dimension is given.

If at national level – either within the framework of the association (e.g. on the basis of the statutes and regulations of the pertinent member association) and/or in a collective bargaining agreement (i.e. a general contract concluded between the social partners, normally the national players' union and the national league, fixing the main guidelines for the contractual relation between professional players and clubs) – an independent arbitration tribunal guaranteeing fair proceedings and respecting the principle of equal representation of players and clubs has been established, then such national body shall be competent to hear the relevant disputes, even if of an international dimension.

It is thus important to emphasise that FIFA only recognises the legitimacy of national decision making-bodies to deal with employment-related disputes between clubs and players of an international dimension if the following two conditions are cumulatively fulfilled:

- a) The principle of equal representation of players and clubs, this is, the national body shall consist of equal numbers of club and player representatives, and an independent chairman.
- b) The national body needs to be an independent arbitration tribunal guaranteeing fair proceedings. To this day, the Dispute Resolution Chamber of FIFA did not have to address the issue of what a “fair proceeding” is. However, by means of its circular no. 1010 of 20 December 2005, with reference to art. 68 par. 3 of its Statutes (former art. 60 par. 3 (c) of the Statutes), FIFA described in detail the criteria that must be fulfilled for an arbitration tribunal to be classed as independent and duly constituted.

First of all, the principle of parity when constituting the arbitration tribunal must be respected. Furthermore, the parties must be granted the right to an independent and impartial tribunal. The principle of a fair hearing, comprising in particular the right to be heard, must also be observed. The parties need to be given the possibility to present their case, to view the pertinent file, in particular the submissions of the counterparty, and to reply to the arguments and claims of the opponent. Consequently, the right to contentious proceedings must equally be granted. And, last but not least, the parties have a right to equal treatment by the arbitration tribunal. In summary, what is required is the respect of fundamental procedural principles, not more but also not less.

In case the national decision-making body does not fulfil both of these conditions, it will not be recognised by FIFA.

⁴⁸ Subject to art. 22 lit. a) of the Regulations (cf. point 3.2 *infra*).

Obviously, in order for the question of a potential jurisdiction of the national body to arise, the employment contract concluded between the parties to the dispute has to provide for a clear jurisdiction clause in favour of the national dispute resolution body. In absence of such a choice of forum, the general rule would apply, i.e. FIFA would be competent to hear the relevant employment-related dispute between the professional player and the club of an international dimension.⁴⁹

Bearing in mind all of the above, the following conclusions have to be reached: If, despite the jurisdiction clause in favour of the national dispute resolution body included in the relevant employment contract, one of the parties to the contract does not recognise the jurisdiction of the national body and refers the litigation to FIFA instead, the Dispute Resolution Chamber of FIFA⁵⁰ will declare itself competent to hear the dispute in case the national dispute resolution body in question does not fulfil both of the abovementioned conditions.⁵¹ Yet, should the national dispute resolution body concerned fulfil the relevant prerequisites, the Dispute Resolution Chamber of FIFA will decline its jurisdiction.

However, if both parties recognise the jurisdiction of the national body by not contesting it, FIFA will recognise any decision passed by the said deciding authority, even if the latter does not comply with the aforementioned procedural standards. In other words, it will not be possible for a party that has recognised (or not contested) the competence of the national body to hear a specific dispute throughout the relevant procedure – either by itself lodging the claim in front of the national body or by merely submitting an answer to the claim as to the substance without contesting the relevant jurisdiction following the other party lodging a respective complaint – to request FIFA to consider the same matter again once a decision as to the substance has been passed by the national body,⁵² on grounds that the said body does not meet with the minimum standards provided for by art. 22 lit. b) of the Regulations.

Finally, should a party despite a jurisdiction clause in favour of the national dispute resolution body being included in the contract at the basis of the dispute, refer the dispute to FIFA and the counterparty not contest FIFA's jurisdiction, the Dispute Resolution Chamber of FIFA would declare itself competent to hear the dispute even if the national dispute resolution body concerned fulfils the procedural minimum standards. In other words, the Dispute Resolution Chamber of FIFA will consider that the parties, following the emergence of the dispute, have tacitly – by action implying intention – concluded a new agreement on the jurisdiction, which,

⁴⁹ Cf. CAS 2008/A/1518 Ionikos FC v/ Marco Paulo Lopes: in the relevant award CAS has fully confirmed that the three aforementioned criteria need to be fulfilled in order for an national independent arbitration tribunal to be competent to deal with an employment-related dispute between a club and a player of an international dimension; cf. also CAS 2010/A/2289 S.C. Sporting Club S.A. Vaslui v/ Marko Ljubinkovic.

⁵⁰ Cf. art. 24 para. 1 in conjunction with art. 22 lit. b) of the Regulations.

⁵¹ Cf. CAS 2010/A/2289 S.C. Sporting Club S.A. Vaslui v/Marko Ljubinkovic: in the relevant award CAS confirmed this approach of the Dispute Resolution Chamber.

⁵² Principle of *res judicata*.

being the newer one, replaces the original jurisdiction clause contained in the employment contract at the basis of the dispute.

It is worth mentioning that FIFA encourages the creation and implementation of so-called National Dispute Resolution Chambers. *“To strengthen the jurisdiction of the member associations, [it] has set itself the task of entrusting member associations with initial responsibilities for adjudicating on employment disputes not involving international player transfers. This procedure will also enable the decision-making bodies to be closer to the circumstances giving rise to the disputes”*.⁵³

3.2 *Disputes between clubs and players in relation to the maintenance of contractual stability*⁵⁴

As was just exposed, art. 22 lit. b) of the Regulations contains a restriction on the general rule that FIFA shall be competent to deal with all employment-related disputes between a club and a player of an international dimension, i.e. a limitation of FIFA’s jurisdiction to deal with such disputes in favour of national independent arbitration tribunals, which will become competent to hear the litigation even if it is of an international dimension.

In art. 22 lit. a) of the Regulations a contrary movement is to be noted. As previously stated, employment-related disputes between a club and a player without an international dimension (e.g. a Greek player against a Greek club), as a general rule, do not fall within the competence of FIFA.⁵⁵ By means of art. 22 lit. a) of the Regulations, an extension of FIFA’s jurisdiction has been established, as an exception to the mentioned general rule. Disputes between clubs and players in relation to the maintenance of contractual stability shall in any case fall within the competence of FIFA, i.e. with or without an international dimension, where there has been a request for an international transfer certificate (ITC) and a claim from an interested party in relation to said ITC request. In this respect, it is also important noting that under such circumstances FIFA will become competent to deal with the respective contractual litigation independently of the existence or not of a recognised national independent arbitration tribunal.

To better understand the reasons for such extension of FIFA’s jurisdiction, a short detour into the administrative procedure governing the transfer of players between associations becomes necessary. Whenever a player moves from a club affiliated to one association to a club affiliated to another association, his registration also needs to be transferred. Actually, when we commonly speak about the transfer of a player, technically it would be more precise and accurate to speak about the

⁵³ Cf. FIFA circular no. 1129 of 28 December 2007: www.fifa.com/aboutfifa/officialdocuments/doclists/circulars.html: National Dispute Resolution Chamber (NDRC) Standard Regulations, Standard Electoral Code and Standard Cooperation Agreement.

⁵⁴ Cf. art. 22 lit. a) of the Regulations.

⁵⁵ Cf. point 3.1 above.

transfer of the player's registration. A player's registration is certified in the so-called international transfer certificate (ITC). Players registered with a club affiliated to one association may only be registered for a club affiliated to a different new association once the latter has received an ITC from the former association.⁵⁶ Without entering into the details of the relevant procedure,⁵⁷ which is not the subject of the present essay, in summary the process is the following: The club wishing to register the player addresses its association with the registration request. The association will then request the association of the player's former club to issue the ITC. The former association will consult its club and either issue the ITC on behalf of the new association, or, in case the former club objects to such action, refuse to send the ITC to the new association. According to the Regulations there is only one valid reason justifying a refusal of an association to issue an ITC: the existence of a contractual dispute between the former club and the player, this is, the contract between the former club and the player has not expired or there has been no mutual agreement regarding its early termination.⁵⁸

In case the issuance of the ITC is refused, the association requesting the certificate, i.e. the association of the player's prospective new club, has the possibility to request FIFA to take provisional measures.⁵⁹ The competent authority, which is the Players' Status Committee or its Single Judge (in view of the nature of such decision, i.e. a provisional measure, and the corresponding urgency, the relevant decision is regularly passed by the Single Judge), will then have to decide whether, as long as the existing contractual dispute between the player and his former club persists, the player may or may not be provisionally registered for the new club.⁶⁰ Such decision is obviously always without prejudice to the decision which the competent body dealing with the contractual dispute will pass as to its substance at a later stage.

Due to its inherent and evident international impact, the relevant competence to take provisional measures with regard to the international clearance of a player, i.e. to grant the provisional registration or not, is exclusively assigned to FIFA. And the reason for the extension of FIFA's competence also to employment-related disputes between a player and a club without an international dimension is to be found precisely in this fact. Whenever the reason for a contractual dispute between a club and a player in relation to the maintenance of contractual stability is the intention of a player to move internationally, i.e. to a club affiliated to another

⁵⁶ Cf. art. 9 para. 1; Annexe 3, art. 8.1 para. 1; Annexe 3a, art. 2 para. 1 of the Regulations.

⁵⁷ For details refer to Annexe 3 and Annexe 3a of the Regulations.

⁵⁸ Cf. Annexe 3, art. 8.2 para. 7 in conjunction with Annexe 3, art. 8.2 para. 4 lit. b) of the Regulations and Annexe 3a, art. 3 para. 6 in conjunction with Annexe 3a, art. 3 para. 4 lit. b) of the Regulations. Since, per definition, no such contractual relation exists between an amateur player and a club (cf. art. 2 para. 2 of the Regulations), the relevant reason justifying the refusal to issue an ITC only applies to professional players. Congruously, Annexe 3a, art. 4 of the Regulations, governing the procedure for the issue of an ITC for an amateur, does not provide for such reason.

⁵⁹ Cf. Annexe 3, art. 8.2 para. 7 and Annexe 3a, art. 3 para. 6, *in fine*, of the Regulations.

⁶⁰ Cf. art. 23 para. 3 of the Regulations.

association, it would not make any sense to split the competences pertaining to the various decisions that will need to be taken. In particular, it does not seem to be appropriate to have a body operating at international level deciding on the provisional measure and another body operating at national level then deciding as to the substance of the contractual dispute. Equally, it is essential to note that the potential new club of the player does in any case not fall within the jurisdiction of the association of the player's former club. Less technically, one could therefore say that the fact that a third party, i.e. the prospective new club of the player, is involved in the matter, due to its wish to register the player, gives an international dimension to the entire affair. Consequently, all the relevant aspects should be considered by FIFA's deciding bodies.

For the proper and correct understanding of the provision at stake it is finally important to point out that art. 22 lit. a) of the Regulations requires for the contractual dispute to have its grounds directly in the ITC request. Should, therefore, an employment-related dispute without international dimension have arisen between a player and a club (e.g. both parties are Greek), and only at a later stage the player intend to move to a new club affiliated to a different association, thus the envisaged international transfer is not the reason for the contractual litigation, the national decision-making authority would normally continue to be competent to deal with the dispute previously arisen.

3.3 *Employment-related disputes between a club or an association and a coach of an international dimension*⁶¹

As a general rule, FIFA is also competent to hear employment-related disputes between a club or an association and a coach of an international dimension.⁶² The latter is given whenever the coach holds a nationality different from the country on the territory of which the association of the club he is working for is located, respectively if the coach holds a nationality different from the country on the territory of which the association he is working for is operating. This means that an employment-related dispute between, for example, a Greek coach and a Greek club will not fall within the jurisdiction of FIFA.

A like the situation pertaining to employment-related disputes between a club and a player of an international dimension,⁶³ provided certain conditions are met, art. 22 lit. c) of the Regulations limits FIFA's jurisdiction to deal with employment-related disputes between a club or an association and a coach even if an international dimension is given.

If at national level an independent arbitration tribunal guaranteeing fair proceedings exists, then such national body shall be competent to hear the relevant

⁶¹ Cf. art. 22 lit. c) of the Regulations.

⁶² As an example for the qualification of the contractual relation between a coach and an association cf. CAS 2010/A/2108 Jamaican Football Federation v. FIFA & Velibor Milutinovic.

⁶³ Cf. art. 22 lit. b) of the Regulations, point 3.1 above.

disputes, even if of an international dimension. One will note that, compared to the equivalent provision referring to disputes between players and clubs, the requirement of the respect of the principle of equal representation has not been taken over with regard to coaches. The reason for this difference is to be found in the fact that, with the exception of very few member associations, in most cases coaches are not organised in unions or associations. Consequently, it would be a quite difficult task to find proper and recognised coach representatives to sit in such a national decision-making body.

Having mentioned this difference and explained its reason, for the details concerning the application of the provision at stake, in particular also the question of what is to be considered fair proceedings, reference can be made to the statements made with respect to art. 22 lit. b) of the Regulations.⁶⁴

Furthermore, as regards coaches, the extension of FIFA's jurisdiction to employment-related disputes without international dimension is not provided for. As previously mentioned, the reason for such extension in relation to employment-related disputes between players and clubs is directly linked to the transfer of the registration of a player.⁶⁵ Yet, as far as coaches are concerned, the Regulations do not provide for the same system of registration at an association for a club. In particular, this means that whenever a coach changes his engagement from a club affiliated to one association to a club affiliated to another association, his registration does not need to be transferred. There is no such thing like an ITC for coaches. As a result, no element justifying an extension of FIFA's jurisdiction to employment-related disputes between a coach and a club (or an association) without an international dimension can be found.

3.4 *Disputes relating to training compensation and the solidarity mechanism*⁶⁶

As already mentioned in the introductory part of the present short article, apart from referring to the creation of a dispute resolution system, the agreement found between FIFA/UEFA and the European Commission in March 2001 also contained topics of substantive nature.⁶⁷ The relevant principles are all the basis of fundamental pillars of the current Regulations. The training compensation⁶⁸ and the solidarity

⁶⁴ Cf. point 3.1 above; cf. also CAS 2012/A/2896 Persepolis (Piroozi) Athletic and Cultural Club v. FIFA & Mr Eduardo Manuel Martinho Vingada and CAS 2012/A/2899 Persepolis (Piroozi) Athletic and Cultural Club v. FIFA & Mr João Arnaldo Correia Carvalo: in the relevant awards CAS confirmed the approach adopted by the Single Judge of the Players' Status Committee in accordance with which, notwithstanding the existence of jurisdiction clause in the relevant contracts, the Single Judge is competent to decide on the respective disputes should the respondent club fail to submit satisfactory evidence showing the existence of a national arbitration body whose *modus operandi* is in compliance with the mandatory criteria set forth in art. 22 lit. c) of the Regulations.

⁶⁵ Cf. point 3.2 above.

⁶⁶ Cf. art. 22 lit. d) and e) of the Regulations.

⁶⁷ Cf. point 1.1 above.

⁶⁸ Cf. art. 20 and Annexe 4 of the Regulations.

mechanism⁶⁹ are two of the institutions concerned. Despite reflecting different principles, i.e. on the one hand the training of young players and, on the other hand, the solidarity in the football world, both aim at rewarding clubs investing in the training and education of young players.

The possible entitlement to training compensation and/or a solidarity contribution is exclusively based on the Regulations. As a result, it goes without saying that any potential dispute arising between clubs in connection with either issue can only be solved by the competent FIFA bodies. As a matter of fact, other instances, in particular ordinary courts, would most likely not take the pertinent legal basis for the claim into consideration.

In this respect, once again emphasis must be given to the fact that, as a general rule, the Regulations require for an international dimension of the dispute.⁷⁰ In other words, with one exception,⁷¹ the dispute relating to training compensation or the solidarity mechanism needs to have developed between clubs belonging to different member associations.

3.5 *Other disputes between clubs belonging to different associations*⁷²

Besides the disputes between clubs relating to training compensation and the solidarity mechanism, FIFA is also competent to hear other disputes arising between clubs belonging to different associations. Once again, the international dimension is the key element. Furthermore, the dispute at stake needs to fall within the general scope of the Regulations.⁷³ This means that the dispute involving two clubs has to relate to the international transfer of a player in order to be subject to assessment and adjudication by FIFA's competent bodies. The most common affairs in this respect are claims in relation to the proper execution of transfer agreements.

4. *Competence of the various FIFA bodies*

Once the jurisdiction of FIFA has been identified, the next question to be addressed

⁶⁹ Cf. art. 21 and Annexe 5 of the Regulations.

⁷⁰ Cf. art. 1 para. 1 of the Regulations, according to which the Regulations lay down global and binding rules concerning, *inter alia*, the transfer of players between clubs belonging to different associations.

⁷¹ Cf. art. 22 lit. e) of the Regulations: Disputes relating to the solidarity mechanism between clubs belonging to the same association can be heard by FIFA, if the transfer of a player at the basis of the dispute occurs between clubs belonging to different associations. Considering that the triggering element for a claim for solidarity contribution is the move of a professional player during the course of a contract (cf. Annexe 5, art. 1 of the Regulations) and bearing in mind that the Regulations lay down global and binding rules concerning, *inter alia*, the transfer of players between clubs belonging to different associations (cf. art. 1 para. 1 of the Regulations), it would not have appeared justifiable to exclude such constellations from FIFA's jurisdiction. The international dimension is thus given by the international transfer triggering the entitlement.

⁷² Cf. art. 22 lit. f) of the Regulations.

⁷³ Cf. art. 1 para. 1 of the Regulations.

is to establish to which competent body within the dispute resolution system inside the structure of FIFA the dispute in question has to be referred.

In this respect, the Rules governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber refer to art. 22 to 24 of the Regulations.⁷⁴ Moreover, the same provision states that in the event of any uncertainty as to the jurisdiction of the Players' Status Committee or the Dispute Resolution Chamber, it will be up to the chairman of the Players' Status Committee to decide on the question of jurisdiction in the appropriate manner.⁷⁵

Prior to proceed to address in detail the competences of the various bodies, already at this stage a "rule of thumb" summarising the various provisions appears to be appropriate, since it might be useful to keep it in mind as a general reference. The Dispute Resolution Chamber is competent to hear all employment-related disputes between a player and a club of an international dimension or following an ITC request as well as all disputes relating to training compensation and the solidarity mechanism. All other disputes deriving from the Regulations fall within the competence of the Players' Status Committee.

4.1 *The Players' Status Committee*

The Players' Status Committee is competent to adjudicate on the following matters:

- employment-related disputes between a club or an association and a coach of an international dimension;⁷⁶
- disputes between clubs belonging to different associations that do not fall within the scope of training compensation and the solidarity mechanism;⁷⁷
- all other disputes arising from the application of the Regulations, subject to the competence of the Dispute Resolution Chamber.⁷⁸

The abovementioned last part of art. 23 par. 1 of the Regulations is the classical "drip pan" included in order to avoid that disputes in connection with the application of the Regulations may arise, for which no competent body has been established. To this day, however, this general clause has never been needed.

As already exposed at an earlier stage,⁷⁹ the Players' Status Committee is also competent to decide on the application of provisional measures with respect to the international clearance of a player, i.e. on the question whether a player may or not be provisionally registered with his prospective new club as long as a contractual dispute exists between the player and his former club and the issuance of the pertinent ITC is therefore being refused.⁸⁰ Yet, it needs to be reiterated that in view

⁷⁴ Cf. art. 3 para. 1 of the Rules governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber.

⁷⁵ Cf. also art. 23 para. 2 of the Regulations.

⁷⁶ Cf. art. 23 para. 1 in conjunction with art. 22 lit. c) of the Regulations.

⁷⁷ Cf. art. 23 para. 1 in conjunction with art. 22 lit. f) of the Regulations.

⁷⁸ Cf. art. 23 para. 1, *in fine*, of the Regulations.

⁷⁹ Cf. point 3.2 above.

⁸⁰ Cf. art. 23 para. 3 in conjunction with Annexe 3, art. 8.2 para. 7, respectively Annexe 3a, art. 3

of the nature of such a decision, the latter is regularly taken by the Single Judge of the Players' Status Committee and not by the Committee in plenum.

Furthermore, the Players' Status Committee is competent to hear matters pertaining to the release of players to association teams. In particular, it may adjudicate on disputes concerning the late return of a player to his club following the participation in an international match with his association team.⁸¹ Equally, it may be asked to intervene with respect to the refusal of a player to comply with the call-up of his association, or the objection of a club to release a player to his association team.⁸²

Finally, on the basis of the Players' Agents Regulations, the Players' Status Committee also has jurisdiction to decide international disputes in connection with the activity of players' agents.⁸³ This provision solely refers to contractual disputes involving a players' agent and his client. Proceedings relating to the potential violation of the applicable regulations and statutes by an agent or one of his clients in connection with the activity of players' agents are dealt with by the FIFA Disciplinary Committee, provided they occur within the scope of an international transaction.⁸⁴

On a side note, reference shall also be made to another field of activity of the Players' Status Committee, which has gained particular importance nowadays. It concerns the provisions of the Regulations on the protection of minors.⁸⁵ Since 1 October 2009 every international transfer of a minor player, i.e. a player who has not yet reached the age of 18,⁸⁶ and every first registration of a minor player with a club in a country of which the player is not a national is subject to the approval by a sub-committee appointed by the Players' Status Committee for that purpose.⁸⁷ Currently the said sub-committee comprises 11 members, one each per confederation, one leagues' representative, one clubs' representative, one players' representative, as well as the chairman and the deputy chairman of the Players' Status Committee. All of them are authorised to act also as single judges of the sub-committee.⁸⁸ The procedure for applying to the sub-committee for a first registration and an international transfer of a minor are contained in Annexe 2 of the Regulations.⁸⁹ In this respect, it might be of interest to point out that the relevant procedure is managed by the transfer matching system (TMS). The TMS is a web-based data information system with the primary objective of simplifying the process of international player transfers as well as improving transparency and the flow of

para. 6, *in fine*, of the Regulations.

⁸¹ Cf. Annexe 1, art. 1 paras 7, 8 and 9 as well as Annexe 1, art. 6 para. 3 of the Regulations.

⁸² Cf. in particular, Annexe 1, art. 6 para. 2 of the Regulations.

⁸³ Cf. art. 30 para. 2 of the Players' Agents Regulations.

⁸⁴ Cf. Chapter VIII. of the Players' Agents Regulations, in particular, art. 32 para. 2 of the said regulations.

⁸⁵ Cf. art. 19 and 19bis of the Regulations.

⁸⁶ Cf. point 11. of the Definitions section of the Regulations.

⁸⁷ Cf. art. 19 para. 4 of the Regulations.

⁸⁸ Cf. Annexe 2, art. 3 para. 2 of the Regulations.

⁸⁹ Cf. art. 19 para. 5 of the Regulations.

information.⁹⁰

4.2 *The Single Judge of the Players' Status Committee*

The jurisdiction of the Single Judge of the Players' Status Committee is set out in art. 23 par. 3 of the Regulations.⁹¹ In principle, his competences are the same as the Players' Status Committee, provided the case is either urgent or raises no difficult factual or legal issues. In case a dispute features difficult factual or legal issues it must be referred to the Committee, unless the matter does not allow any deferment. Furthermore and as already mentioned on various occasions, the Single Judge may, and regularly does, adjudicate on matters pertaining to the provisional registration of a player in relation to international clearance.

4.3 *The Dispute Resolution Chamber*

Deriving from its nature, i.e. a deciding authority respecting the principle of equal representation of players and clubs, the key competence of the Dispute Resolution Chamber naturally is to hear employment-related disputes between a club and a player of an international dimension, respectively disputes between clubs and players in relation to the maintenance of contractual stability following an ITC request.⁹²

Furthermore, the Dispute Resolution Chamber adjudicates on disputes relating to training compensation and the solidarity mechanism.⁹³ This assignment was done in view of the fact that the latter litigations concern the system to reward clubs investing in the training and education of young players and consequently, apart from the clubs involved, also directly touch on the career of a player.

4.4 *The DRC judge*

The jurisdiction of the DRC judge is set out in art. 24 par. 2 of the Regulations.⁹⁴ In principle, his competences are the same as the Dispute Resolution Chamber. However, as already explained in detail when exposing the figure of the DRC judge,⁹⁵ within the various topics, the competence is considerably limited at various levels.⁹⁶ As regards employment-related disputes between a club and a player of an international dimension, respectively disputes between clubs and players in relation to the

⁹⁰ Cf. point 13. of the Definitions section of the Regulations as well as Annexe 3 of the Regulations, in particular its art. 1 and 2.

⁹¹ Cf. art. 3 para. 2 of the Rules governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber.

⁹² Cf. art. 24 para. 1 in conjunction with art. 22 lit. b), respectively art. 22 lit. a) of the Regulations.

⁹³ Cf. art. 24 para. 1 in conjunction with art. 22 lit. d) and art. 22 lit. e) of the Regulations.

⁹⁴ Cf. art. 3 para. 2 of the Rules governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber.

⁹⁵ Cf. point 2.5 above.

⁹⁶ Cf. art. 24 para. 2 of the Regulations.

maintenance of contractual stability following an ITC request, the DRC judge may only adjudicate cases up to a litigious value of CHF 100,000. Disputes relating to training compensation or the solidarity contribution may only be heard by the DRC judge if they do not comprise complex factual or legal issues, or if the Dispute Resolution Chamber already has a clear, established jurisprudence with regard to the issue at stake. Finally, the DRC judge is in any event obliged to refer cases concerning fundamental issues to the Chamber.⁹⁷

5. *Some selected procedural aspects*

5.1 *Applicable material law*

In their application and adjudication of law, all deciding authorities of the dispute resolution system established within the structures of FIFA shall apply, primarily, the FIFA Statutes, the Regulations and any other regulations of FIFA whilst taking into account all relevant arrangements, laws and/or collective bargaining agreements that exist at national level, as well as the specificity of sport.⁹⁸ Without intending to proceed to an in-depth analysis of this provision, which could easily be the subject of an essay of its own, in order to clarify current misunderstandings, it appears to be appropriate to emphasise that national laws and other existing national provisions shall be taken into account. This does, however, not mean that they need to be directly applied.

5.2 *Procedural form*

As a general rule, proceedings before the various decision-making bodies of the dispute resolution system provided for within FIFA are conducted exclusively in writing.⁹⁹ This procedural particularity is an absolute necessity for the proper and well-functioning of the entire system. In fact, the huge amount of disputes referred to FIFA for resolution, simply does not allow for oral hearings to be held.

5.3 *Costs*

With the exception of proceedings relating to the provisional registration of a player in relation to international clearance, costs in the maximum amount of CHF 25,000 are levied in connection with proceedings of the Players' Status Committee and its Single Judge. The same applies with respect to costs for proceedings before the Dispute Resolution Chamber, including the DRC judge, relating to disputes regarding

⁹⁷ Cf. art. 24 para. 3 of the Regulations.

⁹⁸ Cf. art. 25 para. 6 of the Regulations and art. 2 of the Rules governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber.

⁹⁹ Cf. art. 8 of the Rules governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber.

training compensation and the solidarity mechanism. Costs are to be borne in consideration of the parties' degree of success in the proceedings.¹⁰⁰ The procedural costs to be levied are based upon the amount in dispute¹⁰¹ and, as a general rule, in particular depend on the legal and factual complexity of the affair, on the work generated by the relevant investigation as well as by whether the case was adjudicated by a panel or a single judge.

Proceedings before the Dispute Resolution Chamber, including the DRC judge, relating to disputes between clubs and players in relation to the maintenance of contractual stability as well as international employment-related disputes between a club and a player are free of charge.¹⁰²

No procedural compensation is awarded in proceedings of the Players' Status Committee, its Single Judge, the Dispute Resolution Chamber and the DRC judge.¹⁰³ This means that, independent of the outcome of the procedure, every party will have to bear the costs of its legal representative, if any.

5.4 *Temporal limitation*

The Players' Status Committee, its Single Judge, the Dispute Resolution Chamber and the DRC judge will not deal with any case subject to the Regulations if more than two years have elapsed since the event giving rise to the dispute. This time limit is checked *ex officio* in each individual case and does thus not have to be claimed by any of the parties to the dispute.¹⁰⁴ A complaint submitted after expiry of the said deadline will be declared not admissible.

6. *Conclusions*

From the day of its implementation to this date, the dispute resolution system established within the structures of FIFA has proven to be an efficient and valuable institution for all stakeholders of the football family. Whoever decides to submit his/its (contractual) litigation for settlement to one of the various competent bodies within the relevant system is assured that the matter will be dealt with in full respect of fundamental procedural principles and be heard by experts capable and willing to pass consistent, fair and appropriate decisions. The possibility of appeal to the CAS, a fully independent arbitration tribunal, further increases the credibility of the system. The ever-growing popularity of the system is the best witness for

¹⁰⁰ Cf. art. 18 para. 1 of the Rules governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber and art. 25 para. 2 of the Regulations.

¹⁰¹ Cf. Annexe A to the Rules governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber.

¹⁰² Cf. art. 18 para. 2 of the Rules governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber and art. 25 para. 2 of the Regulations.

¹⁰³ Cf. art. 18 para. 4 of the Rules governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber.

¹⁰⁴ Cf. art. 25 para. 5 of the Regulations.

the fact that the system has become a legitimate and well accepted alternative to the recourse to ordinary courts.

FIFA's dispute resolution system is certainly one of the most sophisticated and developed structures of this kind implemented by international sports associations. So far, it is a success story. And with the persisting firm aim of having disputes arising within the football family heard and settled within the structures of the institution instead of by ordinary courts, it will remain one of FIFA's main objectives to make sure that the system will continue to keep pace with future challenges and, if need be, to further develop it in accordance with the emerging necessities.

II. *THE JUDICIAL BODIES OF FIFA*

1. *Introduction*

1.1 *General remarks*

It has been explained in the previous parts the proficiency and some of the numerous advantages of the dispute resolution system at FIFA. But this is not all, as FIFA has also put in place judicial bodies that are capable of imposing a wide range of sanctions in case of breach of the FIFA regulations. These sanctions fulfil a preventive and reprehensive purpose. The scope of action of these judicial bodies is immense and covers a number of different situations. As part of the dispute resolution system, FIFA put an operative and goal-oriented enforcement procedure for the decisions passed by FIFA bodies. The interest is double, as both the winning party and FIFA have a strong interest to see the decisions passed by FIFA deciding bodies respected and complied with.

The scope of action of the FIFA judicial bodies is necessary for a proper functioning of FIFA and for a correct and uniform application of the diverse regulations by stakeholders. As such it falls within the prerogatives of the FIFA judicial bodies to impose the appropriate disciplinary measures.

Before going any further, it is worth mentioning that associations and federations acting with the legal form of an association (art. 60 ff. of the Swiss Civil Code), e.g. FIFA, are entitled to sanction persons subject to their jurisdiction in the event that the latter violates governing statutes. The sanctions described as "association sanctions" available to associations are not means of imposing actual sanctions, but for defining the subordinate relationship by means of an association body and "punishment of one private person by another".

Thus private associations like FIFA have the right to impose sanctions on persons subject to their jurisdiction.¹⁰⁵ However, the exercise of this right does not

¹⁰⁵ Decision of the Swiss Federal Tribunal, 4P. 240/2006. The Swiss Federal Tribunal confirmed in its decision that under Swiss association law, to which FIFA is subject, any violation of a member's duties may incur sanctions such as punishments for clubs or associations. Equally, the Court stated

constitute exercising penal powers like the ones accorded to ordinary national criminal courts. Rather, the respective actions are to be considered as measures of disciplinary nature taken in the context of relations between subjects of civil law. These relations, as well as the disciplinary measures concerned, are not governed by criminal or penal law but by civil law.¹⁰⁶

In 2011, the FIFA Disciplinary and Ethics Committee dealt with more than 700 cases. 235 of those cases, concerned enforcement of decisions passed by FIFA bodies.¹⁰⁷ The mere threat of possible sanctions is often enough to force parties to fulfil their obligations. In 2012, the FIFA Disciplinary and Ethics Committee dealt with no less than 900 cases.

1.2 Statutory provisions

The objectives of FIFA are multiple and complex.¹⁰⁸ Among others, FIFA shall draw up regulations and ensure their enforcement. Prevention of infringements of those Statutes and regulations as well as of the decisions of FIFA is expressly stipulated as one of FIFA's objectives.¹⁰⁹ Equally, the member associations of FIFA have an expressed obligation and duty to ensure that their own members comply with the FIFA Statutes, regulations, directives and decisions of FIFA bodies.¹¹⁰ Confederations are also required to comply with the decisions of FIFA.¹¹¹

To support the above-mentioned, FIFA established judicial bodies, i.e. the Disciplinary Committee, the Appeal Committee and the Ethics Committee, whose tasks are to ensure the respect of the FIFA Statutes and regulations and *a fortiori* to impose the relevant disciplinary measures in case of a breach.¹¹² In view of their role and competence within the structure of FIFA, those bodies cannot be Standing Committees.¹¹³ The judicial bodies function and pass their decisions independently.

The disciplinary measures that can be taken by the three judicial bodies are defined in the FIFA Statutes in a non-exhaustive way.¹¹⁴ They are classified in an

that if a private association draws up regulations to which members are subject to achieve its objectives, it is permissible for a governing body to provide for sanctions that safeguard the members' duties. This decision of the Swiss Federal Court has been considered as a landmark decision and has been very well received in the football world to ensure the viability of the system.

¹⁰⁶ A. HEINI, W. PORTMANN AND M. SEEMANN, *Grundriss des Vereinsrechts*, 2009, 85 et seqq.; A. HEINI AND W. PORTMANN, *Das Schweizerische Vereinsrecht*, Schweizerisches Privatrecht, vol. 2, sub-volume 5, 2005, 144-145, N 315-316.

¹⁰⁷ Enforcement of decisions of FIFA deciding bodies is one of the competence of the FIFA Disciplinary Committee.

¹⁰⁸ Art. 2 of the FIFA Statutes.

¹⁰⁹ Cf. art. 2 lit. c) and d) of the FIFA Statutes.

¹¹⁰ Art. 13 para. 1 lit. d) of the FIFA Statutes.

¹¹¹ Art. 20 para. 3 lit. a) of the FIFA Statutes.

¹¹² Cf. chapter 6 of the FIFA Statutes called Judicial bodies and disciplinary measures.

¹¹³ Cf. art. 21 para. 4 and 34 para. 2 of the FIFA Statutes.

¹¹⁴ Art. 65 of the FIFA Statutes. The disciplinary measures differ whether they shall be imposed against a natural or a legal person.

order of seriousness, from the least to the most severe, with the exception of *social work* which is a disciplinary measure - introduced for the first time in the exemplary catalogue in the FIFA Statutes, edition 2012 - *sui generis*.

It is worth taking a moment to look back to the reform process undertaken by FIFA since the 61st FIFA Congress in Zurich in June 2011,¹¹⁵ since then the rules which govern the composition and functioning of the judicial bodies have been amended in a significant way.

To strengthen the judicial bodies, the FIFA President decided to propose, at the 61st Congress, held in Zurich in 2011, amendments to the FIFA Congress that were accepted by a vast majority.¹¹⁶ At the occasion of the 62nd FIFA Congress in Budapest in 2012, the proposals elaborated by the Task Forces were approved.¹¹⁷ Among others, art. 61 par. 3 of the FIFA Statutes now provides that the judicial bodies are to be composed in such way that the members, together, have the knowledge, abilities and specialist experience that is necessary for the due completion of their tasks. It is specified that the chairman and the deputy chairman of the three judicial bodies shall be qualified to practise law.¹¹⁸ It should be pointed out that a more profound and deeper reform was undertaken as to the composition and functioning of the FIFA Ethics Committee.

Last but not least, in order to strengthen the independence of the judicial bodies and finalise the reform process, at the occasion of the 63rd Congress in Mauritius in 2013, the members of the three judicial bodies will be elected for the first time by the FIFA Congress.¹¹⁹

2. *The judicial bodies*¹²⁰

The judicial bodies of FIFA are the Disciplinary Committee, the Appeal Committee and the Ethics Committee. The responsibilities and function of these bodies are stipulated in the FIFA Disciplinary Code and the FIFA Code of Ethics.

2.1 *The FIFA Disciplinary Committee*¹²¹

The FIFA Disciplinary Committee is currently composed of one chairman, one deputy chairman and fourteen members. Its jurisdiction is specified in art. 76ff of the FIFA Disciplinary Code (hereinafter: *the FDC*). Generally, the Disciplinary Committee is authorised to sanction any breach of FIFA regulations which does not come under the jurisdiction of another body. As to its functioning, it can decide if

¹¹⁵ Cf. www.fifa.com/mm/document/affederation/committees/01/53/05/80/proposal_pdt_21102011.pdf.

¹¹⁶ Cf. www.fifa.com/mm/document/affederation/bodies/01/55/71/31/congressminutes2011_all.pdf.

¹¹⁷ Cf. www.fifa.com/mm/document/affederation/bodies/01/83/98/01/congressminutes_2012.pdf.

¹¹⁸ In contrast with legal qualifications as stipulated in the previous editions of the FIFA Statutes.

¹¹⁹ Cf. *inter alia* www.fifa.com/aboutfifa/organisation/footballgovernance/process/structure.html.

¹²⁰ For the purpose of the present essay, the attention will be put on the FIFA Disciplinary Committee.

¹²¹ Art. 62 of the FIFA Statutes.

at least three of its members are present¹²² and it decides in total independence.¹²³

2.1.1 Competencies

The FIFA Disciplinary Committee has a vast scope of competencies, which comprises firstly the sanctioning infringement to the Laws of the Game within the frame of a match under the jurisdiction of FIFA.¹²⁴ Typically, this concerns all incidents that can occur during a match, such as a serious foul play, unsporting conduct towards a match official or improper conduct caused by spectators.¹²⁵ As far as matches and competitions are concerned, the FIFA Disciplinary Committee is also competent to sanction a team, should an ineligible player take part in a match.¹²⁶ As per the FDC, the FIFA Disciplinary Committee is also competent to sanction *inter alia* any kind of discrimination,¹²⁷ forgery,¹²⁸ doping offenses,¹²⁹ match manipulation¹³⁰ and any breach that would fall under its competence in virtue of another FIFA Regulations.¹³¹ In this context, the FIFA Disciplinary Committee is also involved with regard to the implementation – and a proper functioning – of the Transfer Matching System (TMS), as it is the competent body to impose sanctions on any association or club which might violate one of their obligations as set forth in the regulations.¹³² Last but not least, the FIFA Disciplinary Committee will sanction any breach of the FIFA Statutes.¹³³

In sum, and in light of its residual competence, the FIFA Disciplinary Committee plays a key role as guarantor that the FIFA regulations are respected.

¹²² Art. 82 para. 1 of the FDC. According to art. 78 of the FDC, the Chairman of the Disciplinary Committee has jurisdiction to decide alone in certain type of cases. However, he does not have such prerogative in enforcement-type proceedings.

¹²³ Art. 85 of the FDC; cf. also art. 86 of the FDC governing the incompatibility of office.

¹²⁴ Cf. Art. 46ff of the FDC.

¹²⁵ In this context, it is worth highlighting that art. 67 of the FDC foresees the application of strict liability in case of improper conduct of spectator, which has been uniformly confirmed by the CAS in several occasions (cf. CAS 2009/A/1944).

¹²⁶ Art. 55 of the FDC. CAS has recently once again confirmed the well-established principle according to which, the participating team is responsible to field eligible players and this responsibility cannot be shifted to anyone else (cf. www.tas-cas.org/en/infogenerales.asp/4-3-6567-1092-4-1-1/5-0-1092-15-1-1/).

¹²⁷ Cf. Art 3 of the FIFA Statutes, art. 57 and 58 of the FDC.

¹²⁸ Art. 61 of the FDC.

¹²⁹ Cf. the FIFA Anti-doping Regulations and art. 63 of the FDC.

¹³⁰ Art. 69 of the FDC.

¹³¹ For instance: art. 19bis para. 4 of the Regulations on the Status and Transfer of Players in respect of the protection of minors, art. 30 para. 3 and 32 para. 2 of the Players' Agents Regulations, art. 19 of the Regulations Governing International Matches.

¹³² Annexe 3 of the Regulations on the Status and Transfer of Players, in particular art. 9 regarding the competence of the FIFA Disciplinary Committee.

¹³³ Art. 2 of the FDC mentions cases of forgery, corruption or doping. These are mere examples.

2.1.2 Some procedural and organisational aspects

The procedure and organisation of the FIFA Disciplinary Committee is set forth in the Second Title of the FDC. It is not possible to describe in detail the complete organisation and procedure of that judicial body,¹³⁴ however it is worth highlighting a few important points.

First and foremost, disciplinary proceedings are prosecuted *ex officio*, which means that – contrary to the proceedings before the Players’ Status Committee or the Dispute Resolution Chamber – no complaint is needed for the opening of these proceedings.¹³⁵ The Chairman of the FIFA Disciplinary Committee can therefore start at his own initiative any investigation he deems relevant.¹³⁶ This does not exclude the possibility for any person – inside or outside the so-called “football family” – to lodge complaints in order to bring to the Committee’s knowledge the occurrence of breaches of FIFA regulations.¹³⁷

The rules governing proof are described in art. 96ff of the FDC and it is important to note that the Committee has absolute discretion regarding proof (evaluation of proof)¹³⁸ and the members of the Committee decide on the basis of their personal conviction (standard of proof).¹³⁹ Equally, while any type of proof may be produced – with the exception of proof that violates human dignity or obviously does not serve to establish relevant facts¹⁴⁰ – it is primordial to bear in mind that in disciplinary-related proceeding, the burden of proof rests with FIFA.¹⁴¹

As far as the limitation period for prosecution is concerned, infringements committed during a match may no longer be prosecuted after a lapse of two years, whereas, as a general rule, other infringements may not be prosecuted after a lapse of ten years. It has to be remarked that, anti-doping rule violations may not be prosecuted after eight years have elapsed. Prosecution for corruption is not subject

¹³⁴ The FDC presents the rules governing procedure and organisation in a comprehensive and thorough way.

¹³⁵ Art. 108 para. 1 of the FDC – with the exception of proceedings initiated on the basis of art. 64 of the FDC.

¹³⁶ Cf. art. 109 of the FDC.

¹³⁷ Even more, there is rather an obligation to report any knowledge of infringements for persons bound by the FIFA Code of Ethics, cf. art. 18 of the FCE.

¹³⁸ Art. 97 para. 1 of the FDC, which implies that the deciding body is allowed to freely decide the evidentiary weight of any evidence on the record without being bound by any pre-defined distinction between the kind of evidence and freely choose between contradictory elements of evidence in their decision-making process.

¹³⁹ Art. 97 para. 3 of the FDC – the CAS considered that the standard of personal conviction was not fundamentally different from the standard of comfortable satisfaction, the important point being that this standard is higher than a mere balance of probabilities applicable in civil proceedings but lower than the standard applicable in criminal proceedings of beyond any reasonable doubt (*inter alia* TAS 2011/A/2433).

¹⁴⁰ Art. 96 of the FDC.

¹⁴¹ Art. 99 para. 1 of the FDC. However, art. 99 para. 2 of the FDC recalls the principle that in anti-doping rule violation, the burden of proof lies with the suspect.

to a limitation period.¹⁴²

Last but not least, the Chairman of the FIFA Disciplinary Committee¹⁴³ has the competence to impose provisional measures if an infringement appears to have been committed and if there is a situation of emergency (“*a decision on the main issue cannot be taken early enough*”).¹⁴⁴ Said provisional measures are intrinsically limited in time and may not be valid for longer than 30 days, a period which can be extended only once for a further 20 days.¹⁴⁵

2.1.3 Two examples of the FIFA Disciplinary Committee’s competencies: failure to respect decisions and extension of sanctions to have worldwide effect

2.1.3.1 The procedure of enforcement within the frame of the FIFA dispute resolution system

As it has been underlined in extenso that disputes between inter alia associations, clubs, players, coaches, players’ agents regarding the payment of salaries or commissions or related to transfers are a daily occurrence in international football. Figures are, in this context, self-explanatory. If a party does not respect such a decision taken by a body, committee or instance of FIFA, the FIFA Disciplinary Committee may impose sanctions.

The FIFA Statutes, in its art. 4, enhances FIFA to provide the necessary institutional means to resolve any dispute between different stakeholders. Although it has not been expressly mentioned in that provision, the enforcement proceedings forms an integral part of the dispute resolution system that shall be implemented.

Therefore an efficient enforcement system is absolutely necessary for the viability of any alternative dispute resolution system implemented within the legal framework of a sports federation, in particular when recourse to ordinary courts of law is prohibited thus forcing football stakeholders to submit their disputes to sports bodies.¹⁴⁶ Although enforcement comes at the end of the dispute’s chain, it plays a key central role in the success and recognition of the system as a whole. To be efficient, a valuable enforcement system shall foresee a sanctioning system that will force debtors to comply with the decisions taken.

Failure to respect decisions contained in Article 64 constitutes an infringement of the FIFA legal framework and is, as such subject to sanction.¹⁴⁷

¹⁴² Art. 42 of the FDC.

¹⁴³ The jurisdiction of the Chairman deciding alone is defined in art. 78 of the FDC.

¹⁴⁴ Section 5 of the Second Title of the FDC; this prerogative is essentially used in doping cases (cf. art. 39 of the FIFA Anti-Doping Regulations).

¹⁴⁵ Art. 132 of the FDC.

¹⁴⁶ Presentation of the dispute resolution system has been extensively explained in the previous parts of this chapter.

¹⁴⁷ CAS recalled, in application of a previous edition of the FDC, that the enforcement provisions could not be said to be “procedural” in the context of the FIFA Code – CAS 2007/A/1355.

It is worth highlighting the fact that the enforcement system is governed by one single sophisticated provision: art. 64 of the FDC, which current wording is the result of an evolution of the jurisprudence and responds to the constantly moving needs of football and the FIFA regulations.¹⁴⁸

In view of the conferred power to the FIFA Disciplinary Committee to pronounce the sanctions stipulated in the FIFA Statutes and in the FDC,¹⁴⁹ and in light of the presence of art. 64 in the FDC, the FIFA Disciplinary Committee is competent to ensure the respect of FIFA decisions.

The decision to be enforced can be a financial or a non-financial nature, in practice there is no differentiation as to the proceedings. A financial decision is an order made by the relevant decision-making body of FIFA or CAS to anyone to pay a sum of money (outstanding salary, compensation for breach of contract, sum of money in relation to solidarity contribution or training compensation, transfer compensation) to another person (a player, a players' agent, a coach), a club or an association. A non-financial decision is for instance the order to disclose a transfer agreement to FIFA.¹⁵⁰

Although disciplinary proceedings are, as a general rule, prosecuted *ex officio* and involve one party only, *i.e.* the accused, disciplinary proceedings opened due to failure to respect FIFA decisions are initiated exclusively upon request of the interested party – usually the creditor party – and include the two parties that were involved in the proceedings which led to initial decision to be enforced. Thus, in the absence of a clear and expressed request for intervention of the FIFA Disciplinary Committee, such proceedings will not start. In this respect, it is worthwhile underlining the practice of the DRC and PSC (and their respective DRC judge and Single Judge), whose decisions will always bear an enforcement clause recalling to the debtor person that should he fail to comply with the decision within a given deadline, the creditor person will have the right and the possibility to ask for the intervention of the FIFA Disciplinary Committee to ensure perfect execution of the decision at stake. The creditor also has obligations, as he will have the obligation to send his or its banking details to the other person, so that the latter can effectively comply with the order to pay.

The first element to take into account for the enforcement authority is that the decision to be enforced shall be final and binding. This means that the decision shall not be subject to any appeal at CAS, *i.e.* no appeal is currently pending at CAS and the deadline to appeal has expired.¹⁵¹ In other words, the decision cannot

¹⁴⁸ Art. 64 of the FDC, edition 2011.

¹⁴⁹ Cf. art. 62 of the FIFA Statutes.

¹⁵⁰ Non-financial decision, such as the order to disclose a contractual agreement, will be less needed by FIFA deciding bodies, in view of the implementation of the TMS, which purpose is to ensure that football authorities have clear details of the international transfers of players available, and thus improve credibility and transparency of the system. Thus, in virtue of Annexe 3 of the Regulations of the Status and Transfer of players, clubs are obliged to upload all agreements on the secured platform. Failure to respect obligations set forth in said Annexe is also subject to disciplinary proceedings.

¹⁵¹ Cf. Art. 67 para. 1 of the FIFA Statutes: the deadline to appeal is of 21 days following the

be modified as to its conclusions following an ordinary appeal procedure.

Following this line of thought, and although some parties to the proceedings invoke arguments as to the merits of the case, the FIFA Disciplinary Committee will not act as an appeal instance of the decisions of other FIFA bodies. This means that the substance of the decision to be enforced will not be reviewed by the Committee.¹⁵² This principle has been recognised and applied by the CAS, acting as appeal body against decisions of the FIFA Disciplinary Committee in its long-lasting jurisprudence.¹⁵³ The CAS enlightened that it could not consider requests concerning the debt owed by the Appellant [the debtor club within the frame of the disciplinary proceedings at FIFA level], the issues relating thereto having been already decided by the final and binding decision subject to enforcement. As a result, only submissions relating to the fine imposed by the Disciplinary Committee, such as its legal basis and quantum, can be heard. Any request by the Appellant to have its debt towards the creditor club cancelled, postponed, rescheduled, or divided in several deferred portions, is precluded by the *res iudicata* implied in the decision subject of the enforcement procedure. It cannot be re-heard now, at the stage of enforcement of the obligation to pay.¹⁵⁴

In light of the foregoing, the Disciplinary has as a sole task to analyse if the debtor complied with the final and binding decision rendered by the body, i.e. to verify whether the debt identified in the relevant decision still exists.

In sum, the disciplinary proceedings for failure to respect decisions is based on three conditions: a decision passed by a body, committee or instance of FIFA or CAS, a request from the creditor to start such proceedings and lastly this decision has to be final and binding. Should the Disciplinary Committee reach the conclusion that the final and binding decision has not been complied with accordingly, sanctions will be imposed.

A literal and systematic interpretation of art. 64 of the FDC allows one to see that the system of disciplinary measures is implemented on a three-layers-scales.

Any failure to respect a decision as described above will lead to the imposition of a fine.¹⁵⁵ Although it is not expressly stated in art. 64 of the FDC, the fine shall be proportionate to the amount owed or the infringement committed.¹⁵⁶

notification of the motivated decision.

¹⁵² The FIFA Disciplinary Committee is to be regarded as acting along the lines of any „enforcement authority” and art. 64 of the FDC to be compared to enforcement proceedings under Swiss law.

¹⁵³ In May 2005, entered into force a new opus of FDC which brought a significant modification in order to streamline the legal procedure and ensure the rapid enforcement of decisions. Thus, appeals against decision of the FIFA Disciplinary Committee in this context were to be submitted directly to the CAS and not anymore to the FIFA Appeal Committee (FIFA Circular No 969 of 19 May 2005).

¹⁵⁴ Cf. CAS 2005/A/957 and other subsequent CAS awards uniformly confirming this principle.

¹⁵⁵ Art. 64 para. 1 lit. a) of the FDC in connection with art. 15 para. 2 of the FDC.

¹⁵⁶ In this context, art. 64 of the FDC, edition 2009, mentioned that, in any case, the minimum fine was of CHF 5,000. Edition 2011 of the FDC deleted this amount and consequently refers to the general rule regarding the fine. This is a welcome amendment, as it gives the FIFA Disciplinary Committee more flexibility to impose a proportionate fine.

The party in breach will be given an additional deadline to comply with the initial decision to be enforced.¹⁵⁷ Should the debtor party still fail to comply with the decision at stake, despite the additional time granted,¹⁵⁸ a second sanction will be implemented upon request of the creditor party: for clubs, a points deduction¹⁵⁹ and for natural persons, a ban on taking part in any football-related activity.¹⁶⁰ This type of sanctions is an inherent and exclusive prerogative of the sports bodies, which makes the system remarkably efficient.

The Code underlines the need for the points deduction to be proportionate to the amount owed.¹⁶¹ It goes without saying that the FIFA Disciplinary Committee shall decide and impose sanctions – in any kind of disciplinary proceedings – taking into consideration the principle of proportionality.

More significantly regarding the points deduction, it is expressly stipulated that FIFA shall request the relevant association to implement the sanction. Indeed, for enforcement purposes, FIFA must rely on its members, the national football associations, which have an obligation to assist FIFA in enforcing these decisions.¹⁶² FIFA's enforcement powers in these cases are limited to sanctioning the national federations that do not provide this assistance.¹⁶³

As far as clubs are concerned, points deduction are not the only possible sanction. A relegation to a lower division can be ordered. In practice, a relegation will be imposed should the club still not comply with the decision to be enforced, after points have been deducted and after a subsequent request by the creditor party. This sanction intervenes after the imposition of a fine, a final deadline has been granted and a deduction of points, all in vain. Therefore, a club will, as a general rule, comply with a decision rather than being imposed a points deduction or being relegated disciplinarily. This type of sanction however demonstrates that the enforcement system implemented at FIFA has been given all the tools to reach its purpose, being the execution of a final and binding decision passed by its bodies.

As it has already been mentioned, should the debtor party be a natural person, a ban on taking part in any football-related activity – which goes further than the mere fact of playing football and embeds any and all football-related

¹⁵⁷ Art. 64 para. 1 lit. b) of the FDC.

¹⁵⁸ The FIFA Disciplinary Committee usually grants an additional deadline of 30 days.

¹⁵⁹ Art. 64 para. 1 lit. c) of the FDC.

¹⁶⁰ Cf. art. 64 para. 4 of the FDC and art. 22 of the FDC.

¹⁶¹ Art. 64 para. 3 of the FDC.

¹⁶² Cf. art. 64 para. 2 of the FDC and art. 13 para. 1 lit. a) and d) of the FIFA Statutes.

¹⁶³ Such obligation lying on the member association has been part of the provision since its introduction in 2002. Cf. also CAS 2005/A/899 which expressly recalls that principle. Furthermore, in this context, it is interesting to refer to FIFA Circular No.981 of 4 August 2005, which has as a sole purpose to clarify and ensure the procedure of points deduction once the request has been made to the association. Indeed, it has been remarked that clubs managed to escape the points deduction by clearing their debt before the concrete implementation of the points deduction by the association concerned, as the latter did not act with sufficient celerity. Thus, in order to avoid arbitrary result, the FIFA Disciplinary Committee decided that, once the pertinent request has been made, the deduction of points has to be implemented immediately by the member association concerned.

activity, be it at sports or administrative level, nationally and internationally. Once again, this sanction could not have been imposed by a non-sports body.

In view of the illustration of the sanctions that are at the disposal of the FIFA Disciplinary Committee in such a context, it is essential to underline that the sanctions pursue a preventive as well as a reprehensive effect in order to ensure that the final and binding decisions are executed and complied with by the concerned party.¹⁶⁴ The sanctioning system so implemented met with great recognition and back-up from both the CAS and the Swiss Federal Court as to the principle as well as to the application of art. 64 of the FDC in concrete cases.

In addition, in view of the fact that not only natural persons and clubs but also member Associations may be considered as offenders, it was decided to insert an explicit provision applicable to associations in the latest edition of the FDC.¹⁶⁵ Thus, a Member Association is now threatened of an expulsion from a FIFA competition in case of failure to respect a FIFA decision. Equally, in order to extend the responsibility for enforcing decisions to the associations, and in line with the encouraging efforts of FIFA in the creation and implementation of a so-called National Dispute Resolution Chambers (NDRC), a provision has been added to the FDC enhancing national associations to enforce any financial or non-financial decision pronounced against a club or a natural person¹⁶⁶ by a court of arbitration within the relevant association or by a NDRC in compliance with the principles established in art. 64 of the FDC.

In brief, the system proved itself extremely powerful, which is confirmed by a very high percentage of compliance with FIFA decisions.

2.1.3.2 Extension of sanctions to have worldwide effect

In the pyramidal structure of sports administration, there are cases of infringements which are of a national nature only without any international implication.¹⁶⁷ Consequently, the competence to deal with such type of cases lies with the member association concerned. However, if the infringement is serious – such as doping,

¹⁶⁴ On 29 March 2012, the Swiss Federal Court annulled a decision of CAS confirming a decision of the Disciplinary Committee in the so-called Matuzalem case. Both jurisdictions decided that a non-compliance by player to pay the amount due to the creditor would lead to a ban on taking part in any football-related activity until the amount is paid in full. Whereas the Swiss Federal Court did not question the principle of the sanction to be imposed on natural person, it considers that the threat of an unlimited ban would constitute an obvious and grave infringement in the player's privacy rights (public policy), jeopardising the foundations of his economic existence, unjustified by the interests of FIFA.

¹⁶⁵ Art. 64 para. 1 lit d) of the FDC; cf also FIFA Circular No 1270 of 21 July 2011.

¹⁶⁶ Art. 64 para. 6 and 7 of the FDC. In case of a decision pronounced against a natural person, an association which has not passed the decision may be required to enforce the decision of another association in the event of a new registration (player) or of the signing of a new employment contract (coach); art. 64 para. 7 of the FDC.

¹⁶⁷ As for example, a Spanish player who is guilty of an anti-doping violation within the frame of a match of the Spanish national championship.

unlawfully influencing match-results, forgery – the member association concerned has the obligation to contact FIFA and to request the extension of the sanction to have worldwide effect.¹⁶⁸ Indeed, the sanction taken by the member association concerned will have effect on the territory of that member association only. Thus, the purpose of this rule is to prevent a natural person convicted of a serious violation at national level from playing, should he be internationally transferred.¹⁶⁹ Thus, the Chairman of the FIFA Disciplinary Committee¹⁷⁰ has the competence to extend the sanctions to have worldwide effect provided certain conditions are fulfilled.¹⁷¹ The Chairman can pass his decision without hearing the parties, *i.e.* only on the basis of the file.¹⁷² Indeed, one shall bear in mind that the foregoing is a procedure of extension, in which FIFA deciding body is not allowed to review the substance of the decision taken by the member association.¹⁷³ As a consequence of the extension of the sanction to have worldwide effect, a sanction imposed by an association or confederation has the same effect in each member association of FIFA as if the sanction had been imposed by any of them.¹⁷⁴

Lately, this prerogative has been used in numerous cases of match-fixing, in which member associations sanctioned numerous players and officials involved in massive match-fixing scandals.¹⁷⁵

3. *The FIFA Ethics Committee*¹⁷⁶

As far as the Ethics Committee is concerned, it is competent to judge conduct that damages the integrity and the reputation of football and in particular to illegal, immoral and unethical behaviour.¹⁷⁷ Following the reform process, the FIFA Executive Committee approved the current version of the Code of Ethics (hereinafter: *the FCE*).¹⁷⁸ Thus, the FIFA Ethics Committee is now composed of two chambers, one investigatory, in charge of conducting investigatory proceedings, and one adjudicatory, competent to adjudicate on the case – both chaired by independent chairmen – thus strengthening the Ethics Committee. All the procedural and

¹⁶⁸ Art. 136ff of the FDC.

¹⁶⁹ In the context of international transfers, art. 12 of the Regulations on the Status and Transfer of Players together with its Annexe, in particular art. 8.1 para. 4.

¹⁷⁰ For the jurisdiction, art. 78 para. 1 lit. c) of the FDC.

¹⁷¹ Art. 137 of the FDC, *inter alia* the Chairman has to verify that the sanctioned person has been cited properly and that his right to be heard has been respected.

¹⁷² Art. 138 of the FDC.

¹⁷³ Art. 139 para. 1 of the FDC.

¹⁷⁴ Art. 140 of the FDC.

¹⁷⁵ Cf. www.fifa.com/aboutfifa/organisation/news/newsid=2019030/ or www.fifa.com/aboutfifa/organisation/news/newsid=1982399/index.html.

¹⁷⁶ Art. 63 of the FIFA Statutes.

¹⁷⁷ Art. 1 of the FIFA Code of Ethics, edition 2012.

¹⁷⁸ On a side note, the FIFA Ethics Committee was active before the reform process and passed several decisions in important cases, cf. www.fifa.com/aboutfifa/organisation/bodies/news/newsid=1336779/index.html.

organisational rules are now defined in the FCE and tailor-made for the needs of ethics proceedings¹⁷⁹ and offer a precise and systematic division of the rules of conduct.¹⁸⁰ It is worth mentioning that the FCE applies to physical persons only.¹⁸¹

Regarding the procedure, it shall be pointed out that the Chairman of the Investigatory Chamber decides on his own to open investigation proceedings, if there is a *prima facie* case.¹⁸² The investigation is led by a chief of the investigation.¹⁸³ Upon completion of the investigation, the chief of the investigation drafts a final report containing all the facts and evidence, which shall be remitted to the Adjudicatory Chamber.¹⁸⁴ The latter will, on the basis of the final report, decide to proceed with the adjudicatory proceedings, if he considers the final report to be complete. The Chairman of the Adjudicatory Chamber may also either close the case, if there is insufficient evidence to proceed, or return the final report to the Investigatory Chamber for amendment and completion or undertake further investigations.¹⁸⁵

The Chairman of the Adjudicatory Chamber may also take provisional measures, at the request of the Chairman of the Investigatory Chamber, if a breach of the FCE appears to have been committed and if a decision on the main issue may not be taken early enough. Provisional measures may also be taken to prevent interference with the establishment of the truth.¹⁸⁶

4. *The FIFA Appeal Committee*¹⁸⁷

The FIFA Appeal Committee, currently composed of one chairman, one deputy chairman and twenty members, is responsible for deciding appeals against any of the Disciplinary Committee's and the Ethics Committee's decisions that FIFA regulations do not declare as final or referable to another body.¹⁸⁸ The organisation is identical as to the FIFA Disciplinary Committee. The procedure is also detailed in the FDC. The Code, however, expressly excludes the possibility to appeal in some cases.¹⁸⁹ In ethics-related matters, it is important to remark that the chief of

¹⁷⁹ As an example cf. art. 41ff regarding the obligation to cooperate or 47ff regarding anonymous witnesses.

¹⁸⁰ Examples of rules of conduct: loyalty, conflict of interests, corruption, non-discrimination.

¹⁸¹ Art. 2 of the FCE.

¹⁸² Art. 63 of the FCE.

¹⁸³ Art. 65 of the FCE.

¹⁸⁴ Art. 68 of the FCE.

¹⁸⁵ Art. 69 of the FCE.

¹⁸⁶ Art. 83 of the FCE. The provisional measures may be valid for a maximum of 90 days, which can be extendable, in exceptional circumstances, for an additional period of maximum 45 days (art. 85 of the FCE).

¹⁸⁷ Art. 64 of the FIFA Statutes and art. 66 para. 4 of the FCE.

¹⁸⁸ Cf. Art. 79 and 118 of the FDC. In this respect, art. 118 lit. e) and art. 64 of the FDC, edition 2011, provides for an appeal to CAS directly. Cf. also art. 80 of the FCE.

¹⁸⁹ Art. 118 of the FDC and art. 80 of the FCE mention the cases in which an appeal before the Appeal Committee is excluded.

investigation is entitled to appeal against a decision of the Adjudicatory Chamber.¹⁹⁰

5. *Conclusion*

The competence and the jurisdiction of the FIFA judicial bodies is extremely large but have proved themselves not only useful but also necessary to ensure a correct application and implementation of FIFA regulations and decisions. They have developed a practice and jurisprudence which is unanimously recognised worldwide. The judicial bodies always take care to respect the procedural rules and to apply the regulations properly. This has been recognised by the CAS in the vast majority of its awards confirming the decisions of FIFA judicial bodies. The procedure of enforcement implemented by FIFA is essential to the well-functioning of the dispute resolution system and has acquired with the years a significant level of efficiency and recognition from all the stakeholders and from other jurisdictional instances. Despite the increased level of expectation in terms of quality and quantity, the FIFA judicial bodies succeeded in revealing themselves competent to fulfil the task of ensuring that regulations and decisions are respected and complied with. Thus, FIFA has curved the path for its direct and indirect members so that everyone plays this beautiful game with the same rules.

¹⁹⁰ Art. 80 para. 2 of the FCE.

FAST BREAK: AN OVERVIEW OF HOW THE FÉDÉRATION INTERNATIONALE DE BASKETBALL HANDLES DISPUTES FAIRLY, QUICKLY, AND COST-EFFICIENTLY

by *Andreas Zagklis**

SUMMARY: 1. Introduction – 2. Transfer and nationality disputes – 3. Disciplinary disputes – 4. Ad-Hoc (and technical) disputes – 5. Financial disputes – 6. Conclusion

Abstract:

The Fédération Internationale de Basketball (“FIBA”) provides both internal and external dispute resolution mechanisms, highlighted by the innovative Basketball Arbitration Tribunal (“BAT”), that allow parties a fair, quick, and cost-efficient resolution to the various types of disputes that arise in basketball.

1. Introduction

While the Court of Arbitration for Sport (“CAS”) has become the “supervisory jurisdiction over the rules and practices of international and national sport bodies”,¹ it can decide appeals only after the internal remedies of a federation have been exhausted.² Thus, the responsibility at the first level is still on the shoulders of the federations. And considering the legal, financial, political and other effects of sports disputes, together with their – at times disproportionately – extensive coverage by the Media, this is a heavy burden on large international federations like the Fédération Internationale de Basketball (“FIBA”). With this responsibility in mind, FIBA has

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¹ KEN FOSTER, “*Lex Sportiva and Lex Ludica: The Court of Arbitration for Sport’s Jurisprudence*” in Blackshaw - Siekmann - Janwillem Soek, eds., *The Court of Arbitration for Sport, 1984-2004*, (The Hague, Netherlands: T.M.C. Asser Press, 2006), 420.

² See Code of Sports-related Arbitration, Article R47.

been at the forefront of developing dispute resolution mechanisms that are tailored to the needs of the specific types of disputes present in international basketball. FIBA's dispute resolution system is designed with two overarching principles in mind.

The first overarching principle is that disputes must be resolved fairly, quickly and cost-effectively. It is of paramount importance to FIBA that its dispute resolution mechanism is fair to all parties involved in the dispute. All parties must have the opportunity to be heard, explain their position and present their evidence. Even if the Code of Sports-related Arbitration ("CAS Code") provides in Article R57 for a *de novo* hearing which heals any possible procedural defects of the previous instances, it is of vital importance that national federations, clubs and players feel that they have had their "day in court" when pleading before the FIBA bodies. Furthermore, the dispute resolution process must be as quick as possible. This quickness is especially important in sports in order to allow sporting events to be conducted without any unnecessary obstacles. These mechanisms are used to determine the results of games or the status of players which cannot remain unclear for a long period of time in order for competitions to run smoothly. Finally, the disputes must be cost-efficient. Cost-efficiency is obviously important to the parties. The fact of the matter is that not all players or clubs can afford to spend a lot of money resolving a dispute. For example, a player who has not been paid by his club for four months might not have the ability to pay large fees in order to adjudicate his salary dispute precisely because he is not receiving his salary payments. It is imperative for him that the proceedings remain cost-effective so that he can exercise his rights within the dispute resolution mechanism. Moreover, the cost-efficiency of the dispute resolution mechanism does not only have the parties in mind but FIBA as well. FIBA has chosen to invest in its internal mechanisms to limit the federation's costs. Any decision made within these internal mechanisms could be the subject of an appeal to the CAS which FIBA would then have to defend. Given that most CAS proceedings are no longer free³ and that legal representation usually entails significant costs, it is in FIBA's best interest to adjudicate the dispute in such a way that the parties do not need to resort to an appeal before the CAS.

The second overarching principle is that the disputes should be classified based on the type of dispute to allow the dispute resolution mechanism to be crafted based on the specific intricacies of that dispute. FIBA divides its disputes into four categories, each with dispute resolution systems designed to combat the unique issues within each category. The first category of disputes is transfer and nationality disputes (*see* Section 2. *infra*). These disputes arise when a club is

³ According to the recent (March 2013) amendment of Article R65 of the CAS Code, the proceedings are free in case of "appeals against decisions which are exclusively of a disciplinary nature and which are rendered by an international federation or sports-body". However, "[i]f the circumstances so warrant, including the predominant economic nature of a disciplinary case [...] the President of the Appeals Arbitration Division may apply Article R64 to an appeals arbitration", meaning that the cost-free character of an arbitration may be lifted in such (exceptional) cases.

seeking to sign a player who last played abroad but the player's former club refuses to grant a letter of clearance⁴ or when there is a dispute over a player's nationality. The next category of disputes is disciplinary disputes (*see* Section 3. *infra*). These disputes involve FIBA sanctions applied to individuals, clubs, national member federations or Continental Confederations (which in basketball are called "Zones") for violations of the FIBA General Statutes or Internal Regulations. Doping sanctions would fall under this category of disputes. The third category is ad-hoc matters or technical disputes (*see* Section 4. *infra*). These disputes are based on the results within a basketball competition, such as a protest filed by a team over the result of a game, or disputes requiring interpretations of the Official Basketball Rules. Finally, the fourth category of disputes is financial disputes (*see* Section 5. *infra*). These disputes involve players, coaches, agents or clubs quarrelling over the interpretation and enforcement of their rights and obligations under the contracts that they have entered into.

This article will highlight the solutions that FIBA has found in order to solve disputes in a quick, fair and cost-efficient way through the prism of these four categories of disputes.

2. *Transfer and nationality disputes*

This category of disputes deals mainly with a player's eligibility to play with a certain club or national team. Generally, a player is eligible to play for a club if he is registered with the club's national federation⁵ and complies with the licensing requirements of the FIBA Internal Regulations.⁶ Likewise, in order to be eligible for a national team, a player must "hold the legal nationality of that country and have fulfilled also the conditions of eligibility according to the FIBA Internal Regulations"⁷. In essence, these disputes are based on a party claiming that the player has (or has not) satisfied these eligibility requirements. While FIBA cannot force a player to represent a certain club or national team, it can prevent a player from participating with a certain club or national team.

2.1 *Transfer disputes*

Transfer disputes are rather common in professional basketball. The basic principle governing transfer disputes is the following:

⁴ In order for a player to be registered with the new club's federation, he must first obtain a letter of clearance from the former club's federation for an international transfer. This letter of clearance basically states that the player is allowed to be registered with the new federation. *See* FIBA Internal Regulations, Article 3-42.

⁵ *See* FIBA Internal Regulations, Article 3-7 which states that "[p]layers who participate in professional leagues must be registered with organisations which are affiliated to a national member federation; otherwise they will not be able to participate in the Competitions of FIBA."

⁶ For licensing restrictions, *see* FIBA Internal Regulations, Articles 3-66 through 3-71.

⁷ *See* FIBA Internal Regulations, Article 3-15.

“The only reason for which a national member federation may refuse to grant the request for a letter of clearance is if the player is under contract to play for his club beyond the scheduled transfer date.”⁸

As a result, these disputes are related to the interpretation and enforcement of an employment contract between a player and a club. Typically in these disputes, the player’s former club argues that the player is still under a valid employment contract while the player argues that the contract is no longer valid because the club breached it⁹ or because he had a contractually agreed option to terminate it, which he properly exercised.

In the event that the national federation of the former club refuses to grant the player a letter of clearance because it states that he is under a valid contract with the club, the new club’s federation can ask FIBA to intervene and decide the dispute.¹⁰ Both parties are then invited to provide written submissions to FIBA stating their positions along with supporting documentation. Often, these disputes are highly urgent due to transfer window restrictions. Thus, after reviewing the written submissions of the parties, FIBA will render its decision through its Secretary General or his delegate within seven days from when the dispute arises, unless circumstances dictate otherwise e.g. in complex cases where more than one round of submissions is required.

After the decision is rendered, the parties have the right to appeal the decision before the FIBA Appeals’ Panel within fourteen days of the decision. The appellant is required to pay a modest non-reimbursable fee of CHF 2,000. The appeal does not have suspensive effect but the appellant does have the right to request provisional measures. The Appeals’ Panel is composed of a permanent list of six independent jurists and the Chairman of the Panel who are appointed by the Central Board of FIBA for a four year term.¹¹ The Appeals’ Panel will hear an appeal in either a three-member panel or through a Single Judge.¹² Once the panel or the Single Judge is appointed, the panel hearing the case will determine the amount of the advance on procedural costs. Unless a hearing is waived by the parties, the hearing will take place within four weeks after the appeal has been received by FIBA. In most cases, the Appeals’ Panel will also invite interested third

⁸ See FIBA Internal Regulations, Article 3-46, which also provides that “A letter of clearance cannot be delayed or refused because of a monetary dispute between a club and a player”.

⁹ These disputes usually are based on a breach of contract for non-payment of salary. Thus, there is both a transfer dispute and a financial dispute in these situations.

¹⁰ FIBA has competence over transfers between different national member federations making it responsible for handling the administration as well as the decision at the first level.

¹¹ The judges are all selected from outside of FIBA. Persons employed by FIBA and persons holding a position within FIBA or one of its Zones cannot be appointed as judges. See FIBA Internal Regulations, Articles 1-158 through 1-161.

¹² The Chairman of the FIBA Appeals’ Panel decides whether or not an appeal is heard by a three-member panel or a Single Judge on a case-by-case basis. Transfer disputes are usually heard by a Single Judge. See FIBA Internal Regulations, Article 1-155.

parties, such as the federations for both the former and new club, to participate in the proceedings. Thus, the decision made by the Appeals' Panel would extend to all interested parties. FIBA is also represented at these proceedings, usually as a Respondent, and provides detailed reasons regarding (in principle, supporting) the decision of first instance. The FIBA Appeals' Panel will render its award within four weeks of the hearing.

In turn, a party can appeal the decision before the CAS in accordance with the provisions of the CAS Code. As of the date of publication, this option has been used very rarely in cases handled by FIBA. According to statistics for the last twenty years, no more than five transfer cases have been appealed before the CAS, including cases handled by FIBA's Zones as provided in previous versions of the Internal Regulations.

2.2 Nationality disputes

A similar mechanism is applied to disputes relating to a player's nationality. After both parties provide submissions, the FIBA Legal Commission, acting through the Secretary General or a person delegated by him, decides the dispute in the first instance.¹³ The main difference between nationality disputes and transfer disputes is that the parties can request to have a hearing at the first instance.¹⁴ Another difference is that the dispute may also have an additional consultation process. Specifically, Article 3-34 requires the Secretary General to consult the Chairman of the FIBA Legal Commission before making a decision on a marginal case or a case involving a refugee enjoying asylum rights or involving displaced persons as defined in United Nations Conventions. This consultation process is necessary because these cases typically involve the interpretation of complicated legal provisions and principles. Finally, a party can seek further recourse by appealing the nationality dispute to the FIBA Appeals' Panel and then to the CAS.

The dispute resolution mechanism for transfer and nationality disputes clearly fits within FIBA's two overarching principles. The process is fair, quick and cost-efficient. The dispute resolution system allows for both parties (or more parties, in case e.g. a player could be eligible for three national teams) to make submissions. It also includes interested third parties, and the appeal involves jurists with sports law experience who are not only independent from FIBA but also from the players/clubs/national federations involved: the fact that a judge has the same nationality as the appealing party disqualifies him from hearing the case in question. Until today, the practice has been that the principle of "neutral nationality" also applies with respect to affected parties,¹⁵ following the application of this principle used by the

¹³ See FIBA Internal Regulations, Article 3-29.

¹⁴ See FIBA Internal Regulations, Article 3-36.

¹⁵ See FIBA AP 07/2010 (*Hellenic BF vs FIBA*), involving Greek and Serbian players who participated in an on-court brawl during an exhibition game one week before the start of the 2010 FIBA World Championship in Turkey. Suspension of players on said teams affected a number of teams from their respective groups.

FIBA Disciplinary Panel.¹⁶ Furthermore, the procedures within this mechanism call for quick deadlines, allowing for a decision in the first instance after a week and a decision on an appeal within ten weeks after the original decision. Finally, the first instance does not require the payment of a fee to FIBA while the appeal involves a small non-reimbursable fee and a modest advance on costs, taking into account that the cases are usually heard by a single judge and that the hourly rate of the appeals' judges is lower than that of a CAS arbitrator.¹⁷

This mechanism is also tailored to fit the challenges that face these kinds of transfer and nationality disputes. The decision in the first instance can work around any transfer windows or registration deadlines to prevent any issues that could be caused by missing the deadline. Since the decision in the first instance does not have suspensive effect, the player can become eligible to play with his new club or national team immediately (if the decision is in his favour) without having to wait through the appeals process. This flexible process allows the dispute resolution mechanism to adjust to the fast-paced world of basketball transfer and nationality disputes.

3. *Disciplinary disputes*

FIBA has the power to render sanctions on individuals, clubs, national member federations or Zones for violations of the FIBA General Statutes or Internal Regulations. Included in this power is the ability to sanction athletes for doping violations. Unlike in other sports, the total number of doping cases in basketball is significantly low when compared to the growth of the sport and the number of tests annually performed by FIBA, FIBA Zones, National Federations, National Anti-Doping Organisations and the World Anti-Doping Agency ("WADA"). Yet, doping cases require special attention because they involve personal information (such as medical records) affecting the players' privacy.¹⁸

In principle, disciplinary sanctions are pronounced by the FIBA Disciplinary Panel, a permanent Panel appointed by the Secretary General and chaired by the President of the Legal Commission. At least two members of the FIBA Disciplinary Panel decide an individual case. For example, a member of the Legal Commission and a member of the Medical Commission decide doping cases.¹⁹ The Disciplinary Panel is also determined based on the principle of "neutral nationality," i.e. its members will be from a country other than the countries of the parties involved, for all cases.²⁰

¹⁶ See also Footnote 20 *infra*.

¹⁷ Currently set at CHF 215; see FIBA Internal Regulations, Article 1-234.

¹⁸ Pursuant to FIBA Internal Regulations, Article 4-8.6, a decision can be revealed publicly only after all of the procedures are complete and the decision is final. All doctors and personnel handling the testing are required to maintain confidentiality.

¹⁹ The member of the Medical Commission acts as an expert on the Panel as it relates to the medical effects of the doping allegation.

²⁰ The principle of "neutral nationality" is applied to both the Disciplinary Panel in the first instance

Before the Disciplinary Panel pronounces sanctions, the party who could potentially be sanctioned has the right to be heard.²¹ That party also has the right to have a legal representative or a representative of that party's national member federation present to assist it at the hearing. Usually, FIBA provides the option to conduct a hearing either in person, by telephone or by video conference in conjunction with the written submissions. This flexible approach to the hearing simplifies the proceedings in order to avoid travel inconvenience and a hearing conducted by telephone is usually the preferred solution for players.²² It is significant that only two in person hearings were conducted out of more than 40 doping cases decided by the FIBA Disciplinary Panel between 2009 and 2013; while in all other cases in which the player participated in the proceedings, he/she opted for a hearing by telephone conference or a decision based on written submissions only.

Additionally, the Disciplinary Panel is entitled to legal counsel,²³ which is particularly important in cases that require extensive legal research. FIBA is obviously aware of the fact that it entrusts volunteer²⁴ members of its Commissions (Legal and Medical) with the important task of deciding disciplinary cases at first instance and, for this reason, ensures that they benefit from the technical support that is necessary in carrying out their duties. The assistance of legal counsel also helps guarantee that the quality of the decisions rendered is high and consistent with past practice, which is reflected by both their acceptance by the basketball world and the low WADA-appeal rate of decisions made by the Disciplinary Panel.²⁵ However, it should be clarified that the presence of the FIBA legal counsel in these hearings is not to be confused with the role of a prosecutor or quasi-prosecutor with party-status,²⁶ as adopted by other International Federations or by National Anti-Doping Organisations; it is merely to assist the functions of the FIBA Disciplinary Panel.

Appeals are heard by the FIBA Appeals' Panel in accordance with the principles mentioned *supra*. The only difference is the significantly higher administrative fee charged for appeals against doping-related decisions (CHF 6,000), which was established in order to prevent parties from submitting frivolous appeals, particularly cases in which the FIBA Secretary General decided to submit a national case to the Disciplinary Panel after coming to the conclusion that the national decision did not

and the FIBA Appeals' Tribunal on appeal. See FIBA Internal Regulations 1-146 and 1-161 respectively.

²¹ See FIBA Internal Regulations, Article 1-143.

²² A pertinent example of the prudence of this approach is allowing an American player who was found to have cannabis in his system to conduct the hearing via telephone instead of travelling to Geneva.

²³ See FIBA Internal Regulations, Article 1-144.

²⁴ Unlike the Judges of the Appeals' Tribunal, the members of the Disciplinary Panel are not remunerated for their time spent on a disciplinary matter.

²⁵ Only four decisions have been appealed by WADA before the FIBA Appeals' Panel since the World Anti-Doping Code went into force. See WADA Case Law, available *on line* at www.wada-ama.org/en/World-Anti-Doping-Program/Legal-articles-case-law-and-national-laws/Case-Law/

²⁶ See, e.g., Articles 38-39 of the UEFA Disciplinary Regulations, whereby the UEFA Disciplinary Inspector investigates an incident, submits a report with his/her conclusions to the UEFA Control and Disciplinary Body and may file an appeal against the latter's decision.

meet the required criteria²⁷ that would allow FIBA to adopt it and extend the sanction internationally.

In all other cases, however, the general fee (CHF 2,000) applies. Also, in relation to appeals for lesser, non-doping related violations, for practical reasons the rules provide that the Chairman of the Appeals' Panel appoints one of the judges as permanent Single Judge to hear appeals against warnings, reprimands and financial penalties for the entire 4-year period.

The general right of a further appeal before the CAS is, in any event, also in place for disciplinary cases. Aside from its duties as a Code Signatory and the mandatory nature of the famous Article 13 of the World Anti-Doping Code ("WADC"), FIBA has decided that such right shall apply to the entire spectrum of disciplinary cases; however, this right has been used in only two doping cases, once in 2005²⁸ and once in 2012.²⁹

The dispute resolution system for handling disciplinary disputes also encompasses FIBA's two overarching principles for dispute resolution systems. The procedures used to resolve doping disputes are fair because they incorporate a medical expert and the principle of "neutral nationality". This fairness is reflected by the surprising level of acceptance of the decisions by the sanctioned players and their national federations as compared to other doping tribunals. Likewise, the dispute resolution system for disciplinary disputes is quick because the first instance eliminates the delays associated with in person hearings by allowing hearings by telephone conference. By having a medical expert on the Disciplinary Panel and allowing the Disciplinary Panel to have counsel, the Panel can handle the technical legal and medical issues that arise within a disciplinary dispute efficiently. The average time of issuing a reasoned decision after a hearing is approximately ten days; this short time-frame operates not only in favour of the athlete in question, who needs to see his legal status clarified soon, but also of the entire competition he is participating in because the majority of the cases involve a specified substance – where a provisional suspension is not mandatory – and, therefore, many players compete until the moment of notification of the decision. Also, the internal appeals procedure is the same quick system used in transfer disputes. Finally, the proceedings are cost-efficient. The potentially sanctioned party has the ability to seek assistance with the hearing from the national federation and can save on costs by conducting the hearing by telephone conference instead of appearing in person at the FIBA Headquarters.

4. *Ad-Hoc (and technical) disputes*

Following a rather traditional approach, successfully tested over decades of

²⁷ See FIBA Internal Regulations, Article 4-13.7.

²⁸ See TAS 2006/A/1038, available *on line* at www.wada-ama.org/rtecontent/document/CAS-NSima.pdf.

²⁹ In this case, the appeal was subsequently withdrawn.

international basketball competitions, FIBA operates its own on-site hearing body to decide disputes within an international competition. The creation of this body was essential because disputes within a competition need to be decided within a matter of hours. This body is known as the Technical Committee. It is constituted before each main official competition, cup and tournament of FIBA and consists of three persons: the Secretary General of FIBA (or his delegate), a delegate of the organizing federation and a third member selected by them.³⁰

The Technical Committee is the first instance body for both technical and disciplinary matters throughout the competition and until the announcement of the final classification of the competition. Pursuant to Article 2-47(f) of the FIBA Internal Regulations, the Technical Committee has the authority to impose sanctions against players, coaches, team followers, referees and other individuals who have violated the spirit and the letter of the General Statutes and the Internal Regulations of FIBA or the spirit of “fair play” that exists in basketball. Sanctions are imposed based on reports submitted by commissioners and referees as well as observations by members of the Technical Committee. Furthermore, the Technical Committee is also empowered to rule on technical issues, including the application of the Official Basketball Rules (so-called “field of play” decisions). Thus, they rule on any protests that result from matches played during the tournament.

If a team wants to protest a decision made by an official or any other event that took place during a game in a FIBA main official competition, the team must follow a three-step process in order to protest the result: 1) the captain of the team in question must inform the referee that his team is protesting the result by signing the space in the scoresheet marked “Captain’s signature in case of protest”; 2) the official representative of the national member federation or the club has to give confirmation of the protest in writing to a representative of FIBA or the Technical Committee within twenty minutes after the conclusion of the game; 3) the protesting party must pay a security deposit to the representative of FIBA or the Technical Committee in an amount stipulated in Article 2-228 of the FIBA Internal Regulation.³¹ The protesting national federation or club must then provide the text of its protest within one hour of the conclusion of the game.³² If the protest is accepted, the deposit is refunded.³³ Either the protesting club or its national federation or the opposing club or its national federation may appeal the decision.³⁴

It is important to note that appeals against decisions of referees or table officials made during or at the conclusion of games are dealt with in accordance with the Official Basketball Rules and the regulations governing the conduct of competitions and are not subject to appeal to the FIBA Appeals’ Panel³⁵ or,

³⁰ See FIBA Internal Regulations, Article 2-45.

³¹ See FIBA Internal Regulations, Article 2-56.

³² See FIBA Internal Regulations, Article 2-58.

³³ See FIBA Internal Regulations, Article 2-59.

³⁴ See FIBA Internal Regulations, Article 2-60.

³⁵ See FIBA Internal Regulations, Article 1-153.

subsequently, to the CAS. As a result, FIBA has decided to create a Jury of Appeal, a specially-designed appellate body to handle these ad-hoc matters. The four members of the Jury of Appeal are nominated by the Technical Committee and are representatives of national member federations whose teams are participating in the competition. The Jury is presided over by the President of FIBA or by the most senior member of the FIBA Central Board present at the competition. However, the Central Board may appoint a member of the FIBA Appeals' Panel to act as president of the Jury of Appeal during main official competitions of FIBA in order to rule on cases which require an immediate decision.³⁶ The principle of neutral nationality applies also to members of the Jury of Appeal which are substituted by alternate members if they have a connection with teams involved in a dispute.

In order to appeal the decision of the Technical Committee to the Jury of Appeal, the appeal must be delivered within twenty minutes of the delivery of the Technical Committee's decision, and the appellant must pay a security deposit with the representative of FIBA or the Chairman of the Technical Committee in an amount stipulated in FIBA Internal Regulation 2-228.³⁷ From an evidentiary point of view, it should be noted that the use of videos, film, pictures or any equipment, visual, electronic, digital, or otherwise is valid only to determine responsibility in matters of discipline. No such use is allowed for field of play decisions, even in cases where the referee is authorised to do so under the Official Basketball Rules.

The decisions of the Jury of Appeal are final and cannot be appealed further either internally or externally.³⁸ As a result, there are technical (and, possibly, disciplinary) disputes inside the FIBA world which do not fall under the competence of the FIBA Appeals' Panel or the CAS, simply because they arise during a FIBA competition and have to be resolved on the court or very soon after the completion of the game.

The ad-hoc proceedings analysed above serve the fairness, speed, and cost-efficiency principles that FIBA desires while keeping up with the rigors of dispute resolution within a competition. While parties might not be able to put together perfect submissions within the time restraints, the proceedings are fair given the demanding restraints of a competition setting. The parties have the right to two levels of proceedings. In the appellate level of the proceedings, the principle of neutral nationality ensures that national bias does not come into play. Also, the disputes are decided by the experts of the sport. Furthermore, parties seeking to protest a decision have the ability to obtain two levels of review within a few hours on-site. This balance between speed and procedural fairness is necessary, given the dense competition schedule (e.g. at the 2010 FIBA World Championship for Men, finalist teams played 9 games in 16 days). Finally, the proceedings are cost-efficient as well. The deposit to protest a decision in front of the Technical Committee is CHF 1,500, while the deposit for an appeal is CHF 3,000. These deposits are

³⁶ See FIBA Internal Regulations, Article 1-157.

³⁷ See FIBA Internal Regulations, Article 2-61.

³⁸ See FIBA Internal Regulations, Article 2-62.

refundable if the party prevails in the proceeding.

5. Financial disputes

The most important and innovative FIBA dispute resolution mechanism is the Basketball Arbitral Tribunal (“BAT”) and is used to resolve financial disputes. Financial disputes between clubs, players, coaches or agents represent a large percentage of the disputes in the world of professional basketball and may have a considerable impact both on the sporting result and on the reputation of the sport. Typically, these disputes revolve around outstanding player wages, outstanding player agent commissions or breaches of contract by players. Given the large amount of financial disputes, FIBA created the BAT, an independent court of arbitration, in 2007.³⁹ The BAT’s legal seat is in Geneva, Switzerland,⁴⁰ and it was established having Swiss law requirements for arbitral tribunals in mind. Recently, the BAT was recognised as a true arbitral tribunal under Swiss law.⁴¹

Although other dispute resolution mechanisms established in sports associations claim to be “arbitration courts”, many countries do not recognise the decisions of these “courts” as final and binding.⁴² The main issue is that often the arbitrators are chosen by the association either directly or indirectly and that the court is financially subsidised by the association itself. This lack of independence compromises these courts’ credibility as a true arbitral tribunal.

On the other hand, FIBA has taken a different approach with the BAT. Under Article 3-289 of the FIBA Internal Regulations, FIBA established “*an independent Basketball Arbitral Tribunal ... in which FIBA, its Zones, or their respective divisions are not directly involved*”. Thus, the BAT was first and foremost established as an independent arbitral tribunal. FIBA cannot be a party in the dispute in order for the BAT to maintain its independence. FIBA has no jurisdiction over disputes between third parties about players’ salaries or agents’ commissions.

³⁹ The BAT was the brainchild of Dr. Dirk-Reiner Martens, external legal counsel for FIBA, and was originally named the FIBA Arbitral Tribunal (“FAT”). The FAT was renamed the BAT as of 1 April 2011 in order to underscore the court’s independence.

⁴⁰ The BAT seat does not change based on where the hearings or proceedings are conducted. Contrary to many other European countries, Switzerland is extremely liberal when it comes to the arbitrability of employment disputes, provided that the claim is of pecuniary nature. See Article 177(1) of the Swiss Code on Private International Law (PILA).

⁴¹ In a 14 December 2012 ruling (case reference: 4A_198/2012), the Swiss Federal Tribunal (“SFT”) rejected a request pursuant to Article 190(2) of the PILA to set aside an award rendered under the BAT Arbitration Rules. The SFT found that the “*objet du recours ... ne fait problème en l’espèce*” [“*the object of the appeal does not present any problems in this case*”]. This short note means that the SFT has recognised the BAT as a true arbitral tribunal under Swiss law. This follows from the fact that only “arbitral awards” can be the subject matter of an appeal under Article 190(2) PILA. See English translation of the decision available *on line* at www.swissarbitrationdecisions.com/sites/default/files/14%20decembre%202012%204A%20198%202012.pdf.

⁴² See generally BLACKSHAW I., “*Dispute Resolution: FIBA: effectiveness of Arbitral Tribunal*”, *World Sports Law Report*, vol. 7 iss. 7, July 2009.

Similarly, the BAT is limited to financial disputes and does not hear appeals from FIBA's transfer or disciplinary decisions. The BAT's independence is further supported by the fact that it is self-financed: the BAT Secretariat costs as well as the fees of the BAT President and of the arbitrator are covered by the handling fee and the advances made by the parties to the dispute.

In order for the BAT to have jurisdiction over a financial dispute arising in the world of basketball, the parties must agree to submit their dispute to the BAT in writing. This written agreement is usually found as a clause in the player's personal services contract.⁴³ Although most athletes do not have much of a choice in agreeing to an arbitration clause in sports,⁴⁴ the situation is actually reversed when it comes to the BAT arbitration clause. The BAT is a popular tribunal for players and agents, and most insist on the BAT arbitration clause in contract negotiations.⁴⁵

To initiate the proceedings with the BAT, a party must file a Request for Arbitration with the BAT Secretariat. This Request for Arbitration includes the names and contact information of the parties, a statement of facts and legal arguments, the Claimant's request for relief, all written evidence that the Claimant intends to use to prove his arguments and a request for hearing, if any.⁴⁶ Also, said party must pay a non-reimbursable handling fee⁴⁷ before the arbitration can continue.⁴⁸ To facilitate access to the BAT, a template Request for Arbitration is available on the FIBA website⁴⁹ and can be submitted electronically.

A single BAT arbitrator⁵⁰ is appointed by the BAT President from a closed list of six arbitrators that is available on the FIBA website. They are assigned on a rotational basis.

Once the proceedings have been initiated, both parties have to pay an advance on the costs of arbitration which is set based on the monetary value of the claim and the complexity of the case. If one party fails to pay its share of the advance on costs, the other party may substitute for it. Generally, the parties are

⁴³ The suggested BAT arbitration clause from the Preamble of the BAT Arbitration Rules is:

"Any dispute arising from or related to the present contract shall be submitted to the Basketball Arbitral Tribunal (BAT) in Geneva, Switzerland and shall be resolved in accordance with the BAT Arbitration Rules by a single arbitrator appointed by the BAT President. The seat of the arbitration shall be Geneva, Switzerland. The arbitration shall be governed by Chapter 12 of the Swiss Act on Private International Law, irrespective of the parties' domicile. The language of the arbitration shall be English. The arbitrator shall decide the dispute *ex aequo et bono*."

⁴⁴ For instance, an athlete can only take part in the Olympic Games if he/she has also signed the arbitration agreement in favour of CAS included in the entry form. See Olympic Charter, Bye-Law to Rule 44.

⁴⁵ MARTENS D.-R., "*Basketball Arbitral Tribunal: An Innovative System for Resolving Disputes in Sport (only in Sport?)*", *The International Sports Law Journal*, 2011, vol. 1-2, 55.

⁴⁶ See Article 9 of the BAT Arbitration Rules.

⁴⁷ The handling fee ranges from EUR 1,500 for disputes less than EUR 30,000 to EUR 7,000 for disputes over EUR 1,000,000.

⁴⁸ See Article 9.2 of the BAT Arbitration Rules.

⁴⁹ Together with a section of FAQs and a power point presentation "How does BAT work?". See www.fiba.com/bat.

⁵⁰ Unlike CAS, parties cannot choose between having a single arbitrator or a panel of three arbitrators.

allowed only one set of written submissions under the BAT Arbitration Rules. Under Article 12.1 of the BAT Arbitration Rules, the arbitrator has the sole discretion to determine whether or not there is a need for further submissions. If the arbitrator determines that it is not necessary, any unsolicited submissions will not be taken into account. The arbitrator also has the ability to issue Orders of Procedure with regards to the additional production of evidence, responses from the parties to specific questions or directions for further proceedings.⁵¹ As a general principle, the arbitrator fixes short deadlines to respond to these Orders of Procedure.

An oral hearing can be held in BAT proceedings but only upon application of one of the parties or by virtue of a decision by the arbitrator.⁵² The hearing can be conducted by telephone, video conference or in person based on the discretion of the arbitrator and witnesses can testify in the proceedings.⁵³ The BAT has only conducted four hearings in person since it was established, three of which resulted in the parties signing a settlement agreement.

Unless otherwise stipulated in the arbitration agreement between the parties, the arbitrator will decide the dispute *ex aequo et bono*, i.e. applying general considerations of justice and fairness without reference to any particular national or international law.⁵⁴ This choice of law simplifies the proceedings by not allowing objections based on the arbitrator's supposed lack of knowledge of the nuances of law in a specific country.⁵⁵ With only a few exceptions, the cases decided under *ex aequo et bono* principles have come to the same result as if the case had been decided under the national laws of the country of the dispute.⁵⁶

Before the award is rendered, the BAT President determines the amount of costs for the proceedings. Then, the arbitrator will assign those costs to the parties based on the result of the dispute. If the costs are lower than the advance, the BAT will refund the difference. Likewise, the BAT Arbitration Rules also allow the prevailing party to receive a contribution towards reasonable legal fees and other expenses from the losing party. The BAT Arbitration Rules also cap this contribution based on the amount of dispute.⁵⁷ In principle, the arbitration award is rendered within six weeks of the completion of the arbitration proceedings. More than 90 percent of the awards are posted on the FIBA website.⁵⁸ Because the awards are made available to the public online, parties have begun citing previous BAT jurisprudence for persuasive value.⁵⁹ This allows for a consistency of results

⁵¹ See Article 12.2 of the BAT Arbitration Rules.

⁵² See Article 13.1 of the BAT Arbitration Rules. The arbitrator also has the power to make the holding of hearing dependent on the payment of an additional advance on costs.

⁵³ See Article 13.2 of the BAT Arbitration Rules.

⁵⁴ See Article 15.1 of the BAT Arbitration Rules.

⁵⁵ Decisions rendered under *ex aequo et bono* principles have become so popular that parties only insisted on national law in about 3% of the cases to date.

⁵⁶ MARTENS D.-R., *ibid*, 55.

⁵⁷ See Article 17.4 of the BAT Arbitration Rules.

⁵⁸ Awards are only confidential if ordered by the arbitrator or the BAT President. See Article 16.4 of the BAT Arbitration Rules.

⁵⁹ BAT does not have a *stare decisis* system found in common law states. BAT arbitrators tend to

between awards. Two examples of this include the “BAT interest rate⁶⁰” and the duty to mitigate damages.⁶¹

The BAT does not have a built-in appeals procedure;⁶² however, a party could potentially appeal a BAT award in two ways. The first would be to provide for an appeal to the CAS in the arbitration agreement. The second is an appeal to the Swiss Federal Tribunal pursuant to Art. 190 of the Swiss Code on Private International Law; however, this appeal is mainly limited to procedural issues.⁶³

As arbitral awards, BAT awards are in principle open to enforcement under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”). As stated *supra*, some countries do not allow for arbitration of employment disputes, which creates a quandary because Article V (2) of the New York Convention states that one of the valid reasons for refusing to recognise and enforce a valid arbitration award is that “the subject matter of the difference is not capable of settlement by arbitration under the laws of that country”. However, such laws do not necessarily exclude enforcement, because national legislatures of some countries tolerate resolution of sports disputes by true arbitral (or quasi-arbitral) national bodies.⁶⁴

FIBA addressed these potential difficulties with enforcing a BAT award by enacting Article 3-300 of the FIBA Internal Regulations, which allows FIBA to render disciplinary sanctions on a party that fails to honour a BAT award.⁶⁵ The sanctions range from a fine of up to CHF 150,000⁶⁶ to various types of bans depending on which party is not honouring the award.⁶⁷ The party seeking enforcement makes a request to FIBA for sanctions. The party against whom sanctions are sought has an opportunity to be heard before the FIBA Secretary

refer to previous awards for reasons of consistency, focusing however on the circumstances of each case as required by an *ex aequo et bono* approach to the merits.

⁶⁰ For a discussion of BAT jurisprudence regarding interest rate, see BAT 0244/12 (*Hodge v/Petrochimi Bandar Imam Harbour Basketball Club*).

⁶¹ For a discussion of BAT jurisprudence regarding duty to mitigate, see BAT 0294/12 (*Brown & Yam v/ Halcones UV Promotora Deportiva A.C.*).

⁶² Initially, the BAT Arbitration Rules provided for a possibility to appeal to CAS but this rule was abolished in spring 2010.

⁶³ MARTENS D.-R., *ibid*, 56. As of the date of publication, only two BAT awards had been appealed to the SFT.

⁶⁴ See decision No. 3944/2010 of the Athens Court of First Instance. Arbitration of labour disputes is prohibited by the Greek Code of Civil Procedure (Article 867), but the Sports Law Act 2725/1999 (Article 95 et seq., as amended and applicable today) provides for a special two-tier arbitration of player-club financial disputes in professional football, basketball and volleyball.

⁶⁵ A similar sanctioning system in FIFA was confirmed by the Swiss Federal Tribunal in the case 4P.240/2006 based on association law. Regarding the recent decision of the Swiss Federal Tribunal rendered on 27 March 2012 (case reference: 4A_558/2011), it should be noted that – unlike FIFA – FIBA’s sanctioning power with regard to players is limited to a monetary fine or a ban on transfers, and does not go as far as disallowing participation in competitions.

⁶⁶ This fine can be rendered multiple times.

⁶⁷ For an agent, the sanction could be a withdrawal of his FIBA-license. For a player, the sanction could be a ban on international transfers. For the club, the sanction could be a ban on registration of new players and/or a ban on participation in international club competitions.

General or his delegate makes a decision. This decision is then subject to appeal to the FIBA Appeals' Panel, as per the procedure described in Section 3 *supra*. This sanctioning procedure has been extremely successful in ensuring that BAT awards are honoured.

Like the other dispute mechanisms that FIBA has created, the BAT allows for financial disputes to be resolved fairly, quickly and cost-efficiently. Deciding under *ex aequo et bono* principles allows the arbitrator to make a fair decision based on the specific circumstances of the case which might not always occur if national law was applied. For example, the Greek Sports Law Act considers a coach-club contract null and void if it has not been submitted to and ratified by the competent local tax authorities.⁶⁸ In such case, the foreign coach who has seen his contract normally executed – as if it were valid – but is suddenly fired after e.g. six months, is only entitled to salaries he has worked for on the basis of unjust enrichment provisions, and not to compensation for unjust dismissal.

Furthermore, as of 31 December 2012, the average duration of BAT proceedings was 178 days, i.e. less than half of a year. Three main features allow for this speed. The first feature is that the disputes are decided by the appointment of a single arbitrator which cuts out the delays often caused by the nomination and challenge process of a 3-member panel with party-appointed arbitrators. The second feature is that the proceedings are computer-aided (i.e. submissions and procedural orders are delivered by email) and based only on written submissions. The third feature is that the proceedings are conducted under *ex aequo et bono* principles which prevents delays associated with need to obtain expert opinions on the national law of the dispute.

Said features guarantee also that the proceedings remain inexpensive, subject always to the parties' desire to organise a hearing in person. The average cost of a BAT proceeding as of 31 December 2012 was EUR 7,756, and the average case value was EUR 145,264, resulting in a cost-value ratio of only 5.3 percent. The cap on the maximum contribution for reasonable legal fees has lowered costs significantly. Parties with a strong case no longer try to run up their fees because of this cap. In addition, following several requests by the basketball market, particularly by female players and lower division clubs, the BAT Arbitration Rules were amended in May 2011 to allow the arbitrator to issue an award without reasons in disputes with a value lower than EUR 30,000.⁶⁹ These disputes are not considered part of a special "small claims" division of the BAT because all the other provisions of the BAT Arbitration Rules equally apply to the "low value" cases. The total costs for these cases have decreased by at least 30 percent merely by applying a lower handling fee (EUR 1,500) together with a cap at the advance on arbitration costs (EUR 5,000). The arbitrator does not spend the time required to render a reasoned award unless a party requests a reasoned award and pays an additional advance on costs.

⁶⁸ Article 31 para. 6 of the Sports Law Act 2725/1999, as amended and applicable today.

⁶⁹ See Article 16.2 of the BAT Arbitration Rules.

In essence, FIBA has provided an independent forum allowing third parties to resolve their financial disputes. This forum conforms to the wishes of the parties and the demands of these financial disputes. The BAT's popularity⁷⁰ within the basketball community demonstrates that it is truly the appropriate dispute resolution vessel for parties' financial disputes. In the first quarter of 2013, the BAT averaged approximately 12 new arbitration proceedings initiated every month,⁷¹ making it the second busiest international sports arbitral tribunal behind the CAS.

6. Conclusion

In conclusion, FIBA has embraced its responsibility and shown a willingness to be innovative in order to provide efficient dispute resolution for the basketball community, guided by the two principles that FIBA and its community value: providing a dispute resolution system that is fair, quick, and inexpensive, and crafting mechanisms to the type of dispute. Ultimately, these dispute resolution mechanisms benefit the members of the basketball family.

⁷⁰ The BAT is also attracting the interest of the media. See NYTimes.com article of 5 February 2011 entitled "For Americans Overseas, a Referee for Paychecks", available *on line* at www.nytimes.com/2011/02/06/sports/basketball/06fiba.html?_r=3&ref=basketb& (last visited: 1 April 2013).

⁷¹ Since its inception, the BAT has grown from 2 cases filed in 2007 to 115 cases filed in 2012.

**WINDS OF CHANGE: THE NEW DISPUTE RESOLUTION SYSTEM OF
THE FÉDÉRATION INTERNATIONALE DE VOLLEYBALL**

by *Achilleas Mavromatis** and *Andreas Zagklis***

SUMMARY: 1. Resolution of Disputes in International Volleyball until 2012 – 2. A New System, a New Era – 3. Conclusion

Abstract:

The authors of this paper trace the development and evolution of the internal dispute resolution process of the Fédération Internationale de Volleyball (“FIVB”) over the last two decades. This paper’s primary aim is to illustrate the steps taken by the international volleyball federation towards the restructuring of its dispute resolution system. The starting point is FIVB’s initial resistance to embrace the jurisdiction of the Court of Arbitration for Sport (“CAS”). Following the abolition of its own judicial body called the International Volleyball Tribunal, FIVB approved CAS as the last instance appeals body for all disputes arising within the FIVB family and revised the lower-instance, internal dispute resolution procedures. In this respect, the authors present the new role of CAS as the ultimate appeals body in the FIVB’s dispute resolution system, describe the three types of disputes that are heard by the FIVB according to a new categorisation system and present the newly constituted FIVB judicial bodies.

1. Resolution of Disputes in International Volleyball until 2012

Historically, the Fédération Internationale de Volleyball (“FIVB”) managed its own

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internal dispute resolution process aiming at preserving the sanctity of the sport by having only those truly knowledgeable in volleyball resolve disputes arising within the FIVB family. At a time when most of international sporting federations embraced the formation and the jurisdiction of the Court of Arbitration for Sport (“CAS”) as the ultimate judicial body for international sports disputes, the FIVB resisted fully recognising its authority.

Like the majority of international sports governing bodies that recognised the authority of the CAS, FIVB too signed the 1994 Paris Agreement, the convention for the creation of the International Council of Arbitration for Sport (“ICAS”), the independent body created to manage the finances and administration of CAS.¹ However, unlike the majority of International Federations,² the FIVB officially rejected the idea of being bound by CAS jurisdiction in every respect.³ Instead of yielding to the authority of CAS, the FIVB created in 1994 its own judicial body, the International Volleyball Tribunal (“IVT”).⁴ As of 2004, given that the FIVB is an international federation recognised by the International Olympic Committee (“IOC”), the FIVB had a duty under the Olympic Charter⁵ to adopt and implement the World Anti-Doping Code (“WADC”). The WADC stipulates CAS as the ultimate appeals body for doping cases.⁶ As such, during that time, and up until 2012, CAS could hear only one type of dispute in volleyball: doping cases. Refusing to abandon its own internal judicial dispute resolution mechanisms, all other disputes within the FIVB were heard internally by the IVT.

The IVT was established to function as a neutral body, independent from the governing and supporting institutions of the FIVB. In 2006, the former FIVB President Dr. Rubén Acosta stated publicly his reservations with respect to CAS and presented IVT:

¹ “Agreement relating to the constitution of the International Council of Arbitration for Sport (ICAS)”, 22 June 1994, Paris, France. See www.tas-cas.org/en/arbitrage.asp/4-3-294-1023-4-1-1/5-0-1023-3-0-0/.

² FIFA and FIVB were the only two IFs that signed the Paris Agreement with a reservation.

³ FIVB’s reservation signed by its then President Dr. Rubén Acosta reads as follows: “*En aucune façon, la seule signature de la Convention relative à la Constitution du CIAS ne peut avoir pour effet de créer l’acceptation par la FIVB, de la juridiction obligatoire du Tribunal Arbitral du Sport (TAS), conformément aux articles S1, S12, S20, R27, R38, R39, R47, R48 et R52 du Code de l’arbitrage en matière de sport. Pour tout litige concernant la FIVB, la juridiction compétente exclusive reste celle des organes de la FIVB, et notamment du Tribunal International du Volleyball, selon les termes de la Constitution de la FIVB approuvée par le Conseil d’Administration au mois d’avril 1994 pour présentation au Congrès Mondial de la FIVB. Enfin, la FIVB ne se considère et ne sera pas liée par quelque décision en la matière qui pourrait être prise par le CIAS ou les organisations membres de celui-ci y compris celles dont la FIVB serait elle-même membre, en l’absence d’une décision précise du Congrès Mondial de la FIVB à cet effet.*”

⁴ See FIVB Constitution (as applicable between 1994 and 2012); and see the Statutes of the International Volleyball Tribunal, which set out its jurisdiction and authority, structure, arbitration procedures and appeal procedures.

⁵ See Olympic Charter, Rule 25.

⁶ See WADC, Art. 13.

“On the matter of arbitration, the FIVB has been reluctant to use the IOC-funded Court of Arbitration in Sport, except for anti-doping appeals, preferring instead to refer all other cases to the International Volleyball Tribunal (IVT). This is likely to continue for the time being. The FIVB appreciates the importance of independent arbitration, but believes that key improvements in the IVT may be a better way of guaranteeing independent arbitration while maintaining confidence that arbitrators fully understand Volleyball and Beach Volleyball, two of the most successful team sports in the world. The International Volleyball Tribunal is currently entirely financed by the FIVB and we are looking at bringing in another, independent source of finance. To guarantee independence, we may also need to change the system of election of judges or arbitrators.”⁷

Interestingly, the IVT was structured in a way similar to CAS, undertaking the role of impartial tribunal which could “arbitrate” disputes between two or more parties under the jurisdiction of the FIVB (the Arbitration Chamber), and also as an appellate court deciding appeals against FIVB decisions, other than decisions from the IVT itself (the Appeal Chamber).⁸ Members of the IVT were individuals with a legal background appointed to the IVT by the FIVB. Parties to a dispute would nominate the “arbitrators” to hear their dispute from that pool of appointed members and any decisions issued by either of Arbitration Chamber or the Appeal Chamber were considered final and could not be reviewed by any other FIVB institution.⁹

While the IVT was established with the laudable intention of providing players, coaches, clubs, national federations and other members of the volleyball family with an independent, impartial and knowledgeable forum to resolve disputes, in reality, throughout its nearly 20 years of existence, it was rarely used. Moreover, the few decisions it did issue were not published.

In one instance however, the FIVB allowed a rare glimpse into the decision making of the IVT when it released information through a press release on a high profile case involving the expulsion of the then president of the Argentinean Volleyball Federation.¹⁰ Nevertheless, what became evident over time was that the laudable objectives of the IVT could not overcome its flaws.

Under Swiss law, the IVT could not meet the requirements of what it was trying to fulfil – an independent and impartial arbitral tribunal. Given that the IVT

⁷ A. NAPIER, ‘A confident future for Volleyball and Beach Volleyball’, FIVB VolleyWorld, September 2006, available *online* at www.aanapier.com/confident.html.

⁸ See FIVB Constitution (2006), Article 2.7.1.2.

⁹ See Statutes of the International Volleyball Tribunal, Article 1.3.4.

¹⁰ FIVB Press Release, ‘The International Volleyball Tribunal rejected Mr. Gojiman’s appeal and confirmed his expulsion’, 22 March 2004, available *online* at www.fivb.org/EN/Infomedia/PressRelease.asp?No=4476.

was created by the FIVB, financed by the FIVB, that its members were appointed by the FIVB and finally, that only the FIVB could amend its statutes, the links between the FIVB and the IVT were so strong that the independence of the IVT would be compromised if the FIVB became a party before it.¹¹ This reality therefore opened the IVT's decisions to scrutiny as they could be considered as internal FIVB decisions and recourse to state courts for annulment of a decision of the association would be possible.

Calls were made to reform the IVT to become a truly independent tribunal as well as allowing its decisions to be reviewed by CAS on appeal. The FIVB listened, and in 2012, FIVB became one of the last (if not the last) of the Summer Olympic International Federations to accept CAS as its final appeals body.

2. *A New System, a New Era*

2.1 *Main Principles*

2.1.1 *CAS as the Ultimate Appeals Body*

As a not-for-profit association organised under Swiss law, FIVB's decisions can be reviewed by the Swiss state courts unless the members of FIVB have agreed to submit the review of such decisions to a properly constituted and independent arbitral tribunal. The IVT arguably did not meet these conditions and required reform to bring the FIVB in line with Swiss legal requirements, if the FIVB wished to avoid review of its own decisions (including those of the IVT) by the state courts.

The first step towards restructuring was the decision taken by the FIVB Board of Administration in 2011 to approve CAS as the last instance appeals body for all disputes arising within the FIVB family and also to revise the lower-instance, internal dispute resolution procedures.¹² In January 2012, the then FIVB President Mr. Jizhong Wei formally revoked the FIVB's 1994 reservation to the Paris Agreement, the revocation being presented to and acknowledged by the CAS Secretary General, Mr. Matthieu Reeb. As a result, CAS would "replace the International Volleyball Tribunal as FIVB's ultimate dispute resolution body".¹³

Finally, in September 2012 during the FIVB Congress in Anaheim, USA the new Article 2.7 of the Constitution was approved, which, in addition to officially recognising CAS as FIVB's final appeals body and removing any reference to the IVT, it also approved the recognition of four (4) FIVB judicial bodies: the

¹¹ The IVT would not meet the criteria set out by the Swiss Federal Tribunal in its famous "Gundel" decision (Decision of 15 March 1993, *see* Matthieu Reeb, ed, *Digest of CAS Awards 1986-1998*, Bern 1998, pp.561-575), discussing the relationship between the CAS and the IOC.

¹² FIVB Press Release, 'FIVB to appoint CAS as ultimate dispute resolution body', 10 January 2012, available *online* at www.fivb.org/en/media/viewPressRelease.asp?No=33425&Language=en.

¹³ *Ibid.*

Disciplinary Panel, the Appeals Panel, the Ethics Panel and the FIVB Tribunal.¹⁴ In terms of the composition of these specialised dispute resolution bodies, as per Article 2.7 of the FIVB Constitution, the Congress in September 2012 elected members of the Ethics Panel and, later, in April 2013, the Board of Administration appointed members to the Disciplinary Panel, the Appeals Panel and to the FIVB Tribunal.¹⁵ Each of the five Confederations of FIVB is represented on the judicial bodies with at least one member.

2.1.2 *Categorisation of Disputes*

Through the reforms of the dispute resolution mechanism, a classification system for the types of disputes that are heard by the FIVB has been created. This approach allows for greater efficiency as it has arguably created specialisation within the different judicial bodies to deal with the unique issues specific to a particular category of dispute. The first category of disputes are the so-called “horizontal” disputes, namely disputes where the bargaining power of the parties is equal. These disputes typically arise between the FIVB and third parties and tend to be of a commercial nature, for example agreements with sponsors. In the vast majority of the respective contracts the FIVB defers any possible commercial dispute directly to CAS, which will decide under the rules of the Ordinary Arbitration Division as the first and final instance of dispute resolution.

The second category of disputes are the so-called “vertical” disputes, i.e. disputes arising within the pyramidal structure of FIVB, between persons belonging to different parts of the sports hierarchy e.g. between FIVB and an athlete. Any violation of the FIVB Constitution or Regulations by individuals, clubs, leagues, national member federations or Confederations¹⁶ will fall under this category of disputes. Depending on the issues, disputes of this nature will further be categorised as (a) ethical, (b) disciplinary, including doping, or (c) administrative disputes. Similar to most other IFs, which opt in favour of an internal appeals process before allowing recourse to CAS, the FIVB has adopted a three-tier process for vertical disputes whereby the FIVB will have the authority to exercise its disciplinary or administrative powers over members of the FIVB family through specialised judicial bodies. Such decisions may be challenged before an internal appeals body and, ultimately, CAS will act as the independent, external arbitral body deciding as the court of final instance.

The last category is “third-party” disputes of a financial nature that arise within the volleyball family but that do not involve the FIVB as a party. This would

¹⁴ FIVB Constitution (2012), available *online* at www.fivb.org/EN/FIVB/Document/Legal/FIVB_Constitution_en_20120920.pdf.

¹⁵ Current compositions of the panels can be found *online* at www.fivb.org/EN/FIVB/Judicial_Bodies.asp.

¹⁶ Confederations are associations of national federations within a continent e.g. the European Volleyball Confederation (CEV) for Europe.

include, for example, any financial disputes between a player and a club over their rights and obligations under an employment contract. For these disputes, the FIVB has established an innovative internal mechanism which provides a neutral instance of dispute resolution and allowing an appeal to and a full *de novo* hearing before CAS if any of the parties so wishes.

2.1.3 Principles of Natural Justice

All of the FIVB's judicial bodies will adhere to the general legal principles of natural justice: right against bias and a right to a fair hearing. It is vital that the new dispute resolution system is transparent and fair to all parties involved. All parties must be given notice of the opening of a procedure, the right to be heard, and the opportunity to present their case and evidence with the assistance of legal counsel. As such, unless the circumstances are urgent in nature, the judicial bodies will not impose a sanction before these requirements are met.¹⁷ However, it will remain in the panel's discretion how it wishes to hear the case, for example, solely in writing or also orally, and may authorize the use of whatever media is most efficient to hear the case, for example video or tele-conference. Thus, after evaluating the submissions, and taking into consideration all of the circumstances of the case, the FIVB judicial body will issue the decision after the stated deadline for written submissions or following an oral hearing.

It is important to note that the right of legal assistance is also extended to the competent FIVB judicial body. However, as these judicial bodies are not parties to disputes, this right is not intended to give the body legal representation. Instead it is to permit legal counsel to assist the panel in question in better understanding legal arguments, analyzing large amounts of data and other legal matters that arise.

2.2 "Horizontal" Disputes

The FIVB has taken a decision of principle, that the CAS Ordinary Arbitration Division shall be the forum for the final settlement of commercial disputes, arising – for example – within the framework of licensing or sponsorship agreements. Although not as frequently used as the CAS appeals procedure, the CAS Ordinary Arbitration Division is competent to decide on *all* types of pecuniary disputes related to sport; it derives this competence from Article R27 of the Code of Sports-related Arbitration which states that CAS has jurisdiction to resolve disputes of sports-related nature and from Article 177.1 of the Swiss Private International Law Act ("PILA") which provides that all pecuniary claims may be submitted to arbitration.

This leaves the door open for international federations, such as the FIVB, to refer disputes to the CAS jurisdiction even beyond the usual appellate duties of

¹⁷ See FIVB Disciplinary Regulations, Article 19. Said regulations are available *online* at www.fivb.org/EN/FIVB/Document/Legal/FIVB_Disciplinary_Regulations_en_20130404.pdf.

CAS. FIVB has appreciated the sport-specific expertise of the arbitrators who appear on the CAS list, including also well-known commercial arbitrators, and has consciously amended its contract policy in that respect. This policy is expressed through arbitration clauses inserted in the respective contracts, whereby the contracting parties agree to submit to CAS' exclusive jurisdiction any disputes related to the contract.

As mentioned before, while the CAS Ordinary Arbitration Division's general structure is similar to that of any other commercial arbitration institution such as the London Court of International Arbitration or the International Court of Arbitration of the International Chamber of Commerce, its benefit to the sporting world lies in the fact that its arbitrators are specialists in sports. Commercial issues in sports are very often exclusive to the sports world, for example dealing with image rights of the athletes, the homologation of sports equipment or the loss of sponsorship benefits following an event cancellation. Given these issues, it is important that the arbitrator is generally knowledgeable in all areas with respect to sports. This in turn ensures ongoing and greater consistency in sports related commercial decisions.

2.3 "Vertical" disputes

2.3.1 Disciplinary

The FIVB has the power to sanction individuals, clubs, leagues, National Federations, and Confederations for violations of the Constitution, Regulations, Rules of the Game and decisions issued by the FIVB. Under the umbrella of disciplinary disputes there are different FIVB bodies that can hear disputes and impose sanctions at the first instance level, depending on the type of offence which is being asserted.

FIVB disciplinary offences are subcategorised into (i) simple, (ii) major and (iii) institutional offences depending on the seriousness and type of the offence and the person/entity that committed them, in accordance with Article 7 of the FIVB Disciplinary Regulations:

- “7.1 The following sanctions may be imposed for a simple offence;*
- a) Warning;*
 - b) Reprimand;*
 - c) Monetary fine up to CHF 10,000;*
 - d) Repeal of a right (for example a suspension, i.e. prohibition from participation, for a given period of time, in any official activity within the sphere of the FIVB) up to six (6) months;*
 - e) A combination of the above sanctions.*
- 7.2 The following sanctions may be imposed for a major offence;*
- a) Monetary fine of more than CHF 10,000;*
 - b) Repeal of a right (for example a suspension, i.e. prohibition from participation, for a given period of*

- time, in any official activity within the sphere of the FIVB) of more than six (6) months;*
- c) Disqualification;*
 - d) Forfeit of match(es);*
 - e) Deduction of point(s);*
 - f) A combination of the above sanctions.*
- 7.3 *The following sanctions may be imposed for an institutional offence committed by NFs, Confederations, Zonal Associations and their officers;*
- a) Warning;*
 - b) Repeal of a right (for example a suspension, i.e. prohibition from participation, for a given period of time, in any official activity within the sphere of the FIVB);*
 - c) Discharge from official position(s) within the FIVB and/or the Confederations and/or the Zonal Associations and/or the NFs;*
 - d) Withdrawal of recognition of the Confederation;*
 - e) Dissolution of the Zonal Association;*
 - f) Expulsion;*
 - g) A combination of the above sanctions ”.*

Although anti-doping rule violations also fall under the umbrella of disciplinary disputes, given the mandatory application of the World Anti-Doping Code as well as the scientific understanding and medical knowledge required when evaluating evidence related to anti-doping cases, these instances are given distinct treatment which will be discussed further in section 2.3.2 below.

For major disciplinary offences, such as violent conduct or offences in refereeing, the FIVB Disciplinary Panel is competent to hear the dispute and impose sanctions. The Panel is composed of one Chairperson, one Vice-Chairperson and three members appointed by the FIVB Board of Administration for a renewable term of four years between the sessions of the FIVB elective Congress.¹⁸ In addition, all Confederations must be represented by a member on the Panel. If a dispute arises whereby one of the parties is of the same nationality as a member on the Panel, the FIVB applies the principle of “neutral nationality”.¹⁹ In that instance, the FIVB President shall appoint a substitute member to the Panel, coming from the same Confederation, to hear the case in question.²⁰ In terms of simple disciplinary offences, i.e. offences which incur a lower sanction, the FIVB President is competent to resolve the dispute and determine the sanction, but retains the discretion to refer the matter directly to the FIVB Disciplinary Panel. For both major and simple offences (which the President has referred to the Disciplinary Panel), the Panel will

¹⁸ See FIVB Disciplinary Regulations, Article 18.1.

¹⁹ This principle is applied to all the judicial bodies of the FIVB, including the Appeals Panel.

²⁰ See FIVB Disciplinary Regulations, Article 18.2.1.1.

be constituted as a five member panel, composed of all its members.

Offences occurring during FIVB competitions,²¹ however, need to be treated differently since competitions, especially in volleyball, are fast paced situations where an allegation against an athlete, team, or national federation must be decided in an expedited manner. Should simple or major offences occur during competition, a special body with limited *ratione temporis* competence is formed, called the Appeals Sub-Committee, which is chaired by either the FIVB President or his representative.

The purpose of this body is to provide fair and timely decisions which allow the competition to continue without unnecessary delay or disruption. Given its purpose, the Appeals Sub-Committee is only competent to hear disputes for the period of the competition for which it is appointed. It has the authority to coordinate all aspects of the competition and make the final decision with respect to any protests or complaints about the organization, match results, medical and refereeing issues after consultation with the sub-committee or delegate in question.²² While the Appeals Sub-Committee's decisions are final, they are – as is its jurisdiction – applicable only for the period of the competition. As a result, further sanctions may be imposed by the competent FIVB body. As such, the Appeals Sub-Committee has the additional responsibility to transmit to the FIVB a complete documentation package outlining the facts, official documentation and evidence within 24 hours of the end of the competition, so that the issues may be further evaluated by the competent FIVB body.

The third category of offences are institutional offences. These deal exclusively with the suspension and expulsion of National Federations and the sanction of a Confederation or Zonal Association.²³ A Confederation or Zonal Association may be sanctioned under these provisions for breaching the FIVB Constitution or their obligations as an FIVB institution under the FIVB Regulations, in particular the FIVB General Regulations. A National Federation may be considered for suspension if it failed to fulfil its obligations as a member of FIVB, e.g. if it failed to pay its FIVB membership fee, or to comply with provisions of the FIVB Constitution.

²¹ The CAS Ad Hoc division resolves finally any disputes that occur during the Olympic Games, including the volleyball and beach volleyball tournament.

²² See FIVB Sports Regulations, Articles 9 and 13.5.1 with reference to complaints filed during a match (and decided in the first instance by the so-called Judges Conference) and after the match. In all cases, the Appeals Sub-Committee is competent to decide the matter finally. In instances where an Appeals Sub-Committee is not formed, as is usually the case for individual matches played in different countries in the framework of a FIVB competition (e.g. World League or World Grand Prix) the Control Committee or the FIVB Delegate are competent to decide on site any controversy affecting the development of the Competition with no further appeal. See FIVB Sports Regulations, Article 46.7.3. Said regulations are available *online* at www.fivb.org/EN/FIVB/Document/Legal/FIVB_Sports_Regulations_en_20130515.pdf.

²³ Zonal Associations are the different zones within a confederation, e.g. the Asian Volleyball Confederation has 5 zonal associations: Central Asia, Eastern Asia, Oceania, South Eastern Asia and Western Asia.

Grounds for expulsion on the other hand are more serious and are found where the National Federation either (i) repeatedly breached the FIVB Constitution or Regulations, (ii) severely or repeatedly breached the fundamental principles of the Constitution or ethical principles, (iii) failed to fulfil its financial obligations for an extended period of time, or (iv) lost its status as a National Federation through inquiries made in conjunction with national authorities and confirmed by the FIVB.²⁴ In all cases of expulsion, the FIVB Congress has the exclusive competence to hear and determine the issue. In all other cases, the FIVB Board of Administration is the competent body to impose sanctions for institutional offences.

It is important to note that for all decisions, other than decisions relating to field of play matters, doping matters or decisions issued by the Appeals Sub-Committee or by Congress, there is a general right of appeal to the FIVB Appeals Panel. The parties must make their appeal to the Appeals Panel in writing within fourteen days of notification of the decision. Upon filing of the appeal, the appellant must attach a copy of the decision being appealed and is required to pay an administrative fee of CHF 2.000,-. The appeal does not have suspensory effect, unless otherwise decided by the Panel. All five members of the Appeals Panel, composed of one Chairperson, one Vice-Chairperson and three members appointed by the FIVB Board of Administration will hear the appeal and decisions are taken by a majority. Unlike the Disciplinary Panel, all members of the Appeals Panel must have legal training and cannot hold any other position within the FIVB or its Confederations.

In turn, only after the parties have exhausted all internal remedies is a further appeal to CAS permitted. CAS shall have exclusive jurisdiction to definitely settle the dispute in accordance with the CAS Code. The parties concerned will undertake to comply with the CAS Code and accept and enforce CAS decisions in good faith. In addition, non-observance of sanctions imposed under the FIVB Disciplinary Regulations constitutes *per se* a major offence.²⁵

Lastly, it is important to note that – like most International Federations – the FIVB has the right to decide whether and to what extent disciplinary decisions taken by other organizations (e.g. the IOC, a Confederation, a Zonal Association, a NF etc) are to be applied worldwide, provided that such decisions comply with general principles of law and with the FIVB Constitution and Regulations.

2.3.2 Doping

The FIVB Disciplinary Panel sitting in a special composition, which includes a medical doctor, hears all doping violations within the FIVB. It has the power to sanction players found in breach of the FIVB's Medical Regulations which govern anti-doping within the volleyball family.

Volleyball, however, has historically been a low risk sport for doping. Given

²⁴ See FIVB Sports Regulations, Article 13.5.1.

²⁵ See FIVB Disciplinary Regulations, Article 9.

the number of doping control tests performed each year by FIVB,²⁶ the number of doping cases in volleyball is significantly low considering the FIVB holds the position as the largest (in terms of membership) international federation in the world. Nonetheless, the body formerly known as Anti-Doping Hearing Panel has been the FIVB's most active judicial body²⁷ having issued 4 decisions in 2010,²⁸ 1 in 2011²⁹ and 1 in 2012.³⁰ All decisions rendered by the Panel are ultimately published on the FIVB website.³¹

For anti-doping rule violations, a panel of three members is constituted, composed of two members of the Disciplinary Panel who are appointed by the Disciplinary Panel's Chairperson, and one member of the Medical Commission appointed by the Medical Commission's President. Anti-doping hearings must respect the principles set out in Article 8.3 of the FIVB Medical Regulations which have been drafted on the basis of the WADA Model Rules for International Federations and require that the athlete be informed in a fair and timely manner of the alleged anti-doping rule violation. Prior to the Panel issuing a finding of a rule violation and applying sanctions, the athlete has the right to respond to the alleged anti-doping rule violation and present evidence to support his response. The athlete also has the right to be represented by legal counsel. In addition, Article 8.3 requires that the hearing be held in a timely manner and conducted by a fair and impartial panel. As

²⁶ Out of 1399 samples collected by FIVB between 2009 and 2011, only 1 produced an Adverse Analytical Finding ("AAF"). Out of 440 samples collected by the Confederations between 2010 and 2011, only 4 produced an AAF. According to the WADA statistics, the ratio between samples collected and AAFs for the previous years was: 0.96% (2006), 0.84% (2007), 0.67% (2008) and 0.80% (2009) [information provided to the authors by the FIVB].

²⁷ It is noteworthy that, although the FIVB introduced in its 2008 General Regulations (Article 1.6.1) a Disciplinary Committee as "an advisory organ of the Board of Administration", such body did not hear any cases in the 4 years of its existence. However, two members of the Disciplinary Committee were often appointed to hear doping cases as Anti-Doping Hearing Panel, with the participation of a member from the Medical Commission. This latter combination of know-how and experience was proven successful and has survived in the 2012 revision of the FIVB Disciplinary Regulations.

²⁸ FIVB Anti-Doping Panel decision issued 13 July 2010 against Gregory Berrios (PUR) available *online* at www.fivb.org/EN/Medical/Document/Doping_case_2502283_ADHP_Decision_Berrios%28PUR%29.pdf, the CAS amended the decision upon appeal and imposed a 1-year ban, starting from an earlier date (CAS 2010/A/2229); FIVB Anti-Doping Panel decision issued 19 September 2010 against Sirianis Mendez Hernandez (CUB) available *online* at www.fivb.org/EN/Medical/Document/Doping_case_ADHP_Decision_Mendez_Hernandez%28CUB%29.pdf; FIVB Anti-Doping Panel decision issued 13 October 2010 against Ramon Burgos (PUR) available *online* at www.fivb.org/EN/Medical/Document/Doping_case_1897763_ADHP_Decision_Burgos%28PUR%29.pdf; FIVB Anti-Doping Panel decision issued 14 October 2010 against So-Jin Lee (KOR) available *online* at www.fivb.org/EN/Medical/Document/Doping_case_3369778_ADHP_Decision_Lee%28KOR%29.pdf

²⁹ FIVB Anti-Doping Panel decision issued 4 November 2011 against Nataliya Chernetska (UKR), available *online* at www.fivb.org/EN/Medical/Document/Doping_case_2654034_ADHP_Decision_Chernetska_%28UKR%29.pdf

³⁰ FIVB Anti-Doping Panel decision issued 28 November 2012 against Kumar Umang (IND), available *online* at www.fivb.org/EN/Medical/Document/Doping_Case_UMANG_Kumar_Decision_28.11.2012.pdf.

³¹ See www.fivb.org/EN/Medical/AntiDopingProgramme.asp.

such, to remove any bias or perceived bias, like all other FIVB judicial bodies the Panel is constituted applying the principle of “neutral nationality”. Upon the conclusion of the hearing, the panel will issue a timely, written, reasoned decision, specifically including an explanation of the reasons for any period of ineligibility or acquittal.³²

Like with all disputes, there is a general right of appeal. What is specific to doping disputes is that the appeal can be filed directly with CAS, without the need to seek a review of the Disciplinary Panel’s decision by the FIVB Appeals Panel. In fact, the first ever CAS case involving the FIVB was initiated by WADA in 2010, challenging a decision of the (then) Anti-Doping Hearing Panel.³³

2.3.3 Ethics

Modelled after the International Olympic Committee’s Ethics Commission, the FIVB Ethics Panel is authorised to perform specific functions, namely to examine possible violations of the FIVB’s rules on Ethics and to propose disciplinary actions. Prior to the FIVB’s reform of its dispute resolution system, ethics were governed under Part I of the – highly criticized for its vague and very restrictive provisions – FIVB Code of Conduct. The new ethics section of the FIVB Disciplinary Regulations is drafted on the basis of the IOC’s Code of Ethics and incorporates *verbatim* several provisions thereof.

In order to stress the independent role that the Ethics Panel shall exercise over all FIVB institutions, including the FIVB President and the FIVB Board of Administration, the members of the Ethics Panel are elected directly by the FIVB Congress.

The Ethics Panel can conduct investigations of breaches of the FIVB rules on Ethics in cases submitted to it by the FIVB President, Board of Administration or the Congress. While the Panel cannot itself impose sanctions or discipline the breaching party, it performs an advisory function to the Board of Administration or Congress by providing an opinion and recommendations of suitable penalties applicable to the breaching party. It is also charged with performing any other task, linked to the development of and respect for the ethical principles, assigned to it in the FIVB Constitution, the Disciplinary Regulations or by the FIVB Board of Administration and/or the FIVB President.³⁴

2.3.4 Administrative

The category of administrative disputes applies mainly to issues surrounding transfers and eligibility of players to play for a certain club or national team. In such matters

³² See FIVB Medical Regulations, Article 8.3. Said regulations are available *online* at www.fivb.org/EN/FIVB_Medical_Regulations_en_20130404.pdf.

³³ CAS 2010/A/2229 WADA vs. FIVB and Berrios.

³⁴ See FIVB Disciplinary Regulations, Article 4.3.2.

the FIVB makes use of its powers as governing body and determines, in a binding manner for the persons in question, whether the requirements of the FIVB Sports Regulations are met and the rights derived therefrom (e.g. right to participate in competitions) can be exercised.

2.3.4.1 Eligibility

The general rule for eligibility is that “any player who fulfils the requirements of the rules on nationality, age and sex is eligible for participation in FIVB competitions, including the Olympic Games and qualifying tournaments, provided that he complies with the principles of affiliation established by the National Federation of the country of his nationality and fulfils the conditions set out in the FIVB Sports Regulations.”³⁵ In addition, only nationals of a country, or naturalised players, can play for the national team of that country. A key aspect of these provisions is that the athlete must have as “Federation of Origin” the national team’s federation, namely the national federation which was the first to issue a license or register the player, regardless of the player’s citizenship.³⁶

The FIVB Board of Administration, or under certain urgent circumstances the FIVB President or the Executive Committee, is competent to decide on the interpretation or violations of the rules for the eligibility of a player.³⁷ However, it may rely on the Legal Commission to provide its opinion and advice on the matter. If the Board of Administration or other competent body finds that there has been a violation of the rules, it may cause the FIVB to revoke the player’s eligibility to participate in FIVB competitions as well as in the Olympic Games and their qualifying tournaments.

2.3.4.2 Transfers

The FIVB Sports Regulations include a set of provisions relating to transfers. Said regulations are in place to regulate and promote volleyball according to the general principles of equality, fair play and fair competition in each national federation and across the board of 220 member federations. The rules govern the procedure that national federations, clubs and players have to follow in order to complete a transfer and make the registration of a foreign player possible. However, unlike other international federations, FIVB and its member national federations are directly involved in the *authorisation* of player transfers. In fact, all International Transfer Certificates (“ITCs”) require approval by the national federations involved and by FIVB or the respective Confederation (if the transfer occurs within the continent) before a player can be legally registered with a national federation other than his own Federation of Origin.

³⁵ See FIVB Sports Regulations, Article 43.1.

³⁶ See FIVB Sports Regulations, Article 41.4.

³⁷ See FIVB Sports Regulations, Article 44.1.

Often disputes under the transfer and eligibility regulations relate to whether a particular club can qualify as a “Club of Origin” (whose consent would also be required for the authorisation of the transfer), whether an athlete may change his or her “Federation of Origin”, or whether an athlete can be released during a season while under an ITC. At the heart of many of these disputes are typically financial benefits or the lack of financial compensation. For example, before a transfer is completed, the Club of Origin will typically receive payment from the Receiving Club for the transferred player. Thus, a financial incentive exists for a club to argue that it is the player’s Club of Origin. Considering that an ITC can be issued for a maximum period of one National League season (16 October – 15 May), the number of disputes to date has been relatively low.

The FIVB Sports Regulations provide that if two parties are involved in a dispute over agreements made on the occasion of an international player transfer, at the request of the national federation, the player or club, the FIVB is entitled to mediate the dispute by facilitating negotiations and financial settlement discussions. However, the parties equally have access to the specially designed complaint procedure (see below 2.4) in order to resolve the dispute.

Appeals against administrative decisions of the FIVB can be filed before the FIVB Appeals Panel, within the general time limit of fourteen days from notification of the decision. The procedure will be conducted in accordance with Article 22 of the FIVB Disciplinary Regulations, meaning that the appeals process is the same for all types of “vertical” disputes within FIVB. Similarly, the decision of the FIVB Appeals Panel may ultimately be challenged before CAS within twenty-one days following receipt of the decision.

2.4 Financial Disputes

The FIVB’s financial dispute resolution system is one of the FIVB’s most innovative processes. Due to an increasing number of complaints of a financial nature arising among members of the volleyball family, the FIVB decided in April 2013 to introduce a dedicated process for these types of disputes. Most frequently these disputes relate to breaches of the employment contract between the club and player or coach. As such the procedure designed by FIVB in collaboration with its Confederations only deals with resolving financial, volleyball-related disputes of an international dimension between players, coaches and clubs (or between coaches and national federations). Most importantly, however, this system represents a true service to the sport as it is free of charge for all users, with the funding primarily deriving from the ITC income.

In establishing the method by which financial disputes are to be resolved, the FIVB endeavoured to create a structure which combined the positive characteristics of internal processes found within other international federations with certain key principles of international arbitration. Such structure should fit to the current sporting structure and political environment in international volleyball.

First, the FIVB established itself as having default jurisdiction as a first

instance body responsible to resolve financial disputes.³⁸ In certain circumstances the FIVB extends default jurisdiction to a particular Confederation, but only if both parties come from that Confederation.³⁹ Otherwise, the FIVB will be the competent body to administer and decide the dispute. Experience has shown that the intervention of the FIVB often allows the parties to settle their dispute amicably, without a need for a decision. For this reason, the rules provide for FIVB's authority to assist the parties in reaching a settlement. Such settlement may be submitted to the FIVB, which will monitor its implementation.

As a quasi-judicial body of first instance, the FIVB (or appropriate Confederation) will filter the simple debt-collection cases from the more complicated financial matters. Where the issues are more complex, or where the FIVB or Confederation does not have the capability, the dispute can be referred directly to the FIVB Tribunal.

To initiate a dispute under this procedure the affected party must file a complaint with the FIVB or Confederation. The complaint will include the names and contact information of the parties, a summary of facts and legal arguments, the Claimant's request for relief, Claimant's bank details, a copy of the employment contract and all written evidence that the Claimant intends to use to prove his or her allegations.⁴⁰ The FIVB or Confederation will review the Complaint, and if there are no deficiencies, will inform the Respondent and set a time limit for a response. Once the case file is complete the FIVB or Confederation will evaluate the submissions and issue a decision based on the balance of probabilities and applying general principles of justice and fairness. The decision may set out a time limit for the parties to comply and determine that non-compliance will result in sanctions.

After a decision is issued by the FIVB or Confederation, any affected party may request that the case be reviewed by the FIVB Tribunal. The party must file a Request for Review with the FIVB Tribunal Secretariat within fourteen days from the notification of the decision. The Tribunal is composed of one Chairperson, one Vice-Chairperson and three members appointed by the FIVB Board of Administration. Cases before the Tribunal will be heard by all five members, who must all have legal training and experience in the resolution of international sports disputes. Exceptionally, in case a decision of a Confederation is under review, the Tribunal will decide through a single judge, being the member of the Tribunal coming from the same continent. Like all of the FIVB's judicial bodies, all Confederations shall be represented on the FIVB Tribunal⁴¹ and the principle of

³⁸ This approach is similar to the one adopted by FIFA regarding its Dispute Resolution Chamber.

³⁹ To date, the FIVB has delegated such authority to two Confederations: the CEV (Confédération Européenne de Volleyball) and to NORCECA (North, Central America and Caribbean Volleyball Confederation) which are competent when all members involved in a dispute come from the Confederation's continent.

⁴⁰ A template complaint is available *online* at www.fivb.org/EN/FIVB/Document/Legal/FIVB_Complaint_Template.zip.

⁴¹ See FIVB Tribunal Regulations, Article 2.

“neutral nationality” applies as well.

Proceedings before the FIVB Tribunal will be conducted in writing, including through facsimile and email, promoting speed and efficiency. In fact these principles have become part of the Tribunal’s mandate, to resolve disputes in a fair, fast and inexpensive manner. Once the Tribunal is seized of a dispute, and the parties have provided their submissions,⁴² the Tribunal shall review the facts and the law of the dispute and apply the comfortable satisfaction standard of proof. This is a higher standard than that of a balance of probabilities applied in the first instance and requires the Tribunal to determine the claim against the Respondent, which depends wholly on the facts and arguments submitted.

The FIVB Tribunal will decide disputes *ex aequo et bono* i.e. applying general considerations of justice and fairness without reference to any particular national or international law.⁴³ Once the proceedings have been completed the Tribunal shall issue a written decision with reasons, no later than 6 weeks following the end of the proceedings. As with most FIVB judicial body decisions, the parties have as a final remedy the option to appeal the decision of the FIVB Tribunal directly to CAS.

The FIVB Tribunal started its operations on 15 May 2013. As of today, disputes are still pending at the level of FIVB or Confederation without (yet) a case having been submitted to the FIVB Tribunal or finally to CAS. The efficiency of this system, in particular the efficiency and legal viability of the first-instance quasi-judicial treatment of the cases by the FIVB / the Confederations, can be evaluated only after a sufficient number of cases have tested its limits.

3. Conclusion

It is evident that the FIVB reforms of 2012 and 2013 aim to achieve a type of hybrid system whereby the FIVB undertakes to preserve, as much as possible, the integrity of the sport by managing its dispute resolution system through the new internal judicial bodies, but ultimately give deference to CAS for issues that cannot be resolved within the volleyball family.

Through the adoption of these reforms, the FIVB’s dispute resolution process has become more accessible, transparent and efficient, while still maintaining its sport-specific character. Furthermore, it has become compliant with Swiss law

⁴² A Request for Review shall contain the names and contact information of the parties, a summary of facts and legal arguments, copy of the decision being appealed (or the referral from the FIVB or Confederation), the Appellant’s request for relief, and all written evidence that the Claimant intends to rely on, and any request for a hearing and for the examination of witnesses; *see* Article 8 of the FIVB Tribunal Regulations. The Respondent’s Answer shall contain a statement of defence including all facts and legal arguments, names, address, and nationality of Respondent’s counsel, all available evidence upon which the Respondent intends to rely, request for hearing or examination of witnesses, and any counterclaim and details of the relief sought; *see* Article 10 of the FIVB Tribunal Regulations.

⁴³ *See* FIVB Tribunal Regulations, Article 13, which is similar to the principle first introduced by FIBA for its Basketball Arbitral Tribunal.

by allowing appeals to CAS for all types of disputes, providing for an independent and specialised private-judge instead of the general recourse to state courts.

FROM COURT TO COURTS: AN OVERVIEW OF THE EHF HANDBALL DESIGNED LEGAL SYSTEM

by *Monika Flixeder** and *Loïc Alves***

SUMMARY: 1. Introduction – 2. Judicial bodies – 3. Categories of decisions – 4. The EHF Court of Arbitration – 5. Conclusion

Abstract:

Over the past twenty-one years the EHF established a legal system which is perfectly adapted to the needs of handball stakeholders and ensures an efficient and fast way of dispute resolution. The system consists of two stages of appeal and an external Court of Arbitration. Having been in existence for twenty-two years, the EHF used best efforts to implement and establish a legal system adopted to the handball stakeholders' needs in order to resolve disputes efficiently.

1. Introduction

The European Handball Federation (hereinafter also referred to as the “EHF”) was established in 1991, the first decision taken by a legal body is dated from 1994. The same year, less than ten decisions were released, and the EHF legal system was only composed of one arbitration commission and of administrative bodies. In 2000, following the work of an expert group, new arbitration regulations were adopted. In 2007, the EHF Court of Arbitration was created and became fully effective in 2009. The current EHF system composed of two internal instances (The EHF Court of Handball and the EHF Court of Appeal) and one external court of arbitration was settled in 2011 during the last EHF Congress. During the season 2011/2012, 61 decisions were released by the internal EHF bodies (EHF Court of Handball, EHF Court of Appeal and Administrative bodies). The number will hold steady for the season 2012/2013. It is obvious that the evolution of the EHF legal

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system correlated with the fast growth of the sport of handball. The creation of the EHF Court of Arbitration constitutes the main recent development, however, regarding the regular meetings held by the different bodies, the EHF office and elected members permanently seek to improve an effective system while taking into consideration the evolution of handball as well as the need to comply with European and states laws.

2. *Judicial bodies*

The structure of the EHF legal system is hereby presented through an overview of the different bodies handling disputes within the different competitions carried out by the EHF.

2.1 *Legal bodies*

According to the EHF statutes¹ and the EHF Legal regulations,² the EHF Court of Handball (body of first instance) and the EHF Court of Appeal (body of second instance) are the legal bodies of the EHF, bodies composed and operating in light of two central principles, independence and impartiality.

2.1.1 *Common provisions applying to both bodies*

Members of each body are elected by the Congress for a four-year period of office and shall not hold any other elected function in the EHF. Furthermore, serving in the same function is limited to a maximum of three terms of office and an age limit is set³ (i.e. sixty-eight years old at the time of election or re-election). In order to enable the legal bodies to take into consideration the multidisciplinary dimension of issues brought to them within the framework of disciplinary/legal proceedings the members are not exclusively jurists. Consequently, both bodies are composed of people having different backgrounds such as referees, delegates, former players or member of national federations.

It follows therefrom that the composition of the panels nominated to settle cases and pass decisions is essential for the sake of due process. Each legal body, while deciding upon a case, is composed of three members appointed by the President of the relevant body on a case-by-case basis.⁴ The role of the President is essential while appointing the members, depending on the nature of the case; various elements must be taken into consideration such as the function of the members, the nationality of the referees (i.e. in disciplinary cases) and also of the delegates, as well as the country of third party which might be affected by the decision.

¹ See EHF Statutes, Article 5.

² See EHF Legal Regulations, Article 22.

³ See EHF Statutes for more details, Articles 3.3.3, 3.3.4 and 3.3.6.

⁴ See EHF Legal Regulations, Articles 23.2 and 24.2.

Furthermore, the President of the relevant body shall verify the formal admissibility of the protests before officially informing the parties on the opening of any kind of proceedings.⁵ The President shall proceed in accordance with the Regulations applicable to the case.

Presidents are consequently acting as guardians of the principles of independence and impartiality established as a foundation of the legal system created by the EHF.

In the EHF legal system, proceedings may be initiated in five different ways as follows:

- Proceedings are automatically initiated if a match report contains remarks or a special report is submitted by EHF Officials.⁶
- Proceedings may be initiated by submissions or protest by the clubs and/or national federations.⁷ As a matter of principle, a refundable registration fee of Euro 1000 shall be paid within two days by the claimant.
- Proceedings may be initiated when the EHF is alerted by third parties of circumstances that may constitute an infringement of any kind (disciplinary, administrative, competition). In such a case, the opening of proceedings is not automatic; the EHF Office shall review the relevance of the submission and, if deemed appropriate, may require the opening of proceedings.⁸
- Proceedings may be initiated by the EHF on the basis of its own and/or other parties' observations. However, before requesting the opening of proceedings, preliminary investigations must be conducted.⁹
- Proceedings may be initiated by the initiator of proceedings, on behalf of the EHF.¹⁰ The initiator of proceedings is appointed by the Executive Committee of the EHF for a period of two years. His role is to ensure a fair balance in all legal proceedings, this is the reason why he has the competence to initiate legal proceedings and also to appeal first instance decision of the EHF administrative or legal bodies and to file claims before the EHF Court of Arbitration.

Regarding the conduct of proceedings, as a matter of principle, they shall be conducted in writing. Except within the framework of administrative decisions, once the parties were informed in writing of the opening of proceedings, the parties are invited to provide written statements and any documents deemed significant. However, the legal bodies and/or the parties have the right to request the proceedings to be conducted orally and/or through the organisation of a hearing. This second possibility is rarely undertaken, the cost-efficiency desired by the stakeholders as well as the flexibility of the legal bodies while setting the deadlines for the parties effectively ensure the right of the parties to be heard.

⁵ See EHF Legal Regulations, Article 30.

⁶ See EHF Legal Regulations, Article 27.

⁷ See EHF Legal Regulations, Article 28.1.

⁸ See EHF Legal Regulations, Article 28.5.

⁹ See EHF Legal Regulations, Article 28.6.

¹⁰ See EHF Legal Regulations, Article 26.

2.1.2 Provisions relating to the EHF Court of Handball

The EHF Court of Handball is the body of first instance for disciplinary adjudication,¹¹ composed of one President, two Vice-Presidents and five Members¹² it constitutes the keystone of the EHF legal system since this is, by far, the body having to decide upon the largest number of cases every season. The diversity of issues which may be brought to the EHF Court of Handball and the few number of appeals lodged against its decisions underline the competence of this body. For instance, from the 44 decisions released by the EHF Court of Handball within the framework of the season 2011/2012, only 8 were appealed. Indeed, except cases relating to transfer issues, administrative violations regarding the list of administrative sanctions as well as decisions dealt with by the EHF on-site bodies, the EHF Court of Handball is competent to decide upon disciplinary, marketing, competition or any other type of regulations infringements.

As already mentioned in 2.1.1 *supra*, the formal admissibility of protests, submissions or requests to initiate proceedings shall be verified by the President of the EHF Court of Handball, the same holds applicable for the EHF Court of Appeal.

2.1.3 Provisions relating to the EHF Court of Appeal

The EHF Court of Appeal is the body of second instance for disciplinary adjudication.¹³ It is composed of one President, one Vice President and five Members. Even though the cases brought before the EHF Court of Appeal are fewer than the cases before the EHF Court of Handball, the range of issues which might be brought before this second instance body is wider. Indeed, in addition to the EHF Court of Handball decisions, the EHF Court of Appeal is responsible as second instance in case of appeal against transfer related decisions, administrative decisions, as well as appeals lodged against first instance decisions of the EHF on-site bodies taken during EURO Qualification matches, the EHF Cup Finals and the VELUX EHF FINAL4. However, in order to ensure a quick decision during such events, *ad hoc* Commissions composed of three EHF Court of Appeal members may be appointed by the President, (*See supra* 2.3). As a matter of principle, a refundable appeal fee of Euro 1000 shall be paid by the Appellant.

2.2 Administrative bodies

The EHF administrative bodies are formed by the relevant EHF Office departments, deciding as first instance in cases relating to administrative infringements according to the Catalogue of Administrative Sanctions, as well as in cases relating to players transfers between EHF member federations.¹⁴ It is important to distinguish transfer

¹¹ See EHF Statutes and EHF Legal Regulations, respectively articles 5.1 and 22.3.

¹² See EHF Statutes and EHF Legal Regulations, respectively articles 5.2 and 23.1.

¹³ See EHF Statutes and EHF Legal Regulations, respectively articles 5.2 and 22.5.

¹⁴ See EHF Statutes and EHF Legal Regulations, respectively articles 13.5 and 21.

cases from administrative cases, since transfer decisions are not of administrative nature even though the competent body of first instance is the relevant EHF Office department.

When deciding upon administrative infringements, the relevant EHF Office department is bound by the sanction laid down in the Catalogue of Administrative Sanctions.

Last season, 10 administrative decisions were taken by the relevant departments of the EHF; no appeal was lodged against these decisions, demonstrating the efficiency and fairness of the rank of sanctions laid down in the Catalogue.

2.3 *On-site bodies*

In order to comply with the need of quickness and effectiveness required in international tournaments, Disciplinary Commissions, acting as on-site bodies, are settled for competitions such as the EHF EURO, the EHF Cup Finals or the VELUX EHF FINAL4. As a matter of principle, protests relating to date, time, venue and draw of the matches, nomination of referees and delegates as well as referees' decisions on facts in accordance with the Rules of the Game shall not be permitted. Regarding the cost, a refundable protest fee of Euro 1000 shall be paid directly to the EHF delegate or transferred to the EHF bank account. The Disciplinary Commission, consisting of three members (and two substitutes only for EHF EURO competitions) chosen from the EHF Officials present at the venue shall release their decision no later than 12:00 pm (noon) the day after the relevant match to guarantee a fair competition. Regarding the appeal procedure, the EHF Court of Appeal is the competent body in case of appeal within the frame of the EHF Cup Finals or the VELUX EHF FINAL4. However, an on-site body, so-called Jury, consisting of three members (and two substitutes), which must not have been members of the Disciplinary Commission, is competent as second instance in EURO Competitions (both for Adults and Youth Competitions).

The organisation diverges in the frame of the EURO Qualifications (both for Adults and Youth Competitions), for which the procedure is different if the Qualification phase takes place as a simple match or a tournament. In case of a single match, the EHF Court of Handball is competent as first instance. As two single matches can take place the same week, the EHF Court of Handball might have to take decisions in a short lapse of time. In case of tournament, the EHF delegate acts as the legal body in first instance which draws the necessity to have competent delegates having knowledge of the relevant EHF Regulations. Contrary to single matches, for which the Court of Appeal is competent in second instance in its general form, the Court of Appeal is acting through an *Ad hoc* Commission in case of appeal during a tournament, Commission not having the obligation to be present on-site. The President therefore nominates the three members to compose the commission prior to the beginning of the tournament.

Decisions taken by the EHF Court of Appeal, regardless its form may be

brought to the EHF Court of Arbitration within 21 days following the delivery of the decision.

3. *Categories of decisions*

In the following part, based on observed evolutions in the legal cases brought before the EHF judicial bodies, a dichotomy between what could be identified as “classic” disputes and “recent” disputes will be presented.

3.1 *Classic disputes in the field of sports*

By “classic”, it has to be understood disputes relating to the core organisation of the sport of handball. The most relevant categories are hereby presented.

3.1.1 *Disciplinary proceedings*

The main category pertains to disciplinary violations such as direct disqualifications of players or coaches for violation of the Rules of the Game. For the season 2011/2012, of the 66 cases brought before the different EHF judicial bodies, 25 were related to red cards. The crucial point for the EHF judicial bodies, mainly the EHF Court of Handball, is to be able to establish a guideline in the range of imposed sanctions¹⁵ while every dispute is different and must be dealt with on a case-by-case basis. This difficulty is shown by the fact that 50% of the decisions appealed belonged to this category.

To pass the decisions in disciplinary disputes due to red cards, the EHF Court of Handball relies on the referees’ report in which they have to describe the incident, the match report, the statement of claim and of defense as well as any other evidence provided, such as the video of the incident when available.

3.1.2 *Transfer disputes*

Decisions rendered on transfer disputes predominantly concern the issuance of International Transfer Certificate for professional players since the national federation may refuse to issue this certificate if a player is still under an employment contract with the club of the releasing national federation.¹⁶ The question brought to the first instance body is therefore to determine whether a valid employment contract remains in force between the parties at the moment of the required transfer. In such a case, before the release of any decision, both parties are invited by the relevant EHF Office department (i.e. Transfer department) to provide their statement together with any document deemed significant for the case. The first instance decision can be appealed within seven days to the EHF Court of Appeal. As a last

¹⁵ See EHF Legal Regulations, articles 14 and 15.

¹⁶ See IHF Regulations for Transfer between Federations, article 4§1.

legal remedy, the appeal decision can be brought before the EHF Court of Arbitration within twenty-one days.

3.1.3 Competitions-related disputes

Defining the disputes relating to competition issues in one unique category is complicated since a wide range of issues arise from EHF competitions. In the following part, the attention will only be drawn on one kind of infringement which had grown over the last years, i.e. clubs withdrawals from EHF competitions. It should be specified that withdrawals do not only concern club competitions, however the situation of withdrawals mainly concern clubs, the focus will therefore be put only on it. Therefore, in the season 2012/2013, five cases of clubs withdrawing from EHF competitions after the first draw of the respective competition took place were brought before the EHF Court of Handball. As a comparison, only two cases were dealt with by the EHF Court of Handball for the season 2011/2012. The reasons of club withdrawing are obviously linked to financial struggle, some of them being forced to go bankrupt, notably AG Copenhagen that went bankrupt after having played the VELUX EHF Final4 in 2012. Withdrawals, specifically withdrawals taking place after the registration of a club in a competition, endanger the sustainability and the fair balance of which the EHF shall safeguard in its competitions. When deciding upon the sanction to be imposed, the EHF Court of Handball shall impose a fine for which the amount is laid down depending on the concerned competition and may impose a suspension prohibiting entry to EHF club competitions for up to two seasons.¹⁷ However, in order to enable the EHF Court of Handball to pass decisions more adapted to the club specific situation, the EHF Legal Regulations will be adapted in order to set a wider range of fines to be imposed.

3.2 Recent disputes arising in handball: the example of marketing-related disputes

By “recent”, it has to be understood disputes relating to the organisation of handball as a product. Even though it is emphasised that every category of disputes participate in creating and developing handball as a product, new categories of disputes have arisen, especially in the field of marketing requirements for the VELUX EHF Champions League.

The term marketing is generic; it refers to disputes relating to violations of clubs’ obligations under the VELUX EHF Champions League Regulations, principally obligations of Chapter VII entitled “Marketing rights and duties”. The EHF is the right holder of the advertising rights and transfers these rights to the EHF Marketing GmbH, its daughter company, which is therefore entitled to undertake the respective

¹⁷ See EHF List of Penalties, C.1 and C.2.

measures regarding the usage of the rights.¹⁸ The EHF Marketing therefore sends Marketing Supervisors on-site for every match of the VELUX EHF Champions League to ensure the implementation of the requirements; every supervisor must submit a report to the EHF Marketing after each game. Reports are reviewed and may be transferred, along with relevant documents, to the EHF in order to request the opening of legal proceedings before the EHF Court of Handball in case of reported violation. Most of the disputes relate to violations of the exclusive advertising rights of the EHF, respectively the EHF Marketing.

The emergence of this category of disputes led the stakeholders to adapt their behaviour and their conception of the sport of handball. By passing decisions relating to the use of incorrect balls, positioning of neutral branding, use of non-authorised sponsors etc., the legal bodies contribute to increasing the awareness and necessity of clubs and national federations in implementing the applicable regulations for the sake and the future of the sport of handball.

To conclude, due to the observed development of EHF Competitions such as the Women's EHF Champions League or the EHF Men's Cup and interest shown by sponsors and TV broadcaster, more and more marketing-related cases should arise within the frame of these competitions. The legal bodies are therefore called upon to play a key role in the future development of handball.

4. *The EHF Court of Arbitration*

As an alternative to civil courts and to the complexity and length of their proceedings once all channels of the EHF legal system have been exhausted, the European Handball Federation created and recognised the EHF Court of Arbitration (hereinafter also referred to as the "ECA") in 2007 and effective as of 2009. It also aims to make the advantages of a court of arbitration composed of sport and legal professionals available to every handball stakeholder. Indeed, ECA proceedings are cost-effective and quick, the maximum duration of proceedings is three months from the formation of the arbitral panel, while ensuring a professional and independent handling of each dispute. The ECA's legal seat is in Vienna, Austria. It shall therefore comply with the dispositions laid down in Part Six, Fourth Chapter of the Austrian Code of Civil Procedure pertaining to Arbitral Proceedings.

Regarding its competence, the ECA is competent in case of disputes between the EHF and national federations, between or among national federations, between national federations and their clubs on cross-border matters, in the event of disputes relating to the EHF competitions, as well as in disputes between and among players, player's agents, the EHF, national federations, and clubs.¹⁹ Furthermore, the ECA Council may decide upon the competence of the ECA if this serves the protection of law, legal certainty and uniform application of law or the resolution of the issues

¹⁸ See VELUX EHF Champions League Regulations, introduction of Chapter VII.

¹⁹ See Rules of Arbitration for the EHF Court of Arbitration, Article 1.1.

of sports policy, as well as to resolve disputes in other sports.²⁰ It follows therefrom that claims may relate to three main categories. First, the ECA may be used by the parties upon exhaustion of all legal remedies available within the EHF for disputes and matters within the competence of the EHF administrative and legal bodies.²¹ Secondly, the ECA may be used for national cases, upon exhaustion internal legal remedies of the national federations. Lastly, disputes related to sport outside of sports organisations competence may be brought to the ECA. However, two situations should be distinguished. Indeed, in the first category of cases, the recognition of ECA competence by handball stakeholders is made through the EHF Statutes²² and the Arbitration Agreement signed by the clubs and the national federations while registering for EHF competitions,²³ the two following categories of disputes are submitted to the recognition of ECA competence through a valid arbitration agreement.²⁴

Regarding the organisation, the ECA is composed of a Council with three members (one President and two Vice Presidents, appointed by the EHF Congress²⁵) and an Office. The ECA Council must safeguard the independence of the ECA, especially via the handling of the general organisation of the ECA, its representation towards the EHF Congress, the confirmation of list of arbitrators, the appointment of substitute arbitrators, as well as the nomination of arbitrators for interim measures of protection.²⁶ The ECA Office is coordinating the proceedings, ensuring principles of independent administration and the transparency of proceedings, as well as the compliance with the Rules of Arbitration.²⁷

The EHF Court of Arbitration demonstrated its independence towards the EHF several times, not hesitating to revise decisions from the EHF legal bodies or even to impose on the EHF the payment of damage compensation. Consequently, the EHF having the possibility to be party in ECA proceedings does not call into question its independence and impartiality. Furthermore, from an economic point of view, the ECA is self-financed; the costs of proceedings as well as the non-refundable registration fee (i.e. Euro 1500) cover the various ECA fees.

²⁰ See Rules of Arbitration for the EHF Court of Arbitration-ECA Statutes, Articles 1.2 and 1.3.

²¹ See EHF Legal Regulations, Article 41.1.

²² See EHF Statutes, Article 13.6.

²³ Pledge of commitment, Arbitration Agreement and Code of Conduct Agreement contain in the registration form state as follows: By registering for participation, all entrants in the 2012/13 EHF European Cup accept the conditions applicable for the competition, the EHF statutes and regulations governing the competition including the EHF legal regulations, the EHF code of conduct agreement and the arbitration agreement concerning the final settlement of disputes by the EHF Court of Arbitration. The signatories ensure that the related obligations together with the arbitration agreement are forwarded to their members/associates and that their members/associates forward this obligation in turn to their members/associates. This acceptance is confirmed by the club with below mentioned signature (signature to be affixed by a person having authority to commit the club).

²⁴ See Austrian Code of Civil procedure, Part Six, Fourth Chapter, Second Title relating to Arbitration Agreements.

²⁵ See EHF Statutes, Article 3.1.8.

²⁶ See Rules of Arbitration for the EHF Court of Arbitration-ECA Statutes, Article 2.3.

²⁷ See Rules of Arbitration for the EHF Court of Arbitration-ECA Statutes, Article 3.

To initiate proceedings, a statement of claim must be filed with the ECA Office and must contain the identification and the addresses of the parties, the documentation specifying the jurisdiction of the ECA, the nomination of the claimant's arbitrator and the specific statement of claim along with the relevant documents.²⁸ To ensure the quick handling of the proceedings, the claim can be submitted by e-mail or fax. An advance fee of Euro 5000 shall be paid by the claimant, fee consisting of a non-repayable registration fee of Euro 1500, an advance payment of administrative costs of the ECA Office, as well as an advance on Arbitrator's fees. Upon formal admissibility confirmation of the claim by the ECA Council, the parties are officially informed of the opening of proceedings, the respondent is invited to nominate an arbitrator within seven days and to provide a statement in reply in compliance with the term set by the ECA Council. In the event that the respondent fails to nominate an arbitrator, the nomination is made by the ECA Council. Once the two arbitrators duly appointed, they together choose the chairman of the arbitral panel. The parties, and the ECA Council if necessary, select the arbitrators from the list of ECA arbitrators.²⁹ The list is currently composed of 56 arbitrators, nominated by both the EHF and the national federations.³⁰ As a prerequisite, arbitrators have to sign a declaration of impartiality and independence and a written submission to the ECA Rules of Arbitrators. The list of arbitrators is confirmed by the ECA Council.

The arbitral panel has the competence to rule on its own jurisdiction and must pass decision in accordance with the federation's international and national regulations and agreements, provided these do not violate general principles of law.

Finally, regarding the legal remedy against an ECA award, a court action to set aside the award may be brought before Austrian Court,³¹ or, in case of the event that the arbitration agreements has a provision, CAS could be competent for an appeal. According to the Austrian Code of Execution, arbitral awards are execution titles which mean that ECA awards may be enforced by the court having jurisdiction. Furthermore, the Convention on the Recognition and Enforcement of Foreign Awards apply in principle to ECA awards. From the 15 awards released by the ECA, no enforcement issue was yet raised.

5. Conclusion

Over the years, the EHF has shaped and improved its legal system to adapt it to the needs and particularity of the sport of handball. The legitimacy was especially highlighted through the decision of the Vienna Higher Civil Court³² by which the Court recognised the existence of a proper EHF legal system and the enforceability

²⁸ See Rules of Arbitration for the EHF Court of Arbitration-ECA-ECA Procedural Rules, Article 5.

²⁹ See the list at www.eca-handball.com/index.php/Abitration_list.html.

³⁰ See Rules of Arbitration for the EHF Court of Arbitration-ECA Statutes, Article 4.

³¹ See Austrian Code of Civil procedure, Part Six, Fourth Chapter, Seventh and Ninth Title.

³² Landesgericht für ZRS Wien, 16 Cg 11/10 – 14, 16.7.2010.

of the decisions passed by its relevant bodies (including the ECA) before Austrian Courts. The creation of the EHF Court of Arbitration responds to the growing need in having legal bodies designed especially for sports-related disputes. Nowadays, the ECA demonstrates its capacity to be an independent, competent and impartial arbitration court; its main task will therefore be to increase the awareness of handball stakeholders on the existence of such an alternative way of dispute resolution.

THE FEDERATION INTERNATIONALE DE L' AUTOMOBILE

by Rui Botica Santos*

SUMMARY: 1. General overview – 2. Statutes and relevant regulations – 3. Rights and obligations of the FIA members – 4. Sanctions – 5. Judicial bodies and legal committees – 6. Relationship with the Court of Arbitration for Sport – 7. The judicial procedure – 8. Implementation of FIA decisions – 9. Mediation / conciliation – 10. Conclusion

Abstract:

This article is an insight into the history and organization of the Fédération Internationale de L'Automobile (FIA), the various regulations governing the FIA and the rights and obligations of its members. It takes the reader through an overview of the judicial structures and mechanisms of the FIA dispute resolution bodies. It particularly sets out the dispute resolution structures and mechanisms governed by the FIA at: (i) first instance level, either by the stewards at track/race level and/or the FIA judges of the national sports association or of the International Tribunal; and (ii) appellate level by the International Court of Appeal (ICA). It also gives the reader a synopsis of the interaction between the FIA judicial system and the French judicial system. The relationship between the FIA judicial system and the Court of Arbitration for Sport (CAS) is also discussed, highlighting some recommendations on how the FIA's relationship with the CAS may be extended for the good of sport in general.

1. General overview

The Fédération Internationale de L'Automobile (FIA) is a non profit worldwide organisation and an international association gathering national Automobile Clubs, Automobile Associations, Touring Clubs and National Federations for motoring and motor sport.

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The FIA was founded in 1904 in Paris with the primary objective of creating a forum for international mobility, car-related issues and to unify international motor sport regulations which united motoring organizations around the world. It is not a French sports federation, but rather an international private association based in France and is therefore subject to French law.

Pursuant to Article 2 of the FIA Statutes, the core pillars and goals which pioneered the establishment of the FIA were the need to:

- i. Maintain a worldwide organisation upholding the interests of its members in all international matters concerning automobile mobility and tourism and motor sport;
- ii. Promote freedom of mobility through affordable, safe, and clean motoring, and defend the rights of consumers when travelling;
- iii. Promote the development of motor sport, improve safety in motor sport, enact, interpret and enforce common rules applicable to the organisation and the fair and equitable running of motor sport events;
- iv. Promote the development of the facilities and services of FIA members (Member Clubs, Associations and Federations) and the co-ordination of reciprocal services between Member Clubs for the benefit of their individual members when travelling abroad;
- v. Exercise jurisdiction pursuant to disputes of a sporting nature and any disputes which might arise between its members, or in relation to any of its Members having contravened the obligations laid down by the Statutes, the International Sporting Code and the Regulations; and
- vi. Preserve and conserve all documents and artifacts concerning world motoring in order to retrace its history.

The FIA administers the rules and regulations for all international four-wheel motor sports including the FIA Formula One World Championship, FIA World Rally Championship, the FIA World Touring Car Championship, the CIK-FIA World Karting Championship, the FIA GT1 World Championship and the World Endurance Championships.

Through its national member clubs, the FIA is involved in every level of motor sport and its responsibilities extend to the millions of amateurs and professionals who enjoy motor sport in all of its variety.

The working languages of the FIA are French and English.

1.1 The FIA members

The FIA comprises 230 National Automobile Associations¹ from 134 countries, representing more than 200 million drivers and their families. There is only one National Automobile Association per country, and a National Automobile Association

¹ This is a national automobile club or other national body recognised by the FIA as sole holder of the sporting power in a country.

can only exercise its national sporting power upon being vested or directed by the FIA.

The activities of the National Automobile Associations must embrace the entire national territory and cover road traffic, touring, the defence of the rightful interests of users and their safety on the one hand, and motor sport on the other.

The FIA grants the National Automobile Associations power to direct motor sport in its respective country and all National Automobile Associations must have their international regulations laid down by the International Sporting Code of the FIA. The National Automobile Associations are mandated to accept, observe, and enforce all decisions taken by the bodies of the FIA, including the International Tribunal, the International Court of Appeal, the Senate, the World Council for Automobile Mobility and Tourism, the World Motor Sport Council and the General Assembly.

1.2 *Sporting power*

The General Assembly of the FIA holds the exclusive right to take all decisions concerning the organisation, direction and management of international motor sport.

A dispute regarding the grant of sporting power to a National Automobile Association, or the National Sporting Authority was the subject matter of a decision of the *Cour d'Appel de Paris*, dated 1st December 2009, in the case between the Motorsport Association of India and the FIA.

The dispute arose when the World Motor Sport Council – on the organs of the FIA – transferred the sporting power of the Motorsport Association of India to the Motor Sports Clubs of India. The decision (dated 25th June 2008) which transferred the powers was declared null and void by the International Court of Appeal in a decision dated 29th July 2008. However, on 7th November 2008, the World Motor Sport Council took a further decision to transfer the sporting powers of the Motorsport Association of India to the Motor Sports Clubs of India.

The delegation of the power to transfer sporting powers to the World Motor Sport Council had been taken at a General Meeting of the FIA on 7th November 2008. The Motorsport Association of India appealed to the FIA International Court of Appeal, but its appeal was rejected and the decision of the FIA General Meeting and the decision of the World Motor Sport Council were upheld in a decision dated 6th February 2009.

The Motorsport Association of India disagreed with the interpretation of article 10 of the FIA by-laws regarding the publicity of general meeting agendas.

The Motorsport Association of India decided to take proceedings against the FIA in the French Major Proceedings Court, which, in a decision dated 1st December 2009, rejected the claimant's claim and ordered it to pay damages of 8,000 Euro pursuant to article 700 of the French Civil Procedure Code.

In its challenge, the appellant (Motorsport Association of India) sought the following relief from the *Cour d'Appel de Paris*:

- i. the overruling of the decision of the French Major Proceedings Court of 6th February 2009;
- ii. a declaration that the decision of 7th November 2008 that transferred sporting power to the FMSCI was null and void; and
- iii. an order that the FIA pay damages in the sum of 25,000 Euro pursuant to the provisions of article 700 of the French Civil Procedure Code.

The respondent (FIA) answered to the appellant's claim by asking the *Cour d'Appel de Paris*:

- i. to uphold the decision of the French Major Proceedings Court; and
- ii. an order that the Motorsport Association of India to pay damages in the sum of 25,000 Euro pursuant to the provisions of article 700 of the French Civil Procedure Code.

After carefully considering the case, the *Cour d'Appel de Paris* noted that despite the fact that the time limit for the distribution of the agenda as required by article 10 of the FIA by-laws had not been complied with, the article provided no penalty for breach of the said obligation. Furthermore the participants in the general meeting had had the opportunity to debate and be informed with regard to the decision taken, at seven previous meetings, which had been held between October 1999 and October 2005, so that it was not possible to merely decide that the decision taken was null and void. The *Cour d'Appel de Paris* accordingly decided to:

- a) Uphold the challenged decision; and
- b) To order the Motorsport Association of India to pay damages to the FIA in the sum of 12,000 Euro pursuant to the provisions of article 700 of the French Civil Procedure Code.

2. *Statutes and relevant regulations*

In administering the rules and regulations for all international four-wheel motor sport, the FIA does so bearing in mind the importance of safety and sporting fairness, the encouragement and control of automobile competitions and records, and to organize FIA International Championships.

Among the many, yet relevant regulations recognized under the FIA Statutes are:

- the International Sporting Code
- the FIA Judicial and Disciplinary Rules
- the FIA Anti-doping Regulations
- the General Prescriptions Applicable to all FIA Championships, Challenges, Trophies and Cups and to Their Qualifying Events Run on Circuits.

2.1 *The FIA Statutes*

The main regulation governing the operations and foundations of the FIA is the FIA

Statutes. This is the supreme law of the FIA and it is under the FIA Statutes that various other regulations and by-laws which foster the administration and achievement of the FIA's objectives derive their legal status.

2.2 *The International Sporting Code*

In order to achieve and enforce these principles, the FIA has enacted the International Sporting Code, whose objective has been described under Chapter 1 Article 2 of the International Sporting Code as to “*encourage and facilitate international motor sport*”. The International Sporting Code lays forth the rules which all competitors participating in FIA World Championships must comply with.

All the national clubs and federations belonging to the FIA are presumed to acquiesce in and be bound by this Code.²

Subject to such acquiescence, the FIA only recognizes one single national club or one single Federation (National Sporting Authority) per country, as having sole international sporting power to enforce the International Sporting Code and to control of motor sport throughout the territories placed under the authority of its own country.

Among the activities which the International Sporting Code governs in facilitating and encouraging international motor sport include granting the National Sporting Authority the necessary permit to organize all competitions held in the affiliate countries. It also governs all issues related to the registration and licensing of drivers and competitors, classification of vehicles, suspension and disqualification of automobiles which breach by any driver, manufacturer or entrant of the International Sporting Code or the national competition rules.

Under Article 152 of the International Sporting Code, any organizer, participant, official, competitor, driver or other person or organization of an International Event who breaches the International Sporting Code shall be penalized or fined. These penalties may be imposed by Stewards of by the National Sporting Authorities.

Among the officials recognized and empowered to act under the International Sporting Code are the Stewards. Their duties include, among other things, deciding what penalty to enforce in the event of a breach of the International Sporting Code, prohibiting from competing any driver or any vehicle which they consider to be dangerous and/or postpone a competition in the event of force majeure or for serious safety reasons.

Under the International Sporting Code, any and all parties affected by the decision of a steward or clerk may file a protest and the International Sporting Code contains provisions through which such protest shall be heard and appeals.

² Between 2001 and 2010, the FIA International Court of Appeal handed down 155 decisions. Of these, approximately 28% (43 decisions) were considerations of the rules in the International Sporting Code. This demonstrates the importance of the FIA International Court of Appeal in the regulation of the world of sport.

2.3 *The FIA judicial and disciplinary rules*

These are rules aimed at regulating the appeal and disciplinary function within the FIA and establishing its operating rules. The FIA Judicial and Disciplinary Rules entrust the Judicial Appointment Committee, the International Tribunal, the International Court of Appeal, the Congress of the International Tribunal and the International Court of Appeal with the duty of handling appeal matters. They are centered on the principle of separation between the prosecuting body and the judging body, and the respect of the rights of the defence and generally govern the proceedings before the International Tribunal and the International Court of Appeal.³

They are drafted in French and in English. In case of any difference of interpretation, the French text shall take precedence.

2.4 *The FIA Anti-doping Regulations*

The FIA acknowledges and accepts the World Anti-Doping Code as the basis for the fight against doping in motor sport.

Although the FIA Anti-doping Regulations were enacted in January 2006, it was only in December 2010 that the FIA became a signatory to the World Anti-Doping Code and amended the FIA Anti-doping Regulations to be compliant with the World Anti-Doping Code.

The FIA Anti-doping Regulations aim at protecting the athletes' fundamental right to participate in doping-free sport and thus promote health, fairness, equality and safety in motor sport.

The FIA Anti-Doping Regulations apply to the FIA, each National Automobile Association, and each participant in the activities of the FIA or any of its National Automobile Associations by virtue of its status as a member, its accreditation or its participation in the activities or events of the FIA or its National Automobile Associations.

2.5 *The general prescriptions applicable to all FIA Championships, Challenges, Trophies and Cups and to their qualifying events run on circuits*

These regulations (the "General Prescriptions") contain provisions governing the events qualifying for the FIA Championships. It requires the regulations which govern the qualifying events for all FIA Championships to be compliant with the General Prescriptions as well as the International Sporting Code and its Appendices and the FIA Official Bulletins.⁴ In case of a conflict between the International

³ For further reading, please see the FIA "*International Court of Appeal / Cour d'Appel Internationale Practice Directions*" www.fia.com/sites/default/files/basicpage/file/ICA-Practice-Directions-EN-2011.pdf.

⁴ Article 1A of the General Prescriptions: "*All Regulations of events qualifying for the FIA Championships (Events) shall comply with the International Sporting Code (the Code) and its*

Sporting Code and the General Prescriptions, the International Sporting Code provisions prevail.

The General Prescriptions contain provisions which govern issues related to starting and restarting a race, finishing a race, advertising, methods used for determining the general classification of a race in a Championship, car safety, general safety, practice, car weighing, sporting checks and scrutinizing.

3. Rights and obligations of the FIA members

3.1 General obligations

Pursuant to Article 6 of the FIA Statutes, all persons involved in the FIA activities are obliged to comply with the FIA Statutes, rules, regulations and decisions.

Article 6 of the FIA Statutes mirrors the rights and obligations to be undertaken by the clubs, associations or federations which are members of the FIA. By the very fact of their admission into the FIA, the said members must abide without reservation by the FIA Statutes.

They must also undertake to accept, observe, and enforce all decisions taken by the bodies of the FIA, including the International Tribunal, the International Court of Appeal, the Senate, the World Council for Automobile Mobility and Tourism, the World Motor Sport Council and the General Assembly.

The Members of the FIA are required to send to the Administration of the FIA a list of their affiliated groups and report all changes to that list. Only parties which adhere to the FIA Statutes, to the general regulations established by the FIA and the appendices thereto may be admitted as affiliated groups.

The members are obliged to observe the Conventions regarding FIA customs documents.

All National Automobile Associations have the sporting obligation to take part in the FIA discussions and vote on questions and matters which are within its competence, and pursuant to Article 5 (c) of the FIA Statutes, shall remain responsible to the FIA for any acts exercised using their Sporting Power.

3.2 The individual rights and obligations of the FIA stakeholders

In addition to the aforementioned members, there are several bodies which form part of the FIA family and structures, and they too have some duties and obligations. They include, among others, the:

- World Motor Sport Council
- General Secretariat of the FIA Courts
- Judicial Appointment Committee
- Congress of the International Tribunal and the International Court of Appeal

Appendices, the FIA Official Bulletins, the present General Prescriptions (the Prescriptions), and the Regulations of the Championship (Regulations) of which the Event forms part”.

- World Council for Automobile Mobility and Tourism
- Manufacturers' Commission

a) *Rights and obligations of the World Motor Sport Council*

As the most powerful body within the FIA, the World Motor Sport Council is charged with the executive role of drafting and deciding the rules, regulations and calendars governing the various racing series from karting to Formula One. Its members are chosen by the FIA General Assembly, and it is usually comprised of representatives from all the automobile Associations or Federations worldwide.

Until recently, the World Motor Sport Council used to regularly deal with disciplinary matters and to take decisions affecting licence-holders or organisers, once the disputed acts went beyond the strict framework of the practical running of a competition and were no longer within the remit of the officials having authority at the place of the competition. This was however changed, following the circumstances which led to the judgment issued by the *Tribunal de Grande Instance* on 5 January 2010, involving *Flavio Briatore, Pat Symonds and the FIA*, which somehow revealed a possible conflict of interests as a result of the exercise by the World Motor Sport Council of both executive and the disciplinary powers.

Today, the World Motor Sport Council undertakes executive powers, and is specifically tasked with ensuring improvements in safety and environmental standards in all types of motorsport, adopting common regulations across the various racing series, and nurturing motor sport's roots by developing all forms of the sport, especially among the young and in developing countries.⁵

b) *Rights and obligations of general secretariat of the FIA Courts*

The General Secretariat is made up of FIA staff and is in charge of the operation of the Judicial Appointment Committee, International Tribunal, the International Court of Appeal and the Congress. Article 19 of the FIA Judicial and Disciplinary Rules obliges the General Secretariat to work in liaison with and under the authority of the Presidents of the International Tribunal, the International Court of Appeal, the Presidents of the Hearings and the President of the Congress.⁶

c) *Rights and obligations of the Judicial Appointment Committee*

Pursuant to Article 1 FIA Judicial and Disciplinary Rules, the Judicial Appointment Committee is tasked with examining applications of persons wishing to become members of the International Tribunal and of the International Court of Appeal, to

⁵ For detailed information on the terms of reference of the World Motor Sport Council, please see article 16 of the FIA Statutes.

⁶ For further reading on the role and organization of the General Secretariat of the FIA Courts, please see article 19 of the FIA Judicial and Disciplinary Rules.

select candidates satisfying the criteria of competence and independence required to exercise these functions, and to submit nominations to the FIA General Assembly for election.

d) Rights and obligations of the Congress of the International Tribunal and the International Court of Appeal

The Congress of the International Tribunal and the International Court of Appeal is entitled to, and obliged to:

- i. Elect from among its members and for a three-year term a President and a Vice-President, who may be the Presidents or the Vice-Presidents of the International Tribunal and the International Court of Appeal;
- ii. Suggest amendments to the Judicial and Disciplinary Rules of the FIA, to the Statutes or to the Regulations of the FIA;
- iii. Review the functioning of the International Tribunal and the International Court of Appeal and submit a report to the General Assembly; and
- iv. Examine any grounds for complaints against members of the International Tribunal and the International Court of Appeal who may be accused of having failed to comply with their obligations.⁷

e) Rights and obligations of the World Council for Automobile Mobility and Tourism

Among many other obligations, the World Council for Automobile Mobility and Tourism is specifically required to:

- i. review developments in the area of automobile mobility and tourism that concern Member Clubs and their members;
- ii. receive reports on the activities of the World Council's Automobile Mobility and Tourism Regions, to consider relevant activities undertaken at a world level by international governmental bodies and agencies;
- iii. review the development of the services of Member Clubs, to propose recommendations on issues and priorities for action, and to co-ordinate joint activities at a world level of Member Clubs and the Automobile Mobility and Tourism Regions;
- iv. approve the Internal Regulations of the Manufacturers' Commission;
- v. manage the funds provided for in the budget for the operation of the automobile mobility and tourism activities;
- vi. make the decisions required by the FIA management in the automobile mobility and tourism domains which are not reserved to the General Assembly or Senate;
- vii. present to the General Assembly its recommendations for the admission and

⁷ For further reading on the role and powers of the International Tribunal and the International Court of Appeal, please see article 26 of the FIA Judicial and Disciplinary Rules.

- the striking off the rolls or expelling of FIA Members; and
- viii. approve proposals for amendments to the Statutes relating to Automobile Mobility and Tourism for presenting to the General Assembly.

f) Rights and obligations of the manufacturers' Commission

Pursuant to Article 22 of the FIA Statutes, the Manufacturers' Commission is an advisory body of the FIA and has its own internal regulations, which defines its structure, composition and operation. Its role is to assist the governing bodies of the FIA in their strategic choices concerning motor sport and mobility. It is also empowered to make proposals to the World Council for Automobile Mobility and Tourism and to the World Motor Sport Council.⁸

4. Sanctions

Like all legal bodies, the FIA has a set of rules and regulations which govern the activities of its members, and punishes any errant and/or in-disciplined member in order to ensure sanity, tranquility and direction.

Pursuant to Article 151 of the International Sporting Code, unless stated otherwise, offences or infringements are punishable, whether they were committed intentionally or through negligence. Any natural or legal person who takes part in an offence or infringement, whether as instigator or as accomplice is also punishable.

Among the sanctions and disciplinary measures which may be undertaken for any infringements of the FIA Statutes, other regulations and also race regulations, are the imposition of: (i) fines; (ii) suspensions; (iii) exclusions; (iv) disqualifications; (v) reprimands, (vi) a time penalty; or (vii) an obligation to accomplish some work of public.

The nature of the sanction varies, depending on the offence committed and whether the party which has committed the said offence is a legal or natural person.

For example, an offence may range from a bribery or attempted bribery, fraudulent conduct, refusal or failure to apply decisions of the FIA words, deeds or writings that have caused moral injury or loss to the FIA, its bodies, its members or its executive officers, pursuit of an objective contrary or opposed to those of the FIA, or failure to cooperate in an investigation.

5. Judicial bodies and legal committees

Like all the judicial bodies which run sports nationally and internationally, the FIA's legal system is modeled on the concept of consent. In other words, all parties wishing to be members or affiliated to the FIA must consent to be bound by its regulations and more importantly its justice system.

⁸ For further reading on the Manufacturers' Commission, please see article 22 of the FIA Statutes.

Article 6.1 of the FIA Judicial and Disciplinary Rules⁹ vests the President of the FIA with powers to act as the prosecuting body in proceedings before the International Court of Appeal and the International Tribunal. In exercising his prosecution powers, the FIA President may seek the assistance of the Stewards, the FIA Technical Department or external bodies.

5.1 *Judicial supremacy of the FIA*

The FIA derives its jurisdiction and dominant authority over all motor sport stakeholders under Appendix B paragraph 3 of the International Sporting Code, under which “*All FIA Licence-Holders and all Participants in International Events undertake to comply with the decisions of the FIA and of its bodies and not to do anything that is contrary to the interests of the FIA*”.

The bodies charged with enforcing the FIA Statutes, regulations and objectives are:

- a) the National Court of Appeal;
- b) the International Tribunal;
- c) the FIA Anti-Doping Disciplinary Committee; and
- d) the International Court of Appeal

The International Tribunal and the International Court of Appeal are what constitute the FIA courts. These bodies are assisted in their functions by the Stewards of the meetings / races, who act as the first instance / lowest judicial authority. As detailed in chapter VII of this article, the decisions of the Stewards may be appealed to the National Court of Appeal or to the International Court of Appeal depending on their nature.

The procedures and organs of these bodies are overseen by the General Secretariat of the FIA, who works in liaison with the President of the International Court of Appeal and the International Tribunal.

In order to function effectively, these judicial bodies must have officials who are experts in all disciplines of motor sport on account of the requirement to master the technical parameters of the motor industry combining electronics, mechanics, aerodynamics, and as a common guiding theme: the search for the highest level of safety.¹⁰

5.2 *Limited prohibition against reference to ordinary State Courts*

Although chapter 1 Article 1 of the International Sporting Code states that “[t]he FIA shall be the final international court of appeal for the settlement of disputes”, the FIA gives parties the freedom to file a dispute before any court or tribunal, on

⁹ Article 6.1 of the FIA Judicial and Disciplinary Rules states “*The role of prosecuting body is exercised by the President of the FIA. It represents the FIA before the TI and the ICA*”.

¹⁰ For further reading, see S. BERNARD, “*The settling of disputes by the internal organs of the FIA*”.

condition that the said party or parties have first exhausted all remedies available within the FIA.

Article 20 of the FIA Judicial and Disciplinary Rules is clear, and states that “[f]or the avoidance of doubt, nothing in these rules shall prevent any party from pursuing any right of action which it may have before any court or tribunal, subject at all times to such party having first exhausted all mechanisms of dispute resolution set out in the Statutes and regulations of the FIA.”

It is therefore apparent that although the FIA prohibits members from referring matters to other courts or tribunals, such prohibition is limited as expressly stated in Article 20 of the FIA Judicial and Disciplinary Rules, which provides that “(...) any party [which] seeks to establish an alternative, additional or further right of action before any other body, court or tribunal, such parties acknowledge and agree that they shall only pursue such a right of action having notified the body, court or tribunal of the existence of the obligations contained in [Article 20 of the FIA Judicial and Disciplinary Rules] this Article, even where they dispute the applicability of those obligations”.

In addition, any party wishing to depart from the limited prohibition contained in Article 20 of the FIA Judicial and Disciplinary Rules by filing an action before a different tribunal must first notify the FIA adequately, at the earliest opportunity, and at the latest at the time such action is undertaken.

5.3 *The jurisdiction of the National State Courts over decisions issued by the FIA Courts*

In view of the aforementioned limited prohibition, parties can only refer to other courts or tribunals after exhausting all remedies within the FIA courts, which means that they must refer to the FIA’s International Court of Appeal¹¹ before exploring other judicial options.

However, it is worth noting that there have so far been very few cases where challenges have been filed before the national State courts, and the subject matter of these challenges have been limited.

For example, in the judgment issued by the *Tribunal de Grande Instance* on 5 January 2010, involving *Flavio Briatore, Pat Symonds and the FIA*, the appellant therein (Flavio Briatore) was challenging a decision issued by the FIA World Motor Sport Council on 21 September 2009.

Renault F1 team’s driver Nelson Piquet was alleged to have deliberately caused an accident on the 17th curve of the 14th circuit, by colliding violently with a wall, destroying his vehicle and scattering debris all over the track, which required the intervention of a safety vehicle in order neutralise the race and permit the cleaning up of the track. Fernando Alonso (a team-mate of Nelson Piquet) who was fuelling his vehicle, was therefore able rapidly to join the other competitors

¹¹ This is the highest remedial body and supreme tribunal within the FIA judicial set up.

and to finish in first place as the others had not refuelled. The FIA conducted an enquiry in which it concluded that Piquet had been allegedly asked by the team's executive director of engineering, Pat Symonds, to deliberately crash so as to improve the race situation of his team-mate Fernando Alonso, a proposal which was allegedly approved by the team's managing director, Flavio Briatore.

In its decision, the FIA World Motor Sport Council granted Nelson Piquet immunity for any fault, but ordered the members of the FIA not to approve the participation of Flavio Briatore and Pat Symonds in any future event or sporting competition and not to grant a licence to any team, or entity, related to them. The World Motor Sport Council further ordered officials present at events supervised by the FIA to prevent access by Flavio Briatore and Pat Symonds to any areas under its jurisdiction and not to grant or renew any super licence for an indefinite period, to any driver associated with Flavio Briatore, and, for five years, if associated with Pat Symonds.

The respondent objected the appellant's requests. The FIA instead asked the *Tribunal de Grande Instance* to uphold the decision of the FIA World Motor Sport Council and to dismiss the appellant's claims.

After a careful analysis of the matter, the *Tribunal de Grande Instance* issued its decision and held as follows:

- a) It declared that the decision of the FIA World Motor Sport Council was invalid in relation to Briatore and Symonds;
- b) Ordered FIA to inform its members and licensed participants that the decisions had been set aside and to explain this judgment to the candidates' councils within 15 days of the date of the judgment, on pain of the payment of 10,000 Euro for each day of delay;
- c) Ordered the publication of the judgment in the French press, to be chosen by Briatore and Symonds, at their FIA's expense, subject to a limit of 15,000 and 5.000 Euro respectively; and
- d) Ordered the FIA to pay the claimants the sums of 15,000 and 5,000 Euro respectively pursuant to the provisions of article 700 of the French Civil Procedure Code.

In another matter filed before the *Cour d'Appel de Paris* (judgment on 20 May 2008) between the *Société Coli Et Cie, Jean-Louis Schlessler, Jean Marie Lurquin and the FIA*, the Appellant therein was challenging a decision of the *Tribunal de Grande Instance* of 29th March 2005.

In this case, the world champion Schlessler and his co-driver Lurquin, both of whom were driving for Coli & Cia, had allegedly driven a route other than the official route and has thus gained 2 minutes and 40 seconds in relation to their direct competitor, in the 2003 Orient Rally.

This decision of the *Tribunal de Grande Instance* rejected the claim for the cancellation of the decision of the FIA's International Court of Appeal of 7th October 2003, which had excluded vehicle no. 201 used by the competitor Coli&Cia (Schlessler/Lurquin team) and ordered the appellants to pay the sum of 1,500 Euro

to the FIA pursuant to the provisions of Article 700 of the French Civil Procedure Code.

In its challenge, the claimant wanted the *Cour d'Appel de Paris* to: (i) set aside the decision of the FIA International Court of Appeal of 7th October 2003; (ii) order the FIA to reinstate Coli&Cia (the Schlessler/Lurquin team) in its rights and to alter the final result of the 2003 Orient Rally; (iii) order the FIA to translate the challenged judgment and to publish it in English and French on its official website, and to pay the sum of 300 Euro for every day it delayed in doing so; and (iv) order the FIA to pay damages in the sum of 1,500 Euro to each of them, with regard to the first instance, and 2,000 Euro to each of them with regard to the challenge, pursuant to the provisions of article 700 of the French Civil Procedure Code.

The respondents objected the claimant's requests. They instead asked the *Cour d'Appel de Paris* to uphold the challenged decision; to order the appellants to pay 100,000 Euro by way of damages and for vexatious litigation; and also to order them to pay the court fees of the challenge plus damages in the sum of 15.000 Euro.

After a careful analysis of the matter, the *Cour d'Appel de Paris* issued its decision and held as follows:

- a) Upheld the challenged judgment;
- b) Ordered Coli&Cia and Schlessler and Lurquin to pay the court fees costs; and
- c) Ordered Coli&Cia and Schlessler and Lurquin to pay damages to the FIA in the sum of 5,000 Euro pursuant to the provisions of article 700 of the French Civil Procedure Code.

In fact, disputes related to decisions issued by the FIA bodies were challenged to the *Cour d'Appel de Paris* as early as in 1985, where the FIA was involved in a dispute against the *Society of Tyrrel Racing Organization Limited*.

This matter related to a challenge filed by the FIA against the decision of the President of the *Tribunal de Grande Instance* of 18th December 1984.

The dispute arose during the 1984 Formula 1 World Championship at the Detroit Grand Prix on 24th July 1984. After the end of the event, Tyrrel vehicle no. 3 was checked by the race commissioners, who took samples from the water tank. The forbidden presence of hydrocarbons was detected in the samples of cooling water. The FIA Sporting Commission in charge, which was also aware of other complaints, was therefore convened. On 18th July 1984, the Commission excluded the Tyrrel Company from the championship and cancelled all commitments assumed.

The Tyrrel company appealed to the International Court of Appeal, which upheld the decision of the FIA Sporting Commission in charge in a decision dated 29th August 1984 and also found that a further irregularity had been proved: *i.e.* the abnormal presence of two air outlets in the vehicle. On 20th December 1984, the Tyrrel company filed a challenge before the *Tribunal de Grande Instance* and in the International Chamber of Commerce, seeking the cancellation of the penalties imposed and of the alterations introduced together with some administrative rules

regarding the organisation of the world championship. On the same day, the Tyrrel company filed a challenge before the President of the *Tribunal de Grande Instance*, who granted the challenge.

This decision ordered the delay of the enforcement of the “decisions” made and the “penalties” imposed in the decision of the FIA Sporting Commission in charge of 18th July, which had been confirmed by the FIA’s International Court of Appeal.

In its challenge, the claimant (FIA) wanted the *Cour d’Appel de Paris* to set aside the decision of the President of the *Tribunal de Grande Instance* of 18th December 1984.

The respondents objected the claimant’s requests. They instead asked the *Cour d’Appel de Paris* to reject all of the claims made by the other parties.

After a careful analysis of the matter, the *Cour d’Appel de Paris* issued its decision on 13 February 1985 and held as follows:

- a) It set aside the decisions for lack of grounds and;
- b) Ordered the Tyrrel company to pay the expenses of the first instance appeal.

5.4 *The nature of disputes heard by the FIA Courts*

It is worth noting that compared to other sports tribunals such as the Court of Arbitration for Sport, the disputes submitted before the FIA courts are purely of a sporting, disciplinary or regulatory nature.¹² They entail sanctions on FIA members, drivers, competitors and manufacturers for among other things violating:

- i. The rules governing a particular race or competition such as the starting and finishing procedures, stopping, overtaking, car safety etc, i.e the sporting regulations;
- ii. The technical regulations, such as the rules related to car weight, cylinder capacity, entry rules etc;
- iii. The advertising rules; and
- iv. Anti-doping regulations.

The FIA regulations contain no provision addressing contractual or commercial disputes such as employment matters between the drivers and the car manufacturers, compensation for the “unilateral transfer” of a driver from one car manufacturer to another or training compensation in cases where amateur drivers mature into full professionals.

Although the FIA regulations limit recourse to ordinary courts for disciplinary matters, it would appear that the parties are free to refer cases or disputes which fall outside the scope of disciplinary nature to other courts or tribunals if they have so agreed or if obliged to so by the relevant mandatory national laws. If the nature of the dispute is arbitrable, parties may agree to submit such dispute to institutional or *ad hoc* arbitration. Otherwise, a non-disciplinary dispute will be solved by the

¹² There are several International Federations, such as FIFA which have judicial bodies which deal with disciplinary disputes and other disputes of a contractual and commercial nature.

ordinary courts to be determined in accordance with the relevant applicable law.

6. Relationship with the Court of Arbitration for Sport

6.1 Doping matters

The FIA generally solves all its disputes internally and does not allow appeals to the Court of Arbitration for Sport.

The FIA recognizes the Court of Arbitration for Sport as competent to settle all appeals arising from the application of the FIA's Anti-Doping Regulations definitively. Pursuant to Article 8.1.6 of the International Sporting Code, the Court of Arbitration for Sport may hear appeals against decisions issued by the Anti-Doping Disciplinary Committee or a National Automobile Association or a National Anti-Doping Organisation in accordance with the provisions applicable before such court.

The World Anti-Doping Association (WADA) may also appeal such decision directly to the Court of Arbitration for Sport without having to exhaust other possible remedies in the FIA's or the competent National Automobile Association's process.

The time to file an appeal to the Court of Arbitration for Sport shall be twenty-one days from the date of receipt of the decision by the appealing party.

6.2 Disciplinary matters

Although Article 20 of the FIA Judicial and Disciplinary Rules allows parties to recourse to other courts or tribunals on condition that they have exhausted all remedies available within the FIA, recourse against disciplinary decisions cannot be made to the Court of Arbitration for Sport as an appellate body because the FIA regulations do not contain any such provision or express recognition of the Court of Arbitration for Sport to handle such matters.¹³

The only remedy available to a party affected by a final decision issued by a FIA court is recourse to the French State (civil) Courts. It is worth noting that although the FIA is a private body with its headquarters in Paris, France, it is an international body which is not in charge of any French public mission but rather an international sports affair of administering world motor sports.¹⁴ This is why the FIA decisions are subject to challenge before the French State (civil) Courts, these being the (i) *Tribunal De Grande Instance*, (ii) *Cour d'Appel* and (iii) *Cour de*

¹³ Article R47 of the CAS Code “[a]n appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide (...) and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body..”

¹⁴ For further information, consult Jean-Yves Foucard, partner at LMT Avocats, Paris, France. Also read “*Sports Law in France*”, by JEAN-YVES FOUCARD, partner at LMT Avocats, Paris, France.

Cassation to the French administrative courts.¹⁵ This is because the French administrative courts usually have jurisdiction to hear challenges against decisions issued by French based associations, where such associations are exclusively charged with the responsibility of administering national sports affairs in France. In most cases, the French administrative courts accept jurisdiction after a mandatory conciliation procedure before the French national Olympic Committee.

The *Tribunal de Grande Instance* is the first instance court within the French State (civil) Court structure. A party must first challenge any final and binding FIA court decision (which in most cases is a decision issued by the International Court of Appeal) before the *Tribunal de Grande Instance*, and only thereafter have jurisdiction to challenge any unsatisfactory decision issued by the *Tribunal de Grande Instance* to the *Cour d'Appel*. The *Cour de Cassation* is the final and highest court within the French State (civil) Court system. It has jurisdiction to hear any challenge against a decision issued by the *Cour d'Appel*.

The *Cour d'Appel* has jurisdiction to review the facts and the law which led to the decision issued by the International Court of Appeal. However, the *Cour de Cassation*'s jurisdiction is limited; it can only examine or review errors of law made by the *Cour d'Appel* and cannot go into the facts. The *Cour de Cassation* may quash any decision issued by the *Cour d'Appel* in erroneous application of the law and refer the case back to another *Cour d'Appel* for a fresh appreciation.

6.3 *Non-disciplinary matters*

It is however possible for the FIA members and stakeholders to litigate before any other court or tribunal, such as the Court of Arbitration for Sport (as an ordinary proceeding) provided that the dispute is arbitrable and does not relate to a disciplinary matter. Examples of such cases that could be referred to arbitration include commercial disputes, sponsorship claims, merchandising and/or TV rights issues and other types of commercial disagreements.

Before the Court of Arbitration for Sport is seized of the matter, it must first be established that the parties had or have entered into an agreement where they confer such jurisdiction to the Court of Arbitration for Sport.¹⁶

7. *The judicial procedure*

The FIA's deciding bodies and proceedings are structured on two fronts, with the first front having tribunals which act the first instance bodies and another tribunal which acts as the appeals body and which is intended to act as the final and highest judicial tribunal.

¹⁵ For further reading on the structure and system of the French State Courts, see J.Y. FOUCARD "Sports Law in France", Wolters Kluwer Law and Business, 33.

¹⁶ For more information, please see RUI BOTICA SANTOS, ALEXANDRE MIGUEL MESTRE AND FRANCISCO RAPOSO DE MAGALHÃES, "Sports Law in Portugal".

The bodies which assume the role of first instance tribunals are the National Court of Appeal and the International Tribunal. It is also worth mentioning the Stewards and the role they play because they are usually the first officials to render decisions which affect parties or members particularly during a race.

Hereunder is a brief outlook of the judicial procedures followed by the various FIA deciding bodies.

7.1 *The stewards of the meetings*

a) *Jurisdiction and types of disputes*

The Stewards can be equated to referees within the meaning of most sports such as football, rugby, cricket, etc.

The Stewards of the Meetings have supreme authority to enforce the International Sporting Code, the national and Supplementary Regulations and also the Programmes. The Stewards report any serious breach of the International Sporting Code or other irregularity noted during the event to the FIA, to the proposing National Sporting Authority as well as to the National Sporting Authority of the territory where the event is run.

There are at least two Stewards of a nationality different from that of the organizer for each racing event.

The Stewards reports the results of each competition together with particulars of all protests lodged and exclusions they may have made with their recommendations as to any decisions which may have to be taken for a suspension or a disqualification. Among their duties include as enshrined in Article 141 of the International Sporting Code include:

- i. settling any claim which might arise during a meeting, subject to the right of appeal provided in the International Sporting Code;
- ii. deciding what penalty to enforce in the event of a breach of the regulations;
- iii. imposing penalties, fines or exclusions.¹⁷ The stewards can only impose a maximum fine of 250,000 Euro. These fines must be paid within 48 hours;
- iv. prohibiting from competing any driver or vehicle which they consider to be dangerous or which is reported to them by the clerk of the course as being dangerous;
- v. excluding from any one competition or for the duration of the meeting any entrant or driver whom they consider as, or who is reported to them by the clerk of the course or by the organising committee as being ineligible to take part, or whom they consider as being guilty of improper conduct or unfair practice; and/or
- vi. order the removal from the course and its precincts of any entrant or driver who refuses to obey the order of a responsible official.

¹⁷ In approximately 15% (23 decisions) of the 155 decisions handed down by the ICA between 2001 and 2011, the issue was the exclusion of a competitor from a competition.

b) Appointment of stewards

Article 135 of the International Sporting Code requires at least one of the Stewards of a meeting to be nominated by the National Sporting Authority promoting the meeting or granting a permit therefore. The other officials shall be nominated by the organisers of the meeting, subject to the approval of the National Sporting Authority concerned.

For an absolute world record attempt or an outright world land speed record attempt, a panel of three Stewards is appointed, with the FIA appointing two of the Stewards. The chairman of the panel of Stewards is then appointed from these two. Each National Sporting Authority maintains a list of Stewards.

There is no specific regulation which governs how Stewards must conduct their proceedings although they are generally recognized in the FIA Judicial and Disciplinary Rules as well as the International Sporting Code.

However, pursuant to the International Sporting Code, each race or meeting has at least three Stewards led by a Chairman. The Chairman is appointed by the organiser of the relevant Cup, Trophy, Challenge or Series from a list of Stewards published and regularly updated by the FIA.

The Chairman of the meeting is, in particular, responsible for planning the meetings and ensuring that arrangements are respected. They are also responsible for establishing agendas and drawing up the minutes of meetings.

c) Initiating proceedings

Given their role as referees or officials, the Stewards do not have any specific format for initiating proceedings. They generally take action on any irregularity noted during the event during their meetings subject to the right of appeal by any affected party.

d) The decisions

The decisions of the Stewards are reached by simple majority, with the Chairman having a casting vote. They become immediately binding notwithstanding an appeal if it concerns questions of safety, good standing or irregularity of entry by a competitor entering an event or when, in the course of the same event, a further breach is committed justifying the exclusion of the same competitor.

e) Appeals

The decisions issued by the Stewards are neither final nor binding. They may be appealed to the International Court of Appeal¹⁸ where the parties concerned have

¹⁸Of the 155 decisions of the FIA International Court of Appeal between 2001 and 2010, approximately 46% (71 decisions) concerned decisions taken by the Stewards during events. Of these, 30 decisions

jointly decided to submit the appeal not to the National Court of Appeal of the country of the event, but directly to the International Court of Appeal with the assistance and agreement of their respective National Sporting Authorities (Article 14.1 (b) of the FIA Judicial and Disciplinary rules).

However, the choice made by the court that decides the case is not discretionary: the International Court of Appeal will only consider appeals against Stewards' decisions when the parties agree not to refer the case to the National Court of Appeal of the country in which the event takes place, with the agreement of the National Sporting Authorities.

The competitors, whatever their nationality can also appeal to the National Court of Appeal of the country in which that decision has been given. In such a case, the appeal may be filed by fax or by any other electronic means of communication with confirmation of receipt.

Before exercising their right to appeal before the National Court of Appeal and the International Court of Appeal, any affected party must first notify the Stewards of the meeting in writing within one hour of the publication of the decision of their intention to appeal (cf Article 182 of the International Sporting Code and Article 17.1.1 (d) of the FIA Judicial and Disciplinary Rules).

Thereafter, and pursuant to Article 182 of the International Sporting Code, the right to file an appeal before the National Court of Appeal shall expire two days after the date of the notification of the decision of the Stewards.¹⁹

Pursuant to Article 17.3. (i) (a) of the FIA Judicial and Disciplinary Rules, “[a]ppeals against a decision of the Stewards of a Meeting (...) must be notified within 48 hours of the Stewards’ decision being notified to the person concerned or, failing notification, within 48 hours following the publication of the Stewards’ decision, on the condition that the Stewards of the Meeting have been notified in writing of the appellant’s intention to appeal within one hour of the Stewards’ decision being notified or published”.

f) Costs

No fees or costs are attached to the decisions or meetings held by the Stewards.

7.2 The National Court of Appeal

Article 181 of the International Sporting Code mandates each National Sporting

confirmed the decisions of the Panel of Stewards and only 19 overruled the stewards’ decisions. The FIA Court of Appeal also partially overruled the Stewards’ decisions in 3 cases. In 12 cases, the claimant abandoned the appeal and 7 appeals were rejected on the grounds that they were inadmissible.

¹⁹ For further reading, please see Article 182 of the International Sporting Code “[t]he right to bring an appeal to a [National Court of Appeal] expires two days after the date of the notification of the decision of the stewards of the event on condition that the intention of appealing has been notified in writing to the stewards of the event within one hour of the decision”.

Authority to nominate persons who shall constitute the national court of appeal. Such persons may or may not be members of the National Sporting Authority.

a) Jurisdiction and types of disputes

Article 192 of the International Sporting Code is explicit that the National Courts of Appeal are empowered to decide any matter raised within its territory and concerning the interpretation of the International Sporting Code or its national rules.

The National Court of Appeal can hear appeals filed against decision rendered by the Stewards of a meeting in a National Sporting Authority of the country in which that decision has been given.

It also handles disputes relating to a breach of the National Sporting Authority's rules by an organiser, official, competitor or driver.

Pursuant to Article 182 of the International Sporting Code, competitors whatever their nationality have the right to appeal against a sentence or other decision pronounced on them by the Stewards of the meeting before the National Sporting Authority of the country in which that decision has been given.

b) Appointment of judges

Each National Sporting Authority nominates, or has nominated by its competitions committee, a certain number of persons who may or may not be members of the National Sporting Authority concerned, who will constitute the National Court of Appeal. No members of this court of appeal may sit on a case if they have been involved in any way as competitors, drivers or officials in the competition under consideration, or if they have participated in any earlier decision concerning or have been involved, directly or indirectly, in the matter under consideration.

c) Initiating proceedings

Any competitor or party wishing to file a case before the National Court of Appeal must under pain of forfeiture of their right to appeal, first notify the Stewards of the meeting in writing within one hour of the publication of the decision of their intention to appeal.

The right to appeal expires two days after the date of the notification of the decision of the Stewards of the event on condition that the intention of appealing has been notified in writing to the Stewards of the event within one hour of the decision.

There is an appeal fee, the amount of which is specified annually by the relevant National Sporting Authority, is payable within two days following the moment the appellant notifies the Stewards its intention to appeal.

d) *The decisions*

Pursuant to Article 189 of the International Sporting Code, the National Court of Appeal may either decide to waive any penalty or other decision appealed against, and, if necessary, increase or mitigate the penalty but it shall not be empowered to order any competition to be re run.

e) *Appeals*

Decisions issued by the national court of appeal involving either a foreign licence holder or a breach of the National Sporting Authority by an organiser, official, competitor or driver of foreign nationality may be appealed to the International Court of Appeal. However, pursuant to Article 180 of the International Sporting Code, the decisions issued by the National Court of Appeal involving license holders of the same nationality as that of the National Sporting Authority are final and binding.

Pursuant to Article 17.3 (i) (b) of the FIA Judicial and Disciplinary Rules, “[a]ppeals against a decision of a judicial body of an ASN (...) must be notified within 7 days following notification of the decision of the national judicial body.”

f) *Costs*

The costs which follow a decision issued by the National Courts of Appeal are calculated by the secretariats according to the level of the expenses occasioned in the preparation of the case and the meeting of the courts, to the exclusion of the expenses or defence fees incurred by the parties.

7.3 *The International Tribunal*

a) *Jurisdiction and types of disputes*

Pursuant to Article 8 of the FIA Judicial and Disciplinary Rules, the role of the International Tribunal is to determine disciplinary matters at first instance (for cases not dealt with by the Stewards of the Meeting). Decisions taken by the International Tribunal can be appealed before the International Court of Appeal.

In resolving disputes, the International Tribunal applies and interprets the FIA Judicial and Disciplinary Rules with the aim of enforcing the FIFA Statutes and Regulations.

Pursuant to Article 8.1 of the FIA Judicial and Disciplinary Rules, the International Tribunal has jurisdiction over the following persons and organisations:

- i. FIA Members;
- ii. the officers, members, or licence holders of National Automobile Associations, or officers, members, or licence holders of National Sporting Authorities involved in motor sport;

- iii. officials, organisers, drivers, competitors and licence holders;
- iv. persons having access to premises hosting any event that is subject to the regulations and decisions of the FIA;
- v. any person who is subject to or who has agreed to be bound by the International Sporting Code and the other regulations and decisions of the FIA;
- vi. any person who benefits, in any manner whatsoever, from an authorisation or approval issued on behalf of or by the FIA, or who takes part in any manner whatsoever in a race, competition or other event organised, directly or indirectly, by the FIA or subject to the regulations and decisions of the FIA; and
- vii. the employees, representatives, agents and service providers of the persons listed above, irrespective of any liability of those who employ them or are represented by them, and of the possibility of prosecuting those persons or bodies. Nevertheless, members of the FIA have an exclusive competence to decide whether or not to prosecute and to impose sanctions for offences and infringements referred to in Article 8.2 of the FIA Judicial and Disciplinary Rules on their employees, representatives, agents.

Under Article 8.2 of the FIA Judicial and Disciplinary Rules, persons or organizations may be sanctioned by the International Tribunal if they perform any of the following offences:

- i. contravene the FIA Statutes and Regulations, including the International Sporting Code but excluding the FIA Anti Doping Regulations;
- ii. take part in an international event or a championship not entered on the FIA calendars or not governed by the FIA or its Members;
- iii. pursue an objective contrary or opposed to those of the FIA; and
- iv. without lawful excuse: (i) refuse or fail to apply a decision of the FIA, or (ii) by words, actions or writings have cause damage to the standing and/or reputation of, or loss to, the FIA, its bodies, its members or its executive officers or (iii) fail to cooperate in an investigation.

The International Tribunal is empowered to sanction any guilty party with a fine, exclude any person from the FIA or one of its bodies or ban him/it from directly or indirectly exercising any role in events or meetings organized directly or indirectly on behalf of or by the FIA. The International Tribunal can also impose the sanctions provided for in the International Sporting Code.

Pursuant to Article 12 of the FIA Judicial and Disciplinary Rules, the International Tribunal can also issue an order provisionally suspending any authorization, licence or approval issued by the FIA within the framework of a race or competition for reasons of public order or in the interest of motor sport. Once pronounced, such suspension is fully effective and an appeal before the International Court of Appeal does not suspend the enforcement of this order.

On 20 June 2013, the International Tribunal issued an important decision in relation to a case filed by the FIA against Pirelli Tyres S.p.A & Mercedes-Benz Grand Prix Limited t/a Mercedes AMG Petronas Formula One Team (Mercedes). Briefly put, the facts leading to the aforementioned case are as follows:

Pirelli Tyres and the FIA had a contract entered into in January 2011, under which the FIA granted Pirelli Tyres the exclusive right to act as tyre suppliers for all cars (competitors) taking part in the FIA championship in accordance with the principle of sporting equality.

From 15 May to 17 May 2013, and using its 2013 car, the Mercedes team (competitor) took part in a tyre testing organised by Pirelli Tyres at the Barcelona Circuit in Spain. No other team (competitor) was informed (or involved) of the opportunity to carry out similar tests.

On 26 May 2013, two teams, Infiniti Red Bull Racing and the Scuderia Ferrari Team filed protests against the said test, saying it breached Article 22.4 (h)²⁰ of the Formula One Sporting Regulations as well as the International Sporting Code. They were joined by the Marussia F1 Team, the Vodafone McLaren Mercedes and the Williams F1 Team.

The FIA also argued that by organizing and taking part in the tyre testing, Pirelli Tyres and Mercedes had breached Article 22.4 of the Formula One Sporting Regulations and Articles 1²¹ and 151 (c)²² of the International Sporting Code. The FIA argued that Mercedes had obtained a material advantage from the three days of testing and that both Mercedes and Pirelli Tyres had engaged in conduct prejudicial to the Formula One Championship by using a 2013 car, two current Formula One drivers and during the 2013 Formula One Championship without the knowledge or participation of the other competitors.

In its defence, Pirelli Tyres argued that:

- a) The International Tribunal had no jurisdiction because Pirelli Tyres was a third party with respect to the FIA, and was therefore not bound by the FIA's regulatory and disciplinary power.
- b) Pirelli Tyres' contract with the FIA excluded reference to the FIA Judicial and Disciplinary Rules. It is only the *Tribunal de Grande Instance de Paris* which has jurisdiction.
- c) The testing was conducted in the best interest of the Formula One Championship, and it would not have been feasible to have two or more teams testing at the same time.
- d) Mercedes argued that it did not carry out any track testing within the meaning of Article 22.4 (h) of the Formula One Sporting Regulations.

²⁰ Article 22.4 (h) of the Formula One Sporting Regulations “No track testing may take place between the start of a ten day period which precedes the start of the first Event of the championship and 31 December of the same year (...)”.

²¹ Article 1 of the International Sporting Code “The *Fédération Internationale de l'Automobile*, (...) shall be the sole international sporting on the fundamental principles of safety and sporting fairness, for the encouragement and control of automobile competitions and records, and to organize FIA International Championships”.

²² Article 151 (c) of the International Sporting Code “Any of the following offences in addition to any offences specifically referred to previously, shall be deemed to be a breach of these rules: c) Any fraudulent conduct or any act prejudicial to the interests of any competition or to the interests of motor sport generally”.

In its decision, the International Tribunal held as follows:

- a) The International Tribunal had jurisdiction pursuant to Article 6 of Pirelli Tyres' contract with the FIA, under which Pirelli Tyres agreed to abide by the FIA Governing Rules, which in turn incorporated the FIA Judicial and Disciplinary Rules by reference. However, the International Tribunal's jurisdiction was only limited by scope to violations of the FIA Governing Rules.
- b) The testing was not carried out with the aim of conferring Mercedes an unfair sporting advantage. Neither Pirelli Tyres nor Mercedes acted in bad faith.
- c) However, Mercedes did obtain some material advantage from the testing in light of the confidential data it received from Pirelli Tyres.
- d) Notwithstanding the above, Mercedes breached Article 22.4 (h) of the Formula One Sporting Regulations. However, the testing would not have been conducted had both Pirelli Tyres and Mercedes not informed the FIA of the essence of what they intended to do and/or received the FIA's approval.
- e) Both Pirelli Tyres and Mercedes breached Articles 1 and 151 of the International Sporting Code.
- f) Since the testing only took place following the FIA's "qualified approval", Mercedes was reprimanded and suspended from taking part in the forthcoming "three day young driver training test". Pirelli Tyres was also reprimanded.

b) Appointment of Judges

The International Tribunal comprises between 6 and 12 judges proposed by the Judicial Appointment Committee and then elected by the FIA General Assembly. The judges of the International Tribunal are elected for a term of three years, with one third of them having their terms renewed each year. The International Tribunal has a President and Vice President who are elected for 3 years, during a plenary meeting of the FIA Congress.

Article 12 of the FIA Judicial and Disciplinary Rules require the judges must remain independent of and impartial in relation to the FIA and/or the parties involved. The said provision also makes the judges subject to duties of confidentiality.

At least 120 days before the annual FIA General Assembly, the FIA invites candidates to submit applications. Applications are only valid if they are endorsed and submitted by any member of the FIA or any sporting commission of the FIA; or any group of 5 competitors of the FIA World Championships.

In order for a person to be proposed as a member of the International Tribunal by the Judicial Appointment Committee, he or she must meet the following criteria:

- i. Have legal expertise as well as significant experience in the field of sports law or in an automobile-related technical field;
- ii. Have experience in the field of sports law, for example within the Court of Arbitration for Sport or other major sporting arbitral tribunals, or a national/international sporting organisation;

- iii. Have judicial experience is preferred, for example in a higher court of a particular jurisdiction, or in an internationally recognized arbitral tribunal or mediation forum;
- iv. Be able to communicate in English and French;
- v. Provide the names and contact details of three referees (one reference must, if possible, come from a professional specialised in the field of sports law); and
- vi. Provide their *curriculum*, cover letter and personal contact details.

The Panel is appointed by the President of the International Tribunal from among the members of the International Tribunal. The judging panel is made up of minimum three members, one of whom the President of the International Tribunal appoints as President of the International Tribunal's judging panel for that case. No member of the judging panel may be of the same nationality as one of the main parties to the case, other than the FIA (the nationality of a party being determined by the nationality of the National Sporting Authorities which issued its licence, or if the person or entity is not licensed, the nationality of the passport of a person, or the place of incorporation of legal persons or entities).

c) *Initiating proceedings*

The prosecuting body must first notify the accused party of the charges brought against him. Pursuant to Article 11 of the FIA Judicial and Disciplinary rules, this notice must contain:

- i. the factual and legal allegations against it;
- ii. the penalties that could be pronounced against it;
- iii. the fact that it may read and copy the documents of the case at the headquarters of the FIA;
- iv. the fact that the notification of charges has been served on the President of the International Tribunal – thereby formally bringing the case before the International Tribunal;
- v. the period of time within which he must submit his observations in writing;
- vi. the fact that, if it fails to submit its observations, the International Tribunal may impose a sanction upon it on the basis of the notification of charges which have been notified and/or any inquiry report;
- vii. the fact that it may be assisted by a lawyer of its choice; and
- viii. If an inquiry report has been drawn up, it shall be appended to the notification of charges.

The notification of charges should be served by the prosecuting body on the President of the International Tribunal and is deemed to constitute the commencement of the case before the International Tribunal.

The International Tribunal may, for a period not exceeding three months, and at the request of the President of the FIA provisionally suspend any authorisation, licence or approval issued by the FIA, within the context of a race, competition or other event organised by the FIA if such measures are required for the protection

of any participant in an event organised under the aegis of the FIA, for public interest or the interest of motor sport.

Article 12 of the FIA Judicial and Disciplinary Rules²³ is clear that once issued, a provisional suspension becomes fully effective and enforceable, and an appeal before the International Court of Appeal does not suspend its enforcement.

The party who is the subject of a provisional suspension order may bring an appeal before the International Court of Appeal, and the President of the FIA may request that the International Tribunal terminate the provisional suspension at any time, either on his own initiative or at the request of the party concerned, unless the order has been confirmed by the International Court of Appeal.

Parties before the International Tribunal must prosecute their matters within five years. Pursuant to Article 8.3 of the FIA Judicial and Disciplinary rules, the time limit for prosecuting a matter starts running:

- i. from the day on which the person committed the offence or infringement;
- ii. from the day of the last act, in the case of successive or repeated offences or infringements; and
- iii. from the day the offence or infringement stopped, where it had been continuing.

However, where the infringement has been concealed from the prosecuting body, time will run from the day on which the facts of the infringement became known to the prosecuting body.

The submissions must be filed in both English and French and are sent to the International Tribunal by post.

After the notification of charges has been served, the President of the Hearing shall set a timetable for the hearing, and serve it, together with a summons to attend the hearing, on the prosecuted party and on the prosecuting body.

Pursuant to Article 11.3 of the FIA Judicial and Disciplinary Rules, the prosecuted person has at least fifteen days to submit his observations on a notification of charges, and the prosecuting body will be granted a further fifteen days to reply. There will be a period of at least fifteen days between the Reply by the prosecuting body and the hearing, although the President may any time decide to reduce or extend the time limits of proceedings.

Unless the President orders otherwise, the International Tribunal hearings are open to the press and the public. Proceedings are heard in camera and where necessary, the President may order the matter to be conducted by videoconference or conference calls. Expedited proceedings are also available, particularly for matters relating to sporting competition.

The International Tribunal hearings are presided over by the President, who, in accordance with adversarial principles, invites the Parties to set out their respective arguments, where appropriate without the witnesses, knowledgeable parties or experts being present. The International Tribunal may hear the respective

²³ Article 12 of the FIA Judicial and Disciplinary Rules provides: “A suspension order is fully effective as soon as it is pronounced, and an appeal before the ICA does not suspend the enforcement of this order”.

witnesses, knowledgeable parties, experts and third parties. Other interested third parties may also apply to the International Tribunal to be heard. The President may also allow any party to attend the hearing via videoconference or another means of communication.

d) The Decisions

After the close of the hearing, the International Tribunal panel deliberates with a view to arriving at a final decision. The deliberations are held in camera.

The decisions are rendered by a simple majority of the members of the judging panel, with the President having a casting vote. The decisions are in both French and English, with the French version prevailing in case of any difference in interpretation.

e) Appeals and Review

Pursuant to Article 13.3 of the FIA Judicial and Disciplinary Rules, the International Tribunal may on its own notion or upon application from one of the parties and/or a party directly affected by its decision review or re-examine its own judgment if it discovers relevant new evidence which was previously unknown to the judging panel. Any party wishing to have a petition to review a decision issued the International Tribunal must file its petition “within 12 months of the decision to be reviewed.” If the decision has an influence on the result of a championship, the petition for review must be submitted before 30 November of the year in which the decision to be reviewed was initially taken (cf Article 13.3 of the FIA Judicial and Disciplinary Rules).

An appeal against the International Tribunal decision may be filed before the International Court of Appeal. Such appeal automatically suspends the enforcement of any sanction or effects of the International Tribunal decision. The International Tribunal may however order the provisional enforcement of all or part of its decision whenever it considers this justified.

Pursuant to Article 17.3 (i) (c) of the FIA Judicial and Disciplinary Rules, “[a]ppeals against decisions taken by the bodies of the FIA in application of the Statutes (affiliations, striking off the rolls, etc.) and by the IT: the appeal must be notified within 7 days following the notification or publication of the decision”.

f) Costs

Parties seeking to have their disputes solved by the International Tribunal must pay an advance of costs. In its decision, the International Tribunal determines, depending on the outcome of the case, against whom to award the costs, which are calculated by the General Secretariat of the FIA courts, and include all the expenses, fees, and disbursements incurred by the prosecuting body, including the costs of investigation, witnesses, fees of experts and technical advisers and a contribution to the operative

costs of the International Tribunal. These costs do not include the expenses and legal fees incurred by the prosecuted person.

7.4 The FIA Anti-Doping Disciplinary Committee

a) Jurisdiction and types of disputes

Supplement B Annex B.1 of the FIA Anti Doping Regulations vests the FIA Anti-Doping Disciplinary Committee with disciplinary power in the first instance over athletes and other persons subject to the provisions of the FIA Anti-Doping Regulations. It has jurisdiction over athletes and persons who violate the FIA Anti-Doping Regulations.

b) Appointment of judges

For each case, the President of the FIA Anti-Doping Disciplinary Committee appoints from among the twelve members of the FIA Anti-Doping Disciplinary Committee a judging panel made up of a minimum of three members, one of whom he appoints as President of the panel.

c) Initiating proceedings

Pursuant to Article 8.2.1 of the FIA Anti-Doping regulations, once it appears, following the results management process that the FIA Anti-Doping regulations have been violated, the athlete or other person involved is summoned by means of a registered letter and brought before a disciplinary panel of the athlete's or other person's National Sporting Authority or National Anti-Doping Organisation in accordance with the rules of the National Sporting Authority or the National Anti-Doping Organisation for a hearing to adjudicate whether a violation has occurred and if so what consequences should be imposed.

The athlete or other person may be assisted by one or more defence counsels of his own choice.

The President of the hearing is responsible for conducting the proceedings, verifying the regularity of the proceedings, ensuring that the rights of the parties are respected.

The Athlete may be assisted by one or more defence counsels of his own choice and can also request that certain persons of his choice be called to testify.

The cases are completed expeditiously and in all cases within three months of the completion of the results management process.

d) The decisions and appeals

The decision is taken by the simple majority. The President of the hearing has a

casting vote. The decisions issued by the FIA Anti-Doping Disciplinary Committee are neither final nor binding. They may be appealed to the Court of Arbitration for Sport in as far as they relate to doping and the FIA Anti-Doping Regulations.

Article 13.6 of the FIA Anti-Doping regulations gives an affected party a time limit of 21 days from the date of receipt of the decision to file its appeal before the Court of Arbitration for Sport.

e) Costs

The FIA Anti-Doping regulations do not provide for costs attached to violation of the anti-doping regulations, and it would appear as though the proceedings are free.

7.5 The International Court of Appeal

a) Jurisdiction and types of disputes

The International Court of Appeal is the final appeal tribunal for international motor sport. Established under the FIA Statutes and the International Sporting Code, it resolves disputes brought before it by any of National Sporting Authorities worldwide, or by the President of the FIA. It can also settle non-sporting disputes brought by national motoring organizations affiliated to the FIA.²⁴

The International Court of Appeal has jurisdiction to hear appeals filed against three types of matters:

- i. appeals concerning sporting decisions: These are decisions issued by Stewards, appeals brought by national sporting authorities, organisers, competitors, drivers or other licence holders who are addressees of a decision of a national court of appeal where such decision has an international dimension and appeals relating to other sporting matters as the FIA President may consider should be heard by the International Court of Appeal;
- ii. appeals concerning decisions taken by the International Tribunal; and
- iii. appeals concerning the interpretation or application of the FIA's Statutes.

The right of appeal before the International Court of Appeal is confined to the party or parties concerned in the lower court proceedings. In such cases, the National Court concerned or the National Sporting Authorities cannot refuse to file the appeal on behalf of the party concerned (Article 152 of the International Sporting Code).

The International Court of Appeal may also arbitrate disputes of a sporting or regulatory nature between FIA members on condition that the FIA President decides to refer such dispute to the International Court of Appeal and that the

²⁴ The rate at which the FIA International Court of Appeal has issued decisions has varied over time: in 2007, it decided 13 cases; in 2008 5 cases were decided; 26 cases were decided in 2009, the years of greatest judicial activity; while in 2010 only 5 cases were decided, three more than in 2011. Information available at www.fia.com.

parties to the dispute consent to the International Court of Appeal ruling.

It is through the International Court of Appeal that the FIA preserves the specificity of all legal matters related to the world of motorsport. Although there is no express provision which makes the decisions of the International Court of Appeal final, binding and un-appealable, the parties and members have the statutory duty to accept, observe, and enforce all decisions taken by the bodies of the FIA, including the International Tribunal, the International Court of Appeal, and they have as a matter of practice and in recognition of the provisions of chapter 1 Article 1 of the International Sporting Code, chosen to respect and abide by the decisions of the International Court of Appeal, although a few have been challenged before the French State (civil) Courts.

It should however be noted that the FIA recognizes the Court of Arbitration for Sports' competence to hear matters concerning doping in the world of motorsport by applying the FIA Anti-Doping Regulations and does not prohibit a party from referring to any other court or tribunal provided that all internal mechanisms within the FIA have been exhausted as provided for under Article 20 of the FIA Judicial and Disciplinary Rules.

In accordance with good governance principles, the International Court of Appeal is an independent body with its own administration detached from the main structure of the FIA.

b) Appointment of judges

The International Court of Appeal has between 12 and 24 judges, all recommended by the Judicial Appointment Committee and then elected by the FIA General Assembly. The judges are elected for 3 years. The International Court of Appeal president designates a panel of three (one of whom is appointed as the panel's president) from among the International Court of Appeal judges. In order to ensure independence and impartiality, Article 17.4 of the FIA Judicial and Disciplinary Rules states that no member of the panel can be of the same nationality as one of the main parties to the case other than the FIA.

c) Initiating proceedings

Appeals before the International Court of Appeal can only be sent to the General Secretariat of the FIA Courts. Appeal proceedings are initiated by a notice of appeal filed by the aggrieved party.

Any appeal filed before the International Court of Appeal must be accompanied by an appeal fee of Euro 6,000, which may be increased to Euro 12,000 if the case concerns one of the major FIA Championships (except for the World Karting Championship).

The appeal fee is payable on notification of the appeal, regardless of whether or not the appeal proceeds further.

Failure to pay this appeal fee, or payment of this appeal fee out of time may render the appeal inadmissible, as held in the International Court of Appeal decision No. 2/2002 dated 29 April 2002 which declared an appeal inadmissible on grounds that no appeal fee had been paid to the International Court of Appeal within the prescribed time limit.

The appeal fee is usually retained by the International Court of Appeal in case the appellant's appeal fails and is partially and/or wholly returned to the appellant should its appeal partially and/or wholly be upheld.

Pursuant to Article 11.7 of the FIA Judicial and Disciplinary Rules, any appeal against a decision issued by the International Tribunal effectively suspends the sanction imposed therein. This, however, is without prejudice to the powers of the International Tribunal to order the provisional enforcement of all or part of its decision whenever it considers this justified.

However, a stay of execution is not granted in appeal matters related to decisions issued by Stewards touching on questions of safety, good standing or irregularity of entry by a competitor entering an event (cf Article 152 of the International Sporting Code).

For purposes of deadlines, the time of receipt by the General Secretariat of the FIA Courts and not the time of sending is determinant (Article 17.1.1 of the FIA Judicial and Disciplinary Rules). The time limits vary, depending on the decision being appealed. For decisions issued by Stewards, the time limit for filing an appeal before the International Court of Appeal is 48 hours following the publication of the decision by the Stewards or notification of the decision to the party affected.

Appeals against decisions issued by a judicial body of a National Sporting Authority and decisions issued by bodies of the FIA in application of the Statutes and the International Tribunal must all be filed within seven days following notification of the decision by the relevant deciding body.

The notice of appeal must be filed either by letter, fax or email. The day on which the International Court of Appeal receives this notice of appeal shall be the day of receipt for the purposes of assessing compliance with the appeal deadlines. The burden of proving that a notification of appeal was sent by post, fax and/or e-mail, and the day of sending, in all cases rests only with the party submitting it.

The FIA Secretariat then issues an "acknowledgement of receipt" which notes the time and date of receipt in response to the appeals submitted. For the purposes of all deadlines, the time of receipt by the FIA Secretariat, not the time of sending, is conclusive.

It is worth noting that the time limits mentioned in the FIA Judicial and Disciplinary Rules refer to calendar days, not working days, and start running on the first day following the day on which the relevant event occurs.

Parties before the International Court of Appeal may seek to have their dispute resolved expeditiously, in particular for matters relating to sports competitions. Upon receiving such request, the President shall fix the time limits for the procedure to be followed, respecting the adversarial principles and the

rights of the all parties.

Article 17.5 of the FIA Judicial and Disciplinary Rules grants the appellant fifteen days to file its grounds of appeal and a similar deadline for the defendant to file its response. Any third parties wishing to intervene shall also be granted a right to participate and invited to file submissions within a time limit to be fixed by the President of the hearing.

Where necessary, the hearing may be held by video conference or conference call if the President so directs. The parties may be represented by lawyers.

d) *Decisions and review*

The decisions are rendered by simple majority, with the President of the hearing having a casting vote. Pursuant to Article 17.9 of the FIA Judicial and Disciplinary Rules, the decisions of the International Court of Appeal “(...) are binding with immediate effect as soon as they are issued.”

The International Court of Appeal may on its own notion or upon application from one of the parties and/or a party directly affected by its decision review or re-examine its own judgment if it discovers relevant new evidence which was previously unknown to the judging panel. Any party wishing to have the decision reviewed must file an application to the International Court of Appeal within 12 months following the International Tribunal’s decision.

e) *Challenges*

Although the FIA regulations do not expressly provide so, the decisions issued by the International Court of Appeal may be challenged before the French State (civil) Courts. This naturally flows from the fact that the FIA is a private international body with its headquarters in Paris, France.

There are however very few challenges which have so far been filed, which proves the competence and expertise of the judges who work at the various FIA courts.

As earlier mentioned, any party wishing to challenge a decision issued by the International Court of Appeal must first file the challenge before the *Tribunal de Grande Instance*. The regular deadline for filing such a challenge is five years, but this is not definite; it may vary depending on the subject matter. For example, the deadline for lodging a case related to salaries is five years and that for a commercial debt is ten years, and four years for most of tax issues. A decision issued by the *Tribunal de Grande Instance* may be challenged to the *Cour d’Appel*. A French citizen or company wishing to do so must file its challenge within one month following the issuance of the *Tribunal De Grande Instance’s* decision, whereas a foreign citizen or foreign company must do so within three months. Both the *Tribunal de Grande Instance* and the *Cour d’Appel* will have jurisdiction to

assess both the facts and the law which led to the International Court of Appeal's decision. As a final remedy, any French citizen or company dissatisfied with the *Cour d'Appel's* decision may challenge it before the *Cour de Cassation*, but it must do so within the fixed time limit of two months following the issuance of the *Cour d'Appel's* decision. Foreigners and foreign companies must file any challenge to the *Cour de Cassation* within four months. However, the *Cour de Cassation* will only have jurisdiction to review errors of law and upon finding any such errors, will refer the case back to the *Cour d'Appel* for fresh appreciation.²⁵

The mere fact that a decision issued by the International Court of Appeal has been challenged before the *Tribunal De Grande Instance*, or subsequently appealed to the *Cour d'Appel* does not suspend the previous decision, unless an application for stay has been granted.

8. *Implementation of FIA decisions*

The FIA ensures that the decisions issued by its judicial bodies are implemented by either permanently or temporarily withdrawing the so-called Sporting Power²⁶ it has granted all National Sporting Authorities in running motor sport in a particular territory.

Article 4 of the FIA Statutes entitles the FIA General Assembly to withdraw such Sporting Power in case a National Sporting Authority fails to comply with the decisions of the FIA.

Corroborating the above is Article 6 of the FIA Statutes, which obliges all Clubs, Associations or Federations which are members of the FIA to accept, observe, and enforce all decisions taken by the bodies of the FIA, including the International Tribunal and the International Court of Appeal. It requires all persons involved in the FIA activities to comply with the FIA Statutes, rules, regulations and decisions.

9. *Mediation / conciliation*

Although there is no specific regulation providing for mediation or conciliation, the entire judicial process before the FIA courts can be termed as an alternative dispute resolution framework within which the FIA and its members choose to resolve disputes outside the corridors of the natural courts. Indeed, appendix 1 Article 1 of the FIA Judicial and Disciplinary Rules²⁷ sums this up by requiring all the members

²⁵ For further information, please consult Jean-Christophe Breillat, Secretary General of the Federation Internationale de L'Automobile's Courts and Jean-Yves Foucard, partner at LMT Avocats, Paris, France.

²⁶ This is power held by the FIA but delegated to a National Sporting Authority, Club or Association to take all decisions concerning the organisation, direction and management of International Motor Sport in accordance with the international regulations laid down by the International Sporting Code of the FIA, in its own country.

²⁷ Appendix 1 article 1.1 of the FIA Judicial and Disciplinary Rules: "*The International Tribunal and the International Court of Appeal will be composed of members of the highest caliber (...).*"

who serve in the International Tribunal and International Court of Appeal to have judicial experience both in international arbitration and mediation.

10. Conclusion

As a private association based in Paris France, and the world governing body in charge of motorsport, the FIA has established itself as one of the world's best organised and managed sports association. The FIA not only governs a fascinating sport but also generates millions in terms of revenues from the media following and commercialisation. In 2012, world news agency Reuters reported that Swiss global financial services company UBS AG's analysts expected the Formula One's revenue to grow by 9.2 percent a year from 2011 to 2016, climbing to \$2.37 billion from \$1.52 billion over that period.²⁸

The characteristics of the FIA as detailed in this study are sufficient reason to justify its almost worldwide role and its great importance in terms of mobility and motor sport.

Its universal and impartial mission together with its organisational partnership with national authorities, via the delegation of sporting power, enables it to achieve an immense individual and geographic role. By challenging national barriers, the FIA has members in approximately 134 countries and those covers approximately 200 million drivers and their families.

It is tempting to think that the FIA will continue to play a central role in the evolution of mobility and motor sport. Growth in the membership of the "FIA family" and the expansion of its legislative and judicial resources have led to an increasing development of safe, harmonised and sustainable mobility and motor sport.

By seeking to ensure, safety, justice and sporting equity and also by promoting safety in travel and motor tourism, the FIA has created various international law instruments, which establish the rules, not only with regard to its own organisation but also with regard to the organisation of events and competitions, by ensuring a harmonised and coherent system wherever the sporting event takes place. The decisions of the FIA organs are implemented, under its supervision, by the members of the FIA, whose membership status has been recognised by the FIA, and to which it has granted sporting power.

Like the FIA, the international federations of many sports have made tremendous strides in establishing internal dispute resolution bodies handled by legal experts to resolve disputes at first instance related to their respective sport.

Nominees must demonstrate the following characteristics (...) Judicial experience is preferred, for example in a higher court of a particular jurisdiction, or in an internationally recognized arbitral tribunal or mediation forum..".

²⁸ For further reading, see www.reuters.com/article/2012/05/30/formulaone-ipo-idUSL4E8GU36L20120530.

The disputes that arise between members of the FIA or between participants in motor sport events and also breaches by members or participants of the FIA rules are judged by the FIA's own court structure. The FIA court structure is composed of judges who are independent, impartial and also well versed and experts in sports law matters, even if it might not be perceived as a pure arbitration tribunal like other arbitration tribunals, where the parties can appoint a judge to sit in the panel. At FIA, this is the sole prerogative of the Presidents of the International Tribunal and the International Court of Appeal.

With the exception of matters related to doping, the FIA, as, well as a number of international sports federations (in particular those which are not part of the Olympic family) do not foresee or contain provisions which grant their members the right to challenge a decision at the Court of Arbitration for Sport.

The FIA and other international federations, whose regulations contain no provision for appeal to the Court of Arbitration for Sport risk losing the specificity attached to case laws and jurisprudence issued by their bodies because of the unforeseeable likelihood of having their decisions challenged before the ordinary State Courts as is currently possible with the FIA decisions, and it is always safer to avoid interference by the State Courts.

One of the reasons why the Court of Arbitration for Sport was established was not only the need to ensure fast and equitable access to justice for all sports stakeholders, athletes, clubs, international federations, associations and individual members, but also to offer them a window through which they would challenge, and perhaps overturn decisions which they considered unfair to a superior tribunal composed of legal experts in the world of sports and international arbitration drawn from all corners of the world.

This was ultimately meant to foresee the globalization of sports by establishing a body of law, the so-called *lex sportiva*. The Court of Arbitration for Sport has made this work with great success while at the same time safeguarding this specificity by ensuring that the international federations are represented at the Court of Arbitration for Sport through giving them the right to propose at least one fifth of persons to form part of the list of the Court of Arbitration for Sport's arbitrators.

And with the amendments contained in the Code of Sports-related Arbitration and Mediation Rules 2013, the specificity attached to each particular sport has received special consideration in Article S14 thereof with the possible future creation of separate lists of arbitrators specialized in certain areas.

As the highest judicial body within the FIA, the International Court of Appeal has continued to form an excellent body of jurisprudence to guide the legal activities and operations of the FIA.

Notwithstanding a few challenges against decisions issued by the International Court of Appeal which have been filed before the French State (civil) Courts, the body of law and jurisprudence established by the FIA courts, and in particular the International Court of Appeal remains unshaken, which is further proof of the legal expertise and qualifications of the judges appointed by the FIA.

The FIA's association with other international legal stakeholders in the judicial world of sports continues to play a great role in the centralisation and unification of sports disputes. It is also apparent that there are several aspects and features which are common to both the FIA and the Court of Arbitration for Sport.

For example, the FIA allows the Court of Arbitration for Sport to hear appeals against doping decisions rendered by the FIA Disciplinary Commissions on doping matters. In addition to this, it is possible for the Court of Arbitration for Sport to hear under an ordinary proceeding, non-disciplinary disputes involving FIA members provided that such members have contractually agreed to refer their disputes to the Court of Arbitration for Sport.

These are obvious elements aimed at preserving the specificity of sport and a possible interference by the State Courts with the sports family. Therefore, there exists further avenues through which the FIA and the Court of Arbitration for Sport could develop and foster their already existing judicial association.

Perhaps, and also maybe with a view to avoiding any possible challenge to the State courts against decisions issued by the International Court of Appeal so as to preserve its specificity, the systematic collaboration with the Court of Arbitration for Sport may also be extended, whereby the latter may be allowed to hear challenges against decisions issued by the International Court of Appeal.

We know how a dispute starts. We never know how it ends. For this reason, it would be advisable in future for the FIA to consider having disputes resolved within the sports family by reviewing the current system in a manner which would see the Court of Arbitration for Sport taking part in the final decision.

INTERNATIONAL RUGBY JUSTICE: A PRÉCIS OF THE JUDICIAL SYSTEM OF THE INTERNATIONAL RUGBY BOARD

by *Susan Ahern**

SUMMARY: 1. Introduction – 2. The judicial structure – 3. On-field discipline – 4. Misconduct – 5. Anti-Doping – 6. Eligibility – 7. General - Disputes and mediation – 8. Conclusion

Abstract:

The International Rugby Board (“IRB”) is the governing body of Rugby Union, established in 1886. This chapter provides an overview of the current system of laws and rules which apply within the sport. It draws together the universality of the Rugby Regulations and provides an insight into how those Regulations are applied by the independent judiciary in a global context.

1. Introduction

The origins of the Game of Rugby Union (“Rugby/”Game”) emerged from an act of spirited defiance when, at Rugby School in 1823, William Webb Ellis picked up the ball during a game of soccer and ran with it.¹ Today, his name and legend live on as the Webb Ellis Cup is presented to the champions of the sport at the quadrennial Rugby World Cup event. Legend and legacy are important in Rugby but so also is the need to be relevant in modern times. There is a wide choice of sports disciplines from which parents and children can select. They will only choose a sport that is disciplined both on and off the field. That means it is critical that the sport accords with modern mores and disciplinary standards. As such, the IRB takes its role of guardian of the Game and protector of the character and integrity of the sport extremely seriously. This paper endeavours to give an overview of the judicial

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¹ See page 4 of the IRB Charter: www.irb.com/mm/Document/AboutIRB/0/PLAYINGCHARTER_6259.pdf (30 May 2013).

system which the IRB has created to underpin the sport and to delve into some key areas which are fundamental to upholding the IRB Bye-Laws and the IRB Regulations Relating to the Game (“IRB Regulations”).²

The IRB Regulations cover all off-field matters relating to the proper governance and administration of the sport including *inter alia* eligibility, advertising around the playing pitch, technical equipment specifications, betting, agents, anti-doping and player release. The IRB Bye-Laws deal with the governance structure of the organisation, the establishment of committees, their roles, powers and responsibilities, while the Laws of the Game deal entirely with on-field matters. The Bye-Laws and Laws of the Game are not considered within the scope of this paper save to deal with the off-field consequences of foul play as addressed in Section 3 and where appropriate to provide context.

2. *The judicial structure*

Independence, neutrality and expertise are core requirements for appointees who carry out judicial responsibilities on behalf of the IRB. By extension IRB member Unions are mandated to emulate this fundamental tenet in all appropriate areas of their domestic processes. The core IRB Regulations dealing with disciplinary and judicial matters set out the foundation structure supporting the appointment of independent judicial personnel. The functions and powers of the independent judiciary and the general principles which they should apply in the course of their appointment and the exercise of their duties are also delineated. Notwithstanding this, they retain a high degree of discretion in the exercise of those powers.³ While long a feature of IRB Regulations, the present structure was put in place in 1995 as the Game turned professional.⁴

2.1 *IRB judicial panel*

The IRB Council, which is the supreme law making body of the IRB, appoints individuals to a panel – the Judicial Panel – whose members are drawn from recommendations made by the individual national member Unions. The Judicial Panel members are eligible to sit in the capacity of Judicial/Appeal Officers and/or as members of Judicial/Appeal Committees. Appointments are for a period of up to two years. For IRB appointments, the nominees are selected from the Judicial Panel by the Judicial Panel Chairman, in consultation with the Chairman of the

² The IRB Regulations Relating to the Game support the Laws of the Game and can be found in the IRB Handbook at: www.irb.com/imgml/irb/irbhandbook/en/index.html#/1/ (30 May 2013).

³ IRB Regulation 18 – Disciplinary and Judicial Matters at www.irb.com/imgml/irb/irbhandbook/en/index.html#/266/ (30 May 2013).

⁴ Today there are over 5.5 million Rugby players globally and approximately 1% of the total known playing population are professional players. The IRB regulates the professional and amateur levels of Rugby in all its forms.

⁵ IRB Regulation 18.2.1.

IRB Council. As appropriate, specialist experts not drawn from the Judicial Panel may be called upon to sit in matters involving allegations of breaches of the Bye-Laws and IRB Regulations⁵ which require their specialist skills and expertise.⁶ The Judicial Panel Chairman position is independent of the executive and governing arms of the IRB.

The IRB Regulations set out certain minimum requirements in terms of expertise before appointments can be made.⁷ Appointments from the Judicial Panels deal at first instance or on appeal with (i) alleged breaches of the IRB Bye-Laws and IRB Regulations Relating to the Game; (ii) disputes regarding player status and movement; (iii) circumstances where a Union or a Regional Association is charged with bringing the IRB, the Game or any Person⁸ into disrepute; engaging in conduct or practices which may be prejudicial to the interests of the IRB/the Game; disclosing confidential information, and/or breaching the IRB Code of Conduct.⁹

Judicial Committees are ordinarily comprised of three persons but may be up to a maximum of five and a minimum of two persons.¹⁰ All first instance decisions of Judicial Officers and/or Judicial Committees may be appealed. On appeal, the Appeal Officer, or more usually an Appeal Committee, is appointed by the Appeal Panel Chairman. No member of the IRB Council or any other IRB standing committee may be a member of the Appeal Panel. The composition of the Appeal Committee in numbers mirrors that of Judicial Committees¹¹ and the Appeal Panel Chairman who appoints Appeal Committees, has similar rights of co-option where the requisite skills and expertise that are required are not to be found within the membership of the Appeal Panel.¹²

All Judicial Officers and Judicial Committees appointed under the IRB Regulations are fully autonomous and they are obliged to exercise their functions *“independently, including independently of (i) the parties to the Match and/or proceedings, (ii) the Unions, Associations or Rugby Bodies under whose jurisdiction responsibility falls for the relevant Match and shall not perform a legislative role in any Union, Association or Rugby Body involved in the Match and/or proceedings”*. Any decision they make is binding on the relevant player, Person, their Union(s) and members, and all other Unions, Associations,¹³

⁶ IRB Regulation 18.2.7.

⁷ For example in on-field disciplinary matters IRB Regulations 17.13.1(c)(iv) and 17.13.2(b) require that a Judicial Officer must be a legal practitioner of 7 years' standing or a serving or retired judge and the other members of the Judicial Committee do not need to be lawyers but do need rugby playing or administration or disciplinary regime experience.

⁸ Person as defined in IRB Regulation 1 means *“a Player, trainer, referee, touch judge, coach, selector, medical officer, physiotherapist or any other individual who is or has been at any time involved in the Game, or in the organisation, administration or promotion of the Game”*.

⁹ The IRB Code of Conduct is itself embedded as part of the Regulations as Appendix 1 to IRB Regulation 20 (www.irb.com/imgml/irb/irbhandbook/en/index.html#/286/, 30 May 2013).

¹⁰ IRB Regulation 18.2.4.

¹¹ IRB Regulation 18.3.5.

¹² IRB Regulation 18.3.7.

¹³ Association - means an association of Unions recognised by the Council (per IRB Regulation 1).

tournament organisers and their constituent bodies, none of whom shall have the power to affirm, revoke or alter any decisions. Decisions of other sporting tribunals and public authorities, in particular in the areas of anti-doping and anti-corruption, may be recognised and applied in Rugby where the appropriate recognition steps are taken.¹⁴

2.2 *Initiation of proceedings*

All judicial investigations, assessments and appointments arise from either a matter initiated by the IRB acting on its own accord (which may be initiated by the Council, the CEO or the Disciplinary Officer of the IRB as applicable) or from a complaint/request from a Union or Association to the IRB in relation to another Union or Association against whom a breach of the Bye-Laws or IRB Regulations, including the Code of Conduct, is alleged.

The IRB respects the hierarchical structure of sports governance and while it has the responsibility to regulate the Game it also respects the autonomy of national member Unions and Associations to regulate and enforce the IRB Regulations within their own jurisdictions. The IRB does not ordinarily descend uninvited into the domestic realm of individual Unions as that is a matter which Unions and Associations are specifically mandated to manage themselves. Unions and Associations have a positive obligation to investigate, as soon as reasonably practicable “*each and every alleged breach of the Regulations occurring or committed within or relating to its jurisdiction and of which it has knowledge*”.¹⁵ In the event that there is a failure to investigate or act or the procedures adopted and/or decisions taken by the Union or Association are not satisfactory to the IRB, then such matter may be referred by the IRB via the Judicial Panel Chairman to a Judicial Officer or Judicial Committee to take such other action as it deems appropriate.¹⁶ In this way the IRB adopts and maintains a supervisory role over the domestic actions of its members relating to adherence to the IRB Regulations and leaves the substantive assessment of any alleged breach or failure to apply the rules to the independent judiciary. In practice, there has been infrequent recourse by the IRB to these rights of intercession which demonstrates that Unions are mindful of their obligations and take seriously their responsibility for what transpires within their home jurisdictions. Were the ultimate sanction of suspension or termination of the membership of a Union to be proposed by a Judicial Officer or Judicial Committee then this single aspect of a decision would require the approval of the IRB Council - who consider this to be a matter of core sports governance.¹⁷

¹⁴ See IRB Regulation 21.28.2 and IRB Regulation 6.14.2 respectively.

¹⁵ IRB Regulation 18.4.1.

¹⁶ IRB Regulation 18.4.2.

¹⁷ IRB Regulation 18.6.1 provides that penalties may include “*a recommendation to the Council that a Union or Association be expelled or suspended from Membership of the Board. Subject to the provisions of Bye-Law 6(d), only the Council shall be competent to expel or suspend a Union or Association and any such expulsion or suspension shall only have effect if approved*”

The most recent example, excluding player eligibility cases (which are discussed in Section 6) where a referral was made to the IRB was a case involving an allegation that a Slovenian club participated in the national league of Austria without the prior consent of the Slovenian Rugby Union (“SRU”) in contravention of IRB Regulation 2.1.2 which specifies that *“A Club or Rugby Body may only be affiliated to the Union within whose geographical boundaries its Home Ground is situated and shall only be entitled to play in Matches organised, recognised or sanctioned by that Union, unless specific approval has been given by both Unions”*. The IRB asked both Unions to investigate the conduct and report back. Being dissatisfied with the outcome, a Judicial Officer was appointed to consider the alleged breach of IRB Regulation 2.1.2. The Judicial Officer determined that Bezigrad Rugby Club did participate in an Austrian Rugby league without the approval of the SRU and that the Austrian Rugby Union (“ARU”) was aware of this and was consequently found *“to have acted contrary to IRB Regulation 2.1.1 by permitting the club to participate in the Poweraid League”*. The ARU received a warning and a fine of Euro10,000 which was suspended for two years subject to there being no further breach of the Regulations.

The Regulations dealing with on-field discipline, misconduct and anti-doping, given their nature and the extent of judicial activity, are worthy of a detailed review and are discussed in more depth in respectively Sections 3, 4 and 5 below.

3. *On-Field Discipline*

“At first glance it is difficult to find the guiding principles behind a game which, to the casual observer, appears to be a mass of contradictions. It is perfectly acceptable, for example, to be seen to be exerting extreme physical pressure on an opponent in an attempt to gain possession of the ball, but not wilfully or maliciously to inflict injury. These are the boundaries within which players and referees must operate and it is the capacity to make this fine distinction, combined with control and discipline, both individual and collective, upon which the code of conduct depends”.¹⁸

Rugby is a physical team contact sport played at high speed and with significant intensity without protective equipment.¹⁹ In order to ensure the image and integrity of the Game as well as its longevity as a sport such that parents are willing to allow their children to participate, it is imperative that when Foul Play²⁰

by a two-thirds majority of the votes cast at a properly convened and quorate Council meeting”.

¹⁸ IRB Charter page 4, *ibid*.

¹⁹ Padded equipment is permitted on-field in accordance with Law 4 (www.irblaws.com/?law=4, 30 May 2013) and IRB Regulation 12 (www.irb.com/imgml/irb/irbhandbook/en/index.html#/180/, 30 May 2013) to reduce the severity and frequency of injuries from impacts with other players or the playing surface. The maximum thickness of any padded equipment is 0.5cm when uncompressed.

²⁰ Examples of Foul Play (which are contrary to Law 10.4) include; punching, striking, stamping, trampling, kicking, tripping, dangerous tackling, playing an opponent without the ball, dangerous charging, tackling the jumper in the air, dangerous play in the scrum, ruck or maul, retaliation, acts

occurs on the field it is strongly and efficiently managed by referees, by Citing Commissioners and by the independent judiciary should the action(s) warrant such recourse. Citing Commissioners are off-field referees who have the power to assess Foul Play in the Game and where they believe an act warrants a red card, i.e. dismissal from the match, can “cite” or refer the player to a hearing. The Citing Commissioner may make such referral even in the circumstances where the referee has dealt with the matter during the match. The Citing Commissioner looks solely at the incident and relevant evidence and does not take into account the intention of the player - this is a matter for the Judicial Officer to assess.

3.1 *A rugby specific regime*

The on-field disciplinary regime for Foul Play (“Disciplinary Regime”) that applies to the Game today has evolved in particular since the Game went professional in 1995, but importantly, it is structured so that it can be applied at all levels of the Game and in all countries where Rugby is played. There are elements of the Disciplinary Regime which are mandatory, namely the Core Principles,²¹ but yet it retains a flexibility that enables Unions at national level to be able to adapt the Disciplinary Regime to the requirements of their domestic structures at all levels.

The Disciplinary Regime recognises the various stakeholders (Unions, tournament organisers, professional and amateur players, 15’s and 7’s players), the common threads that bind them and embraces their different needs, while all the time maintaining the universality principle which has underpinned the sports sanctioning regime in Rugby to date. The universality principle is the simple premise that players as they move from one national system to another and into the international arena should be governed by the same rules (“Laws”) and the same Rugby judicial systems and processes and notably, that all matches, regardless of their perceived stature, are treated the same.²²

The Disciplinary Regime is Rugby-specific. It is designed to meet the unique needs of Rugby and is supported by a robust judicial system which is independent and delivered swiftly by people who have an intimate knowledge of the Game. It is a hybrid regime which incorporates fundamental features of the civil law system, such as the inquisitorial system of law, together with rules of evidence which are common law based. As such the system is one which is sport-specific, incorporating established thresholds, standards and a Rugby-specific sanctioning regime²³ which has been devised by the Game.

It is inevitable that under an independent system of sports discipline, administered by personnel from different jurisdictions, that a degree of inconsistency

contrary to good sportsmanship and misconduct. The sanction ranges applicable to Foul Play are set out in Appendix 1 to IRB Regulation 17.

²¹ IRB Regulation 17.1.1 at: www.irb.com/imgml/irb/irbhandbook/en/index.html#/226/ (30 May 2013).

²² See IRB Regulation 17.1.1(b).

²³ See IRB Regulation 17.19 and Appendix 1 thereto.

in decision-making may exist virtually irrespective of the Laws, the content of Regulations, the recommended sanctions and/or the adjudicators appointed. However, it is necessary for the margin of such inconsistency to be minimised to the extent possible and for there to be transparency in the system and the application of the rules so that all stakeholders can feel confident that the disciplinary system for Foul Play in Rugby is, and is seen to be, credible, robust and truly reflective of the Game's contemporary morality.

3.2 *The Morality of the Game*

At reasonable intervals, the IRB reassesses its disciplinary rules to ensure that its independent disciplinary procedures reflect the current morality of the Game and are based on the application of the appropriate interpretation of the Laws of the Game to ensure that there is an understanding and acceptance from all stakeholders in relation to the ultimate decisions made.

To assist in this regard, in 2005 a disciplinary conference was held by the IRB which brought together highly respected stakeholders in the Game (including eminent coaches, referees, current and former international players, administrators and members of the judiciary) under the umbrella of a Morality Conference to discuss and seek to arrive at a consensus on key issues within the disciplinary regime of the IRB and the Game as a whole. Key issues considered were (i) the suitability and current application of the threshold test for citing; (ii) the suitability of the IRB recommended sanctions for Foul Play in particular the entry points; and (iii) other issues arising out of the application of the "rugby-specific" sanctioning regime, including the application of aggravating and mitigating factors and additional judicial discretion in exceptional circumstances.

Arising from the conference a consensus was reached and sanctions for Foul Play were categorised according to the level of seriousness of the offending, ranging from low end, to mid-range to top end offending. To achieve the categorisation, a weighting was applied to the sanctions to reflect the principles that Foul Play can (i) undermine the principle of fair play; (ii) undermine the protection of health and welfare of player; (iii) deter participation; (iv) damage the image of the Game; and (v) could lead to circumstances in which prosecution authorities would intervene if appropriate action was not taken by the sport. It was assumed, by participants, that those offences at the top end and/or mid-range of the scale of offending would be offences that had a high risk impact on the adherence to these principles. The resulting IRB Recommended Table of Sanctions has become firmly embedded as the core element of the disciplinary sanctioning regime. When it was reviewed in 2012 by another Morality Conference (again of eminent stakeholders in the modern Game including its various forms) it was found to have stood the test of time very well. Minimal adjustments were made and the Sanctions Table is now mandatory at all levels of the Game.

It is notable that all sanctions for Foul Play are based upon exclusion from

participation in matches. Fines are not permitted nor can sanctions be suspended. Suspensions should also be meaningful (e.g. not served during the off-season when the player has no scheduled match participation). The view of the Game is that a prohibition on playing is a greater and more effective sanction for a player than a financial penalty as it affects not just the player but also his team and therefore is more likely to have a deterrent effect in the future.

The Disciplinary Regulations were designed to ensure that the prescribed processes for ordering off hearings and citing hearings and appeals comply with the fundamental legal principles of natural justice and incorporate constitutional protections such as the right to be heard, to be represented, to be advised of the charges and to have the right of appeal. Further, to avoid extraneous influences in the decision-making process the Disciplinary Regulations include the essential requirement that judicial personnel must be independent of the executive arm of Rugby administration (in addition to neutrality considerations at the time of appointment). This fundamental tenet has been underscored by its incorporation as a Core Principle. Guidance on its scope has been provided by the IRB Regulations Committee which has clarified to the membership that independence in the context of judicial appointments means *‘having complete discretion in the exercise of the appointed function free from the influence, pressure or control of any party’*.

3.3 Core Sanctioning Process

Since early 2012 the core sanctioning process is required to be applied on a mandatory basis in all Rugby disciplinary cases for Foul Play. This is to ensure the proper application of the universality principle and aims to achieve consistency of outcome throughout the sport. It also means that players at national, regional and international level are treated the same as they traverse borders and participate in different competitions and test matches and consequently they are subject to the same process and range of applicable sanctions. IRB Regulation 17.19 requires that *“when imposing sanctions, all Disciplinary Committees or Judicial Officers dealing with an Ordering Off and/or citing shall apply the IRB’s sanctions for Foul Play set out in Appendix 1 and do so in accordance with Regulation 17.19.”*

As part of case management and to ensure fairness (and avoid any manipulation of the system) Players are provisionally suspended pending a hearing. As a counter-balance, cases are brought expeditiously, ordinarily before the player is next scheduled to play a match. The first step in the process requires an assessment of the seriousness of the player’s conduct that constitutes the offending and categorise that conduct as being at the lower, mid or top end range of the scale of seriousness. That enables the ‘entry point’ to be identified. Factors which are considered in assessing the entry point include, *inter alia*, intention, recklessness, self-defence, effect of the actions on the victim player including injury, whether the conduct was completed, and the effect of the actions on the Game.

Once the entry point is determined the Judicial Officer will assess the

off-field aggravating factors (e.g. past disciplinary record or the need for a deterrent) and will then consider the off-field mitigating factors (e.g. presence and timing of culpability, good character, youth and inexperience of the player etc.). By following this process, each case is considered on its own facts and merits but in a manner that is consistent in approach and assessment, thereby leading broadly to more consistency in decision making and outcomes. The IRB recognises that while there may not always be identical sanctions for like offences, the rationale for the differences should be explainable by the unique particulars of each case.

The IRB Disciplinary Regime is applied by Unions, Associations, tournament organisers and the IRB itself within its competitions and matches. To date, it has never been challenged successfully in the civil courts of any constituent Union's country and, in particular, on the grounds that it is unfair, unreasonable or repugnant to justice.²⁴ As a Regulation which is tested every day and reviewed frequently, it is hoped that it will continue to remain fit for purpose and evolve with the needs and contemporary morality of the Game while maintaining its Core Principles.

4. *Misconduct*

All sports have to deal with misconduct in one form or another and the IRB is no different. Rugby takes very seriously behaviour which does not meet the requisite standards set out in the Laws and Regulations and the notion of a player or Person bringing the Game into disrepute is one for which there is little tolerance.

The IRB Misconduct and Code of Conduct Regulation²⁵ sets out certain high level standards of acceptable and unacceptable behaviour. There is a clear veil of protection afforded to Match Officials (being referees, touch judges, television match officials) and disciplinary personnel in the exercise of their functions due to the stature of their roles. Consequently, behaviour that interferes unduly with or constitutes criticism of decisions made by these persons will be liable for disciplinary action. Given the physical contact nature of Rugby and the strength and physical fitness of its players, it is vital that the referee's stature is not only protected but seen to be protected by the Game and its participants. The referee is the sole judge of fact and Law but he is also the conductor of a mighty orchestral manoeuvre of 80 minutes duration complete with relentless physical contact involving 30 players at one time.²⁶ He must therefore be the master of the playing field and have that

²⁴ See further the cases of *Richard Wyllie Loe v The New Zealand Rugby Football Union*, Oral Judgement of Gallen J. of 9 & 10 August 1993 (CP. 209/93) and *Johan Le Roux v New Zealand Rugby Football Union*, Oral Judgement of Eichelbaum CJ of 14 March 1995 (CP 346/94). Loe – a case of eye gouging and Le Roux – a case involving ear biting- both sought unsuccessfully, High Court Judicial reviews of the New Zealand Rugby Union (“NZRU”) disciplinary rules. On both occasions, the Court dismissed the applications, the Judges (one of whom was the Chief Justice) ruling that there was no reason to interfere with the process adopted by the NZRU on the grounds that the rules were unfair, unreasonable or repugnant to justice.

²⁵ IRB Regulation 20 at: www.irb.com/img/ml/irb/irbhandbook/en/index.html#/286/ (30 May 2013).

²⁶ Or 14 players in the Sevens version of the Game with 14 minute matches. Rugby Sevens is now an

position respected and upheld by the governors of the sport.

The IRB ensures that the referee's position is respected both within the rules and through their consistent enforcement. Notably, Unions, Associations and their constituents "*must ensure that the Game is played and conducted in accordance with disciplined and sporting behaviour...shall co-operate in ensuring that the spirit of the Laws of the Game are upheld...shall accept and observe the authority and decisions of ... Match Officials and all other Rugby disciplinary bodies...shall not publish or cause to be published criticism of the manner in which a referee or touch judge handled a Match...[or] of the manner in which Council or any other Rugby disciplinary body handled or resolved any dispute or disciplinary matter resulting from a breach of the Bye-Laws, Regulations or Laws of the Game...shall not abuse, threaten or intimidate a referee, touch judge or other Match Official whether on or off the field of play*".²⁷

These provisions have been relied upon in cases involving criticism of referees by coaches,²⁸ physical and/or verbal abuse of referees,²⁹ ³⁰ insulting and offensive conduct towards match officials³¹ and increasingly the abuse of referees

Olympic Sport and will participate in the Rio Olympic Games 2016. For the first time since 1924, Rugby is back on the Olympic Programme. It previously appeared in the Olympic Games of 1900, 1906, 1920 and 1924 – See further: www.irb.com/mm/Document/Home/0/impact_mag.pdf (30 May 2013).

²⁷ See IRB Regulation 20 at Appendix 1, Code of Conduct.

²⁸ In *SANZAR v Eddie Jones* (22 February 2007) the then Queensland Reds coach Eddie Jones was fined AUD\$10,000 for adverse comments he made, reported on television, radio and in the print media, about the standard of refereeing in a Super 14 match against the Brumbies (17 February). This was the first matter of its type to be referred for determination by a SANZAR (the Super 14 tournament organiser) appointed Judicial Officer. In making his determination, Mr Terry Willis "*took into consideration the fact that not only were the comments made by Jones towards the referee in a live post game interview, but he continued his comments during a subsequent ABC radio interview maintaining his criticism... Further that the use of the words "squared up" implied that the referee was not honest*".

²⁹ In a case of *IRB v Mahoni, Lafoe and the Tonga Rugby Football Union* (12 June 2009), the Judicial Officer Bruce Squire QC in finding the charges upheld and imposing sanctions of three months and one month respectively, gave a clear pronouncement on the abhorrence the Game holds for abuse of its match officials: "*It scarcely needs to be said that the abuse and intimidation of match officials, however accomplished and for whatever motive, is utterly unacceptable in the game of rugby football. It strikes at the spirit of sportsmanship which lies at the very heart of the game itself and is rightly regarded as misconduct of the most serious kind attracting in the worst cases the most severe of penalties*".

³⁰ See also *RFU v Dylan Hartley* (26 May, 2013), a decision dealing with verbal abuse of a referee where the Judicial Panel clearly stated its position on such conduct when applying an 11-week suspension - "*Swearing at a match official is offensive in its own right, but challenging a referee's integrity by calling him a cheat exacerbates the offence. Referees have a very difficult job; some make mistakes; some have bad days when their officiating is poor. However, suggesting that the referee is a cheat, particularly in such an offensive manner – that is suggesting that the referee was making erroneous decisions for the benefit of one favoured side over another – represents an attack on an official's integrity. It undermines the core values of rugby. That is reprehensible and makes the offending more serious*".

³¹ On 15 May, 2013 a SANZAR Judicial hearing (Mr Terry Willis sitting as the Judicial Officer) found

and their decisions via social media³² and by officials using the medium to comment on match performances.³³

Misconduct cannot be exhaustively defined, as there is an infinite number of types and levels of behaviour which can and do fall within its boundaries. The IRB has sought to define Misconduct in a broad fashion and provides examples of the types of behaviour which in a non-exhaustive fashion illustrate its meaning.

IRB Regulation 20.3 states that “*Misconduct shall mean any conduct, behaviour, statements and/or practices on or off the playing enclosure during or in connection with a Match or otherwise that is unsporting, and/or cheating, and/or insulting, and/or unruly and/or ill-disciplined, and/ or that brings or has the potential to bring the Game and/or any of its constituent bodies, the IRB and/ or it appointed personnel and/or its commercial partners and/or Match Officials and/or judicial personnel into disrepute...*”. Such behaviour includes, *inter alia*, acts of violence or intimidation within a match venue, discriminatory acts or statements, match fixing or betting on Matches/tournaments in which a player is involved (and related breaches of the IRB Anti-Corruption and Betting Regulation (see further Section 4.1(i) below)), breaches of the IRB Code of Conduct, and failure to co-operate with investigations.

Each Union must nominate a designated disciplinary officer to administer the Misconduct Rules within its jurisdiction and such persons must be vested with investigative powers to make them effective.³⁴ Where the designated disciplinary officer elects to bring a Misconduct complaint the matter shall be referred to a Judicial Officer or Judicial Committee for consideration.³⁵

In cases involving Misconduct, the burden of proof is upon the party alleging the Misconduct. This party must demonstrate on the balance of probabilities that

the Stormers Team guilty of Misconduct under the SANZAR Code of Conduct following charges of insulting and offensive conduct towards match officials during the Stormers v Hurricanes Super Rugby match on 26 April, 2013. According to the press release of SANZAR, “*The Stormers Team has been found to have brought the game into disrepute and breached Section 8.3 of the SANZAR Code of Conduct...the Stormers Team has admitted its behaviour and accepted, that insulting and offensive conduct towards match officials was a breach of the SANZAR Code of Conduct and has no place in rugby and has unreservedly apologised to the Match Officials...*” The team was fined AUD\$15,000 for the insulting and offensive conduct and AUD\$10,000 for bringing the Game into disrepute.

³² In the case of the *Rugby Football Union v Chance Ridler* (2012) – see a summary of the decision issued by the RFU at: www.rfu.com/thegame/discipline/judgements/judgments-2012-2013/judgments-by-offence/~media/files/2013/discipline/ judgments/ anti%20doping/ridler%20judgment.ashx (30 May 2013) and *Rugby World Cup Limited v Eliota Fuimaono-Sapolu* (2011) – see further Section 4.1(ii) below.

³³ In April 2013 veteran Welsh referee Hugh Watkins resigned from his role of 20 years when he was called to a code of conduct hearing for comments allegedly made regarding a refereeing decision in the Wales v Fiji Hong Kong Sevens final see: www.bbc.co.uk/sport/0/rugby-union/22207141 (30 May 2013) and www.telegraph.co.uk/sport/rugbyunion/10011208/Twitter-furore-over-Hugh-Watkins-Hong-Kong-Sevens-comment-show-how-out-of-touch-sports-authorities-are.html (30 May 2013).

³⁴ See IRB Regulation 20.6.1.

³⁵ See IRB Regulation 20.7.10.

the act(s) of Misconduct have been committed. The Judicial Officer/Judicial Committee has the sole discretion to impose a provisional suspension on the Person subject to a Misconduct complaint pending the resolution of the case. Sanctions for Misconduct fall within a broad range from a caution and warning, fine, suspension from matches, through to expulsion from events and loss of points. Any decision of the IRB or decision recognised by the IRB must be recognised and applied by all Unions, Associations and Rugby Bodies who must take all necessary actions to render such decisions effective within their jurisdictions. In this way, there is universal application of sanctions for Misconduct within Rugby.

Disciplinary incidents do arise, both on and off the field, which can and have challenged the ethos and values of the sport together with the processes and personnel the sport has in place to administer self-regulated discipline. The Harlequins Rugby Club incident in the European Rugby Cup (“ERC”) Heineken Cup match against Leinster on 12 April 2009 involving the use of false blood capsules to garner a temporary medical blood substitution at a crucial point in the match, was an incident of Misconduct which rocked the world of Rugby (it was referred to in the media as ‘Bloodgate’). The independent disciplinary process of the tournament organisers ERC was tested at first instance and appeal, but ultimately delivered decisions which resulted in significant suspensions for the coach, player and physiotherapist along with a substantial fine for the club. The decision and its consequences are still felt in Rugby today.³⁶

Another seminal case that caused the IRB to review the structure of its Misconduct rules was that involving the South African National Team (“Springboks”), management and the Union in an action taken during the British & Irish Lions Tour of South Africa in 2009. At the conclusion of the second test match between the sides played in Pretoria on 27 June, the Springbok player Bakkies Botha was cited for an alleged breach of what was then Law 10.4(j) (by dangerously charging into a ruck without binding on a player). The citing was upheld and the Judicial Officer imposed a two-week suspension on Mr Botha³⁷ which was later upheld on appeal. The consequence of the disciplinary decision was that the Springbok team and management took retaliatory action in the form of an armband protest in the next Lions Test Match.³⁸ The IRB considered the acts to be in breach of the IRB Code of Conduct (which applied to the Lions Tour) in that it constituted a criticism of the judicial decision and the judicial process.

³⁶ See further ERC news site at: www.ercrugby.com/eng/6538.php (30 May 2013).

³⁷ Hearing of 28 June, 2009.

³⁸ “...the Springbok team, the coaching and support staff were all highly aggrieved by the citing of Mr Botha, the upholding of that citing, his suspension and the rejection of the appeal. As a group they determined to take a stand (to put it at its most neutral at this juncture) to support their team-mate. This stand took the form of the players wearing armbands bearing the words “Justice” or “Justice 4”. One player had this on his headgear. The players placed the armbands in position before taking the field for the third test match which took place at Coca Cola Park, Johannesburg on Saturday 4 July... The actions taken by the players and coaching staff and associated officials led the IRB to issue the charges that we are hearing...”.

Ultimately the Judicial Committee did find against the Springbok team and management and were clear that “*the playing area is no place for protest*”³⁹ and went on to elaborate that “*...in our view the matter goes much further. We consider the evidence suggesting this was merely a protest against the law of the game is disingenuous in the extreme. In our view, Ms Ahern submitted properly that there are a number of proper channels available to the South African players, support staff, SAPRA and the SARU to utilise to resolve their concerns with the law. But we do not accept this was simply an expression of their frustration with the law and an attempt to get the IRB to act in relation to it. We consider it was clearly a protest against the disciplinary processes that led to Mr Botha being suspended for two weeks. It was not, as Mr Heunis submitted, simply a complaint as to outcome*”. The Judicial Committee was satisfied that the acts “*clearly amounted to a calculated and well-publicised criticism of the manner in which the disciplinary personnel involved handled Mr Botha’s case. We have no doubt that any viewer would have taken from the armbands exactly what we have. The affidavits filed from Lions personnel confirm our view and confirm also that the action brought the game into disrepute, criticised the judicial process and was misconduct*”.⁴⁰

What these cases (and others) demonstrate is that there is an ongoing need for regulatory bodies to remain vigilant and to continually review and enforce their rules and standards. In doing so, the tide is stemmed and a warning is sent out to all participants and stakeholders that those that misbehave or behave in a manner that is not acceptable to the stated standards expected by the sport, will be brought to account.

4.1 *Emerging misconduct*

(i) *Anti-Corruption and Match Fixing*

The notion of a competitive contest between two opposing teams, both doing their best with the ultimate aim of emerging victorious is at the heart of all sport. Keeping the contest pure, with the outcome of the match to be determined solely by reference to the respective merits of the competing teams, is fundamental to what is frequently referred to as ‘sporting integrity’ and gives sport its unique appeal.

Betting has always been part of the sporting environment but it becomes problematic where it leads to manipulation of competitors. Match fixing and unrestricted and unregulated sports betting are a significant threat to the integrity of sport and to the public’s confidence therein. Reputational risk is high on the agenda of international sports organisations given the threat to sport’s authenticity and

³⁹ *IRB v South African Rugby Union, Team Management and named Team Members* (2009) at para. 67 ([www.irb.com/mm/Document/NewsMedia/0/FinalIRBdecision24.8.09\(Signed\)_8823.pdf](http://www.irb.com/mm/Document/NewsMedia/0/FinalIRBdecision24.8.09(Signed)_8823.pdf), 30 May 2013).

⁴⁰ *Ibid* at para. 69.

integrity by corrupt practices.

The changes to the betting environment in recent years with the emergence of new technology, easy access to satellite television and different forms of betting, e.g. spot betting, spread betting, the use of betting exchanges, and internet and phone accounts that allow people to place a bet anytime anywhere, including in-game betting, have all increased the potential for the development of corrupt betting practices. This means that the risks to sporting integrity in modern times is ever greater as is the risk that attempts will be made to involve participants in such practices. Even where that risk is more theoretical than practical, its consequence is to create a perception that the integrity of sport generally is under threat.

Modern examples of the emergence of corruption and match fixing can be seen in the sanctions that have been brought against athletes at the highest level in a number of sports. For those sports not directly affected to date, it sounds a loud warning bell to ensure that their systems and processes are designed to detect and deal with such activity aggressively. Where sports have experienced illegal betting or match fixing problems, they have responded in a largely positive fashion, by adopting robust rules and disciplinary procedures, implementing education programmes for participants, in some cases creating integrity units with intelligence and investigative capabilities.⁴¹

Under IRB rules it is an act of Misconduct to “*engage in any conduct or any activity on or off the field that may impair public confidence in the honest and orderly conduct of a Match, tour or tournament or Series of Matches (including, but not limited to, the supply of information in relation to the Game, directly or indirectly, to bookmakers or to persons who may use such information to their advantage) or in the integrity and good character of any Person*” or to breach the IRB Regulations on anti-corruption and betting.⁴²

While there has long been a regulation prohibiting players and their management teams from betting on themselves, the scope of the rules did not cater for the technological advancements in online and in-game betting. In early 2011 the IRB recognised the need to modernise its wagering rules and make them more fit for purpose. Following extensive review with the membership together with engagement with other sports, betting operators, regulators and monitoring bodies, the IRB introduced its new Anti-Corruption and Betting rules in 2012.⁴³

At the heart of these provisions are two simple rules (i) all professional Rugby players and their player support personnel⁴⁴ are prohibited from betting on Rugby; and (ii) all international players and persons involved in the organisation, administration and/or promotion of the Game at international level are prohibited from betting on an event in which they or their team are participating;⁴⁵ collectively

⁴¹ These three component structures were recommended by in the Report of the Sports Betting Integrity Panel (February 2010, UK) available at: http://webarchive.nationalarchives.gov.uk/+/http://www.culture.gov.uk/images/publications/reports_sports_betting_integrity_panel.pdf (30 May 2013).

⁴² See IRB Regulation 20 at Appendix 1: www.irb.com/imgml/irb/irbhandbook/en/index.html#/296/ (30 May 2013).

⁴³ See IRB Regulation 6 at www.irb.com/imgml/irb/irbhandbook/en/index.html#/106/ (30 May 2013).

amounting to prohibited wagering offences under IRB Regulation 6.3.1. These rules apply internationally to all such persons and Unions are obliged to enforce such rules within their jurisdictions.

The range of offences which constitute Anti-Corruption Breaches include not just prohibited wagering but also corruption related to Fixing (including failing to perform to the best of one's abilities),⁴⁶ misuse of Inside Information⁴⁷ and more general corruption offences (such as posing a threat to the integrity of the Game and tampering with evidence).⁴⁸ Anti-Corruption Breaches are strict liability offences. Accordingly, it is not necessary that intent, fault, negligence and/or knowing commission of such breach on the part of a Connected Person be demonstrated in order to establish that the breach has been committed. These rules form the bedrock of the anti-corruption educational programme the IRB operates, primarily through its anti-corruption website 'Keep Rugby Onside'.⁴⁹

Monitoring, investigations and the imposition of strong sanctions form the natural pillars which uphold the anti-corruption rules of the sport. The range of sanctions for Anti-Corruption Breaches range from a reprimand and/or warning to a life suspension (and such additional suspensions as a Judicial Officer or Judicial Committee may consider appropriate including fines, cancellation of sports results and return of rewards). The sanctioning regime mandates that the adjudicator(s) in assessing the relative seriousness of the offence take into account the aggravating and mitigating features of the offending and examples of these are delineated to provide guidance.⁵⁰

Pending a hearing it is possible for the IRB through the Anti-Corruption Officer⁵¹ to seek the imposition of a provisional suspension which will only be imposed where the Officer demonstrates on the balance of probabilities that there

⁴⁶ IRB Regulation 6.3.2 and defined in IRB Regulation 6.2 as: "*Fixing, contriving in any way and/or otherwise influencing improperly the outcome of an Event and/or any aspect of an Event and/or being party to any effort to fix, contrive in any way and/or otherwise influence improperly the outcome or any aspect of an Event. The foregoing shall include, without limitation, improperly ensuring that a particular incident(s) takes place or does not take place during an Event(s) or at a particular time or juncture during an Event(s) and improperly manipulating the scoring or any other aspect of an Event(s)*".

⁴⁷ IRB Regulation 6.3.3 and defined in IRB Regulation 6.2 as: "*Any non-public information relating to any Event including any aspect thereof that a Connected Person possesses by virtue of his position within the Game. Such information includes, but is not limited to, relevant information regarding a Participant(s), conditions, tactic(s) and/or strategy(ies), selection, injury(ies), and/or any other information relating to the likely performance of a Participant(s) and/or outcome of an Event including any aspect thereof, and/or any other relevant information in relation to an Event which is known by a Connected Person(s) but which is not already published or a matter of public record, which is not readily acquired by an interested member of the public and/or disclosed according to the rules and regulations governing the Event*".

⁴⁸ IRB Regulation 6.3.4.

⁴⁹ The IRB Anti-Corruption Website is located at www.irbintegrity.com/ (30 May 2013) and available in multiple language options.

⁵⁰ See IRB Regulations 6.10.3, 6.10.4 and 18.6.3.

⁵¹ Being the IRB Anti-Corruption Officer appointed from time to time.

is a *prima facie* case that the Connected Person has committed an Anti-Corruption Breach. Where a provisional suspension is imposed a credit for the period of provisional suspension shall be given against any suspension ultimately imposed.⁵²

The Anti-Corruption Regulations apply to the IRB and its Member Unions (and their constituents) who have certain obligations to perform including (i) putting in place anti-corruption rules at national level (below international and professional player level) which reflect the principles within the IRB rules and ensuring its members comply with both the Union and IRB anti-corruption rules; (ii) the provision of information and assistance to the Anti-Corruption Officer; (iii) educating its members to combat corrupt gambling practices and promote the integrity of sport; and (iv) notifying the IRB of all breaches of the IRB and Union anti-corruption rules and nominating a national anti-corruption officer.

Awareness of anti-corruption in sport is growing through education and monitoring. So too is the general understanding of the need for closer co-operation in the area of data and intelligence transfer, both within sport and with regulatory and law enforcement bodies at national and international level. Current efforts to highlight the growing risks to sport from anti-corruption and match fixing can be seen through the work of the European Commission in the establishment of the Expert Group on Good Governance under the European Union Work Plan for Sport for 2011-2014⁵³ incorporating the topic of Combating Match Fixing in Sport⁵⁴ as well as work on other issues such as the follow-up to the Green Paper on online gambling.⁵⁵ Other ongoing processes initiated at European and international level to tackle match fixing, include the International Olympic Committee process on the Fight against Irregular and Illegal Betting in Sport⁵⁶ and the Council of Europe's process towards the possible adoption of a Convention against the manipulation of sports results in association with EPAS (the Enlarged Partial Agreement on Sport).⁵⁷

⁵² See IRB Regulation 6.8.

⁵³ Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on a European Union Work Plan for Sport for 2011-2014. In: Official Journal of the European Union, C 162/1, 1.6.2011, 1-5.

⁵⁴ The IRB is an Observer member of the Expert Group on Good Governance which as one of its strands is looking at Combating Match Fixing, see further: http://ec.europa.eu/sport/library/consultation-and-co-operation_en.htm#experts_groups (30 May 2013).

⁵⁵ See: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0128:FIN:en:PDF> (30 May 2013).

⁵⁶ The IRB Chairman Bernard Lapasset is a member of the Founding Working Group on the Fight Against Irregular and Illegal Betting in Sport which has met on a number of occasions since its creation in March 2011. The report of the 4th meeting can be found at: www.olympic.org/news/founding-group-on-fight-against-irregular-and-illegal-betting-calls-for-a-universal-monitoring-system/199073 (30 May 2013).

⁵⁷ The Committee of Ministers of the Council of Europe has invited the Enlarged Partial Agreement on Sport (EPAS), to conduct the negotiation of a possible Council of Europe Convention against Manipulation of Sports Results and notably Match-fixing. This new international Convention would be a binding instrument open to both European and non-European countries aimed at combating the manipulation of sports results. www.coe.int/t/dg4/epas/source/23rev1_Framework-and-timetable-of-Convention-negotiation-process_EN.pdf (30 May 2013).

(ii) *Social media as a medium for misconduct*

The world of communication and social interaction has experienced a revolution in recent years with the emergence of social media. Its ubiquity creates challenges to the well established norms of behaviour and discourse as they are adapted and adjusted in this new social environment. Without visible boundaries every rule is open to challenge. Sports governance transcends boundaries and it has to adapt to the changing environment. The IRB has embraced social media as a communications mechanism as has its members. But Rugby's Code of Conduct has also transcended the divide into the virtual environment when those that are bound by the rules have been called to account where they have breached the Code.

The first case the IRB dealt with was a high profile one during the course of the Rugby World Cup 2011 in New Zealand. Mr Eliota Fuimaono-Sapolu a member of the Samoan Rugby team participating in the tournament tweeted a series of adverse comments about the referee who managed the South Africa v Samoa match on the evening following the 1 October match. He later appeared (4 October) on a New Zealand prime time television programme where he confirmed that he had used and meant the term "racist".

The Judicial Officer determined that the statements used to describe the referee Nigel Owens "*are objectively and subjectively abusive and offensive. They also breach the various sections of the Code of Conduct. They impugn his integrity and reputation both as a referee and as a man. The suggestion that this is an exercise of free speech is specious – there are limits to what one may say about others and those who are maligned without justification can seek relief through defamation proceedings – the statements used here cross those limits*".⁵⁸ On appeal the findings of the first instance decision were upheld and "*The Appeal Committee agreed...that abusive comment of match officials on Twitter or other social media which as a consequence very widely holds match officials to public ridicule is completely unacceptable and should carry significant sanction in line with the Judicial Officer's Decision*".⁵⁹

As the social environment becomes an extension of life, so too can it become a forum for Misconduct. It behoves Rugby Unions to highlight the dangers involved and educate their members. The recent English case involving Mr Chance Ridler,⁶⁰ is a notable example of where public statements on social forums can have a direct impact for sports participants. In a case involving statements (admitted) made on Mr Ridler's Twitter account that he was using and distributing and encouraging others to use Performance Enhancing Drugs, the Rugby Football Union

⁵⁸ *Rugby World Cup Limited v Eliota Fuimaono-Sapolu* (19 October 2011), www.rugbyworldcup.com/home/news/newsid=2058954.html#fuimaono+sapolu+misconduct+charges+upheld (30 May 2013).

⁵⁹ *Eliota Fuimaono-Sapolu v The decision of HHJ Jeff Blackett* (24 November 2011) www.rugbyworldcup.com/home/news/newsid=2060495.html#fuimaono+sapolu+appeal+decision (30 May 2013).

⁶⁰ *RFU v Chance Ridler* (2012) (ibid).

appointed Disciplinary Panel drew clear attention to the medium and its public nature: *“The offending is serious. Twitter did not exist before 2006 and its popularity continues to grow. Those who use social networking and micro-blogging services must appreciate they are public forums. Once posted on a public time line any person who is able to access the Twitter network can read it. It is a public statement. Those in the Game who wish to use such a service must do so responsibly. Those who do not, risk condign punishment. The sanction we impose is one which we hope makes clear that offending of this kind, namely the wholly irresponsible use of (in this case) Twitter will not be tolerated. It is intended to be a deterrent both to this Player and to others who might be tempted to use Twitter or a similar service to make inappropriate, offensive, insulting and/or abusive comments about those within or without the rugby world or, as in this case, about drugs”.*

As technology and virtual social engagement continue to progress and become embedded in our everyday lives, it will be important that the IRB and its member Unions continue to highlight the public nature of social media, its permanency and the equal and continuing application of the sports rules to it.

5. *Anti-Doping*

The IRB was an early proponent of the anti-doping movement and had prohibitory rules in place pre-dating 1995, well before the Lausanne Declaration on Doping in Sport (4 February, 1999) which established the need for an International Anti-Doping Agency (later the World Anti-Doping Agency). With the advent of the World Anti-Doping Code (“WADA Code”) in 2003 came a unification of the disparate rules of sport in relation to anti-doping and one global view of a harmonised anti-doping regime emerged – the standard anti-doping rule violations were defined for all⁶¹ and the minimum mandatory sanction of two years for a Prohibited Substance became the benchmark.

The IRB which had in the 1999 created an advisory group on anti-doping as a sub-committee of its Medical Advisory Committee determined that the subject matter and expertise were of such import that it deserved its own permanent expert group and it established the Anti-Doping Advisory Committee (ADAC). Over the intervening period, that group was to oversee the implementation of the WADA Code into IRB rules, the creation and global roll-out of educational programmes and a sophisticated testing regime (both in and out of competition) that was later extended to incorporate blood testing. Importantly, members of the ADAC sit as adjudicators on cases involving alleged anti-doping rule violations.

The IRB has dealt with more than 70 anti-doping rule violations in the past 10 years.⁶² The judicial structure supporting the anti-doping regulations (IRB

⁶¹ See IRB Regulation 21.2 at www.irb.com/imgml/irb/irbhandbook/en/index.html#/298/ (30 May 2013).

⁶² The cases from 2004 can be found at www.irbkeeprugbyclean.com (30 May 2013).

Regulation 21) has remained largely within Rugby, with first instance and appeal hearings being dealt with by an independently appointed IRB Judicial Committee or Post-Hearing Review Body on appeal. The composition of each Committee requires independence, nationality neutrality and no prior involvement with the case(s). Each Committee comprises a senior legal practitioner (chairman), an experienced medical practitioner and either an ex-player/current or ex-administrator/doctor or lawyer.⁶³ The Committees have wide powers to regulate their own procedures but guidance is provided⁶⁴ and reflects the principles of natural justice (*inter alia* right to be heard, right to know the case against him/her, right to be represented) as well as procedural and evidential guidance. In all cases, regardless of whether the player/Person requests it or not, the IRB asks a representative of the player/Person's Union to attend the hearing. This is to ensure that not only is the Union fully aware of the proceedings but also can learn from the experience and use it to help to educate their constituents and prepare the Union in the event they have domestic cases with which they need to deal or prosecute.

Naturally, there is recourse in the IRB anti-doping rules to arbitration before the Court of Arbitration for Sport ("CAS"), consistent with the WADA Code. However, by having a two stage judicial process within the sport, the IRB has found that it is rare that referral to CAS takes place. The IRB has on three occasions appealed cases to CAS – each of these was a case conducted at a national level by IRB Member Unions which in the opinion of the IRB ADAC did not fall within the scope of IRB Regulation 21/WADA Code. The IRB was successful in its appeal of each case before the CAS.⁶⁵

With the advent of the 2009 WADA Code, the IRB also took the opportunity to widen the base of its judicial personnel by creating an Anti-Doping Judicial Panel ("ADJP") which comprises medical, legal and administrative experts from various countries to support the ADAC (the members of which are ex officio members of the ADJP). ADJP members are appointed for a two year term and many perform a similar function for other sports or as part of national sports resolution panels. In that way, the IRB benefits from cross-sport exposure in the field of anti-doping results management.

The IRB also exercises an active supervisory jurisdiction over the decisions made by its Member Unions in anti-doping cases. This is an important tenet of IRB Regulation 21 and is managed actively. The IRB has two avenues of appeal in the event a national case does not meet the expected standards or sanction range. Consistent with the WADA Code, the IRB as the international federation has standing to appeal. However, the time limits are relatively short and take no account of language (translation), timing of communication of the decision to the international federation and/or any the internal review process which must be undertaken.

⁶³ See IRB Regulations 21.21.2 and 21.25.1 (*ibid*).

⁶⁴ See IRB Regulation 21.21.6.

⁶⁵ CAS 2006/A/1067 *IRB v/Keyter*; CAS 2005/A/963 *IRB v/Worgan*; CAS 2008/A/1664: *IRB v Luke Troy* - www.keeperugbyclean.com/downloads/cases/32/luketroy_8947.pdf (30 May 2013).

IRB Regulation 21.29.1 creates the second avenue of recourse for the IRB. All Unions (and, in appropriate cases, tournament organisers) are required to submit to the IRB Anti-Doping Manager the outcomes from any hearings arising within their jurisdiction within 72 hours of the final written decision. The Anti-Doping Manager has the delegated authority of the IRB Council⁶⁶ to seek the file, accept the decision or refer the matter to the ADAC who “*on behalf of the Board may accept the result and decision or subject to these anti-doping Regulations refer the matter to a post-hearing review body or appeal the matter to CAS*”.⁶⁷ Where the decision is made to refer a first instance case back to a post-hearing review (to be put in place by the Union) or an appeal case to CAS it shall be done “*no later than 28 days from receipt of the full, English translation (where required) of the case file by the Board from the Union and/or NADO, as applicable*”.⁶⁸ The application of IRB Regulation 21.29.1 was upheld by CAS Panel in WADA/IRB v Luke Troy.⁶⁹

Depending upon the structures in place at national level, Unions may either deal with cases through their own internal but independent judicial structure or, increasingly, will have recourse to national sports resolution panels which cater for the results management needs of multiple sports within their particular jurisdiction. IRB Regulation 21.14.8 addresses key provisions that are required to recognise the jurisdiction of the IRB whether there is recourse to a national sports resolution panel or it is managed by a Union-appointed panel, namely (i) the anti-doping rules of the Union shall include or require the application of IRB Regulation 21; (ii) prior notification in writing to the IRB of any cases to be heard; (iii) the right of the IRB to appeal any case at any stage in the results management process; and (iv) the right of the IRB to be represented and participate at its election in any national case involving the sport.

Specifically in relation to national sports resolution panels, in order to ensure the sport and the international federation in particular are not excluded or ignored, where the process is undertaken by an entity outside the sport, Unions must ensure that such bodies recognise the remit of the IRB to review every decision arising from or connected to the Game and the ability of the IRB to either accept that decision or remit it to the applicable review body.

The administrative and judicial aspects of anti-doping case management are dealt with separately but in parallel within the IRB executive structure. The Anti-Doping Department, which is responsible for education, testing and results management administration, is the entity which advises the player or Person (where the offence involves a coach, physiotherapist, doctor or other player support personnel) of the positive finding or other anti-doping rule violation which may

⁶⁶ Also referred to as the “Board” in the IRB Regulations.

⁶⁷ See IRB Regulation 21.29.1 (ibid).

⁶⁸ See IRB Regulation 21.29.1 (ibid).

⁶⁹ At that time the Regulation was 21.28.2. See para. 92-93 of the Preliminary Award on Jurisdiction; CAS 2008/A/1652; CAS 2008/A/1664. *IRB v Luke Troy*.

have been detected (arising from IRB testing). The department also liaises with the Judicial Panel Chairman (in order to initiate the process to have a Judicial Committee appointed) and acts as the communications conduit between the player/Person, the appointed Judicial Committee and the IRB Legal Counsel. The Legal Counsel is responsible for the gathering of evidence, submission of charges and the presentation of the case before the Judicial Committee/Post Hearing Review Body.

As a team sport, Rugby has on occasion been faced with multiple cases in relation to the same team which arise from a single event, thereby triggering the Team Consequences provisions in IRB Regulation 21.23.2⁷⁰ which reflect WADA Code Article 11. To date the findings have all emerged post-tournament and therefore consequences have not been match, tournament or tour specific. In addition to the individual cases taken against players/Persons concerned, action has also been taken in these Team Consequences cases against the Union of the Team implicated, both on behalf of the Team members and as the entity which is vicariously responsible for the actions of its Team. Decisions to date have included:

- (i) Action taken against the Sri Lanka Rugby Football Union following adverse analytical findings against three national team members tested at an IRB Tournament in relation to the use of Methylhexaneamine (MHA) resulted in a financial sanction of £10,000 being imposed, but suspended for 2 years, plus explicit supplemental steps the Union must take to ensure that detail conditions are complied with – including *inter alia* the development and enforcement of an appropriate policy for the management of supplements for all National Representative Teams, proper anti-doping training and education for national squads, the translation of the IRB Anti-Doping Handbook into Sinhala and Tamil within three months of the decision and the creation of an anti-doping section on the Union website in multiple languages.⁷¹
- (ii) In three separate cases Judicial Committees held that anti-doping rule violations had been committed by Players of the Samoan Rugby Union (“SRU”) who represented the Upolu Samoa team, namely Muliufi Salanoa,⁷² Taligatuli Moala⁷³ and Evile Telea⁷⁴ arising out of the IRB Pacific Rugby Cup 2008. The Judicial Officer, imposed a fine of £20,000, suspended for 2 years, in

⁷⁰ “If more than two members of a Team are found to have committed anti-doping rule violation during a Match, Tournament or International Tour, the entity with jurisdiction over the Match, Tournament or International Tour shall impose an appropriate sanction on the Team (e.g. loss of points, Disqualification from a Match, Tournament or International Tour and/or other sanction) in addition to any Consequences of Anti-Doping Rule Violations imposed upon the individual Team member(s) committing the anti-doping rule violations”.

⁷¹ IRB v Sri Lanka Rugby Football Union (16 May 2012), Judicial Officer Tim Gresson.

⁷² Decision of BJC in IRB v Salanoa delivered 21 October 2008 available at: www.irbkeeprugbyclean.com/downloads/cases/26/bjcdecisionsalanoa-samoa_6353.pdf (30 May 2013).

⁷³ Decision of BJC in IRB v Moala delivered 17 November 2008 available at: www.irbkeeprugbyclean.com/downloads/cases/28/bjcdecisionmoala-samoa_6561.pdf (30 May 2013).

⁷⁴ Decision of BJC in IRB v Telea delivered 18 August 2010 available at: www.irbkeeprugbyclean.com/downloads/cases/35/Telea_decision_EN.pdf (30 May 2013).

addition to the supplemental conditions the SRU were required to fulfil including the translation of the IRB Anti-Doping Handbook into Samoan, the improvement of the Union's anti-doping education programme and the provision of written reports every six months to the IRB Anti-Doping Manager outlining its efforts and activities.⁷⁵

The fight against doping in sport continues. It is important that sports and the IRB evolve with the changing times and practices to ensure that doping cheats are detected and excluded from participation for appropriate periods commensurate with the severity of their transgression(s). The impending WADA Code 2015 will require consequential changes to the anti-doping rules of sports, but at this juncture it would appear that a simpler structure is emerging.

6. *Eligibility*

IRB eligibility rules are based on the philosophical underpinning that players selected to represent their country at senior or next senior national representative level or senior Sevens level must have a genuine, close, credible and established national link with the country of the Union for which they have been selected. Such a national link is essential to maintain the unique characteristics and culture of the international sporting competitions between Unions.⁷⁶

The criteria for player eligibility are not tied to a nationality requirement; rather, they are based upon satisfaction of one of three criteria (i) place of birth; (ii) place of birth of a parent or grandparent; or (iii) completion of thirty six consecutive months of Residence immediately preceding the time of playing, Residence being defined as the place or location in which a player has his primary and permanent home.

In essence, the residency provision constitutes a sporting naturalisation procedure based on a geographical presence test and it is designed to create a contemporary national link with the country of the Union concerned. By being resident in a country for a period of thirty six months immediately prior to the scheduled participation in an International Match for that Union, a player is deemed to have acquired a close, credible and established national link with that country which entitles him/her to participate in sporting competitions for that Union.

Tied to the eligibility criteria, as a counterbalance to an otherwise open eligibility regime, is the principle that a player should only ever play for one Union and s/he should not be able to switch Unions once the first selection and participation in a relevant capturing match has been made. This is the position even if the player is able to satisfy one or more of the other eligibility criteria.⁷⁷

⁷⁵ *IRB v Samoa Rugby Union* (26 October 2011), Judicial Officer Graeme Mew.

⁷⁶ See Explanatory Guideline No.1 to IRB Regulation 8 at: www.irb.com/imgml/irb/irbhandbook/en/index.html#/134/ (30 May 2013).

⁷⁷ The 'one Union only rule' became effective from 1 January 2000. Unions were notified and players were given a three year period prior to 1 January 2000 to select the Union they wished to play for going forward based on satisfaction of any of the eligibility criteria.

The area of eligibility in sports regulation is one which is often complex and always presents significant challenges. In an effort to provide both clarity and certainty, the IRB eligibility rules (IRB Regulation 8) are accompanied by both explanatory guidelines and a mechanism whereby Unions can seek clarification regarding the eligibility status of a player before his/her first participation for that Union. The referral is made by the Union which is seeking to have the player represent them, the burden of proof being on the Union and the player to prove his/her eligibility.

Under the residency criteria the player/Union “*must be able to demonstrate that, during the relevant period, the country in which he claims he has been Resident was, genuinely, the country that the Player treated as his home and is clearly the country in which the Player has his primary and permanent home*”.⁷⁸ Consideration will also be given not only to the commitment the player has made to his “new” country but, particularly if this is not the first country in which the player has been Resident, regard will be had to what efforts the player has made to relinquish his ties with the country in which s/he lived previously. The underlying intention is to demonstrate that there is a contemporary, permanent, national link with the country/Union which the player now proposes to represent.

Three non-conflicted members of the IRB Regulations Committee sit and consider each case. The IRB Regulations Committee is empowered under IRB Regulation 2 to “*rule on matters of interpretation and/or implementation of these Regulations...*”. Its quorum is three and it can regulate its own procedures save that its decisions must be made by majority. In the consideration of an eligibility application the assessment is ordinarily done on the papers. Each case is considered upon its merits and in reliance upon its own unique facts and circumstances. The decision of the IRB Regulations Committee is final and binding pending its ratification by the IRB Council.

There is a right of appeal from a decision of the IRB Regulations Committee to the IRB Council. This can only occur on the occasion of a Council meeting (which takes place twice annually) and the Union seeking the player’s eligibility to play for them must present the case to the Council. The decision of the Council is final and binding.

The responsibility rests with each Union to ensure compliance by it and its players with the eligibility regulations and the penalties for breach are severe and deliberately so. It is a strict liability offence and is construed in accordance with the principles of strict liability under English Law (which is the governing law for the IRB Regulations and Laws of the Game). It is therefore not necessary that fault or intent on the part of a Union be demonstrated in order for a breach of IRB Regulation 8 to be established. Conversely, a lack of fault or intent is not a defence to a breach of the Regulation and Unions are deemed to be responsible and accountable for the conduct of their players and Persons under their jurisdiction.

⁷⁸ IRB Regulation 8 Explanatory Guideline 15 (ibid).

Mandatory fines of Stg£25,000 and Stg£100,000 apply (depending upon the development status of the Union concerned) for each demonstrated breach together with any other appropriate consequences. The assessment of breaches of IRB Regulation 8 is done in accordance with the procedures set out in IRB Regulation 18. No such case has arisen since 2002. On that occasion, the Rugby Union of Russia was found to be in breach of IRB Regulation 8 when it played three players of South African nationality on its team (all of whom claimed to have a Russian grandparent) during two Rugby World Cup qualifying matches. In addition to the fines imposed, the Russian Team, which had for the first time qualified for the Rugby World Cup, lost its place in the 2003 Finals. The decision was upheld on appeal and the Appeal Committee was strong in its application of Regulation 8 and upholding the principles which underpin it: *“With respect to the issue of Russia’s disqualification from the Rugby World Cup 2003 Competition, the Appeal Committee is not prepared to re-instate the Russian team under any circumstances. The concept of a level playing field is an important one to any form of organized sport and rugby is no exception. The will of the rugby community, as expressed by Regulation 8, is that there be clear and unequivocal rules regarding eligibility to represent a Union. This is reinforced by the imposition of strict liability for non-compliance with the Regulation and the application of substantial minimum fines. To give RUR a second chance to play its matches against Spain, notwithstanding the violations of Regulation 8 that have occurred, would be unfair to Spain and would send the wrong message to the rugby community about the resolve of the Board to uphold and enforce this important Regulation”*.⁷⁹

7. General – Disputes and mediation

There are other areas of engagement with the sport where Regulations and judicial processes exist to aid the parties. One such area relates to compensation for player training and development - which is a mechanism that enables clubs/Unions that have developed a player who becomes a professional/Contract Player to recoup some of that investment when a player moves to another club/Union. This is not a transfer fee/transfer mechanism and is tied into the period of the player’s development and takes account of their playing contribution to the club/Union up to the age of 26 years. Disputes over which Union constitutes a player’s Home Union for the purposes of determining entitlement to compensation for a player training and development may be referred by Unions or Associations only to the IRB CEO who shall refer the matter to adjudication via the Judicial Panel Chairman.⁸⁰ There has been little enthusiasm on the part of member Unions to expand the scope of this provision (Regulation 4) beyond its present scope.

There is also a mediation service option upon which Member Unions can

⁷⁹ Appeal Decision (13 February 2003).

⁸⁰ IRB Regulation 4.7.3 at: www.irb.com/imgml/irb/irbhandbook/en/index.html#/76/ (30 May 2013).

call should they need to resolve a matter between them in this way.⁸¹

In addition to being the governing body for the sport, the IRB also acts in the capacity of tournament or match organiser. Participation in IRB tournaments and matches is based upon an additional contractual arrangement where Unions and their players agree to participate based upon IRB Regulations, which may be modestly reformulated to cater for a tournament/match environment. Such agreements have a wider scope than the playing of the Game and include rules around commercial matters (e.g. broadcast copyright, use of player images for education and development purposes, permitted commercial activations, merchandising etc.), media engagement and tournament specific arrangements which are tailored in a manner appropriate to the seniority of the event. In all cases the judicial process contained within the IRB Regulations is applied and Judicial Officers and Citing Commissioners are independently appointed and attend the events to deal swiftly with issues arising. In this way every effort is made to deal with cases and disputes (including commercial via an established Disputes Committee process) in the location in which they arise, to ensure optimum circumstances (e.g. availability of witnesses) and minimise the inconvenience to the parties.

8. *Conclusion*

The modern IRB judicial system which was put in place some 20 years ago has matured into a well accepted institution whose decisions are respected and adhered to. The IRB Regulations are constantly evolving and adapting to the modern needs of the Game and its constituents. They will continue to adapt to remain dynamic and to ensure best practice in keeping with the expectations of the participants and the national guardians of the Game - the Unions.

⁸¹ IRB Regulation 19 available at: www.irb.com/imgml/irb/irbhandbook/en/index.html#/284/ (30 May 2013).

PART II

SPORTS JUSTICE AT NATIONAL LEVEL

SPORTS JUSTICE IN ARGENTINA

by *Javier H. Delfino**

SUMMARY: 1. Principles of sports justice – 2. Relationship between ordinary and sports justice – 3. Argentine Olympic Committee – 4. Relevant football regulations – 5. Clubs and players' rights and obligations – 6. Sports offences – 7. Sanctions on clubs and players – 8. Economic benefits vs. federative rights – 9. Dispute resolution – 10. Conclusion

Abstract:

This chapter examines the concept of sports justice in Argentina, the interaction between ordinary and private bodies to resolve controversies related to sports. Argentina has mandatory federal laws that apply to sports even though there is no specific governmental sport justice body. This chapter covers Football specifically.

1. Principles of sports justice

In Argentina sports regulation is mainly governed by private law; however, this autonomy is subject to governmental control. So, controversies on sport are heard by the venues set up by the corresponding sport federation, and might be reviewed by relevant ordinary justice depending on the issue. In case of arbitrary or discriminatory or abusive decisions by the private body, review by the ordinary courts is granted.¹

Amateurism is a characteristic of the majority of sports practiced in Argentina; this provides a large opportunity for private governance. On the other hand, those sports disciplines in which the State declared the professional status of the athletes, a more active ordinary judicial review is available. Nevertheless, there are different mandatory laws that provide the venue to bring many cases before the

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¹ R. TREVISTÁN, *La situación jurídica del deportista*, 2005, elDial.com, DC644.

ordinary justice.

Therefore, sport justice must be understood as a complex forum of ordinary and private bodies competent to solve cases based on mandatory or private law.

The ordinary justice is divided into federal and local jurisdiction, as well as into specific matter courts (i.e. employment and labour courts, civil courts, commercial courts, criminal courts, etc.). All courts are empowered to hear and decide all cases arising under the constitutional test regarding the Law. The Supreme National Court (CSJN) is the highest level court. Depending on the nature of the dispute at stake, or the nature of the parties to a judicial procedure, legal cases may be heard either by federal or local jurisdictions.

According to Article 14 of the Constitution,² all the inhabitants of the Nation are entitled to associate for useful purposes, and Article 19 grants the right of privacy and the corresponding limit to governmental control.³ There are different interpretations regarding the proper scope of the privacy, some authors⁴ believe that the privacy provision protects only those actions that do not take place in manifestations; others⁵ also include under such protection those actions that take place in manifestations which in no way offend public order or morality, nor injure a third party; and others⁶ also include that those actions that take place in the presence of the public by making close reference to themselves.

National Sports Federations are non-profit organizations governed by private law in accordance with Section 31 of the Civil Code and have to promote the general welfare expressing the constitutional freedom of association provision granted by Article 14 of the Constitution. They can enact their own set of rules regarding organized sports activities and regulate the operations of the bodies.

² Article 14: All the inhabitants of the Nation are entitled to the following rights, in accordance with the laws that regulate their exercise, namely: to work and perform any lawful industry; to navigate and trade; to petition the authorities; to enter, remain in, travel through, and leave the Argentine territory; to publish their ideas through the press without previous censorship; to make use and dispose of their property; to associate for useful purposes; to profess freely their religion; to teach and to learn.

³ Article 19: The private actions of men which in no way offend public order or morality, nor injure a third party, are only reserved to God and are exempted from the authority of judges. No inhabitant of the Nation shall be obliged to perform what the law does not demand nor deprived of what it does not prohibit.

⁴ G. BADENI, *Tratado de derecho constitucional*, T. I, Buenos Aires, Argentina, 2006, 568.

⁵ A. E. SAMPSON, *La filosofía jurídica del art. 19 de la Constitución Nacional*, Buenos Aires, Argentina, 1975, Cooperadora de Derecho y Ciencias Sociales, 25/38.

⁶ G. J. BIDART CAMPOS, *Tratado elemental de derecho constitucional argentino*, T. I-B, Buenos Aires, Argentina, 2000/2001, Ediar, 51. M. A. EKMEKDJIAN, *Tratado de derecho constitucional*, T. II, Buenos Aires, Argentina, 2001, Depalma, 376. M.A. GELLI, *Constitución de la Nación Argentina. Comentada y concordada*, Buenos Aires, Argentina, 2008, La Ley, 250. C. S. NINO, *Fundamentos de derecho constitucional*, Buenos Aires, Argentina, 2002, Astrea, 304. N. P. SAGUÉS, *Elementos de derecho constitucional*, T. II, Buenos Aires, Argentina, 2003, Astrea, 384/385.

1.1 Development of sports law in Argentina

In 1904 the Congress enacted the Law No. 4345 to encourage the practice of athletic sports and football. According to the law, the Executive Power was empowered to invest a sum of money on an annual basis to promote the practice of athletic sports and to celebrate national football competitions awarding the “*Copa Argentina*” (Argentinean Cup) organized by the *Sociedad Sportiva Argentina*.⁷

A few years later, the Congress passed the Law No. 6013 to promote the practice of shooting and physical education. On the other hand, the Law No. 6277 was issued to promote the physical culture. A new agency was created with the objective to control the investment called *Sociedad Sportiva Argentina* and also to approve the regulations of the physical culture. In addition, the Law No. 6277 ordered five stadiums to be built in different Provinces: a 50,000 capacity stadium in the Capital City; a 15,000 capacity stadium in the Province of Córdoba; a 10,000 capacity stadium in the Provinces of Tucumán, Mendoza and Entre Ríos. The budget for those constructions came from the government. In those stadiums international competitions should take place every four years and national competitions every two years.⁸

Three years later, a new law on the promotion of the practice of shooting was passed, the Law No. 8830. In 1947 a credit for Argentinean shooting practitioners was provided by the Law No. 12974. The purpose was to support attendance at an international competition so that they would be able to attend the ISSF World Shooting Championship that took place in Stockholm.

Since then, Argentina has been very active in promoting and assisting sport activities through contributions, loans, credits, cash grants, subsidies, building stadiums and sports venues, and donations or transfers of public property to sports entities.

Finally, in 1969 the Decree-Law No. 18247 on the promotion of sports and assistance of the practice was passed. Five years later it was repealed by Law No. 20655 which today is the current regulation with some amendments. The fundamental stone in the role of the Government in sport is set up by Law No. 20655 on sports regulation, Law No. 24819 on fair play in sports and drug-free sport, Law No. 24192 on prevention and punishment of violence in sporting events, and Law No. 25284 on special system for the administration of entities with economic problems and administration trust with judicial control.

2. Relationship between ordinary and sports justice

The legal system of Argentina comes from the continental civil-law tradition and its

⁷ SCHMOISMAN MARIO A., DOLABJIAN DIEGO A., *Estudios sobre derecho y deporte*, T. I, Córdoba, Argentina, 2009, Ed. Lesner Editora, 138.

⁸ M. A. SCHMOISMAN, D. A. DOLABJIAN, *Idem*, 139.

National Constitution.⁹ All the powers not delegated to the Federal Government in the Constitution are reserved to the Provinces.

Ordinary justice is constrained to rule over the private governance of sports unless mandatory rights apply. In the case “*Club Atlético Lanús c/ Asociación del Fútbol Argentino*”¹⁰ dated in 1980, the CSJN upheld the lower court decision that dismissed the lawsuit because the associative pathway was not exhausted: its condition is not replaced by the doctrine of arbitrariness or alleged injury to constitutional guarantees.

Later in 2000, the CSJN held in the case “*White Pueyrredón, Marcelo C. c/ Jockey Club Argentino*”¹¹ the limited power of judges on reviewing internal decision made by associations. The plaintiff requested judicial review on a disciplinary action on the ground that such decision was illegal.

According to the decision, Judiciary should be restricted only to exercise judicial review in the case of disciplinary action imposed by associations, control of legality and reasonableness.

In 2001, the National Court of Appeals No. “D” on Civil matters heard a case¹² where the plaintiff sought judicial review of an expulsion imposed by an association’s body. The expulsion decision was motivated by the fact that the plaintiff was accused for sexual harassment. As the crime was not proved before the criminal court, the innocent plaintiff filed a petition to declare illegal the internal decision made by the association based on the argument that he should not be expelled as the criminal accusation was rejected by the criminal court.

The Court of Appeals after examining the facts, that the internal procedure that took place granted the due process and that the provision of the bylaws stated the cause for expulsion in cases where a member did a reprehensible conduct in accordance with the democratic principle, it decided that the decision was reasonable. In doing so, the Court of Appeals reasoning was based on the limited judicial review power doctrine made by the CSJN in the named case.

In addition, the National Court of Appeals No. “M” on Civil matters established that the judiciary is not another upper associative court, so the judicial review must be restrictive.¹³

On the other hand, in matters related to mandatory law, the ordinary courts are the exclusive forum to hear such cases. In fact, there is a specific statute for those athletes who play football as a professional activity, under Law No. 20160.

⁹ See full text version in English of the Constitution in the Senate web site: www.senado.gov.ar/web/interes/constitucion/english.php (13 May 2013).

¹⁰ Case 302:1013.

¹¹ Case 323:1042.

¹² “*D. C., R. L. c/ Tiro Federal Argentino de Buenos Aires*”, decided by the National Court of Appeals No. D on civil matters, December 16, 2004, cited by M. A. SCHMOISMAN, D. A. DOLABJIAN, *Estudios sobre derecho y deporte*, T. I, Córdoba, Argentina, 2009, Lesner Editora, 174/184.

¹³ “*M., B. E. c/ Club Universitario de Buenos Aires*”, decided by the National Court of Appeals No. M on civil matters, March 7, 2006, Lexis N° 70038021; cited by SCHMOISMAN MARIO A., DOLABJIAN DIEGO A., *Estudios sobre derecho y deporte*, T. I, Córdoba, Argentina, 2009, Lesner Editora, 377.

The general Employment Act (Law No. 20744) applies also for coaches, referees and some athletes.

3. *Argentine Olympic Committee*

Comite Olímpico Argentino -Argentine Olympics Committee- (COA)¹⁴ was founded in 1923 and since then handles all issues related to the application of the principles that shape the Olympic Charter. The COA is a non-profit civil and autarkic entity under private governance.

According to the respective bylaws, the requirements to be a member are: being affiliated with an International Federation of sports included in the Olympic Games program or recognized by the International Olympics Committee (IOC), possessing a statute that satisfies the Olympic Charter, not being intervened by the Federal Government nor by any local government, and providing evidence that it carries out an actual sporting activity that takes part in the country and the international sport competitions, and also that it provides training programs for athletes.¹⁵

Members are obliged to carry out their sporting activity with loyalty and to

¹⁴ See web site: www.coarg.org.ar.

¹⁵ COA members of Olympics Games: Confederación Argentina de Atletismo (CADA); Federación Argentina de Badminton (FEBARA); Confederación Argentina de Basquetbol (CABB); Asociación Argentina de Bobsleigh, Skeleton y Luge; Federación Argentina de Box (FAB); Federación Argentina de Canoas (FAC); Unión ciclista de la Republica Argentina; Confederación Argentina de Deportes Acuáticos; Federación Argentina Ecuestre (FEA); Federación Argentina de Esgrima (FAE); Asociación del Fútbol Argentino (AFA); Confederación Argentina de Gimnasia; Asociación Argentina de Golf (AAG); Confederación Argentina de Handball (CAH); Confederación Argentina de Hockey sobre Césped y Pista (CAH); Asociación Argentina de Hockey sobre Hielo y en Línea (AAHHL); Confederación Argentina de Judo (CAJ); Federación Argentina de Luchas Asociadas (FALA); Federación Argentina de Patinaje sobre Hielo (FAPH); Unión argentina de Patinadores de Velocidad sobre Hielo (UVEPA); Federación Argentina de Pentathlon y Biathlon; Federación Argentina de Pesas (FAP); Asociación Argentina de Remeros Aficionados (AARA); Unión Argentina de Rugby (UAR); Federación Argentina de Ski y Andinismo (FASA); Confederación Argentina de Taekwondo (CAT); Asociación Argentina de Tenis (AAT); Federación Argentina de Tenis de Mesa (FATM); Federación Argentina de Tiro (FAT); Federación Argentina de Tiro con Arco (FATARCO); Federación Argentina de Triatlón (FAT); Federación del Voleibol Argentino (FEVA); Federación Argentina de Yachting (FAY).

COA members of recognized games: Federación Argentina de Actividades Subacuáticas (FAAS); Federación Argentina de Ajedrez (FADA); Federación Argentina de Aficionados al Billar (FAAB); Federación Argentina de Beisbol; Confederación Argentina de Bochas (CAB); Asociación Argentina de Bowling (AAB); Asociación del Bridge Argentino (ABA); Federación del Deporte de Orientación de la República Argentina (FDORA); Federación Argentina del Esquí Náutico y Wakeboard (FADEW); Federación Argentina de Karate (FAK); Confederación Argentina de Motociclismo Deportivo (CAMOD); Federación Argentina de Paracaidismo (FAP); Confederación Argentina de Patín (CAP); Confederación Argentina de Pelota (CAP); Asociación Argentina de Polo (AAP); Confederación Argentina de Fútbol; Asociación Argentina de Squash Rackets (AASR); Asociación Argentina de Surf (ASA); Federación Argentina de WushuKungfu (FAWK).

COA members of adherent games: Confederación Argentina de Cestoball (CADC); Federación Colombófila Argentina (FCA); Federación Deportiva Militar Argentina; Federación Argentina de Faustball (FAF) Asociación Padel Argentino (APA); Federación Argentina de Yoga.

comply with the principles, regulations, and usual practice of the sport. Athletes should practice a sport in compliance with the rules and instructions of IOC and COA.

One representative of each national federation has the right to participate in the assemblies, both ordinary and extraordinary, in accordance with the relevant statutes.

The COA exclusively represents the athletes of the country in the Olympic Games, in continental games, in regional games and any multi-game competitions sponsored by the IOC. The athletes are appointed by the relevant federation and subject to the final approval of the COA. They must meet established sports performance standards and have a flair for the representative role for the youth in the country.

The COA's objectives are:

- To respect the Olympic Rules established by the IOC.
- To cooperate with the national authorities of the sports, in everything related with the promotion and diffusion of the sports, proposing and advising in everything that may be requested by these authorities.
- To promote the Olympic Movement and the Olympic Ideals in all the Argentine territory.
- To coordinate with the National Sport Federations the arrangements for the delegations taking part in the Pan American, South American and Olympic Games, to assume the responsibility of the enrolment and participation of the Argentine teams in the Games, coordinating with the national authorities the best representation for each of the events.
- To support the national sports developing projects and to promote the constructions of sport facilities required for high level performance.
- To organize and develop sport and cultural courses, lectures and expositions.
- To cooperate with the authorities of the sports at national, provincial and local levels and with national federations in the organization of the Argentine Sport Games.
- To develop annually, the courses of the Argentine Olympic Academy.
- To keep the connection with the IOC, National Olympic Committee Associations, International Federations, National Olympic Committees, so as with the American Sport Organizations, like Pan American Sport Organization, South American Sport Organization, Central America and Caribbean Sport Organization, Central America Sport Organization and Bolivian Sport Organization.

In accordance with the COA's bylaws, the Executive Committee is exclusively empowered, in Argentina, to construe the provisions of the Olympic Charter and its rules, as well as the rules of the Association of National Olympic Committees (ANOC), Pan American Sports Organization (ODEPA - PASO), South American Sports Organization (ODESUR), and Argentine Olympic Committee (COA).

The Executive Board can impose sanctions to its entity members, athletes and officials under its jurisdiction, once the opportunity to provide defence to the accused is granted. The affected party can appeal the decision by filing it in writing before the Court of Appeals for the COA within five working days from the date of its notification to the plaintiff. Later, the decision can be appealed before the Court of Arbitration for Sport (CAS) or the one in Argentina within twenty one working days from the date of notification. In case of absent of appeal, the decision is legally binding.

The sanctions that might be applied to the entities members are: a) warning; b) suspension, the maximum term not exceeding one year, c) expulsion, which is established according to the severity of the case and the circumstances of the case for the following reasons: 1) breach of the obligations imposed by statute, regulation or resolutions Assemblies and Executive Board, 2) flagrant misconduct, 3) voluntarily damage to the association, cause serious disturbances within it or observe a misconduct which is notoriously harmful to the general welfare. On the other hand, the possible sanctions to be applied to athletes and officials are: a) warning; b) temporary disqualification to integrate COA's delegations but not exceeding a-four-year-term; c) permanent disqualification for integrating COA's delegations.

4. Relevant football regulations

In 1934, the well-known *Asociación del Fútbol Argentino* (AFA) was established by the merge of the two previous existing organizations.¹⁶ All private regulations related to football in Argentina are under the control and authority of AFA.

4.1 Legal entity and functions

AFA is a private entity formed by local football clubs and subject to the rules of the Civil Code as any other association in Argentina. It is an upper level association, in other words it constitutes a federation.

Under Section 2 of its bylaws, AFA promotes the practice of football in Argentina coordinating the action of all its affiliated entities in accordance with FIFA's provisions.

Furthermore, Section 3 allows AFA to achieve its goals by joining to other sports entities in the country or abroad. AFA has the exclusive representation of Argentine football association at international level and specially to the '*Federation Internationale de Football Association*' (FIFA) of which it is a member.

As a consequence of its status of federation, AFA has a double role:

- From the private governance view, AFA is the governing body of football in Argentina and therefore affiliated clubs recognize and delegate to AFA the necessary power to achieve such purpose.

¹⁶ M. A. SCHMOISMAN, D. A. DOLABJIAN, *Estudios sobre derecho y deporte*, T. I, Córdoba, Argentina, 2009, Lesner Editora, 381.

- From the public governance view, sports federations are empowered by Government to pursue certain activities which have public nature. This is a consequence of the increasing public role that has been allocated on the sporting phenomenon which at first was purely governed by private regulations.¹⁷

It is possible to summarize AFA's functions on both a local and international basis, being part of the first category: (i) to organize Argentine football league, (ii) to cooperate with the State; (iii) to exercise the sports disciplinary authority, (iv) to exercise the governing authority over the football in the provinces (through the *Consejo Federal de Fútbol* (CFF)), (v) to appoint the members of national teams, and (vi) to appoint clubs participating in the international tournament. Regarding the functions on an international basis, AFA (i) has the exclusive international representation of the discipline, and (ii) is responsible for collaboration in the organization of international competitions that take place in the country.

4.1.1 Assembly

It is the supreme authority of the AFA. Its most important duties are: (i) choosing the members of the Executive Committee and the President of the Institution; (ii) approving the annual report, the General Balance, the Inventory, and the Resources and Expenditures, authorizing the buying and selling of real estate and their taxing, mortgaging or permuting; (iii) fixing the maximum total amount of credits and/or loans that the Executive Committee can request and obtain in banks or other institutions for official or private credits, as well as the maximum total amount of loans that the Executive Committee can grant to affiliated institutions; dissolving AFA or changing its structure, according to national laws that are in force at the moment.

The members are the directly affiliated institutions that form the different divisions, as well as by the Clubs indirectly affiliated and that participate in the tournaments of the First Division and First B National Categories, and by the affiliated Leagues. It is formed by a President and 49 members: one for each club of the First Division; 8 for the First B National; 7 for the Affiliated Leagues; 7 for First B Division; 4 for First C Division and 3 for the First D Division. The legal representative of AFA is the appointed as President of the Assembly, the Executive Committee and the Federal Counsel'.¹⁸

4.1.2 Executive committee

It is formed by a President and 27 chief members that represent all categories, clubs and Affiliated Leagues; the Body is also composed of substitute members.

¹⁷ L. M. CAZORLA PRIETO, *Deporte y estado*, 1979, Labor-Politeia; cited by M. A. SCHMOISMAN, D. A. DOLABJIAN, *Estudios sobre derecho y deporte*, T. I, Córdoba, Argentina, 2009, Lesner Editora, 383.

¹⁸ See AFA web site: www.afa.org.ar/index.php?option=com_content&view=article&id=8745&Itemid=267 (13 May 2013).

Between the most important tasks are to summon the Assembly, to have an ordinary session once a week, on the dates and times decided upon, and in extraordinary session when it is summoned by the President or by request of 10 members; interpreting the Regulations on Transgressions and Penalties; to comply and to make the Regulations Statute compliant; to agree, to suspend or to cancel affiliations of clubs directly affiliated ad referendum to the Assembly; to manage AFA and to represent it in administrative or judicial matters; naming referees and applying measurements according to the proposals filed by the Referees School; to take care and to run the international affairs of Argentine football; to authorize players transfers, or not authorizing them'.¹⁹

4.1.3 Discipline Court

The Sports Discipline Court was created in 1934. It is composed of a President and 12 members. This court decides any transgressions to the Statute, to the regulations or to AFA's resolutions.

In that sense, it is empowered to punish faults that would turn out to be imputable to clubs directly or indirectly affiliated that participate in its competitions as well as players, associates or employees, coaching personnel, managers, referees, assistant referees or other personnel that have connections with AFA.

4.1.4 Appeals Court

This Court of Appeal consists of 3 members, who must be lawyers. One of them performs as President of such body. The Appeals Court is entitled to review Judgments decided by the Sports Discipline Court, in cases of major sanctions mentioned in AFA's Statute.²⁰

4.1.5 Court of Auditors

It is composed of a President, four chief members and four substitute chief members. Their most relevant functions are: (i) to control the movement and handling of funds that are made by AFA's government entities; (ii) to establish, in a mandatory nature, an accounting system and a consistent accounting plan as well as fixing the annual budget for resources and expenditures; (iii) to make resolutions regarding the Annual Report, Balance Sheet, Inventory and the Resources and Expenditures Account for the H. Ordinary Assembly to review; (iv) to request affiliated clubs to provide their accounting statements certified by a national public accountant according to the current accounting regulations; (v) to carry out audits to institutions

¹⁹ See AFA web site: www.afa.org.ar/index.php?option=com_content&view=article&id=8746&Itemid=252 (13 May 2013).

²⁰ See AFA web site: www.afa.org.ar/index.php?option=com_content&view=article&id=11462&Itemid=276 (13 May 2013).

affiliated to AFA when requested by the Executive Committee or by the Assembly; and (vi) to supervise AFA's process of liquidations when disposed by the H. Assembly'.²¹

5. *Clubs and players' rights and obligations*

Clubs and players have different rights and obligations depending on the amateur or professional status of the players. The employment relationship is governed by Law No. 20744 (namely 'LCT' or 'RCT') enacted in 1974 and modified several times. The LCT governs the employment relationship from the hiring up to the termination. The majority of the concerns that might show up regarding the rights and duties of employees and employers are covered by such statute.

The statutory coverage includes every person in the licit service of another who has the right to manage and there is a payment in compensation for it, under any employment contract, expressed or implied. This employment relationship is defined as a salaried work in contrast with an independent contractor and will be regulated by the LCT and the corresponding CBA. There are several activities that are not excluded by the LCT, but have a separate statute that governs such activities: construction workers (Law No. 22250), travelling sales employees (Law No. 14546), professional journalists (Law No. 12908), administrative employees for press companies (Law No. 12921), professional musicians (Law No. 14597), professional football players (Law No. 20160), hairdressers (Law No. 23947), among others.

Since 1969, the CNAT as a whole ruled that the relationship between the professional football player and the club is governed by the employment law.²² However, there is no parallel with other sports activities such as volleyball, handball or basketball. In these other sports activities the courts have been ruling that the practice is amateur and therefore they are not covered by the scope of the LCT. The reasoning is that the players only have a philanthropic interest in it that helps their own development as persons but not as a subordinate. In many such sport practices, coaches and referees have the employee status and all the corresponding rights and obligations.

The employment and labour issues have been delegated to the Federal Government empowering the Congress to enact the laws regarding such field as well as Social Security.

Despite the failure to enact a code of labour law, separate laws addressing conditions of employment, right to self-organizations and to strike, to bargain collectively, and collective dispute resolution have been approved.

²¹ See AFA web site: www.afa.org.ar/index.php?option=com_content&view=article&id=11465&Itemid=279(13 May 2013).

²² "Ruiz S. c/ C. A. Platense s/ Despido", decided by the CNAT as a whole under *Plenario* No. 125, in October 1969.

5.1 Law No. 20596 – Special leave pay for sports competitions

All amateur athletes who are appointed to intervene in selective regional Tournaments by the corresponding sports federation, have a special leave pay, both public and private, for preparation and to participate in the competition.

In addition, the Act also includes as beneficiary: (i) any person who in his capacity as manager or agent must integrate necessarily the delegations participating in the competitions; (ii) those who must necessarily participate in congresses, conferences, meetings, courses or other activities related to sports, which take place in Argentina or abroad, either as representatives of recognized sports federations or members of sports organizations; (iii) those who have been appointed by the sports federations or national or international organizations to intervene as a referee, official or arbitrator; and (iv) coaches, trainers and all those who must necessarily perform functions relating to the athlete's psychological and physical care.

In relation to the period of time, the athletes have up to 60 calendar days per year and the other beneficiaries have up to 30 calendar days per year.

In order to apply for the leave pay, the person must have at least 6 months of seniority at the time of requesting it and also has to be authorized by the competent authority.

The Government will provide the sum of money corresponding to afford the salary and social security contributions in order to release the private employer to afford the labour cost of the beneficial person by the system.

5.2 Athletes performing in team sports

Among the athletes who perform sports in teams that depend on a sports institution, this is that they practice sports as part of a squad; it is possible to distinguish them by its professional or amateur characteristic. In the professional sports, the athlete executes with the club an employment agreement while in the amateur sports it is not clear whether or not there is an employment agreement.

The first step for the athletes to affiliate with a club is the signing (*fichaje*). The signing is intended to mean the registry made on behalf of an amateur athlete by the relevant club in the records of the respective sports federation.

The signing is done in general when the players begin playing for a certain club, in its lowest divisions, which usually happens at an early age, for example when they are ten or eleven.²³

As to the legal nature of the signing, it is a contract, an adhesive one, governed by contract law.²⁴ Therefore the relationship between the athlete and the

²³ M. P. VIDELA, *Contratos deportivos relacionados con niños/as y jóvenes*, 2005, elDial.com, DC681.

²⁴ “*S. N. y otro v. Club Independiente*” decided by Court of Appeal N° 2 on Civil and Commercial in Azul, Province of Buenos Aires, October 28, 2004, Lexis N° 35000903.

club is subject to the pyramidal shape in which activities are governed by private law of the relevant sports federation, including the sporting entities affiliated to it, which also complies with the international sport federation.²⁵

According to the regulations of different sports federations in Argentina (i.e., football through AFA, basketball through Argentina Basketball Confederation, volleyball or rugby ones, etc.), an amateur athlete that has been registered by the signing then will need to be granted a “transfer” in order to be able to begin play for another club.

The question is whether or not that signing binds the child or young athlete.

Children or young athletes cannot be bound, as they have no capacity to enter into a contract of adhesion validly called ‘*fichaje*’ by themselves or through their legal representatives if this contract involves giving up rights so precious as freedom and free association rights.²⁶

Despite of the important role and benefits of sport entities, all the rights and duties towards children fall on their parents. The exercise of parental authority must be performed in order to provide protection geared toward their comprehensive development, in accordance with Section 264 of the CC.²⁷

According to the Section 189 of the Law 20744 it is prohibited for employers to employ persons under the age of 16 in any activity; neither under economic nor philanthropic interests.

There is no jurisprudence addressing the issue that arises from this new regulation since 2008 related to whether the possibility to require the signing to children and young athletes under the age of 16 years old should be limited or not. This is because the law prohibits that young people render any kind of service in any activity neither with economic nor philanthropic purposes. On the other hand, it could be arguable that sports practice is not covered by such provision.

Regarding the *fichaje*, it does not entail by itself an employment relationship nor a framework that can infringe the children’s constitutional rights of freedom of association and freedom of work.

Even though clubs have a crucial role on the comprehensive development and training of young athletes, the law recognizes parents the mission of ruler over the children. Therefore, the clubs have not an unlimited power against young athletes will or his parents.²⁸

5.3 Athletes performing individually

The case of athletes who perform individual sports is very different from those

²⁵ R. TREVISTÁN, *La situación jurídica del deportista*, 2005, elDial.com, DC644.

²⁶ M. P. VIDELA, *Contratos deportivos relacionados con niños/as y jóvenes*, 2005, elDial.com, DC681.

²⁷ MOLINA, as Children’s Advocate Chamber in the case Coloccini, quoted by M. P. VIDELA, *Contratos deportivos relacionados con niños/as y jóvenes*, 2005, elDial.com, DC681.

²⁸ “*Diebold, Roberto c. Club Atlético Obras Sanitarias de la Nación y otro*” decided by National Court of Appeal on Civil N° E, june 25, 1987, ED 127-375.

who perform as part of a team. However, there is the same classification of professional and amateur status. The basic difference is the fact that, in the majority cases, there is no relationship with a club, but this practice is also subject to the pyramidal shape in which activities are governed by private law of the corresponding sports federation, including the sporting entities affiliated to it, which also complies with the international sport federation.

This individual approach causes a more difficult financial position for the athlete in training, registration fees for competitions, travelling abroad, etc. The athlete often enters into an agreement with corporations or people who affords the athlete's expenses in exchange of a share of future profits from it. These contracts are usually made for a long period and the percentage in the share of profits is generally very high. It is very common that these contracts impose obligations in relation to athlete training, diet, residence, prohibited activities, etc.²⁹

In a case³⁰ of a female tennis player, her parents signed a contract on behalf of their daughter when she was 16 years old with a company for a period of ten years. Later, the company sued the player for breaching the contract and damages which was awarded.

The Court upheld the legality of the contract between the tennis player and the company based on the argument that it was an employment agreement and therefore it was valid because her parents consented at the time of formation. However, the assumption of the court regarding the existence of an employment agreement was questioned by commentators due to the fact that in this case the dependency as a key factor to determine employment relationship was not so clear.

This issue is relevant in the sense that the ability of children and youth to celebrate employment agreements is broader than the ability to enter into other contracts.

Another interesting point of the judgment, is the fact that although the Court did not mention a right to training, in a way it considered this by ordering the player to pay the plaintiff the costs it incurred (on expert assessment) for the professional development of her tennis game.

5.4 Law No. 20160 – Statute of professional football players

The relationship between sports entities and athletes who play football as a professional activity is governed by the Law No. 20160, the Law No. 20744 in those aspects that could be applied, the corresponding CBA and the contract to which the parties subscribe. Any other employment legislation in force compatible with the characteristics of this sports practice shall be of subsidiary enforcement.

²⁹ M. P. VIDELA, *Contratos deportivos relacionados con niños/as y jóvenes*, 2005, elDial.com, DC681.

³⁰ “*Emprendimientos Tenísticos Sociedad Anónima c/ Suárez Paola s/ ordinario*”, decided by the National Court of Appeal on Commercial, No. C, on July 5, 2002.

The contract is defined as when one party binds itself to play football for a fixed term as a member of a sports entity which also binds itself to compensate the player with a sum in money.

In 2009, both AFA and the union, agreed on representing the football players and signed a new CBA under the registry CCT No. 557/2009³¹ replacing the previous one dated on 1975 under the registry CCT No. 430/1975.

According to the CBA, a professional football player is considered a person who binds himself to play football for a fixed term as a member of a sports entity which participates in the professional tournaments, and also with compensation in favor of the player with a sum of money.

The contract shall clearly detail the amount the football player will receive as compensation for:

- monthly salary;
- bonus for points won in official matches;
- bonus for friendly matches won or tied;
- bonus for classification on the national or international competitions or tournaments in which the contracting club plays or may play.

If the club in which the player renders his services moves to a lower category, the contracting club may decide to reduce his compensation by 20% for the period of time that the club remains in the lower category; the lowest limit for reduction shall be the established by the minimum vital and adjustable salary. Should the club where the player renders services move to a higher category, player's salary shall be increased by at least 25% as from January 1st of the year that the new season starts.

5.4.1 *Obligations*

The statute establishes generic and specific obligations for the clubs and players, the following obligations are for the clubs:

- to pay all amounts agreed in the contract even if the club dispenses the player's services;
- to grant player one day per week to rest and, annually, a leave of absence for 30 days with the right to be paid his monthly salary as established in the contract. Except by agreement of the parties to the contrary, days of the leave shall be running days;
- to provide full medical attention, including psychology and rehabilitation services, to guarantee player's efficient sports performance;
- to contract insurance policies to foresee compensation for player's generic or specific incapacity, whether total or partial, or player's death during competitions, preparation events or player transportation irrespective of the means used, and whether the event takes place in the country or abroad,

³¹ See full version in Spanish: <https://convenios.trabajo.gob.ar/include/showfile.asp?ArchivoId=30927> (13 May 2013).

pursuant to what is established by Law No. 24557;

- to pay expenses for transportation, accommodation and food when player travels in order to honour contractual obligations.

On the other hand, the statute lists the following obligations for the players:

- to play football only for the contracting club or in teams that represent the AFA, pursuant to relevant rules;
- to maintain and improve the condition of his sport abilities and physical and psychological well-being in order to achieve efficient performance; if his abilities and conditions are diminished or lost for reasons attributable to player, he shall be responsible for gross negligence;
- to play efficiently and to the best of his abilities and strengths;
- to adapt his lifestyle to the demands of his contractual obligations;
- to attend any meeting called by the club or the authorities of the AFA, and to play in all the matches in the position he is indicated irrespective of the date, time and place where the match takes place;
- to comply with all international sports rules that regulate the football activity, and the sports regulations of the club and AFA, as long as they are not contrary to the statute;
- to train as determined by the person appointed by the AFA to such effect. This obligation shall subsist despite disqualification of the player; likewise, player cannot excuse himself from attending training sessions due to working or other job reasons, unless expressly permitted by the club. The club shall be the only one to determine date, time and place for training, according to practices and customs, as well as any changes it deems necessary in exceptional circumstances, provided that said changes do not damage players interests;
- to notify the entity, within 24 hours, of any circumstance that may alter his physical or psychological well-being; player shall accept assistance by the club's physicians and follow any indications they prescribe. The player may request that a three-medical-doctor-panel (Medical Examination Board) be appointed: one designated by the AFA, another one by the corresponding club and a third doctor appointed by the player himself.
- to travel to every location where the club or the AFA are to take part in a sports event within the country or abroad;
- to behave properly during matches, accept indications imparted by the club, respect the audience, sports authorities, teammates and opponents;
- to pursue fair play, any sanction decided against him by competent authority resulting in his impossibility to play shall be sufficient ground for suspension of his rights to receive payment for as long as the sanction lasts, irrespective of his obligation to continue training to keep his abilities and himself in the best physical and psychological conditions.

5.5 *Football contract*

The term of football contracts shall be between one and four years. In that sense, there are different alternatives:

- The club shall offer a one-year contract, with the option for the club to extend the term for one more year, up to three times. The players to be offered such contract are to be registered in the AFA and must achieve legal majority (18 years of age) within the first year, or, if a minor, the player shall have played in 30% of official tournaments matches for the First division within the previous year.
- Should a club contract a player of 21 or more years of age by transfer, or because player is free to enter into contract, the club shall execute with the said player a one-year contract, with the option for the club to extend the contract for two more years.
- The club may contract minor players registered in the club or transferred to it, executing a one-year contract with the possibility for the club to have the contract extended for two more years. The contract shall be registered within the time established by law, but in a period not shorter than the time between two seasons.

Aside from this, the new CBA provides a new scheme. The clubs can celebrate with players, who have been transferred or were free agent, professional promotional contracts for one-year-period with an option of extending or a fixed term contract for a period between one and five years but without any option of extending.

The professional promotional contracts could be celebrated by the club with athletes in the range of 16-21 years old, as follows:

- With players who have attained 16 years old, a one-year-period with an option for the club to extend it for 1 or 2 years more.
- With players who have attained 17 years old, a one-year-period with an option for the club to extend it for 1 or 2 years more.
- With players who have reached 18 years old, a one-year-period with an option for the club to extend it for 1 or 2 years more.
- With players who have reached 19 years old, a one-year-period with an option for the club to extend it for 1 or 2 years more.
- With players who have reached 20 years old, a one-year-period with an option for the club to extend it for 1 or 2 years more.
- With players who have reached 21 years old, a one-year-period with an option for the club to extend it for only 1 more year.

Since June 2009, any club determinate to extend the contract must notify by telegram by May 31 of the immediate following year in the case of option by the first extension and by April 30 of the following year in the case of the option for the second extension.

Once the players attain the age of 22 years old it is not possible to celebrate contracts with option to prorogue them.

5.6 *Limit foreign players in the squad*

According to the CBA, the clubs that participate in the competitions under the categories *Primera A*, *Primera B Nacional* and *Primera B*, organized by AFA shall be limited to the number of four foreign players in their squad.

5.7 *Registration*

Every executed contract must be registered at the MDS, and copies of the contract must be provided to different entities. One copy must be filed to AFA, another to the corresponding union and another to the corresponding club. The football player has to submit to AFA a copy of the contract.

This process has to be fulfilled within the term of ten days after signing the contract. Nevertheless, failure by one of the parties to submit the copy or copies of the contract within the term established shall not affect the validity of the contract submitted by the other party. Failure to register the contract within the specified term shall give rise to a daily fine, in favour to the FND, equivalent to 3% of the monthly compensation of the player which shall be paid by the party failing to register the contract.

Any contract or agreement modifying, altering or changing the content of that registered in the MDS shall be null and void.

The new CBA No. 557/2009 in its Article 3 modifies the requirement to submit a copy of the employment agreement to the MDS and also modifies the nullity of those later agreements that alters the registered agreement only if a higher salary in favour of the player is agreed.

Some commentators supported such provision because it is common in Argentina that the parties celebrate a separate agreement with the actual salary and it assumes a condition in favour of the player; others criticize it because there is no benefit to the activity.³²

In any case, it is important to clarify that as a consequence of Section 40 of the Law No. 20744 the prohibition is only addressed to the employer and in no case will affect the employees' rights.

Once the club registers the contract before AFA, the football player is able to play for and form part of the squad of the club. In addition, this implies that the player acknowledges that all the rules and regulations of AFA, as long as they are not contrary to the Law No. 20160, shall govern his sport relationship with the club and the respective sports activities.

Notwithstanding, the CBA establishes a system to guarantee that players receive all the amounts owed by the transferor club. In that sense, AFA shall not register the contracts that a club signs up with players who come from another

³² M. PELLORROSO, C. ACUÑA, E. VERCELLONE AND F. SALA GIMENEZ, *Estabilidad contractual en el fútbol*, 2010, elDial.com, DC14B0.

club, if it is shown that the former club fully paid the amounts for his previous services.

Every month, clubs shall submit to the AFA a report detailing the concepts included in the compensation paid to their players. If a club fails to compensate a player for two consecutive months, the club shall be compelled to pay after the unpaid player requests payment to the club and to AFA in writing indicating the amount owed. The AFA, within 72 hours after receiving the player's complaint, shall compel the club by registered telegram to deposit the amount claimed by the player in the Treasury of the AFA within 10 days following reception of said telegram. If the club fails to demonstrate, by true means, that the claim is not justified, or it fails to make the deposit within the term specified in the telegram, the player shall automatically be considered free and the club shall be compelled to pay the compensations accrued and claimed as well as the amounts the player should have received until the end of the year in course of the terminated contract.

If the AFA fails to notify the club about the claim, the union shall demand fulfilment of the obligation to the AFA, which shall notify the club within the following 48 hours. Should this fail, the AFA shall become jointly and severally liable for the amounts owed. The debt shall be honoured within the periods established; otherwise the player shall be automatically free from any contractual obligation.

5.8 *Transfers*

There is no restriction for transferring contracts, but in these cases the player must be awarded with a percentage of the value involved in the transaction.

The transferor club must have the expressed player's consent to the transaction. The minimum amount that the player must receive is 10% of the total amount paid for transferring the contract. It has been enforceable by the Court awarding the players and ruling that both clubs and AFA were jointly and severally liable.³³

The percentage to be paid to the player has been increased by the new CBA to the minimum of 15% of the total amount paid for transferring the contract.

Later, the player must conclude a new employment agreement with the new club governing their relationship.

On the other hand, it is also allowed to temporarily assign the contract to another club for a maximum of a one year period. The temporary assignment shall not affect the payment established in the contract assigned, and the assignor club shall be jointly and severally bound for the fulfilment of the economic obligations of the assignee, until the original contract is fully satisfied.

³³ "*Calderon Jorge Adrian c/ Asociacion del Futbol Argentino y otro*", decided by the National Court of Appeal on Labour, No. IV, on October 31, 1979, D. T. XL-1980-353; a other cases now omitted, cited by J.A. CONFALONIERI, *Futbolistas profesionales*, *Revista de Derecho Laboral* N° 2003-2, Rubinzal-Culzoni, 205.

According to the Article 8 of the CBA, it is forbidden to transfer the football player's federative rights in favour of any other person or entity that does not participate in any categories of the tournaments organized by AFA.

In case of partial transfers, the transferor must deposit 15% of the total amount involved in the transaction at the time of executing the agreement.

5.9 Termination

Another consequence for the termination of the contract by unjustified breach of obligations on the part of the club, is that the player shall be free from any contractual obligation.

Therefore, the player has the right to enter into a new contract with any other club within the country or apply for a certificate of international transfer.

6. Sports offences

Athletes and clubs might perform conduct detrimental to the sport policy that involves values of honesty and loyalty. Those offences are a consequence of the violation of the rules of the games and/or public order. In addition to the sports offences mentioned above, it is important to point out the following.

6.1 Law No. 24192 – Prevention and punishment of violence in sporting events

The system addresses different fields of law, establishing jointly and severally liability for torts, describing criminal conducts and offences. Torts and criminal laws are under federal preemption whereas offences are not. The last one is only for those offences which take place in the City of Buenos Aires.

According to the law, there are terms defined as follow:

- Supporter: any person who goes, stays in, and leaves the stadium where the match takes place;
- Organiser: any member of managerial committee, manager, employees or assistants under contractual relation with the entities which participate or organize the sports events, either official or private;
- Participant: athletes, technicians, referees and all those whose participation is necessary to carry out the sports event;

The Argentinean policy against the violence in sports events is mainly contained in the Law No. 24192 which describes conducts against a person in general and those who have a relationship with sports entities. The wrongful deed is when the foreseeable acts take place because of or on the occasion of a sports event with public attendance, either in the same place or nearby, before, during or after the event.

The Judges that found the accused guilty of one or more of the relevant crimes shall also impose one or more of the following accessory punishments:

- Disqualification for a term between six months and five years to attend the kind of sports event that gave rise to the conviction. Fulfilment shall be guaranteed by the convicted person appearing before the Police Station of the jurisdiction of his domicile, whenever there is a sports event similar to the one that gave rise to the conviction, on the date and at the time fixed by the Court for such appearance. The Judge may wholly or partially excuse the convicted person from appearing before the Police;
- Disqualification for a term between one and fifteen years to carry out activities as athlete, professional player, technician, collaborator, manager, licensee, member of a committee or subcommittee of sports entities, or to be under contractual relation with any sports entity for any reason whatsoever;
- Life disqualification to attend matches held at the location or stadium where the crime took place.

In addition, it is considered an offence subject to punishment if a conduct performed by any person in the City of Buenos Aires aids, abets or facilitates in any way the commission of unlawful access to the stadium, or disturbs the order of the queues to acquire the tickets, or the queues to enter or to leave the premises where the sports event takes place. It is also an offence if a person does not expressly offer the total quantity of available tickets, or sells them in different conditions from those communicated to the public, or if an unauthorised spectator steps into the field or changing rooms or any other exclusive area for the participants in such event; or if he sells or consumes alcoholic beverages in sports events; or he commits offences against the maintenance of the order.

People who commit offences against the maintenance of the order are:

- Any person who does not obey the instructions ordered by the competent authority - aimed at maintaining the order and organization of the security measures.
- Any person who provokes supporters from the opposite team by carrying or showing banners or trophies that represent any club other than their own, or who with the same purpose, keeps or allows the said banners or trophies to be kept in a stadium.
- Any person who arouses violence through signs, megaphones, loudspeakers, radio or any other means of mass media.
- Any person who carries pyrotechnics, except for exceptional authorizations which shall be communicated, in writing, by competent authority to the event organizers.
- Any person who by any means generates the danger of crowd or avalanche.
- Any person who deliberately changes his personal appearance, or by any other way hinders or prevents people from identifying him.
- Any person who spills liquids or throws pieces of paper in flames, objects or substances that may trouble or hurt others.
- Any person part of a group of three or more people which occasionally or permanently causes disturbances, insults, or threatens others.
- Any person who participates in a fight, in any way.

- The athlete, manager, reporter, figure or organizer of a sports event, who disrupts public order or encourages others to do so, by means of expressions, gestures, or antisocial behaviour.
- Any person who enters or carries or keeps with him sharp weapons or any other element whose clear aim is to inflict violence or to attack third parties.
- Managers, members of the managerial committees or subcommittees, employees any other member of sports entities under contractual relations with the entity for any reason whatsoever, licensees or any of their employees who accept that the said sharp weapons or elements whose clear aim is to inflict violence or to attack third parties.
- The vendor who sells or supplies people present at the sports event with beverages in bottles or food in containers, which owing to their characteristics, may be used as elements of aggression. In this case, the vendor shall be punished with a fine between ten pesos (ARS 10) to one thousand pesos (ARS 1,000).

6.2 Law No. 24819 - Fair play and drug-free

According to the law, doping is defined as the use of prohibited substances or methods irrespective of how much substance is administered, by an athlete, before, during or after a competition. The prohibited methods and substances are detailed and amended regularly by *Comisión Nacional Antidoping* (CNA). Likewise, doping is also defined as the administration of prohibited substances or methods to an animal which is part in a sports competition.

The purpose of the regulation is to preserve ethics and fair play in sports, in order to maintain the best conditions of physical and psychological health. These anti-doping controls remain exclusively on a governmental agency.

The international competitions that take place in the country shall be governed by the regulations of the international sports federations or the IOC, as the case may be.

The classification of prohibited substances is broke down by the Laws No. 17818 and 19303 regarding narcotics and psychotropics respectively, as well as the lists updated by the International Narcotics Control Board of the United Nations.

This chapter does not address this specific issue; however, it is important to provide an overview of the obligations regarding to this matter.

6.3 Damages

Violation of the rules of the game might also be a violation of mandatory law, such as economic damages based on the Civil Code or Criminal Code. In that sense, the National Court of Appeal on Civil matters, Room I,³⁴ ruled in favour of a referee

³⁴ "Sánchez, Angel O. v. Maradona, Diego A.", Cámara Nacional de Apelaciones en lo Civil, sala I, 01/07/1999.

who sought economic damages against Diego Maradona as a coach who verbally and with libel offended him under Section 1089 of the Civil Code. The court held that the coach had to respond for the damage suffered by the referee, and such liability has to be increased by the popularity that it enjoys as technical director and by the journalistic impact of their judgments and attitudes, as this increases its harmful potentialities.

7. *Sanctions on clubs and players*

7.1 *Sanctions on clubs*

According to Section 51 of the Law No. 24192, entities or associations that participate in a sports event are jointly and severally liable for the damages taking place within the stadium.

Any breach of the dispositions established by the Law No. 24819 on the part of the sports entities registered at the *Registro Nacional de Instituciones Deportivas* in accordance to the Law No. 20655, and/or those recognized by the COA and/or the *Confederación Argentina del Deporte*, shall imply the cease of their participation in the *Fondo Nacional del Deporte* and in the *Registro Nacional de Instituciones Deportivas*.

7.2 *Sanctions on players*

There are different sanctions for those athletes tested positive for doping. The punishments applied to an athlete tested positive for doping while carrying out a specific sport discipline shall be applied in full to all of her/his other sports disciplines. Every sport authority has to address this statutory provision.

Regarding athletes' offences under Law 24819, the following disciplinary sanctions shall be imposed:

- ineligibility for a period between three months and two years to carry out federative sports activity, as from the finding of the first offence;
- ineligibility for a minimum period of two years in case of recidivism, as well as the disqualification or forfeiture of points according to the nature of the sports competition;
- in order to determine the recidivism, the violations committed by the athlete abroad shall be taken into account, whenever the corresponding sanctions have been imposed by international sports federations and/or the national sports federations recognized by the corresponding international federation;
- should the athlete refuse to undergo a doping test;
- it shall be under the jurisdiction of each federation to determine if athletes are to be punished by disqualification or by forfeiture of points, whether the sports competition is practiced individually or in teams. If the athlete punished for doping is dependent on narcotics, the sports institution shall impose a safety

health measure, apart from the punishment it considers appropriate, through the corresponding administrative body. The mentioned measure shall consist of detoxification and rehabilitation treatment for the period deemed necessary. The athlete may resume sports practice only upon issuance of an official medical certificate attesting athlete is apt.

Regarding physical trainers, managers and any other third party related to physical training and/or participation of an athlete in a competition, who by any means facilitates, administer, and/or incites athlete to use prohibited substances or methods, or who hinders doping controls tests, shall be sanctioned with disqualification for two years to develop the federative sport activity she/he was carrying out.

7.3 *Criminal punishment*

The Argentinean policy against the use of performance-enhancing drugs is structured on both drug testing policies forced in the private law of sports entities, but also in criminal punishment.

The physical and/or psychological trainer, sports director, manager, doctors and paramedics related to the preparation of the athletes, and/or any person related in any way to the training or participation of athletes in a competition, who incites the use of prohibited substances and/or methods shall be punished by imprisonment for a term between one month and three years unless a more serious punishment has been foreseen for this crime. In case that the substance/s administered to athlete should be narcotics, the punishment shall be for a term between four and fifteen years.

8. *Economic benefits vs. federative rights*

The non-profit character of the sports activities was the target of many critics, but there was no amendment to the scheme, maybe because it has a long tradition in Argentina or because it drives some alternatives to channel private investment to get profits.

There was a trend of doctrinal and jurisprudential position that argued that contracts on economic benefits isolated from the corresponding player's federative rights were illegal and therefore unenforceable.

In a bankruptcy process of a club³⁵ the Court declared the nullity of an agreement which transferred the economic benefits and federative rights in favour of a company. The Court ruled based on the Section 1050 of the CC regarding the absolute nullity. According to the Section 14 of the Law No. 20160, Article 9 of the respective CBA No. 430/75, and Article 249 of the AFA general regulation, the employment agreement and therefore the federative rights must have as parties a

³⁵ "*Club Atlético Belgrano de Córdoba s/ quiebra pedida - régimen ley 25284*", decided by the Civil and Commercial Court, No. 7, of the Province of Córdoba, on December 15, 2001.

player and a club. However, it has been said that in no way can it be construed to extend such limitation or economic benefits, to the employment relationship or other legal relationships governed by civil law.³⁶

In another case,³⁷ the plaintiff sued the club on the argument that he was the owner of a professional football player. The plaintiff had executed a contract with a professional football player in which the last one transferred definitely to him all the federative rights, economic benefits and labour force. The Court of Appeal rejected the claim because the contract between the plaintiff and the football player could not be considered valid under the provisions of the Article 9 of the respective CBA No. 430/75, and Article 249 of the AFA general regulation, noting that the intervention of third parties to clubs and players in the transfer of the federative rights and economic benefits of professional football players is forbidden. On the other hand, this case did not solve the problem of enrichment without cause by the club as some commentators appointed.³⁸

However, others have argued differences based on the fact that the Government recognizes proprietors of economics benefits which can be different from the federative rights, as explained in the following.³⁹

The Executive Committee of the AFA implemented a registry for the transfers of economic benefits under the No. 3819⁴⁰ in 2005 and the *Administración Federal de Ingresos Públicos* (AFIP) issued the Resolution No. 2182⁴¹ on information to be provided as affidavit by the professional football teams to AFA and finally to AFIP. The professional football teams subject to the information system are those in the first and second leagues, known as *Primera A* and *Primera B*. The clubs must inform each semester the following:

- Individuals or entities which are proprietor in part of or all of the economic benefits of professional football players. The information shall include the entire roster of players from each club, including those where the informing club is the only proprietor.
- Individuals or entities which made transfers of economic benefits or borrowings for the use of the services provided by professional football players. The deals in which the clubs have acted as intermediary in the payment or collection shall also be included.
- Individuals or entities which acted as intermediaries or managers of the

³⁶ R. TREVISÁN, *El contrato de cesión de beneficios económicos provenientes de la transferencia de un jugador de fútbol*, 2005, ElDial.com, DC7BB.

³⁷ “Otero, Javier F. c/ Club Atlético Colón”, decided by the National Court of Appeal on Civil, No. 1, on March 16, 2004.

³⁸ R. TREVISÁN, *Ibidem*.

³⁹ R. TREVISÁN, *Ibidem*.

⁴⁰ Resolution No. 3819 issued by the Executive Committee of the AFA on November 22, 2005, cited by R. TREVISÁN, *El contrato de cesión de beneficios económicos y las cuestiones de competencia*, 2007, ElDial.com, DCB3B.

⁴¹ See full text in Spanish: www.infoleg.gov.ar/infolegInternet/anexos/120000-124999/123934/norma.htm. (13 May 2013).

deals related to the preceding paragraph.

- The debts to national individuals or entities as well as foreign ones, for the purchase of economic benefits, rights of use or borrowing of money except for those owed to entities regulated under the Law No. 21526 on Financial Institutions.

In a case⁴² filed by investors of a professional football player against a club for breach of contract and a criminal complaint for fraud; the CSJN ruled on jurisdiction dispute between the Province of Buenos Aires and the Federal Government.

According to the facts, the investors filed the claim against *Club Atlético Tigre*, its president and its secretary, for sale and transfer of fifty percent (50%) of federative and economic rights of the professional football player Ezequiel Maggiolo without investors' consent.

The player was transferred to another club, so the investors claimed that based on the agreement they had with the *Club Atlético Tigre* any transfer of the federative rights of the player in question, either on loan or permanently, could not be made without investors' express consent. The issue was the confusing wording of the agreement between the club and investors which confused the concepts of federative rights and economic benefits from the sale or loan of the federative rights.

The CSJN solved by giving jurisdiction to the judge of the Province of Buenos Aires based on its own doctrine that the choice of the competent judge must rule to what is more convenient from the point of view of a more efficient investigation, most efficient process and best defence of the accused.

As a consequence of not rejecting the right of investors by the contract, it is construed that contracts on economic benefits of professional football players are valid also for private entities or individuals as investors.

The last CBA for professional football players states that, it is forbidden to transfer the football player's federative rights in favour of any other person or entity that do not participate in any categories of the tournaments organized by AFA.

9. *Dispute resolution*

When two parties who have a sporting dispute that they have not yet fully amicably solved, they have three alternatives to solve it: (i) bring the dispute before the sports judicial bodies, (ii) bring the dispute before the ordinary courts of justice, or (iii) solve the dispute through arbitration process.⁴³

⁴² Citation omitted, cited by R. TREVISÁN, *El contrato de cesión de beneficios económicos y las cuestiones de competencia*, 2007, elDial.com, DCB3B.

⁴³ J. P. ROCHAT, *Justice, droit et sport*; cited by G. ACOSTA, *La prohibición de recurrir a la justicia ordinaria y los mecanismos alternativos de resolución de conflictos deportivos*, 2006, elDial.com, DCB7A.

The sports judicial bodies are within the federations and they are called sports courts, ethics sports courts or courts of honour. The members are usually appointed by the executive committee or by the president of the federation, and sometimes receive per diem or travel expenses for the services which are paid by the federation that is also involved in the dispute.⁴⁴

These characteristics are the main arguments that are referred to when criticizing the organic sporting courts. As they are nothing more than internal bodies of the federations, they often do not have the objectivity and independence necessary to be able to resolve impartially.⁴⁵

The ordinary courts of justice could be considered to be the appropriate mechanism to solve disputes in sports due to the aptitude of guaranteeing due process. Nevertheless, the constraint provision to bring such dispute before the ordinary courts of justice, as well as their timing process and lack of specialization, turned into having developed alternative dispute resolution channels.⁴⁶

There is no doubt that state courts do not create greater transparency, and independence, and greater equity. The solution is not achieved through limiting the appealable, nor ordinary courts, nor the state tribunal; arbitration appears to be the best possible venue being aware that there are legal issues in sports that might be better understood at a specialized body by the matter: sports.⁴⁷

Actually, the arbitration is the alternative dispute resolution venue chosen as appropriate to the world of sports. In arbitration, the parties choose one or more arbitrators that supplant the state judge to solve the conflict, getting the parties to accept the decision. Judicial review is limited to aspects of the due process guarantee.⁴⁸

The autonomy of the organization and operations of the sports arbitration, both national and international, is intended solely for the protection and independence of the people and sports regulations.⁴⁹

9.1 *Disciplinary disputes*

Disciplinary disputes on football are decided by the Sports Discipline Court in AFA. This entity is empowered to solve cases brought by the relevant parties as

⁴⁴ G. ACOSTA, *La prohibición de recurrir a la justicia ordinaria y los mecanismos alternativos de resolución de conflictos deportivos*, 2006, elDial.com, DCB7A.

⁴⁵ J. P. ROCHAT, *Justice, droit et sport*; cited by G. ACOSTA, *La prohibición de recurrir a la justicia ordinaria y los mecanismos alternativos de resolución de conflictos deportivos*, 2006, elDial.com, DCB7A.

⁴⁶ G. ACOSTA, *La prohibición de recurrir a la justicia ordinaria y los mecanismos alternativos de resolución de conflictos deportivos*, 2006, elDial.com, DCB7A.

⁴⁷ H. J. FERRARI, *Arbitraje jurídico deportivo*, in D. Crespo and N. Fregaeditors, *Cuadernos de derecho deportivo*, Nos. 6/7, 2006, Ad-Hoc, 91-92.

⁴⁸ G. ACOSTA, *La prohibición de recurrir a la justicia ordinaria y los mecanismos alternativos de resolución de conflictos deportivos*, 2006, elDial.com, DCB7A.

⁴⁹ H. J. FERRARI, *Arbitraje jurídico deportivo*, in D. Crespo and N. Fregaeditors, *Cuadernos de derecho deportivo*, Nos. 6/7, 2006, Ad-Hoc, 93.

well as by its own initiative. The last alternative was for the first time implemented in the case of the player Galmarini who got the second yellow card in a match and consequently the red one because of a reported action that actually did not happen; touching the ball with his hand during the game. In order to decide so, the decision was based on TV evidence.

9.2 Economic disputes

This kind of dispute might be solved by arbitration; however, the ordinary justice is empowered to review any decision as first instance due to mandatory laws such as those related to the employment law.

10. Conclusions

Correction of the unbalances between professional and amateur sports should be the principal focus of the legal operators in order to promote the growing importance of sports as an economic activity and its role in the society.

The status of athletes must be addressed in order to guarantee the equal protection and treatment in order to develop a more professional practice of the high level performance sports.

In Argentina, the football organizational system is the most developed one. However, a more transparent administration of information and access to it should be granted in order to develop a better understanding of the decisions making and awards in the world of sport justice.

SPORTS JUSTICE IN BELGIUM

by *Sven Demeulemeester** and *Wouter Lambrecht***

SUMMARY: 1. Principles of Belgian Sports justice – 2. The relationship between ordinary justice and Sports justice – 3. The relevant NOC regulations and NOC judicial body – 4. The relevant football regulations and RBFA judicial bodies – 5. Other sports judicial bodies – 6. Clubs' and players' rights and obligations – 7. Dispute settlement – 8. ADR and interim relief – Conclusion

Abstract:

This article aims at providing an overview of sports justice in Belgium. More precisely, it sets out the basic principles in which sports justice in Belgium operates, provides input as to the interaction between sports justice and ordinary justice and deals with the main judicial bodies operating within the sports justice system. Specific attention is paid to the Belgian Court of Arbitration for Sport and the judicial bodies of the Royal Belgian Football Association. Case law is cited on numerous occasions in order to clarify the interaction between sports justice and ordinary justice and a specific title is dedicated to different kinds of disputes that can arise. Finally, it is also worth mentioning that this article deals with relevant questions such as the consent to arbitrate a dispute, be it at national or international level, the power of sports federations to issue disciplinary sanctions without a contractual relationship between a sports federation and an affiliated athlete and the issue of arbitrability of employment related disputes, and this according to Belgian law.

1. Principles of Belgian Sports justice

The principle of freedom of association is set out in article 27 of the Belgian

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Constitution and it is this article that forms the basis on which sports federations are established: “Belgians have the right to associate; this right cannot be made subject to any preventative measure”.

The freedom of association is further guaranteed through Art. 2 of the Freedom of Association Act of 24 May 1921, which states that “Anyone who, at his demand, becomes a member of an association, undertakes, through his membership, to submit to the rules, decisions and sanctions taken in accordance with such rules; any rule waiving such freedom, is null and void”.

This rule clearly heralds the autonomy of sports federations to organise themselves as they see fit.¹

Like any other enterprise/association, the articles of association form the basis of a sports federation’s internal governance whilst further rules are specified in internal regulations and decisions by the governing body. Besides laying down the rules of the game, sports federations usually specify administrative and financial requirements for their members and set down the rules and procedures for resolving disputes. Logically, sports federations can sanction, suspend or even expel their members. It is perfectly normal for sports federations to set out internal procedures to verify compliance with the rules and to settle disputes with regards to the application of these rules.² As a result, each sports federation has its own sports justice system, some more elaborate than others.

Disciplinary measures imposed by sports federations must comply with public order legislation and a fair trial must be guaranteed. This means that they must give the defendant the right to be heard³ and the right to receive objective treatment.⁴ It is generally accepted that Article 6 of the European Convention on Human Rights (ECHR) applies to sports justice handed down by sports federations.⁵ The rules of the Royal Belgian Football Association (RBFA) include a number of procedural guarantees, such as, but not limited to, guarantees of judicial impartiality and independence⁶ and the right for defendants to be assisted by lawyers or trade union representatives.⁷ Defendants also have the right of recourse before a civil

¹ W. LAMBRECHTS, ‘*Ons rechtssysteem*’, in *Werkgroep Sportrecht in Beweging* (eds.), *Handboek voor sportrecht*, Ghent, Die Keure, 1995, 8. Sports federations must of course also comply with applicable legal rules, e.g. legal rules pertaining to their type of legal organisation (e.g. rules for a non-profit association).

² L. STAS DE RICHELLE, ‘*Un système “judiciaire” au sein des fédérations: leurre ou réalité?*’, *Cah. Sc. Adm.*, 2005, 53.

³ R. BLANPAIN, *De Gladiatoren van de sport. In de ban van de sportmaffia*, Brugge, Die Keure, 1992, 149; K. MOLLEKENS, ‘*De tuchtsrechtspleging binnen de sportbonden*’, in A. De Becker (ed.), *Sport en recht*, Antwerpen, Kluwer, 1986, 71; The right to be heard is considered to be a matter of public order (Supreme Court decision of 29 September 1967, *Arr. Cass.* 147).

⁴ C. COOMANS, ‘*Het sportrecht: een stand van zaken*’, in X (ed.), *Liber Amicorum Alfons Vandeurzen*, Ghent, Mys & Breesch, 1995, 68.

⁵ J. DE HERDT AND S. VERHELST, ‘*De aanpak van strafrechtelijke problemen in de sport door private organisaties : de Koninklijke Belgische Voetbalbond als casestudy*’, *Nullum Crimen* 2012, 21.

⁶ Arts. 1736 and 1744 of the RBFA’s rules.

⁷ Art. 1740 of the RBFA’s rules.

court and this after having exhausted all internal appeal possibilities. As a result, clauses in the rules of sports associations which state that their members can never have their case heard by a civil court are null and void and this because a private association can never act as a last instance body.⁸ Sports associations must also comply with their own articles of association, rules and regulations.

Whereas sports federations must comply with their own articles of association, rules and regulations, they often have to strike a balance between retaining their autonomous right to take disciplinary measures and avoiding that the defendant has the measures annulled or suspended by a civil court (*infra*) as the latter damages the association's credibility. This means that associations have every interest in devising disciplinary procedures that respect the fundamental rights of all parties involved.

Arbitration, whether or not in the sense of the Belgian Judicial Code,⁹ complements the internal sport justice systems of sports federations.

2. *The relationship between ordinary justice and Sports justice*

In Belgium, there are no national courts that deal specifically with sports cases, as this is considered both financially and politically unachievable.¹⁰

Sports Justice is predominantly rendered by the commissions and committees of the relevant sports federations whilst arbitration procedures complement those internal procedures. As sports federations must operate within their powers and the Belgian legal system, an interesting interaction (can) take(s) place between Sports Justice and Ordinary Justice.

First of all, it should be noted that decisions rendered by sports federations are subject to scrutiny of ordinary courts.

More precisely, it is nowadays generally accepted that internal dispute settlement by sports federations is subject to what is called "limited judicial review" ("*marginale toetsing*" c.q. "*contrôle marginal*").¹¹ As a rule, the courts can only reassess decisions made by sports federations if they breach public order legislation, other mandatory legislation or fundamental (procedural) rights.¹² These rights

⁸ R. BLANPAIN, *op. cit.*, 158; C. COOMANS, *op. cit.*, 64.

⁹ Art. 1676 Judicial Code:

"1° Any dispute already existing or that may arise from a given legal situation, and which can be the object of a settlement, may by agreement be submitted to arbitration.

2° Anyone who has the legal capacity or the right to settle can agree to arbitration.

(...).

3° The above mentioned stipulations shall apply without prejudice to the exceptions provided by law."

On the Judicial Code provisions regarding arbitration, see for instance www.cepani.be (16 April 2013).

¹⁰ C. COOMANS, 'Enkele bedenkingen bij het artikel van Mr. Grutterinck "Belgisch arbitragerecht in sportaangelegenheden", *TvA* 1994, 208.

¹¹ Brussels Employment Court 28 November 2008, in C. Coomans, F. Hendrickx, J. Maeschalk (eds.), *Sportrechtspraak*, Brugge, die Keure, 2012, 33.

¹² Namur Employment Court, summary proceedings, 7 September 2007, *J.L.M.B.* 2007, 1520;

include, but are not limited to, the right to a fair trial, the right to appeal, defence rights, the right to privacy, the freedom to work and anti-discrimination laws (*infra*). The same applies *mutatis mutandis* to awards by arbitral tribunals. Important to note is that civil courts cannot be seen to act as an appeal court¹³ and that according to the principle of subsidiarity, recourse to the civil courts requires that all other remedies available within the association have been exhausted.¹⁴

Secondly, it can be noted that litigation in criminal courts can interfere with¹⁵ and/or run in parallel¹⁶ with, sports justice. Examples in this respect are allegations of match-fixing,¹⁷ assault and battery,¹⁸ money laundering¹⁹ and human trafficking.

Thirdly, when dealing with the relationship between ordinary justice and sports justice, it is equally important to note that for certain types of disputes, mandatory law provisions install exclusive jurisdiction on ordinary courts (*infra*, for employment related disputes).

Next, the Belgian Council of State (*Conseil d'Etat*) may have a role to play, especially in doping matters. More precisely, when decisions are rendered by a public authority,²⁰ the decisions of that body can be challenged to the Council of State.²¹ However, specifically with regard to doping offences of elite athletes sanctioned by the Flemish Doping Court (FDC), the Supreme Court has ruled that the FDC cannot be considered as an administrative authority as “*the legislator clearly had the intention to bring disciplinary sanctioning of doping offences within the private law relation between an athlete and his federation*”.²²

R. BLANPAIN, *op. cit.*, 149.

¹³ Mechelen Court of Appeal 2 October 2001, case n° 2001/90/A; Brussels Court of Appeal 28 November 2000, case n° 98/1852/A.

¹⁴ J. DE HERDT AND S. VERHELST, *op. cit.*, 24.

¹⁵ On the relation between sports justice and criminal law liability, and the application of the principle *le criminel tient le disciplinaire en état*, see J. De Herdt and S. Verhelst, *op. cit.*, 32 - 33. Regarding the RBFA, the applicability of the *adagium* has already been accepted, see in this respect the Brussels Employment Court decision of 28 March 1977, *R.W.* 1977 - 78, 1899.

¹⁶ As a rule, the *non bis in idem adagium*, does not apply as criminal law and disciplinary law have a different scope and purpose.

¹⁷ Cf. *Mitu case (infra)*.

¹⁸ In this respect, reference can be made to the *Lozano case*. Anderlecht FC player, Juan Lozano, was injured following a dangerous tackle by a player from the opposing side, resulting in the *de facto* end of his career. A criminal prosecution for assault and battery was undertaken.

¹⁹ Cf. FATF Report, *Money Laundering through the football sector*, July 2009, www.fatf-gafi.org.

²⁰ In this respect, it is important to note that Belgium is a federal state, divided in three Regions and three Language Communities. Regulation of ‘*physical education, sports and open-air activities*’ and ‘*health policy (curative and preventative medicine)*’ is the responsibility of the Language Communities (French, Flemish or German). As a result, the latter have extensive competencies in the area of sports, including doping offences and the sanctioning thereof.

²¹ E.g. the principle of *strict liability* in doping affairs was challenged in a Council of State decision of 28 June 2012.

²² Supreme Court Decision of 30 May 2011 revising Council of State decision of 14 July 2010, *TBP* 2011, 169.

Finally, it should be noted that Belgium has a rather long-standing track record of “*forum bashing*”,²³ especially when it comes to foreign forums such as the Court of Arbitration for Sport (CAS). This can be illustrated by a number of recent cases.

For example, in the *Malisse/Wickmayer* case, the FDC banned two Belgian tennis players for the failure to comply with the whereabouts requirements/rules. According to the applicable procedural rules, the FDC’s disciplinary decisions can only be appealed to the CAS.²⁴ In addition to following these rules, the tennis players began summary proceedings before a Belgian civil court, seeking an injunction to suspend the execution of the FDC’s decision. The civil court issued the injunction as requested based on a procedural argument that the proceedings *prima facie* did not offer the athletes the minimal procedural guarantees required by Article 6 ECHR. This meant that the players could resume playing tennis. Interesting to note from this injunction is that the civil court was rather suspicious of appeals to the CAS, stating that “*Ms Wickmayer and Mr Malisse rightly raise the question whether the appeal possibility against the FDC’s 5 November 2009 decision at the CAS sufficiently guarantees the procedural requirements of Article 6 ECHR.*”, questioning the facts that “*the appeal against a decision of a non-purely disciplinary court is entrusted to a private-law entity, where athletes are not judged in their own language, where third parties (read WADA) intervene for the first time in degree of appeal in the view of claiming higher sanctions, and the decisions of which are in no way whatsoever submitted to the control of a Belgian judge*” and that “*the CAS, having its seat in Lausanne, uses French or English as its procedural language, whereby translation and interpreter costs are borne by Ms Wickmayer and Mr Malisse*”.

In the *Keisse* case, a Belgian track cyclist was banned for two years by the CAS due to an adverse analytical finding.²⁵ As a result, the cyclist began summary proceedings before the Brussels’ civil courts seeking an injunction suspending the execution of the ban. As requested, the Brussels Court of Appeal²⁶ issued the injunction and added a clause fining the Union Cycliste Internationale (UCI) 100,000 euros should it challenge the injunction.²⁷

²³ It is no coincidence that the *Bosman* ruling resulted from a Belgian case.

²⁴ These appeals (CAS/2009/A/1994, CAS/2009/A/1995, CAS 2009/A/2020 and CAS 2009/A/2021) were lodged. However, WADA withdrew from the CAS proceedings following the annulment, by the Belgian Council of State, of the legal basis on which the FDC decision had been taken. For this reason, the FDC decisions were annulled by the CAS (3 December 2012).

²⁵ CAS/2009/A/2014, overruling the 2 November 2009 decision of the disciplinary committee of the Royal Belgian Cycling Federation whereby Mr Keisse was discharged as the forbidden substance was found in a polluted food supplement supplied by the team sponsor.

²⁶ Brussels Appeal Court Decision of 10 November 2010, case n° 2010/AR/2717.

²⁷ Moreover, the court gave the ruling a worldwide applicability, which resulted in a game of “cat-and-mouse”, eagerly covered by the press, between Mr Keisse (who had contracts with many cycling event organisers) and the UCI. In a - criticized - ruling of 30 March 2012, the Brussels Attachment Judge ordered the UCI to pay Mr Keisse compensation of 100,000 euros for having prevented him from participating in the “Six Days of Bremen” event.

The above demonstrates the desire of national courts to have the final word, at least in doping cases.

Having made the above introductory remarks as to the interaction between sports justice and ordinary justice, we shall now set out the different Sports Judicial Bodies in Belgium with special focus on the National Olympic Committee (NOC) and the Royal Belgian Football Association (RBFA). Whilst doing so, the interaction between sports justice and ordinary justice will be further evidenced.

3. *The relevant NOC regulations and NOC judicial body*

3.1 *Introduction*

The Belgian Olympic and Inter-federal Committee (BOIC) has 81 full or affiliated member federations, limited to one per sport. The federal structure of Belgium means that there are usually two or three federations per sport (one in the Flemish, French and German Community) which are united in one national sports federation which in turn is a member of the BOIC.

Initially, the BOIC's rules obliged members to submit disputes to arbitration conducted by its board of directors.

In 1991, the BOIC's rules were changed following the creation of the Belgian Arbitration Commission for Sports (BACS), and this due to pressure from the sports sector which felt the need to have a specialized dispute settlement mechanism. More precisely, the sports' sector was rather frustrated following a number of decisions rendered by courts, where the latter did not sufficiently take into account the specificity of sports.²⁸ The BACS was intended to offer quick, cost-effective, flexible and definitive settlements of disputes by arbitrators who, on the one hand, were familiar with the world of sport and, on the other hand, had a sound knowledge of legal principles.

The BACS arbitrators were appointed by the BOIC's board of directors from candidates proposed by the sports federations, and they held their hearings at the BOIC's offices. Each party to the dispute could choose an arbitrator²⁹ following which the two party appointed arbitrators appointed a third arbitrator to preside over the proceedings.

The BACS rules stated that it was able to settle disputes "*between Belgian, national or country-wide sports federations, or between such sports federations and their clubs or members, insofar the disputes related to freely disposed entitlements*". This meant that one of the parties had to be a sports federation.

²⁸ M. PIERS, 'Arbitrage in de sport', in *Sectorale Arbitrage*, Intersentia, 2007, 56.

²⁹ The notion of 'panel member' may be more appropriate than 'arbitrator' since these individuals often do not qualify as arbitrators in the sense of the Belgian Judicial Code (H. VAN HOUTTE, 'De Belgische Arbitragecommissie voor de Sport: Vooruitzichten', Bijdrage naar aanleiding van het Colloquium *Arbitrage in de Sport* van 15 november 2002, n° 24).

Often, the BACS acted as a court of appeal against internal decisions by sports federations and as such it was a procedural extension of the sports federations' internal dispute settlement processes.

However, the BACS could also act like a court of appeal by ruling on points of law and referring cases back to the sport federations for a re-trial by the relevant association's dispute resolution court.³⁰ Finally, in some cases, the BACS merely gave binding advice.³¹ Although called a court of arbitration, the decisions of the BACS could as a rule not be considered as proper arbitration awards in the sense of the Belgian Judicial Code.³²

Whereas, the BACS received a lukewarm reception at first, its workload gradually increased over the years and in March 2012, the BACS was replaced by the Belgian Court of Arbitration for Sport (BCAS).

3.2 *Belgian Court of Arbitration for Sport*

The BCAS³³ is currently the main sports judicial body in Belgium and is a distinct legal entity with the BOIC being one of its founding members.

The powers of adjudication of the BCAS are set out in article 1 of its rules and stipulate that it is empowered to arbitrate sport related disputes in so far as the by-laws, rules or regulations of sports federations foresee in such possibility or in those cases where an arbitration agreement is entered into by the parties concerned. The latter implies that the BCAS can also hear cases where the parties voluntarily submit to its competence, even if no sports federation is involved in the case. As to the "appeal procedures", it is interesting to note that most Belgian sports federations have now amended their rules enabling the right of appeal to the BCAS.

In addition to the above mentioned cases, the BCAS is also competent to hear disputes where a law or decree foresees in mandatory arbitration at the BCAS.

Finally, the BCAS can hear appeals against decisions made by the Inter-federal Disciplinary Committee on Doping (CIDD). However, article 1 of the BCAS rules state that decisions made on appeal in this respect do not qualify as arbitration awards.

For the BCAS to hear a case, a formal arbitration request containing specific information must be made and the arbitration agreement must be attached to this request.

Cases are heard by a panel of three arbitrators,³⁴ one chosen by each party and one chosen by the party appointed arbitrators who will then chair the panel. The exception is for doping cases, which are heard by a single arbitrator.

³⁰ L. DERWA, *Le droit du sport. Organisation, acteurs et dérives*, Kluwer, Waterloo, 2012, 49.

³¹ H. VAN HOUTTE, *op. cit.*, n° 6.

³² H. VAN HOUTTE, *op. cit.*, n° 3 - n° 8.

³³ More information about the BCAS is available at www.bas-cbas.be/index.php (16 April 2013).

³⁴ Single-judge proceedings are likewise possible, if the parties agree and the chairman confirms the appointment.

Like arbitrators on any other arbitration body, the BCAS arbitrators must be independent (i.e. they cannot be shareholders nor directors of the BOIC), they must sign a declaration of independence and they are banned from hearing cases involving any sports federations of which they are members.

Regrettably, the BCAS list of arbitrators, like the CAS list of arbitrators, is a closed list, meaning that parties cannot appoint an arbitrator from beyond this list. The closed list of CAS arbitrators is however more substantial than the one of the BCAS.

As to the structure of the BCAS, its board consists of 7 directors who are appointed by the main representatives of the sports sector (the BOIC, the BOIC's athletes' commission, the member sports federations, the collective sports federations, employee representatives and the professional leagues). The directors then elect the chairman of the board.

3.3 *Agreements to Arbitrate*

Neither Sports federations, their members clubs, nor individual athletes/players may be coerced into submitting to arbitrations. According to Belgian law, any choice to submit to (international) arbitration must be freely made and like in many other countries, the issue of what constitutes "free choice/consent" has been debated at great length; this by legal scholars,³⁵ in case law,³⁶ and by the sports arbitration panels themselves.³⁷

Some sports federations specify in their rules that all their members must submit to arbitration, on pain of direct or indirect sanctions. This implies that the question often arises as to how the arbitration agreement was entered into.

The BACS has ruled, for example, that "*the affiliation by a club to the hockey federation and its participation in federation competitions, presumes that it has agreed to the hockey federations' rules, including the arbitration clause*". Also, the Brussels Court of First Instance has ruled that the "*agreement to arbitration can be deducted from the documents exchanged between the parties, such as the affiliation documents and federation rules*"³⁸ (*arbitration clause by reference*).

The Brussels Court of Appeal, on the other hand, annulled an alleged arbitration agreement between the Royal Belgian Football Association (RBFA) and one of its member clubs because the latter had written to the club telling it to sign

³⁵ L. DERWA, 'L'arbitrage et le sport', in *Quelques questions d'actualité en droit du sport*, Editions du Jeune Barreau de Bruxelles, 2006, 110-111; C. COOMANS, 'Enkele bedenkingen bij het sportrecht', *Limb. Rechtsl.* 2003, 7-8; E. GRUTTERINK, 'Belgisch arbitragerecht in sportaangelegenheden', *TvA* 1994, 201ff; C. COOMANS, 'Enkele bedenkingen bij het artikel van Mr. Grutterink - Belgisch arbitragerecht in sportaangelegenheden', *TvA* 94/4, 207ff; P. LEMMENS, 'Het beroep op de rechter in sportzaken', *Sport en Recht*, 1986, Kluwer, 90.

³⁶ E.g. Brussels Employment Court, summary proceedings, 29 June 1982, case n° 108.643.

³⁷ E.g. Belgian Arbitration Commission for Sports, decision of 10 August 1999.

³⁸ Brussels Employment Court 28 January 2003, case n° 2002/1974/C.

the arbitration agreement, “or else to face the consequences”.³⁹

The issue of accepting arbitration is not limited to Belgium, as was demonstrated by the highly mediated *Oulmers* case; a dispute which ultimately led to new compensation rules for the release of players by clubs to their national teams and the creation of the European Club Association (ECA). In the *Oulmers* case, the Commercial Court of Charleroi ruled that neither FIFA’s rules nor the rules of the RBFA placed a clear obligation on G14⁴⁰ or Royal Sporting Charleroi FC, the employer of the player, to submit themselves to a CAS arbitration panel. The Court held that in the absence of any specific arbitration agreement, none of the parties could invoke the “arbitration exception”.

3.4 *Employment related disputes*

As to the question of arbitrability of employment related disputes under Belgian law, the following can be noted.

Disputes in relation to employment contracts cannot, in advance, be made subject to arbitration.⁴¹ Therefore, litigation regarding the negotiation, execution and termination of employment contracts must, as a rule, be brought before the competent civil courts, i.e. the Employment Courts and the Employment Courts of Appeal.

However, once a conflict has arisen, parties can nevertheless decide to opt for arbitration. It should be noted that disciplinary procedures, through which fines and sanctions may be imposed on players, do not equate to arbitration.⁴²

Having said the above, FIFA and the CAS will nonetheless take jurisdiction when a Belgian employment related dispute between a Belgian football club and a foreign player would be lodged at its services; this irrespective of Belgian law provisions. The reason hereto is that according to article 177 of the Swiss Federal Act on Private International Law,⁴³ all pecuniary disputes can be submitted to

³⁹ Brussels Employment Court, summary proceedings, 29 June 1982, case n° 108.643

⁴⁰ Now ‘European Club Association’ (ECA).

⁴¹ Art. 9 of the Professional Sports Men Act of 24 February 1978, which defines a paid sports player as “someone who takes up the obligation to prepare himself or to participate in a sport competition or sport exhibition, under the authority of someone else and remunerated with a salary which exceeds a certain amount”. From 1 July 2013 to 30 June 2014, this annual amount is set at 9,208 euros. However, sports men who are paid less than this can still be “employed” under Belgian law, i.e. if a sports player performs his activities under the authority of another individual/entity. In that case, general employment law likewise forbids preliminary agreements to submit to arbitration (Art. 15 of the Employment Contracts Act of 3 July 1978). Also, the Flemish Decree of 24 July 1996 regarding the status of non-professional athletes, stipulates that any arbitration agreement entered into prior to the emergence of the conflict, is null and void.

⁴² Although the disciplinary powers of a club are in turn regulated under Belgian law. E.g. Belgian employment laws foresee that fines and sanctions must be provided for in the club’s mandatory work regulations (Act of 8 April 1965 regarding the Work Regulations and Collective Labour Agreement of 13 June 2012 relating to the terms and conditions of employment of professional footballers).

⁴³ 291 Loi fédérale du 18 décembre 1987 sur le droit international privé.

arbitration in Switzerland; the CAS applying the aforementioned law when establishing its jurisdiction.

4. *The relevant football regulations and RBFA judicial bodies*

4.1 *Introduction*

The RBFA was founded in 1895 and today every football club in Belgium is a member of the RBFA, making a total of approximately two thousand.⁴⁴ The RBFA is a purely private-law entity, and one of its founding objectives was to minimise government interference in football.⁴⁵

It has several jurisdictional competences, all limited by the principle of speciality. In practice, this means that its disciplinary competence is limited to measures relating to the administrative and organisational aspects of football.⁴⁶ Through the players' affiliation with the RBFA, the disciplinary competence of the relevant federation courts is acknowledged.⁴⁷

The RBFA has set up several commissions and committees to ensure the effective management and administration of football in Belgium⁴⁸ but its jurisdictional competence cannot be equated to arbitration in the formal sense of the word. The commissions and committees form a distinct legal order and can unilaterally order disciplinary measures.⁴⁹

The RBFA's rules expressly refer to internal and external arbitration, and do not expressly and generally prohibit its member clubs or their players to address civil courts to seek redress. Specifically, the rules recognise the right of civil courts to hear disputes over players' contracts in cases where a player has refused to go to internal arbitration⁵⁰ (*supra*). Nevertheless, from reading several other provisions of the RBFA's rules ("*any dispute regarding the application and the interpretation of the regulations shall be submitted to the competent federation courts*")⁵¹ and

⁴⁴ All football clubs based in the Flemish Region (and any Brussels-Region-based clubs who so desire) automatically also belong to the Flemish Football Federation ("*Voetbalfederatie Vlaanderen*"). All football clubs based in the Walloon Region (and any Brussels-Region-based clubs who so desire, with the exception of football clubs established in the German-speaking part of the Walloon Region) automatically also belong to the Francophone Football Club Federation ("*Association des Clubs Francophones de Football*"). This is linked to the fact that the Belgian Language Communities fund and are responsible for sport.

⁴⁵ L. MISSON, "*L'affaire Olympique de Marseille et les droits de l'homme: parlera-t-on encore de juridictions sportives?*" *J.T.D.E.* 1993, 34.

⁴⁶ J. DE HERDT AND S. VERHELST, *op. cit.*, 21.

⁴⁷ Article 1701.5 of the RBFA's rules.

⁴⁸ More information about the organization of the RBFA is available at www.footbel.com (16 April 2013).

⁴⁹ J. DE HERDT AND S. VERHELST, *op. cit.*, 25.

⁵⁰ Article 1107 of the RBFA's rules. This article provides that, specifically regarding the disputes over players' contracts, clubs must submit to arbitration.

⁵¹ Article 1701.2 of the RBFA's rules.

“the commitment by the affiliates to respect the decisions taken”⁵²) it is clear that solving disputes in ordinary courts is not the RBFA’s preferred route of dispute settlement.⁵³

4.2 Judicial bodies of the RBFA

As indicated above, the RBFA has set up several commissions and committees to ensure the effective management and administration of sporting and associated activities.⁵⁴ In addition, there are several disciplinary commissions and committees, each competent to hear different categories of cases, as specified in the rules.

The RBFA has its own prosecutor, who is empowered to prosecute disciplinary offences and doping and match-fixing related cases on behalf of the FA.

The RBFA’s rules expressly refer to internal “arbitration” (before the arbitration panel of the Players’ Status Committee, the Law Committee or the Arbitration Committee for Paid Football⁵⁵) and to external arbitration (possibility to contest the decisions of the Extraordinary Chamber of the Dispute Resolution Board for Paid Football with the BCAS⁵⁶).

Transfer issues are settled both through ordinary courts and arbitration. Recently, issues arose with regards to the application of article 913 of the RBFA’s rules dealing with exceptional validations and annulments of transfers/player registrations outside the normal transfer windows.⁵⁷

In the *Goor* case, the contract between a player, Mr Goor, and K. Beerschot A.C. was terminated by the latter on 21 November 2011. Consequently, he signed a new contract with another first division club, KVC Westerlo, which at that point in time feared relegation from the first division. The transfer was validated by the RBFA in application of article 913 of the RBFA’s rules. As K. Beerschot A.C. was facing financial difficulties at the time of the termination, another first division club, KSTVV – also in fear of relegation – argued that K. Beerschot A.C. and KVC Westerlo orchestrated the termination in order to circumvent transfer regulations and player registration rules. The case was brought before the BCAS

⁵² Article 504 of the RBFA’s rules.

⁵³ P. LEMMENS, *op. cit.*, 86; Cf. also *Mitu* case (*infra*), in which the Brussels Court of Appeal states that “the regulations seems to oppose to a full jurisdiction recourse in several of its provisions; the appellates are nevertheless entitled to a recourse before a normal court created by law and deciding in accordance with the terms and conditions of Article 6 ECHR”.

⁵⁴ For more information about the RBFA’s administration and activities please see www.footbel.com (16 April 2013).

⁵⁵ First and second division clubs constitute the “Paid Football” category with clubs playing in the first division forming a sub-league called the “Pro League”.

⁵⁶ Art. 1723 of the RBFA’s rules.

⁵⁷ In exceptional circumstances, a transfer can be validated or annulled at the request of the concerned party, or in those cases where (i) the contract of the paid sportsmen (i.e. player earning more than 9,027 EUR per year - *infra*) is terminated by the player due to a serious violation (*faute grave*) of the contract by the club or (ii) in the event of shortfall of goalkeepers.

on appeal but the argumentation of KSTVV was not withheld.⁵⁸

In the *Huyssegems* case, a player of KRC Genk had a contract with the club until 30 June 2013. His contract was terminated during the Belgian summer transfer window of 2011. Next, the player entered into a new employment contract with K. Lierse S.K. and this after the end of the summer transfer window, i.e. on 2 September 2011. Faced with the request of the new club to register the player, the RBFA refused to do so and later on the RBFA also refused to validate the transfer as an exceptional transfer in the sense of article 913 of the RBF rules. This because it considered that KRC Genk and Mr Huyssegems had terminated their employment contract in mutual agreement,⁵⁹ a ground which according to article 913 did not allow for the exceptional registration. K. Lierse S.K., the player and the RBFA subsequently agreed to submit the dispute to an *ad hoc* arbitration committee. The arbitration committee referred, *inter alia*, to art. 6 of the FIFA regulations and 3.2. of its accompanying commentary⁶⁰ – which allows for exceptional registrations outside the transfer-windows in the event of a mutual termination⁶¹ – and ordered the registration of the player for the new club.

5. *Other sports judicial bodies*

Besides the sports judicial bodies mentioned above, the following can be noted with regards to other sports judicial bodies in Belgium.

With regards to doping related cases, the Flemish Community used its responsibility for health policy to set up the FDC⁶² but did so indirectly, by obliging the Flemish sports federations to set up disciplinary procedures for elite sportsmen and women which met specific legal requirements.⁶³ The result was that the majority of the Flemish sports federations delegated their disciplinary jurisdiction to the FDC. In the French Community, doping cases are still dealt with by the sports federations,⁶⁴ but they can delegate their disciplinary competence to the CIDD, except for those cases in which international athletes are involved.

Other than the BCAS, the FDC, the CIDD and the sports associations'

⁵⁸ Arbitral award of 30 March 2012.

⁵⁹ As a termination in mutual agreement is not foreseen in article 913 to allow an exceptional transfer, the transfer was refused.

⁶⁰ "Although not expressly mentioned by the Regulations, a player who has mutually agreed with his club on the early termination of the employment relationship before the expiry of the registration period also falls under the aforementioned exception. The mutual termination of the employment contract must occur before the end of the registration period for the player to fall under the aforementioned Exception".

⁶¹ Arbitral award of 19 October 2011.

⁶² Vlaams Doping Tribunaal.

⁶³ It should be noted that the Belgian Supreme Court ruled that the FDC cannot be considered an administrative authority as a result of which the Belgian Council of State is not competent to hear appeals taken against the decisions of the FDC (Supreme Court Decision of 30 May 2011).

⁶⁴ In practice, the French Community is in charge of anti-doping checks as they recruit the specialised investigators.

internal bodies, there are no other specialised sports judicial bodies in Belgium.⁶⁵

6. *Clubs' and players' rights and obligations*

Belgian (case) law often considers that any team sport activity of which the timing and place are determined by the team/employer and which are usually performed under the supervision of a trainer and/or club, takes place in the framework of an employment contract.

Insofar as contracts between players and their clubs are (considered) employment contracts, it should be noted that Belgian employment law applies. In addition to the general employment law provisions, a federal law was adopted setting out the specific provisions applicable to paid sportsmen.⁶⁶ Additionally, mention should be made of a collective labour agreement of 13 June 2012 setting out the rights and obligations of football clubs and players.

With respect to the series of laws regulating the rights and obligations of clubs and players, we deem it worthwhile to mention a specific rule set out in the Act of 24 February 1978 regarding Paid Sports Men, which states: “*a termination of contract, either by the employing club for just cause or by the player without cause, bans the player from participating in a paid sports competition or exhibition in the same league, division, category of the same sports sector during the same season (...)*”.⁶⁷

These civil law sources setting out the clubs' and players' rights and obligations should of course be read together with the relevant sports federations' rules.

7. *Dispute settlement*

Dispute settlement procedures vary significantly from one sports federation to another.

Generally speaking, the dispute settlement procedures of most sports federations have three stages: the initial hearing, appeals against decisions made at the initial hearing and appeals on the grounds of misinterpretations of points of law by the appeal bodies. The summary below focuses on dispute settlement within the RBFA.

⁶⁵ L. DERWA, ‘*Justice sportive et justice publique: le temps des décisions*’, in *La valeur ajoutée de l’avocat, Actes du congrès de l’O.B.F.G. du 17 février 2011*, 102.

⁶⁶ The Act of 24 February 1978 regarding Paid Sports Men, which complements the general 3 July 1978 Act on Employment Contracts.

⁶⁷ Art. 8 of the Act of 24 February 1978.

7.1 *Technical disputes*

The Referee Committees⁶⁸ adjudicate allegations/protests against alleged errors made by referees.

Like regulations of UEFA and other FA's, the RBFA's regulations make a distinction between the incorrect assessment of facts during a game (so called factual errors) and the incorrect interpretation of the rules of the game (breaches of the rules). If it concerns a so called factual error, the result of a game cannot be changed with retrospective effect, even if the referee would admit that he/she made an error.⁶⁹ However, if it concerns a breach of the rules, other RBFA committees can annul the game's result and order a replay.⁷⁰

The distinction between factual errors and breaches of the rules are not always easy to make, the following example illustrating this. In the *Anderlecht / La Louvière* case, a ball burst in the air, changing its trajectory and landing it in the goal. The referee awarded the goal, which clearly affected the result.⁷¹ Whereas the Central Referee's Committee decided that the referee had "at the most" made a factual error (he was unaware that the ball had burst/exploded before it landed in the goal),⁷² the Appeals Committee was of the opinion that a breach of the rules had occurred. More precisely, it held that as the ball burst and the ball was no longer inflated properly there was no longer a game in the sense of the rules.⁷³ The Appeals Committee's decision was subsequently over-ruled by the Evocation Committee⁷⁴ and another chamber of the Appeals Committee.⁷⁵

7.2 *Disciplinary disputes*

As indicated above, sports federations can take disciplinary measures against their member clubs and affiliated players.

At the level of the RBFA, it is possible to start prosecution on the basis of – convincing – television pictures/images provided that the fundamental legal principles regarding the investigation of a case are respected. More precisely, such prosecution should respect and comply with the contradictory nature of proceedings, rights of defence and the principle of double jurisdiction.⁷⁶ Sanctions can be of conditional nature and appeals, in principle, have a suspensive effect.⁷⁷

⁶⁸ Central Referee Committee and Provincial Referee Committees.

⁶⁹ Art. 1439 of the RBFA's rules.

⁷⁰ Art. 1440 of the RBFA's rules.

⁷¹ The goal, with which Anderlecht equalised, was allowed by the referee. Anderlecht went on to win the match 2-1.

⁷² Decision by the Central Referee's Committee of 4 December 2004.

⁷³ Decision by the Appeals Committee of 20 January 2005.

⁷⁴ Decision by the Evocation Committee of 10 March 2005.

⁷⁵ Decision by the Appeals Committee of 25 March 2005.

⁷⁶ Art. 1702.22 of the RBFA's rules.

⁷⁷ Art. 1717 of the RBFA's rules.

In order to be subject to a sports federation's internal procedures, member clubs and their players must consent in advance. Such consent is often laid down in the application documents when seeking one's registration with a sports federation, but one can argue whether this constitutes sufficient consent *c.q.* equals a contractual link. This poses problems in practice, especially for sports federations whose regulations expressly deny the existence of a contractual link between the players and/or the management of a club and the sports federation.⁷⁸

The best known example in Belgian case law is the *Mitu* case. Three first division football players were accused of participating (actively or, at least, passively) in match-fixing. While the criminal investigation was conducted, the RBFA⁷⁹ decided to impose disciplinary sanctions on the players. Faced with these sanctions (ban on playing football) the players lodged summary proceedings against the RBFA. Ruling upon the request, the Brussels Court of Appeal held that the players were affiliated to their club and not to the RBFA. Consequently, it was held that the RBFA, *prima facie*, had no competence to hand down disciplinary sanctions against them⁸⁰ and as such could not ban them from playing football.

Another well-known example is the *Bayat / RBFA* case. Mr Bayat was the somewhat controversial chairman of a first-division football club and when faced with a disciplinary case against him, he deliberately disaffiliated himself from the RBFA. When the RBFA, notwithstanding his disaffiliation, took disciplinary measures against him, he initiated summary proceedings against the RBFA in the civil courts. In doing so, he challenged the FA's right to issue disciplinary measures against him as he no longer was a member of the FA. The court rejected his claim, albeit on procedural grounds.⁸¹

7.3 Financial disputes

As a general rule, financial disputes between clubs and their players are not settled by internal bodies of the sports federation involved but rather by the competent (civil) courts, i.e. the Employment Courts and the Employment Courts of Appeal.

However, disputes between clubs and players may be heard by the RBFA's Players' Status Committee or the Arbitration Commission for Paid Football. Whereas the RBFA member clubs are bound to the RBFA's arbitration procedure, their

⁷⁸ Such provisions risk being considered misuse of law. The declared will not to engage in a contractual relationship seems irreconcilable with the parties' actual will to submit their relationship to an (enforceable) set of rules, which in turn pre-supposes the conclusion of a contract (T. BOMBOIS AND C. EYBEN, 'L'arrêt *Mitu c. U.R.B.S.F.A. ou le hors-jeu disciplinaire des fédérations sportives*', *J.T.* 2007, 405-406).

⁷⁹ URBFA (*Union Royale Belge des Sociétés de Football Association*) c.q. KBVB (*Koninklijke Belgische Voetbalbond*).

⁸⁰ Brussels Employment Court, 8 February 2007, *J.T.T.* 403 – 405. It should be noted however that the employment contracts of the players – possibly encapsulating the RBFA's regulations – were not brought forward in this case. Also, the RBFA was not able to produce proof of the players' affiliation.

⁸¹ Brussels Employment Court, 23 September 2009, case n° 09/1392/C.

players can choose between the RBFA arbitration bodies or the civil courts⁸² (*supra*).

The RBFA created specific committees for different kinds of disputes.⁸³

Broadcasting rights are often a major source of friction between (football) clubs.⁸⁴ In 2010, the Competition Council clearly indicated that a bidding procedure regarding broadcasting rights must be compliant with competition (*anti-trust*) rules as “*the collective exclusive sale of broadcasting rights has the inherent risk of entailing exclusive effects*”⁸⁵.

The RBFA foresees specific licensing requirements and procedures for football clubs which play in the top two divisions in Belgium. In order to be granted such a licence, specific conditions must be met. Moreover, all first division clubs must comply with the UEFA Club Licensing and Financial Fair Play Regulations.⁸⁶ ⁸⁷ Failure to comply with these conditions may result in sporting and/or financial sanctions.⁸⁸

Finally, (financial) conflicts between clubs and the RBFA are resolved by arbitration by the BCAS and this after all internal legal remedies have been exhausted.⁸⁹

8. *ADR and interim relief*

Alternative Dispute Resolution (“ADR”) possibilities are foreseen in Belgium.

Before an employment dispute can be heard by an Employment Court, the parties must make an attempt to settle their dispute amicably. In addition, the statutory Joint Consultative Committee, which covers some employees in the sports sector,⁹⁰ has set up a reconciliation office.

The BCAS can organize, at the request of the parties, mediation in sports related matters.⁹¹

Some disciplinary matters in football, which fall within the competence of the Dispute Resolution Committee for Paid Football, the Sports Committee and the Provincial Committees, can be settled amicably.⁹² In case of an agreement, the sanction becomes final and binding. If the amicable settlement proposal is refused, the refusal must be notified to the Secretary of the competent federation court

⁸² Art. 1107 of the RBFA’s rules.

⁸³ See for instance the Dispute Resolution Committee for Paid Football (Art. 266 of the RBFA’s rules).

⁸⁴ C. VERDONCK AND L. DEPUYDT, ‘Voetbal op internet, GSM of TV: de mededingingsautoriteiten kijken mee’, in *Jaarboek Handelspraktijken en mededinging*, 2006, 844 – 862.

⁸⁵ Competition Council Decision of 29 November 2010.

⁸⁶ Article 402 of the RBFA’s rules.

⁸⁷ An exception applies the first year following the promotion to the first division.

⁸⁸ Art. 403 of the RBFA’s rules.

⁸⁹ Art. 117.13 of the RBFA’s rules.

⁹⁰ This is the case for sports men earning more than 9,208 euros per year (amount between 1 July 2013 and 30 June 2014).

⁹¹ Art. 1 of the BCAS’ rules.

⁹² Art. 1731 of the RBFA’s rules.

within four calendar days.⁹³

In cases submitted to the BCAS, an interim relief request⁹⁴ can be made to the panel's president. However, interim relief requests are often directly requested before the ordinary courts and this in the framework of summary proceedings.

Conclusion

Ever since the growing importance of sports as an economic activity, review of sports related disputes by ordinary courts has increased. This tendency has obliged sports federations to fine-tune their internal dispute resolution mechanisms, which is a positive development for all actors involved in the world of sports.

Whereas it is difficult to strike a balance in the interaction in Belgium between sports justice and justice through ordinary courts, such interaction is even more challenging when an international element comes into play. This is evidenced by the *Malisse / Wickmayer* case as well as the *Oulmers* case.

With regards to Belgian sports justice, the creation of the BCAS should be welcomed as it is expected that this arbitration body will play an important role in the years ahead with regards to sports related disputes.

Where sports justice respects the basic principles of law, sports justice should be encouraged and this taking into account the principle of the specificity of sport.

⁹³ This term takes effect on the first working day following the publication of the amicable settlement proposal in the federation's official gazette (Art. 1731 of the RBFA's rules).

⁹⁴ 'Urgent and provisional measures' in the sense of article 19 of the Belgian Judicial Code (Art. 15 of the BCAS' rules).

SPORTS JUSTICE IN BRAZIL

by *Eduardo Carlezzo** and *Rodrigo Marrubia Pereira***

SUMMARY: 1. Principles of sports justice – 2. Relationship between ordinary justice and sports justice – 3. Relevant regulations of the Brazilian Olympic and Paralympics Committees – 4. Football Regulations (relevant provisions) – 5. Clubs and players' rights and obligations – 6. Sports offenses – 7. Sanctions on clubs and players – 8. The Sports Judicial Bodies – 9. The procedure – 10. Dispute settlements

Abstract:

This article covers Brazilian Sports Law, specifically addressing the disciplinary system put in place by the Federal Constitution, regular laws and other administrative rules. Many of these legal provisions have been established to discipline sports in general, including the Sports Justice, which was created to decide disputes arising from disciplinary offenses and competition regulations. Other specific provisions were created to regulate the organization of the competitions, improving the relationship between clubs, players, federations, officials, supporters and sports justice.

1. Principles of sports justice

In all legal systems the principles are remarkably present, regardless of whether

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they are specified in the law (explicit) or not (implicit). The principles are the basis of law, serving as a parameter to the application of the law in specific cases.

The principles have the function to assist in the interpretation of the rules governing the sport, allowing the adequate filling of apparent gaps. The laws, rules, regulations and codes generally recognized, for solving missing cases, the use of analogy, case law, customs and general principles of law.

As one might expect, the Brazilian Sports Law also has a number of principles that should be observed. Besides the general principles established in the Brazilian Constitution of 1988, there are principles inherent to the sport established in the Law No. 9.615/98, which is the regulatory framework of sport and sports justice in Brazil.

The Law No. 9.615/98 is the Brazilian general law that governs sports with its principles, disciplinary courts, financial resources and procedures. This law establishes 12 fundamental principles¹ in the practice of sport in general, namely: sovereignty, autonomy of individuals and corporations in organizing themselves freely to practice sports, democratization, freedom, the social right, differentiation, national identity, education, quality, decentralization, security, and efficiency.

These aforementioned principles apply to the Brazilian Sports Law in general. Regarding specifically the Brazilian Sports Justice, its guiding principles are listed in the Brazilian Code of Sports Justice,² issued by the Ministry of Sport. The statement of principles listed by the Brazilian Code of Sports Justice is not exhaustive and may be complemented, alternatively and analogically, with other principles that are part of the Brazilian legal system.

The Brazilian Code of Sports Justice adopted the alphabetical order of the first fourteen principles provided, so that there is no confusion about any question of precedence or preference between the principles. The last 4 principles were added recently and do not respect the alphabetical order.

Briefly examining each of the principles that guide the Brazilian Sports Justice, the principle of legality implies a stable and politically organized society. This principle relates to the obedience to what is stated in the law, or in other words, the procedures of the Sports Justice must always be guided by the law.

On the other hand, the principle of morality determines the conduct of the parties before the Sports Justice, acting always honestly and in good faith. After all, it is not possible that a case is considered legal if it is immoral.

The principle of publicity determines that the acts performed before the

¹ According to Schmitt, "*Os princípios têm a função de auxiliar no processo interpretativo das regras, permitindo o adequado preenchimento das lacunas*" (Schmitt, Paulo Marcos. *A Função dos Princípios*, 9).

² Article 2 of the Brazilian Code of Sports Justice: "*This Code shall observe the following principles: I – full defense; II – celerity; III – adversarial procedure; IV – judicial economy; V – impersonality; VI – independence; VII – legality; VIII – morality; IX – motivation; X – formality; XI – rhetoric; XII – proportionality; XIII – publicity; XIV – reasonably; XV – due legal process; XVI – sports specificity; XVII – prevalence, continuity and stability of competitions; and XVIII – fair play*".

Sports Justice must be transparent and the access must be available for the general public through regular publications. The secrecy of the acts is permitted only in exceptional circumstances, always provided by law.

According to the principle of impersonality, the Sports Justice should prosecute and judge without any distinction of race, color, creed, ideology, social or sports position. The treatment should be isonomic to everyone, regardless of whether the prosecuted is a director of a club, a referee, an athlete or even a member of the sports judicial body.

Moreover, the principle of formality does not allow the automatic initiation of the process by the Sports Justice. It is necessary that the interested party prepares a complaint so that the procedure begins. The performance of Sports Justice is mandatory on its own initiative and authority only in notorious cases, with more complexity, which endanger peace and the morality of sport.

The principles of adversarial proceeding, full defense and due legal process, recognized by many jurisdictions, must be respected in all disciplinary proceedings. Whenever there is a complaint, the other party has the right to present his defense, and the parties shall be heard equally.

The Sports Justice shall render decisions quickly. Thus, the principle of rhetoric determines that some procedural acts are produced orally, speeding up the judgment of the cases. However, some acts rely mandatorily on written form, not fitting the oral form.

The principle of judicial economy seeks to prevent unnecessary procedural acts practiced throughout the procedures, otherwise the Sports Justice would be endowed with slowness, dodging its purpose.

Decisions given by the Sports Justice must be properly justified, with the exhibition of the reasons in fact and in law. This requirement is established by the principle of motivation.

Furthermore, it is necessary that the Sports Justice acts with independence and autonomy³ of entities that administer the sport, which are the national and regional federations, otherwise there could be a conflict of interest in the decisions rendered by the court.

The principle of celerity occurs due to the peculiarities and dynamics of sport, considering that later decisions can lead to irreparable damage to the parties and the proper conduct of the competitions. Precisely for this reason the Brazilian Federal Constitution of 1988 provides that all cases should be judged by the Sports Justice within sixty days.

Also, the Sports Justice should review the cases with reasonability and proportionality, or in other words, it means that its members should act with common sense and prudence, without any evidence of illegal conduct, endowed with personal interests. Otherwise, there could be unfair decisions, violating fundamental rights.

³ According to Schmitt, "*A autonomia consiste na relação equilibrada com os demais poderes da entidade de administração do desporto*" (Schmitt, Paulo Marcos. *Sports Justice's Course - Autonomia e Independência da Justiça Desportiva*, 64).

Members of Sports Justice are not allowed to act with misuse of purpose or abuse of power. They must always act with wisdom and consistency.

The principles of sports specificity, fair play and prevalence, continuity and stability of competitions are related to the progress of the competition, and must always be observed the particularity of sport, as well as the conduct of the participants, who must always act in good faith.

It appears, therefore, that the principles are propositions that underlie and support the entire structure of a system, in this case the Sports Justice, guiding the judgments of disciplinary proceedings. Consideration should be given to the application of principles in all activities of Sports Justice, as the ideal and logical path to follow during the procedural instructions.

2. *Relationship between ordinary justice and sports justice*

The Sports Justice, essentially, is an administrative justice, under private law, specialized in sports matters, but due to its peculiarities has its proper attributions and shall follow the general principles of law and others, according to the public interest involved.

All national sports bodies, such as confederations, federations and athletes, are subjected to the rules of the Sports Justice. Only members of the Brazilian Olympic Committee and the Brazilian Paralympic Committee are excluded from the scope of Sports Justice because these organizations are governed by provisions from the International Olympic Charter and the International Paralympic Charter, respectively.

Although the Sports Justice is autonomous and independent from the entities of administration of sport, the Brazilian sports confederations have an obligation to create and fund the Courts of Sports Justice, however the Courts cannot be subordinated to the sports confederations under any circumstances. It has no connection with the government, State or judiciary.⁴

The Sports Justice is recognized by the Brazilian Federal Constitution, in its article Article 217, paragraphs 1 and 2.⁵

The Federal Constitution determines the competence of Sports Justice, recognizing the necessity of the depletion of all recourse with the sporting bodies as a prerequisite for the Ordinary Courts entering into the substance of any sporting/disciplinary disputes. This is the limit of the jurisdiction of Sports Justice, which

⁴ According to Schmitt, "*Os princípios têm a função de auxiliar no processo interpretativo das regras, permitindo o adequado preenchimento das lacunas*" (Schmitt, Paulo Marcos. *A Função dos Princípios*, 9).

⁵ Article 2 of the Brazilian Code of Sports Justice: "*This Code shall observe the following principles: I – full defense; II – celerity; III – adversarial procedure; IV – judicial economy; V – impersonality; VI – independence; VII – legality; VIII – morality; IX – motivation; X – formality; XI – rhetoric; XII – proportionality; XIII – publicity; XIV – reasonably; XV – due legal process; XVI – sports specificity; XVII – prevalence, continuity and stability of competitions; and XVIII – fair play*".

means that it can only appreciate causes relating to disputes arising from disciplinary offenses or competition regulations. In other words, the Sports Justice exists to regulate the sports conduct.

Besides, it is stipulated the maximum period of sixty days for rendering a decision in such disputes. Considering this time limit, it is up to the claimant to meet the burden of proof in the sense that it exhausted all instances of Sports Justice, or that it did not receive any final decision within 60 days, in order to be allowed to forward the case to the Ordinary Justice.⁶

According to Filho,⁷ this prerequisite is essential and constitutionally guaranteed, requiring very fast trials by the bodies of Sports Justice.

In addition to its constitutional recognition, the Sports Justice has its operation ordinarily regulated by the Law No. 9.615/98 and subsequent amendments, culminating with the publication of the Brazilian Code of Sports Justice.

The Law No. 9.615/98 defines what kind of disciplinary measures can be applied, prohibiting the imposition of penalties for persons under 14 years old, prohibiting the condemnation of non-professional athletes to pay fines, defining the sports bodies, form of nomination and appointment of its members, maximum period of mandates, effect of appeals, among other issues.

It is important to emphasize that the Sports Justice shall have jurisdiction only in issues relating to discipline and sports competitions. Cases relating to employment contracts, contractual compensation, transfer disputes, crimes within the scope of sports, among others, are within the competence of the Ordinary Justice.

Although the State, through the ordinary courts, is competent to judge the demands relating to discipline and competitions after the exhaustion of the instances of Sports Justice, in practice few are the cases that, after undergoing to the Sports Justice, are led to the appreciation of Ordinary Justice.

If the Sports Justice punishes an athlete for doping, or a club with the loss of points for questions related to sport, the condemned party shall not bring the matter to the ordinary courts trying to overturn the decision.

The participants of football, for example, whether athletes, governing bodies or clubs, besides being submitted to the maximum governing body of the world of sport (i.e. FIFA), they must accept its regulations, statutes and rules. Therefore, they renounce, tacitly, the right to take action before the Ordinary Courts to judge demands regarding discipline and competitions.

Moreover, it is undeniable that if the discussions in the scope of sports were brought to the Ordinary Justice, they would suffer with the severe slowness of the judiciary due to the huge number of cases to be judged, as well as the peculiar bureaucracy of the State entities.

⁶ It does not configure prohibition to the access to the Ordinary Justice, but only establish a condition and not a ban on access to the Ordinary Courts.

⁷ According to Filho, "*a norma constitucional fixa restrição temporal ao reexame judicial que exige prévia exaustão das instâncias da Justiça Desportiva*" (Filho, Álvaro Melo. *Princípios*

The sports disputes require fast decisions, as well as specific knowledge of its provisions. Obviously the judges of the Ordinary Justice do not know the sports rules deeply, and for this reason they would find it difficult to decide such cases, with the necessary celerity.

3. *Relevant regulations of the Brazilian Olympic and Paralympics Committees*

As analyzed in the previous chapter, the members of the Brazilian Olympic Committee (hereinafter referred to as BOC) and the Brazilian Paralympic Committee (hereinafter referred to as BPC) are not subject to the jurisdiction of Sports Justice, because these organizations are governed by the provisions of the International Olympic Charter and the International Paralympic Charter.

Due to the fact that the entities (BOC and BPC) represent an institution like the IOC in Brazil and the fact that these entities are of great importance in the national scene, BOC and BPC have some guarantees and protections established by the Brazilian Constitution of 1988.⁸

Extensive guarantees were granted for the development of national sport, such as priority allocation of public resources for development of sport nationally and autonomy of sports bodies in relation to their organization. It is important to remember that the IOC requires that members of every National Olympic Committee have full autonomy and independence from the public institutions.

Besides the constitutional guarantees provided to the BOC and BPC, other specific laws were created to regulate these organizations and their operation in Brazil.

Approved in July 2001, the Law No. 10.264 determines that 2% of the gross collection of all federal lotteries in Brazil must be transferred to the BOC and BPC for the promotion of national sport. From the total funds raised, 85% is allocated to the BOC, and 15% to the BPC.

From the funds received, the BOC is required by law to invest 10% with sports in schools and 5% with university sports. The remaining amount received by COB must be applied directly in programs of the 29 Brazilian Olympic Confederations, with the exception of football, since CBF declined to receive its part.

In the Law No. 9.615/98,⁹ the first relevant mention about the BOC occurs

Desportivos em Sede Constitucional. Revista do IBDD, 53).

⁸ Article 217 of the Brazilian Federal Constitution:

“Art. 217 - It is the duty of the State to promote formal and informal sports practice, as the right of each citizen, observing:

I - the autonomy of sports entities and associations, regarding its organization and operation;
II - the allocation of public resources for priority promotion of sport in the area of education and, in specific cases, to the high performance sport;
III - differential treatment for professional and non-professional sports;
IV - the protection and encouragement of sporting events created nationally”.

in Article 13, which names the responsible bodies for managing the sport in the country, placing the BOC as first on the list, followed respectively by the BPC.

Being BOC and BPC considered entities comprising the “National Sports System”, placed as first and second on the list with the assumption to promote and enhance the practice of sports performance, both entities have priority to receive public resources.

Furthermore, the Law No. 9.615/98 delegates to the BOC the responsibility with respect to the Olympic movement in the country. These prerogatives are in accordance with the Olympic Charter, ensuring State protection for the use of Olympic symbols. This preserves to the BOC the authority and right to use the valuable Olympic brand, and consequently, to the IOC.

4. *Football regulations (relevant provisions)*

There are many laws and regulations governing the practice of football in Brazil, starting with the Brazilian Code of Sports Justice, which provides for situations that are subjected to the jurisdiction of Sports Justice, which means, the cases relating to disputes arising from disciplinary offenses or competition regulations, as already explained before.

Any disciplinary offense committed during the dispute of a match or any violation of competition rules should be reviewed and judged by the Sports Justice. All members affiliated directly and indirectly to the “*Confederação Brasileira de Futebol (CBF)*” – Brazilian Football Federation (referees, coaches, athletes, etc.) may be punished by the Sports Court.

All other disputes involving employment contract, compensation payments, transfer disputes, crimes related to sports, among many other possibilities, are under the jurisdiction of the Ordinary Justice.

Another legal provision of fundamental importance for Brazilian football is the Law No. 10.671, from 2003. This law is known as the “Fan’s Statute”, and establishes standards for the protection and defense of the supporters.

In the words of Ocaña¹⁰ “*Brasil posee un ordenamiento jurídico especializado que ha sabido evolucionar al compás de las necesidades y el progreso del deporte brasileiro*”.

The Fan’s Statute defines the meaning of “organized supporters”, including organizations regularly constituted and organizations *de facto*, that are now required to maintain updated records of their members. With these records, the intention is to improve the conditions for prevention and punishment of those involved in

⁹ Also known as “Pelé Law”, it is the basis of sports law in Brazil, covering principles; structure of the federation, clubs and leagues; employment contracts; etc.

¹⁰ Ocaña also recognizes the importance of the Fan’s Statute, stating that “*es válido el nutrirse de la experiencia brasileiro para establecer una normativa que regule la seguridad de los eventos desportivos y garantice los derechos del hinchado como consumidor*” (Ocaña, Jorge Luis Merizalde. *Estatuto do Torcedor: Um modelo para Latinoamérica?*, Revista do IBDD, 2012, 186).

cases of violence in sports arenas and its surroundings, up to a distance of five kilometers from the stadiums.

In an attempt to end wars between supporters and ensure safety for both the public and for the athletes, the law established measures to prevent and suppress violence. The supporters who are detained by promoting riot, practicing or inciting violence, or invading restricted area of competitors may be sentenced to imprisonment for up to two years.

Besides worrying about the conduct of the supporters to avoid violence, the law also provides about the activity of individuals who buy tickets for the matches and resells it for higher prices than the printed on the ticket, as well as individuals who provides or facilitates the distribution of these tickets to be resold. If they are caught in this act, they can be punished with imprisonment of up to two years.

The Fan's Statute also prohibits the consumption of alcoholic beverages inside the stadium, in addition to the possession of fireworks, flags and shirts with symbols that incite violence or contain offensive messages. These measures are modeled on the legislation that has been in force for several years in many European countries and that managed to restrain the violence of hooligans.

Moreover, the law also has provisions on transparency in the organization of competitions and matches, the competition regulations, the safety of the fans, ticket sales, transportation of fans to the location of the match, food and hygiene within the sports arenas, the relationship with the referees, sports entities and the Sports Justice.

Beyond the Brazilian Code of Sports Justice and the Fan's Statute, Law No. 9.615/98 plays a fundamental role and establishes general standards on sport, with many articles intended for the specific regulation of football, as will be explained hereinafter.

5. *Clubs and players' rights and obligations*

The Law No. 9.615, approved in 1998, suffered recent changes in March 2011, especially regarding the relationship between clubs and players, particularly with regard to employment contracts with professional athletes and training contracts with amateur athletes.

The law has a provision of penalty clauses in case of the premature termination of the employment contract between the parties. The so-called "Indemnity Clause"¹¹ is due exclusively by the athlete to the club in case of termination motivated by the athlete. The amount of this clause shall be mandatorily stipulated in the employment contract registered with the "*Confederação Brasileira de Futebol (CBF)*" – Brazilian Football Federation. The amount of the clause can reach up to 2,000 (two thousand) times the average salary in case of domestic

¹¹ The new club and the player are jointly and severally liable for the payment of the "Indemnity Clause" to the former club.

transfers, having no limitation in case of international transfer.

On the other hand, the so-called “Compensatory Clause”¹² is due solely by the club to the athlete in the event of the early termination by the club. The amount of this clause can reach up to 400 (four hundred) times the monthly salary of the athlete at the time of termination.

With the recent amendments made to the Law No. 9.615/98 in 2011, included the solidarity mechanism was included in case of domestic transfers. Likewise as the solidarity mechanism established in the FIFA Regulations provides for the distribution of 5% of the transfer fee, the Brazilian solidarity mechanism also provides for the distribution of 5% of the transfer fee, but with its own rules, different from those established by FIFA.

The sports entities are considered training clubs, for purposes of charging the solidarity mechanism, whenever the club registered the athlete, as an amateur or professional, between 14 and 19 years of age, being due 1% for each year in which the athlete was trained from 14 to 17 years of age, and 0.5% for each year in which the athlete was trained from 18 to 19 years of age.

According to the Brazilian law, the training clubs have the right to sign the first professional contract with the athlete, provided the athlete is 16 (sixteen) years of age and with a maximum duration of the contract of 5 (five) years.¹³

In case the training club cannot exercise the right to sign the first contract with the professional athlete, by exclusive fault of the athlete, the club may request compensation of up to 200 (two hundred) times the proven expenditures with the athlete and specified in the training contract. This indemnification shall be charged directly from the new club of the athlete, regardless of the athlete being registered as professional or amateur for that club.

This is an innovation of the law and it was designed to benefit the training clubs of athletes at the national level.¹⁴

In order to be entitled to claim compensation the club must be certified by the *Confederação Brasileira de Futebol (CBF)* – Brazilian Football Federation as a training club, following several requirements, including: providing a training program, ensuring assistances (educational, psychological, medical, dental, food, transportation), maintenance of adequate sports facilities, the athlete must be registered by the club for at least one year, among others.

In addition, the club that invests in the training of an athlete will have the right of preference to the first renewal of the professional contract of this athlete,

¹² The “Compensatory Clause” was created with the goal of increasing the protection towards the player in case of dismissal without just cause by the club.

¹³ FIFA states that players under the age of 18 may not sign a professional contract for a term longer than three (3) years.

¹⁴ According to Soares, “*não se pode evitar que um atleta profissional acabe se transferindo para outra agremiação onde será mais bem remunerado (...) mas que a legislação brasileira continue, assim como está fazendo, a acompanhar essa evolução para evitar prejuízos aos nossos clubes e ao futebol brasileiro*” (Soares, Jerri Adriani Perrando. *Cláusula Penal no contrato de trabalho do atleta profissional de futebol*. Revista do IBDD, 2012, 128).

whose term cannot be longer than three years.

To ensure this right of preference, it is necessary that the training club fulfill a series of requirements, under the law, presenting a proposal to renew the contract of the athlete, as well as the answers regarding the assimilation of proposals from third parties.

However, if the athlete refuses to renew the contract, even with the training club reaching the exact terms of the proposal submitted by another interested club, the training club may require from the interested club the payment of compensation of up to 200 (two hundred) times the monthly salary offered in the most advantageous proposal to the athlete.

With these measures, the law seeks to encourage the clubs to continue investing in the training of athletes, protecting them against premature exit of these players without any financial compensation.

Furthermore, with clear influence of the famous Article 18bis of the FIFA's Regulation,¹⁵ which forbids the influence of third parties on clubs, the Law No. 9.615/98 also stipulates that contracts between players and football clubs with third parties that intervene or have influence in transfers and performance of athletes are null and void. Thus, the Brazilian law reinforces the understanding already pacified by FIFA.

6. *Sports offenses*

According to the Brazilian Federal Constitution, the judgment of cases involving sporting discipline and/or sporting competitions is the responsibility of Sports Justice.

Therefore, it is up to the Courts of Sports Justice and their respective Disciplinary Committees the analysis and judgment of all possible disputes regarding, for example: a) noncompliance of rules by athletes, officials or teams, which undermine the progress of the competition; b) Doping; c) fraud results; d) Invasions of pitch, among countless other possibilities of offenses.¹⁶

The disciplinary offenses are provided in the Brazilian Code of Sports Justice and it occurs when the offender, by the act or voluntary omission, commits an unlawful act with impact in sports. The attitude becomes a tort when the person has an obligation not to perform certain acts, and practices it. The omission, on the other hand, becomes a tort when the person is required to perform a certain act and voluntarily stops practicing it. In sports, the tort committed is called an "offense".

Among the most frequent offenses in sports that are judged by the Disciplinary Committees, there are the disputes concerning offenses during the matches and competitions, which are:

¹⁵ *Art. 18bis - No club shall enter into a contract which enables any other party to that contract or any third party to acquire the ability to influence in employment and transfer-related matters its independence, its policies or the performance of its teams.*

¹⁶ Other issues that do not involve sporting discipline and/or sporting competitions are subject to the Ordinary Justice. i.e. employment relations between athletes and clubs.

- a) *Unfair/Hostile act*: performing an act contrary to the rules of the game, preventing a clear scoring opportunity, or equivalent and/or pushing an opponent on purpose out of contention of the move;
- b) *Violent move*: performing any action whose use of force is inconsistent with the standard expected for the modality and/or acting recklessly in the dispute of a certain move;
- c) *Physical aggression*: practicing physical aggression during the match or competition, striking the opponent with a punch, using the head, elbow, kicks, assuming the risk of harm or injury to the victim;
- d) *Act contrary to the sporting ethics*: giving up the dispute of match, for neglect, injury simulation, or attempt to prevent its continuation, as well as disrespecting the team or the decisions of the referees.

These are the most recurring disciplinary offenses in the trials of the Sports Justice, however this list of offenses is not exhaustive, being only illustrative. There are many behaviors that can be punished, such as infractions relating to moral offenses, offenses related to legal and administrative obligations, etc.

Ultimately, the Sports Justice will also be responsible for examining and judging the cases related to doping. When a positive result of doping occurs on the analysis of an athlete, the President of the Federation of the modality shall transmit the expert report, together with the rebuttal evidence, directly to the Chairman of the Court (Superior Court of Sports Justice or Court of Sports Justice), which will determine the preventive suspension of the athlete for a maximum period of 30 (thirty) days, until the case is definitively decided.

7. *Sanctions on clubs and players*

The Law No. 9.615 and the Brazilian Code of Sports Justice determines the sanctions applicable by the Sports Justice, in a total of eleven possibilities: warning; elimination, exclusion from a tournament or championship; indemnification; interdiction of the sports location, fine, loss of the right to play at home, deduction of points, loss of revenue, suspension for a match and suspension for a period of time.¹⁷

¹⁷ Article 50, para. 1º of Law No. 9615: “*Paragraph 1º - Transgressions regarding discipline and the sporting competitions subject the violator to:*

I – warning;

II – elimination;

III – exclusion from a tournament or a championship;

IV – indemnification;

V – interdiction of the sports location;

VI – fine;

VII – loss of the right to play at home;

VIII – deduction of points;

IX – loss of revenue;

X – suspension for a match;

XI – suspension for a period of time”.

The penalty of elimination consists of removing the offender, whether club or individual, from any activity of the association. The exclusion from a tournament or a championship is a measure to be imposed at the discretion of the sporting codes, by removing the offender from the competition, specifically.

The penalties of elimination and exclusion have no perpetuity, so that the entity excluded/eliminated can apply for its reinstatement after a reasonable lapse of time.

The warning, when applied by the Sports Justice, should be registered in the individual records of the offender, and withdraws its first-time offender condition.

The indemnification is due in case of property damage caused by the individual or by the breach of obligation to conclude a payment, and must be paid within a period settled by the decision, unless the code determines the exact period of time. If the debt is not paid, the offender will have to comply with an automatic suspension until the debt is settled.

The interdiction of the sports location is the prohibition on holding any competitions, official or friendly, in the stadium or arena. It is applied when there are no minimum conditions of safety and infrastructure offered to the referees, assistants, representatives, delegates and athletes.

The fine will be imposed by the Sports Justice and it shall be taken into account the economic situation of the offender, and its non-compliance also results in an automatic punishment of the offender.

The loss of the right to play at home consists in the temporary revocation of the entity's right to play a match or competition at its official sport location. It is often applied by the Sports Justice to punish disorder caused by the organized supporters.

The deduction of points occurs when the club has a certain amount of points removed from it during a competition, being widely used by the Sports Justice.

The loss of revenue will be applied when the club, for example, gives cause to the suspension of a match, and it is actually a monetary penalty, since it implies that the club does not receive totally or partially the amounts that would be earned in the event.

The suspension for a match implies the prohibition of the athlete to compete in a determined number of matches, set by the decision of the Sports Justice. This suspension must always be fulfilled in the league or tournament from which the offense was originated, and whenever it cannot be fulfilled, it will be converted into a fine or suspension for a period of time.

The suspension for a period of time is identical to the suspension for a match, except that designates a determined number of days of suspension, and can be fulfilled in all competitions or tournaments of the Confederation, depriving the athlete from participating in any match. It can also be applied to the clubs, which will lose the right to play home and the possibility to exercise any legal right, statutory or regulatory. But the clubs will lose only the right to play the friendly

matches, because they have the duty to play official matches (keeping only the loss of the right to play at home).

What is important with respect to all disciplinary sanctions is that they should, whenever possible, exercise their effects in competitions where the offense was originated. There is no reason why an athlete punished in the Championship of the State of Rio de Janeiro fulfills the sentence when he is playing in the Brazilian First Division.

With regard to the disciplinary sanctions imposed by the Sports Justice, it is important to clarify that it cannot be applied to athletes under 14 years old. Moreover, the legislation differentiates the professional athletes from nonprofessional athletes, so it is forbidden to apply fines to non-professional athletes.

Lastly, besides the professional and non-professional athletes, others may be configured as offenders in the sports disciplinary procedures: members of the technical staff of the clubs, club officials, the referees and the members of the Sports Justice.

8. *The Sports Judicial Bodies*

The Law No. 9.615/98 establishes the bodies of Sports Justice, defining their powers and matters that are under its jurisdiction. It also delegates to the Brazilian Code of Sports Justice the internal rules of organization and operation of these bodies, as well as the procedures.

The bodies of Sports Justice consist of, according to the article 52 of Law No. 9.615/98, Supreme Courts of Sports Justice, the Courts of Justice Sports and Disciplinary Committees.¹⁸

These bodies are autonomous and independent from the governing bodies that manage each modality of sport. Despite the physical and financial dependence of these bodies in relation to governing bodies, as provided by law, the performance of Sports Justice shall have full independence in its decisions, any type of intervention from the governing bodies being prohibited.

Only persons that graduated in law or persons with notable legal knowledge in sports, with an unblemished reputation, may be members of the courts. The members of these bodies are called "Auditors", and they shall be elected for 4 (four) years, being allowed one reelection for the same period of time.

The organization of Sports Justice does not follow the same standards of the ordinary courts. There is one Supreme Court of Sports Justice for each sport. The Sports Justice is constituted of Auditors (judges), Prosecutors (as guardian of

¹⁸ "Art. 52 - *The bodies comprising the Sports Justice are autonomous and independent from the governing bodies of each modality of sport, and it is composed of the Supreme Court of Sports Justice, working with the national authorities of administration of sport; Courts of Sports Justice, working with the regional entities of administration of sport, and the Disciplinary Committee, with jurisdiction to adjudicate the issues set out in the Codes of Sports Justice, always guaranteed the full defense and adversarial proceeding*".

the law) and defenders (anyone of legal age can act as an attorney). The Brazilian Code of Sports Justice is the statute that defines the procedures for sports (disciplinary or special), deadlines, annulments, evidence, trial sessions, appeals, disciplinary actions, and ultimately, the whole procedure to be adopted by the bodies and members of the Sports Justice.

8.1 *Disciplinary Committees*

The Disciplinary Committees are bodies of first instance, acting as a trial court and judging all offenses committed in the competitions. They are composed of five members, and appointed by the court. Their decisions can always be appealed to the Court of Sports Justice. All of this occurs within the Court of the Sport to which it belongs.

8.2 *Courts of Sports Justice*

The Court of Sports Justice is a body of second instance (appeal court), working on the jurisdiction of the regional administration of each sport, with jurisdiction to adjudicate appeals in cases arising from sporting competitions played within the regional federation.

They are linked to the federations of each sport. Just as an example, the Football Federation of the State of São Paulo has a specific Court of Sports Justice, as well as the Aquatic Sports Federation of the State of São Paulo has a specific Court of Sports Justice and so on.

Each Court of Sports Justice is composed of nine auditors, being: two appointed by the regional administration of the sport (e.g. Football Federation of the State of São Paulo), two appointed by the clubs that participate in the main competition of the regional administration of the sport, two appointed by the Brazilian Bar Association, through the State corresponding to their territory (e.g. Brazilian Bar Association, Section São Paulo), two appointed by the Union of the Athletes and a representative appointed by the association of the referees.

This body judges mainly appeals, originated from the decisions of the Disciplinary Committee, but also has original jurisdiction in some matters, such as judging its own auditors, for example.

8.3 *Supreme Courts of Sports Justice*

The Supreme Court of Sports Justice is a body of second and third instance, depending on the case, which is linked to the national governing body of each sport, with jurisdiction to adjudicate appeals in cases arising from all official sporting competitions held in the country.

There is a Supreme Court of Sports Justice for each sports federation that exists in Brazil, with the assignment of adjudicate appeals against the decisions of

the regional Courts of Sports Justice, or against the decisions of its own Disciplinary Committees, in cases where it should be the original judge.

The Supreme Courts of Sports Justice are also constituted by nine auditors, being elected in the same manner as occurs with the regional Courts of Sports Justice, as required by Law No. 9.615/98.

8.4 *Prosecutors of Sports Justice*

Regulated by the Brazilian Code of Sports Justice, the prosecutors act similarly to the Public Attorney's Office, however the prosecutors are not part of the official bodies of Sports Justice.

They shall enforce the provisions of the Brazilian Code of Sports Justice, promoting the responsibility of individuals or legal entities that violate it. Its tasks include: to provide denunciations, follow and supervise the legal procedures of the cases, ensure compliance with the principles of Sports Justice and to request the opening of investigations.

Its members are appointed by the respective adjudicative body (Supreme Court of Sports Justice or regional Court of Sports Justice) and are nominated as attorneys, one being chosen as Attorney-General with a mandate similar to that of the auditors, 4 years with the possibility of reelection for another 4 years.

9. *The procedure*

As previously informed, the guiding principle of the Sports Justice is the celerity of its procedures. This principle exists due to the speed with which the competitions are developed, so the procedures relating to it must have immediate solution.

The procedure of Sports Justice begins on Disciplinary Committee, from the complaint offered by the Prosecutor or when a sporting disciplinary infraction is proposed by written notice directly to the Prosecutors' Office.

The written complaint must be formulated by an individual or a legal entity provided that there is legitimate interest and that the interested party submits proof of legitimacy. It is entirely up to the prosecutor to assess the desirability of promoting or not the complaint from the written notice of the disciplinary offense.

Therefore, the occurrence of an intervention of the interested party is essential, by sending a complaint to the Prosecutors' Office. Thus the judge (auditor, in Sports Justice) cannot promote the procedures on their own initiative.

The complaint is the inaugural accusatory document of the disciplinary action. Most of the times the summary of the match and the report of the match or competition are used as the basis for the complaint. The summary and report of the match are the documents in which the referees report the events occurred during the match. As evidence, the report has presumption of veracity.

Upon receiving the summary and the report of the match or competition, the entity that manages the sport will conduct an analysis of the existence of any

irregularities mentioned in the documents. In case of irregularities occurred during the sporting event the Chairman of the entity shall forward the documents to the relevant Court (Superior Court of Sports Justice / Court of Sports Justice) within three days from receipt. After the Chairman of the Court verifies the presence of disciplinary offense, he will determine the submission of the case to the Prosecutors' Office of the Disciplinary Commission so that they must offer the complaint within two days.

Upon the filing of the complaint the case shall be sent to the Chairman of the Disciplinary Committee that within two days will randomly select the reporting judge, designating the day and time for the trial session, and questioning whether the parties have evidence to be produced. Evidence may be documents, film, through oral testimony of witnesses, and any other evidence that are pertinent.

After that, the Chairman grants a time to the Prosecutors and the parties to present their oral arguments. At the conclusion of oral arguments, the reporting judge, the Deputy Chairman and the other auditors will present their votes, and the decision will take effect from the following day, since regularly notified to the parties and their legal representatives.¹⁹

The trials shall be public, however the Chairman of the adjudicative body can determine secret trials in special situations, ensuring the presence of the Prosecutor, the parties and their legal representatives.

The special procedures will have preference ahead of summary proceedings, due to its specificities. The special procedure is adopted for processing the cases that require special measures before the Sports Justice, such as the invalidation of a result of a match or competition, cases of doping, offenses punished with elimination, among other specific procedures.

The fundamental for the Sports Justice is the occurrence of celerity in its judgments in order to avoid procedural delay, besides the Brazilian Code of Sports Justice states that if any Auditor requests to review the documents of the case, as a rule, this will occur at the same time of the trial, thus avoiding the postponement of the proceedings.

10. *Dispute settlements*

The sports law is a very embracing area, regulating all relations existing in sports. The disputes in sports may have the most diverse natures: disciplinary offenses or regulations of competitions, labour conflicts between clubs and athletes, disputes about economic rights, image rights, brands of clubs, corporate affairs between entities, technical issues related to the qualification of teams, register, doping, among several other possibilities.

Although all these possibilities are related to sport, most of these disputes

¹⁹ In the event of a tie during the voting of the trial, the Chairman shall have the casting vote, except in the case of imposition of disciplinary penalty, in which shall prevail the votes more favorable to the Party, being considered the penalty of fine milder than the suspension.

are not within the competence of Sports Justice, as it will be seen below.

10.1 Technical disputes

According to the Law No. 9.615/98, the national entities that administrate the sport (federations of each sport) have jurisdiction to decide technical issues, in other words, issues relating to compliance with the standards and rules of Sport.

This jurisdiction cannot be confused with the jurisdiction of the Sports Justice. The technical competence is regarding disputes concerning the violation of the general rules of sport, or in relation to disobedience of any internal rule of a federation, such as the statutes.

In case of violation of a statutory rule, the federations may apply sanctions to its affiliated members. The penalties can be a warning, written censorship, fine, suspension and even disaffiliation of the member. However, the suspension and disaffiliation can only be applied after judgment by Sports Justice, different from the others penalties that do not have this requirement.²⁰

10.2 Disciplinary disputes

As previously mentioned, it is up to the Sports Justice the judgment of disputes involving sporting discipline, in accordance with the provision of the Brazilian Federal Constitution.

Therefore, it is the jurisdiction of the Courts of Justice Sports and its Disciplinary Committees the analysis and judgment of “purely” sporting issues, such as doping, disciplinary offenses, etc.²¹

10.3 Economic disputes

The disputes concerning economic issues are under the jurisdiction of the ordinary justice or arbitration courts, in case the parties have stipulated in the contract or statutes. Consequently, training compensation cases as set in football will fall under the jurisdiction of the ordinary courts.

Thus, litigation involving image rights, brand licensing, sponsorship agreements, national transfer agreements, partnership between football clubs, among others, are within the jurisdiction of the ordinary justice or the arbitration courts.

Lastly, all disputes relating to employment contracts are exclusive jurisdiction of the Labour Court, as well as those related to crimes in sports are under the exclusive jurisdiction of Criminal Justice.

²⁰ A club might be fined by its federation through mere administrative procedure, without requiring that the parties are given an opportunity to confront the arguments and without the legal full defense.

²¹ Disputes arising between clubs, federations, confederations and athletes, which do not have relation with the “discipline and sporting competitions”, are not analyzed by the Sports Justice.

SPORTS JUSTICE IN CROATIA

by *Vanja Smokvina**

SUMMARY: 1. Principles of Croatian sports justice – 2. The relationship between ordinary justice and sports justice – 3. The relevant NOC of Croatia regulations and NOC of Croatia judicial bodies – 4. National Sports Federations - Emphasis on football – 5. Clubs' and players' rights and obligations – 6. Sports offences – 7. Sanctions on clubs and players – 8. Dispute settlements – 9. Conclusions

Abstract:

This chapter attempts to provide an overview of sports justice in Croatia. It focuses on the National Olympic Committee of Croatia (“NOC of Croatia”) as well as on football, with its special system, and on the Arbitration tribunal of the Croatian football federation. Particular attention is paid to the establishment and the procedure of arbitration in the sports associations' tribunals (Croatian Court of Arbitration for Sport and arbitration tribunals for a single sport). It should be highlighted that there are not many judgments of ordinary courts in sport-related issues, primarily because sport is still considered as a special system of rules, on its own not connected to the ordinary judicial system. However, the number of litigation before sports disciplinary courts is significant and deserves due attention.

1. Principles of Croatian sports justice

The Croatian Constitution entails no provisions on sport, except that it provides that sport lies within the competence of the local administration (municipalities and cities).¹ On the other hand, it should be stressed that the freedom of association is

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¹ Constitution of the Republic of Croatia (*Ustav Republike Hrvatske*), Official Journal (*Narodne novine*) No. 56/90, 135/97, 8/98, 113/2000, 124/2000, 41/01, 55/01, 76/10, 85/10, Art. 134.

guaranteed to every person as a fundamental right.²

Croatian sport is governed by the Sports Act, which since 1990 had four revisions.³ The latest 2006 Sports Act, currently in force, was amended four times. According to Siekmann and Soek's criteria of sport governance,⁴ Croatia has a semi interventionist model of sport since, as regulated by the *Croatian Sports Act*, it is characterized by certain elements which are going to be elaborated further in the text. In this regard, under the Sports Act of 2012 sports activities are activities of special interest to the Republic of Croatia.⁵ Although the sport governing bodies are autonomous, their autonomy is based on State laws.⁶ The *National sports programme* for instance is financed by the State. The later programme is adopted by the Croatian Parliament upon the proposal of the Government for a period of 8 years and regulates the aims and scope of sport development; activities essential for the fulfilment of those aims, as well as subjects of development and control of the programme implementation.⁷ The *National Committee for sports* as a major professional sports body with competences in the development and safeguard of quality of sport in Croatia consists of members who are appointed and dismissed by the Croatian Parliament.

Sports activities are defined as participation in sports competitions, sports preparation, sports recreation, sports training, organisation of sports competitions, the conducting of sports competitions and management and maintenance of sport infrastructure, organised extra-curricular school sports activities and students' sports activities are also considered sports activities as well.⁸ Persons that engage in sports activities are enrolled into special registers administered by the local administrative offices in the Counties or in the City of Zagreb according to the seat or the residence of those persons.⁹

Croatian Sports Act confers the power to regulate the status of a professional sportsperson and his/her rights and duties to the national federations, by means of their autonomous acts.¹⁰ Furthermore, the legal status of professional sportspeople

² Constitution of the Republic of Croatia, *o.c.*, Art. 43.

³ Sports Act (*Zakon o športu*), Official Gazette (*Narodne novine*) No. 59/90. Sports Act (*Zakon o športu*), Official Gazette (*Narodne novine*) No. 60/92, 25/93, 11/94, 77/95. Sports Act (*Zakon o športu*), Official Gazette (*Narodne novine*) No. 111/97, 13/98, 24/01. Sports Act (*Zakon o športu*), Official Gazette (*Narodne novine*) No. 71/06, 150/08, 124/10, 124/11 and 86/12, (hereinafter: Sports Act).

⁴ R.C.R. SIEKMANN, J. SOEK, "Model of Sport Governance in the European Union: The Relationship between State and Sport Authorities", *The International Sports Law Journal*, vol. 10, 2010, no. 3-4, 93-102.

⁵ Sports Act, *o.c.*, Art. 1(2).

⁶ See R. B. MARTINS, "A European Legal Football Match Heading for Extra Time", *The International Sports Law Journal*, vol. 4, 2004, no. 3-4, 23.

⁷ Sports Act, *o.c.*, Art. 2.

⁸ Sports Act, *o.c.*, Art. 18(1,2). According to the para. 3 of the same article, if there are doubts whether an activity is a sports activity, the Ministry of Science, Education and Sport, clarifies the later.

⁹ Sports Act, *o.c.*, Art. 20.

¹⁰ Sports Act, *o.c.*, Art. 8(3).

in Croatia, due to the previously mentioned provisions and the manner in which the national federations define it, is governed by two acts: the Obligations Act¹¹ and the Labour Act.¹² The Obligations Act is applied in a relationship between a club and a self-employed professional sportsman or sportswoman. Self-employed professional sportsmen or sportswomen represent the great majority of all professional players in individual or team sports, because they are defined as such by autonomous acts of the sports federation.

In addition to the Sports Act in force, the legal relationship between professional sportsmen or sportswomen on the one hand, and the professional sports club, on the other, is regulated in Croatia by civil law acts – primarily by the law of obligations. According to Art. 6(2) of the Sports Act “*sportspeople can perform their activity as professionals or amateurs. The activity of sportspersons is defined as a professional activity if there is a contract of professional play or a contract of employment with a club, or the sportsperson takes part in sports competition as an individual in an individual sports discipline*”.¹³ Furthermore, it is stated that a sportsperson who professionally takes part in sports activity is a person who performs that activity as a main activity and who is being paid mandatory insurance contributions on that basis. The legal status of sportspersons, their rights and duties are governed by the regulations of the national sport organizations.¹⁴ As will be demonstrated, there are only few labour law relationships in Croatian professional sport.

2. *The relationship between ordinary justice and sports justice*

In Croatia, like in other countries, the debate about the relationship between ordinary justice and sports justice has over the years become very intense and led to the contributions from commentators as well as the issuing of many decisions from both sports bodies and a few from ordinary (state) courts.

As a general rule, all statutes of National Sports Federations provide obligations for all participants in sports activities to accept as binding and final all decisions adopted by sports courts and bodies. This obligation, that reflects the principle of independence of sports, prevents (or prohibits) in effect the challenging of decisions of sports bodies before state courts.

As previously stated, the case law of Croatian ordinary courts is scarce, but nevertheless, there were some interesting judgments in 20 years of Croatian independence. Such is for example, the case brought before the Supreme Court of Croatia,¹⁵ between former football players and their football club, a private citizens’

¹¹ Obligations Act (*Zakon o obveznim odnosima*), Official Gazette (*Narodne novine*) No. 35/05, 41/08.

¹² Labour Act (*Zakon o radu*), Official Gazette (*Narodne novine*) No. 149/09, 61/11 and 82/12.

¹³ Sports Act, *o.c.*, Art. 8(1).

¹⁴ Sports Act, *o.c.*, Art. 8(2,3).

¹⁵ Croatian Supreme Court, Decision No. Revr 631/06, of 4-09-2008, (*Odluka Vrhovnog suda Republike Hrvatske, Revr 631/06*) available at the official web page of the Supreme Court of

association (NK Dinamo Zagreb PCA), for non-fulfilment of contract obligations, i.e. contract payment.¹⁶ Since the Club NK Dinamo Zagreb sport's Ltd (with whom the players had entered into contracts) ceased to pay its obligations to the players and to all their creditors, the insolvency procedure was opened on the Club with the formal settlement of the Commercial Court in Zagreb No. St-685/02 of 07/05/2002. One player's financial demand on behalf of his salary was fulfilled in the insolvency procedure by only 1/9. At the end of the procedure, NK Dinamo Zagreb sport's Ltd was removed from the Croatian register of commercial companies and ceased to exist. Since the Club continued to take part in all competitions as a private citizen's association, it seemed to be a legal continuation of the NK Dinamo Zagreb sport's Ltd, with whom the players had concluded their contract of employment. However, ordinary tribunals (of the first and second grade) were not of the same opinion. Because of that, the tribunals made a decision that NK Dinamo Zagreb PCA was not a party to the contract and that there is no capacity to be a defendant in the dispute. The Supreme Court confirmed those judgements and stated that there is no legal continuity between NK Dinamo Zagreb sport's Ltd and NK Dinamo Zagreb PCA; and that it is of no importance that the same person was a general manager in the NK Dinamo Zagreb sport's Ltd (previously called NK Croatia Zagreb sport's Ltd) and NK Dinamo Zagreb PCA, and that it is of no importance that the contract of employment had the stamp of the CFF. The contract party NK Dinamo (Croatia) sport Ltd does not exist anymore since it was withdrawn from the commercial registry after the insolvency and liquidation procedure.¹⁷

On the other hand, it should be stated that there were a lot of proposals made for the opening of a insolvency procedure for another famous football club, HNK Hajduk PCA, although the procedure was not initiated. In the end, HNK Hajduk PCA according to the Sports Act in 2006, was legally transformed into Hajduk sports joint stock company.¹⁸ Other clubs have also changed their legal status in sports commercial companies because of mounting debts (a great part to the State for taxes and mandatory contributions).

Croatia: <http://sudskapraksa.vsrh.hr/>.

¹⁶ The same legal form is present now. It should be noted that before 2000 professional football players had actually a labour law relationship, but then because of big problems with the payment of taxes and mandatory assurances by their employers (clubs), national sports federations changed their autonomous act and defined players as self-employed persons.

¹⁷ NK Dinamo Zagreb PCA in the season 2002/03 (the year after the bankruptcy and liquidation of NK Dinamo Zagreb sport's Ltd) simply continued where NK Dinamo Zagreb sport's Ltd stopped, and become the Croatian champion. It was the Croatian champion for eight more times after that (in 2003/04 and 2004/05 season the Champion was HNK Hajduk Split).² They compete in UEFA competitions: Champions league preliminary rounds (2003, 2006, 2007 and 2008) and UEFA Cup (later UEFA League – 2004, 2007, 2008, 2009 and 2010). In the seasons 2011/12 and 2012/13 NK Dinamo Zagreb PCA entered the Champions league group stage competition. For more see V. SMOKVINA, "Case Law of the Croatian Supreme Court in the Fields of Sports Law", *The International Sports Law Journal*, vol. 12, 2012, no. 1-2, 106-108.

¹⁸ For more see: H. KAČER, A. PERKUŠIĆ, B. IVANČIĆ-KAČER, "Postoji li u Republici Hrvatskoj (kvalitetno) sportsko pravo?", *Collected papers of the Law Faculty of the University of Split (Zbornik radova Pravnog fakulteta u Splitu)*, vol. 49, 2012, no. 4, 730-731.

3. *The relevant NOC of Croatia regulations and NOC of Croatia judicial bodies*

National Olympic committees are one of the three integral elements of the Olympic Movement, together with the International Olympic Committee (IOC) and international sports federations. The task of every national Olympic committee is to develop, promote and protect the Olympic Movement in its respective country, in line with the Olympic Charter. In Croatia the entire national sports movement is supervised and governed by the Croatian Olympic Committee (“HOO”)¹⁹ which is one of 204 national Olympic committees recognised by the IOC.

3.1 *The NOC of Croatia*

The NOC of Croatia was founded in Zagreb on 10 September 1991 and was awarded provisional recognition in Lausanne on 17 January 1992 by the president and four vice-presidents of the IOC, with full recognition following at the 101st session of the IOC in Monaco, held on 24 September 1993. The NOC of Croatia is a major sports association gathering all national sports associations and other associations important for sports promotion. Although it is autonomous in its work,²⁰ it is important to note that sport in Croatia is financed predominantly by the State and local administration (cities and counties). The NOC of Croatia has an obligation to deliver annual reports on the spending of public funds for the public sports needs to the Croatian Parliament and the Ministry of Science, Education and Sport.²¹ Both the inspection and the supervision of the legality of work of the legal persons in sports and their general acts is in the competence of the Ministry of Science, Education and Sport.²²

The goals of the NOC of Croatia are to represent Croatian sports as a whole before the IOC and relevant international sports organisations and associations; to undertake activities aimed at disseminating Olympic principles, ethical and moral norms in sports; to harmonise, encourage and to assist the activities of national sports federations; to assist the development and promotion of sports at the national level and to encourage the organisation and harmonisation of sports at the county, city and municipal levels and to promote and assist Croatian sport as a whole.

The Sports Act has entrusted the NOC of Croatia with the public authority to determine athlete categories and to adopt decisions on the categorisation of athletes. It institutes and maintains a registry of categorised athletes.²³

The basic regulations that define the activity of the NOC of Croatia are:

¹⁹ National Olympic Committee for Croatia (*Hrvatski olimpijski odbor - HOO*), hereinafter: the NOC of Croatia.

²⁰ Sports Act, *o.c.*, Art. 49.

²¹ Sports Act, *o.c.*, Art. 75.

²² Sports Act, *o.c.*, Art. 84 and 85. The Act on Sports Inspection (*Zakon o sportskoj inspekciji*), Official Gazette (*Narodne novine*) No. 86/12.

²³ Sports Act, *o.c.*, Art. 6.

- the International Olympic Committee's Olympic Charter,²⁴
- the Sports Act,²⁵
- the Associations Act,²⁶
- the NOC of Croatia Statute.²⁷

The role of the NOC of Croatia in creating sports law is needless to say related to its activities, which include:

- implementing and overseeing the application of international sports regulations and the adoption of acts related to their application;
- safeguarding the symbols and insignia of the IOC and NOC of Croatia;
- determining the nomenclature of sports and branches of sport;
- combating doping and the use of substances and procedures forbidden by the IOC or international federations;
- establishing the principles and basic elements of the system of competition in Croatia, and the conditions for the participation of Croatian athletes and sports clubs at international sports competitions; and
- publishing and other tasks as established by law,²⁸ the IOC Olympic Charter, the NOC of Croatia Statute and other regulations that have been omitted here in respect of the subject under consideration.²⁹

3.2 *The Croatian Court of Arbitration for sport (CAS Croatia) and the Croatian Sports Arbitration Council (CSAC)*

At its 19th session on 25 May 1999 the NOC of Croatia's Assembly established the independent and autonomous NOC of Croatia bodies: the *Court of Arbitration for Sport (hereinafter: CAS Croatia)* and the *Croatian Sports Arbitration Council (hereinafter: CSAC)*. Their role is the resolution of sports disputes and disputes related to sports, as well as the reconsideration of decisions of sports associations where other means of legal remedy have been exhausted or do not exist and, among other things, provision of legal opinions at the request of NOC of Croatia Council or a NOC of Croatia member.

The arbitration rules for CAS Croatia, also adopted at the 19th session of the NOC of Croatia's Assembly, regulate in detail the issues of competence, composition, structure, rules of arbitration procedure and mediation procedure.

²⁴ Olympic Charter, available *on line* at: www.olympic.org/Documents/olympic_charter_en.pdf (15-04-2013).

²⁵ Sports Act, *o.c.*, Art. 49-52.

²⁶ Associations Act (*Zakon o udrugama*), Official Gazette No. 88/01 and 11/02.

²⁷ The NOC of Croatia Statute, available at: www.hoo.hr/downloads/statut%20HOO-a%20srpanj%202012.pdf (18-04-2013)

²⁸ Sports Act, *o.c.*, Art. 50 and 51.

²⁹ B. VRBEK, "The role of the Croatian Olympic Committee in creating in creating sports law", in R.C.R. Siekmann, R. Parrish, V. Smokvina, N. Bodirola-Vukobrat (eds.), *Social Dialogue in Professional Sports*, forthcoming, 167-168.

The scope of CAS Croatia jurisdiction is, as a rule, previously agreed by the parties.³⁰

The Sports Act establishes the competence and activity of the Croatian Sports Arbitration Council and of the Croatian Court of Arbitration for Sport.³¹

The CSAC is in particular authorised to resolve disputes and issues pertaining to the execution of the tasks of the NOC of Croatia. Particularly significant among these are decisions on disciplinary measures and decisions regarding doping, decisions on disciplinary and other procedures that involve or imply long-term bans or prohibition from participation in sports competitions, decisions that pertain to Olympic candidates or top athletes (category I to III), the principles and conditions of sports competitions and other issues regulated by the NOC of Croatia Statute. Since its establishment the CSAC has ruled in 39 cases,³² and reached more than 10 decisions and legal opinions important for the development of sport.³³

Members of the CSAC are elected by the assembly from eminent attorney-athletes and former athletes, officers and professionals.

All NOC of Croatia members, with the exception of the Croatian Football Federation, have provisions in their statutes concerning the jurisdiction of the CSAC for disputes related to their respective sport.

A CSAC decision may be appealed before the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland, if the case is related to the Olympic Games, which then renders a final decision on the dispute pursuant to the Sports Arbitration Code.

The CSAC has deliberated on various sports disputes pertaining to requests to review decisions by bodies of sports associations where other means of legal remedy have been exhausted in these associations; bans against individual members in these associations, i.e. sport; the expulsion of a club or person from membership in a federation or the rejection of an application for membership; the amounts of compensation for damages or the non-payment of damages for a player transfer; the issue of licences to play in the Croatian Football 2nd League and many other

³⁰ Arbitration rules of the Croatian Court of Arbitration for Sport of the Croatian Olympic Committee (*Arbitražna pravila športskog arbitražnog sudišta pri Hrvatskom olimpijskom odboru*), Official Gazette No. 72/99.

³¹ Sports Act, *o.c.*, Art. 52. More details about the CAS Croatia and CSAC in: J. ČIZMIĆ, H. MOMČINOVIĆ, “Športsko arbitražno sudište HOO-organizacijske i postupovne odredbe”, *Collected papers of the Law Faculty of the University of Split (Zbornik radova Pravnog fakulteta u Splitu)*, vol. 48, 2011, no. 4, 759-773.

³² It is interesting to point out that sometimes procedures before CSAC are not effective. See for example the case of a famous handball player Blaženko Lacković and his club Zagreb CO. The case was about the issuance of a transfer certificate which the club was reluctant to issue. In the end the player had to take the transfer certificate under the club's conditions, irrespective of the decision of the CSAC which demonstrated its ineffectiveness. See H. KAČER, A. PERKUŠIĆ, B. IVANČIĆ-KAČER, “Postoji li u Republici Hrvatskoj (kvalitetno) sportsko pravo?”, *o.c.*, 731.

³³ More available *on line* at: www.hoo.hr/637-v-vijece-sportske-arbitraze-jednostavnije-dodluke.aspx (23-04-2013).

issues; and requests that have been submitted for legal opinions on issues of contention in the field of sports.

4. National Sports Federations - Emphasis on football

In Croatia there are 38 sports associations representing Olympic sports; 32 associations representing non-Olympic sports; 21 sports association communities and federations from the counties and the City of Zagreb and the Croatian Olympians Club in NOC of Croatia's full membership; while 8 national sports federations and 9 associations and institutions in the field of sports have the status of NOC of Croatia's associate member and 2 federations have the status of NOC of Croatia's associate member. NOC of Croatia has exclusive authority to represent Croatian sports at the Olympic Games and at world, European and regional multi-sport competitions held under the auspices of the IOC or the European Olympic Committee.³⁴

4.1 Relevant football regulations

In Croatia the autonomous acts of the *Croatian Football Federation (hereinafter: CFF)*³⁵ regulate the legal status of football players. The CFF derives its existence from the Croatian sports federation in Zagreb founded in 1912 as the only national sports federation with the aim of encouraging, supporting and protecting Croatian football, its national teams and representing Croatian football internationally.³⁶

The bodies of the CFF are the Congress, the Executive Committee, the President of the CFF and its legal bodies.³⁷ The CFF's legal bodies are Disciplinary Committee, Appeal Committee, Committee for the authentication of clubs and players registration, Licences Committee and Appeal Committee for licences.³⁸ The Arbitration tribunal of the CFF is also among these legal bodies.³⁹

According to the *CFF's Regulation on the status of players*, a professional football player with Croatian citizenship, who concluded a contract on professional play with the club, if older than 16 years of age, autonomously takes part in sports competitions (with a status of self-employed persons), while a foreign player (with the citizenship other than Croatian, or a person without citizenship) could conclude a contract of employment and have the status of worker in a labour relationship (status of subordination).⁴⁰ The professional football players of Croatian nationality

³⁴ B. VRBEK, "The role of the Croatian Olympic Committee in creating sports law", *o.c.*, 166-167.

³⁵ Croatian Football Federation (*Hrvatski nogometni savez*), official site: www.hns-cff.hr/?ln=en, (20-04-2013).

³⁶ Statute of the CFF, Art. 1 and 2, available *on line* at: www.hns-cff.hr/file/document/file/145-Statut.pdf, (15-04-2013)

³⁷ Statute of the CFF, *o.c.*, Art. 33.

³⁸ Statute of the CFF, *o.c.*, Art. 55.

³⁹ Statute of the CFF, *o.c.*, Art.61.

⁴⁰ CFF's Regulation on the status of players (*Pravilnik HNS-a o statusu igrača*), available *on line* at: www.hns-cff.hr/upl/products/Pravilnik_o_statusu_igraca.pdf (20-04-2013).

are discriminated since they usually cannot enter into a labour law relationship with all the labour and social law protection, while a foreign player (of citizenship other than Croatian) could conclude a contract of employment and have the status of a worker in a status of subordination, with all rights and obligations which derive out of it.⁴¹ Furthermore, in Art. 2 of the formulary contract (Contract of professional play) issued by the CFF, it is stated that the player has to be registered as a self-employed person (similar to the status of a craftsman) according to Croatian Sports Act and the Income Tax Act.⁴²

As an outcome of such legal regulation of the status of sportspeople, it is not surprising that there are only a few regular court judgements on this issue. One very interesting judgement of the Supreme Court of the Republic of Croatia of 1997 stated “*a contract between a professional sportsman and a sports organization, because of its contents which do not demonstrate that it is a contract of employment, should be defined as a sui generis contract*”.⁴³

Every football player and every club has the right to demand the protection of their rights before ordinary (state) courts, but if actually such protection is sought (which is very rare primarily because of duration of the procedure, better flexibility, informality of procedure and less costs in the arbitration procedure),⁴⁴ such demand is connected with the violation of contract obligations or due payment arising from the contract obligations.⁴⁵

On the other hand, it should be noted that it is not in conformity with the previously stated and with the relevant FIFA and UEFA regulations, that the Statute of the CFF determines that: “*In case of disputes which are in the competence of FIFA, UEFA, CAS, the Arbitration and the Arbitration tribunal of the CFF or the legal bodies of the CFF, subjects of para. 1 of this article oblige themselves not to present claims before ordinary (state) courts*”.⁴⁶

4.2 The Arbitration tribunal of the CFF

According to the autonomous acts of the CFF, the *Arbitration tribunal of the CFF*

⁴¹ CFF's Regulation on the status of players, *o.c.*

⁴² CFF's standard formulary contract of professional play (*Obrazac HNS-a Ugovora o profesionalnom igranju*), available on line at: www.hns-cff.hr/upl/products/Ugovor_o_profesionalnom_igranju.doc (20-04-2013).

⁴³ Croatian Supreme Court, Decision No. Rev 1120/95, of 26-11-1997, (*Odluka Vrhovnog suda Republike Hrvatske, Revr 1120/95*) available on the official web page of the Supreme Court of the Republic of Croatia: <http://sudskapraksa.vsrh.hr/>.

⁴⁴ See, Đ. VUKOVIĆ, E. KUNŠTEK, *Međunarodno građansko pravo*, Zagreb, Zgombić i partneri, Zagreb, 2005, 111. See also: S. TRIVA, A. UZELAC, *Hrvatsko arbitražno pravo*, Narodne novine, Zagreb, 2007.

⁴⁵ V. PULJKO, “*Arbitražno rješavanje sporova u nogometu*”, *Pravni vjesnik*, vol. 7, 2010, no. 2, 60-61.

⁴⁶ Statute of the CFF, Art. 62(1): “*The Federation, its bodies and officials, Federation members, leagues, clubs, players, coaches, football referees, official persons, licensed agents for the*

was established.⁴⁷ As an autonomous and permanent tribunal of one instance, it is competent for status questions of coaches and players and connected to that the material questions originating between single subjects of the CFF (club-club, player-club, coach-club, club-single county football federation) in conformity with the provisions of the acts of CFF, FIFA and UEFA regulations and Croatian laws. From 2002 when it was founded to 2010, the Arbitration tribunal of the CFF adjudicated in more than 500 cases mainly concerning non-paid contract obligations and contract resolution.⁴⁸ In most cases the decision was delivered in 3-4 months, but there are also exceptions with cases pending for a year or more.

The Arbitration tribunal of CFF has six members and delivers its decisions in boards of three members. Members of the Arbitration tribunal of the CFF are elected by the Executive Committee of the CFF upon the President of the CFF's proposals.⁴⁹ Its procedure is run by principles of non-contentious proceedings.⁵⁰ If the parties of the procedure do not make a different agreement, the procedure is made with public exclusion.⁵¹ There are no ordinary legal remedies against the Arbitration tribunal of the CFF decisions, since its decision is final. There is a possibility for a reopening of a case in two months from the date of the decision if there is new evidence and new facts unknown at the date of the decision delivery.⁵² On the other hand, according to the *Arbitration Act*, against an arbitration decision it is a possible to take action for its annulment before ordinary state courts.⁵³

This tribunal has no competence in disputes between subjects in the football organisation derived from the application of sports rules, training compensation, solidarity mechanism, disputes against which not all legal aims were used before the Federation etc.⁵⁴ Except decisions, the Arbitration tribunal of the CFF may also mediate in a dispute settlement.⁵⁵

Ivkošić is of the opinion that we cannot recognise the character of chosen tribunal (arbitration) because it does not fulfil the elementary principles of the arbitration procedure: freewill in concluding the contract on arbitration (or arbitration clause), the independence and autonomy of arbitrators, compliance

organisation of games, licensed agents for players transfers and others football stakeholders recognise the competence of the Court of arbitration for sport (CAS) in Lausanne, Switzerland in conformity with the regulation of FIFA and UEFA Statutes". See also Art. 11 of the Statute of the CFF, *o.c.*

⁴⁷ Statute of the CFF, *o.c.*, Art. 60-63.

⁴⁸ S. HAUTZ, "Arbitražni sud Hrvatskog nogometnog saveza", *Pravo u gospodarstvu*, vol. 50, 2011, no. 4, 914-918.

⁴⁹ Rules of procedure of the Arbitration tribunal of the CFF (*Poslovnik o radu Arbitražnog suda HNS-a*), Art. 3, available *on line* at: www.hns-cff.hr/upl/products/Poslovnik_o_radu_Arbitraznog_suda_HNS-a.pdf, (10-04.2013).

⁵⁰ Rules of procedure of the Arbitration tribunal of the CFF, *o.c.*, Art. 2 and 3.

⁵¹ Rules of procedure of the Arbitration tribunal of the CFF, *o.c.*, Art. 15.

⁵² Rules of procedure of the Arbitration tribunal of the CFF, *o.c.*, Art. 28.

⁵³ Arbitration Act (*Zakon o arbitraži*), Official Gazette (*Narodne novine*) No. 88/01, Art. 36.

⁵⁴ Statute of the CFF, *o.c.*, Art. 60(2).

⁵⁵ Rules of procedure of the Arbitration tribunal of the CFF, *o.c.*, Art. 29.

with elementary principles of arbitration procedure.⁵⁶

It is important to highlight that there is a strong mechanism of enactment of the Arbitration tribunal of the CFF decisions,⁵⁷ *inter alia* in the question of due payment of contract obligations. In case a football club does not fulfil its obligations derived from the decision of the Arbitration tribunal of the CFF and upon the proponents demand, the Arbitration tribunal of the CFF will make a request to the Disciplinary committee of the CFF for suspension⁵⁸ and the initiation of the disciplinary procedure against the football club which did not fulfil its obligations⁵⁹ derived from the Arbitration decision.⁶⁰

5. Clubs' and Players' rights and obligations

5.1 General obligations

The Statute of the CFF provides for the general obligations of all persons and entities operating within CFF to abide by the sports rules set forth by CFF, FIFA and UEFA, while the *Codex on Behaviour of Football Participants*⁶¹ contains a code of conduct that must be followed by all those who are subject to the sports rules of CFF.

Article 11 of the CFF Statute and Chapter 4 of the CFF Codex state that all persons and entities registered with CFF or operating within the Federation must conduct themselves according to the principles of loyalty, honesty and integrity.

These standards of conduct, like in other states, represent the pillars on which CFF's sports justice is based. Not only do all sports offences described by CFF's acts or other sports rules and regulations represent a specification of, - and can be related to - these principles, but any other behaviour not in keeping with the general principle of sportsmanship, even if not expressly codified, can be sanctioned by relevant sports justice bodies of the CFF.

5.2 The responsibility of individuals and clubs

As previously stated, the *Standard contract of professional play* in Croatian football, regulates the rights and obligations of players and clubs. Professional football

⁵⁶ M. IVKOŠIĆ, "Pravni okvir transfera profesionalnih sportaša", in I. Crnić et al., *Uvod u športsko pravo*, Zagreb, Inženjerski biro, 2009, 124.

⁵⁷ Even though, according to the Arbitration Act, the recognition and enactment of an arbitrary decision is made before ordinary state courts. Arbitration Acts, *o.c.*, Art. 47.

⁵⁸ The club may not play official and friendly matches.

⁵⁹ Disciplinary Regulation of the CFF (*Disciplinski pravilnik HNS-a*), available *on line* at: www.hns-cff.hr/file/document/file/152-Disciplinski_pravilnik.pdf (22-04-2013), Art. 136.

⁶⁰ V. PULJKO, "Arbitražno rješavanje sporova u nogometu", *o.c.*, 62.

⁶¹ *Codex on Behaviour of Football Participants (Kodeks ponašanja nogometnih djelatnika)*, available *on line* at: www.hns-cff.hr/file/document/file/817-Kodeks%20pona%C5%A1anja%20nogometnih%20djelatnika.pdf (23-04-2013).

contracts in Croatia, like the usual professional football contracts in most countries that have the contracts of employment, entail the same standard terms, especially the rights and duties of the parties.

Clubs obligations derived from the Standard contract of professional play are: to fulfil economic and other obligations towards the player; to put free of charge at player's disposition its sports-medical and therapeutic care; to fulfil its obligations toward the player if he/she suffers an injury or professional illness during contract performance; to provide vocational training to the player with professional persons; to allow the player to reach its national team for preparation and games; to provide adequate sports equipment; to allow a player attending mandatory schooling or university to fulfil his educational obligations.⁶² It is important to stress that there is no clear and express obligation of the club to provide medical treatment and to continue to pay a player's basic wages during the period when he is injured or otherwise incapacitated.⁶³

On the other hand, the obligations of the player are more precisely regulated in 16 points (while the clubs obligations are regulated in 7 points).⁶⁴ To illustrate the position of professional football players it is important to highlight that players are obliged to take out an insurance policy against professional illness and accidents at work for the duration of the contract on their own and to pay the total contributions for mandatory health and pension insurance.⁶⁵ Other player's obligations are: to make efforts to play and train at best of its possibilities and to avoid anything that could distort the image of the club or have effect on the club's results and club's functioning; to behave in a sport and fair-play manner with all participants of a football match including the spectators; not to take part in other football activities which do not derive from the contract and which are potentially dangerous without

⁶² Standard contract of professional play of the CFF, Art. 7, available *on line* at: www.hns-cff.hr/hns/propisi/hnsa/propisi/obrasci (22-04-2013).

⁶³ Standard contract of professional play of the CFF, *o.c.*, Art. 5 and 7.

In fact there is a similar Club's obligation, but it is not of the same meaning and puts the players in an unfavourable position regarding their health care. "*The Club is obliged to put at player's disposition its sports-medical and therapeutic care, without fee..... If the Player during the performance of the contract suffers injury or professional illness and is not able to fulfil its obligation towards the Club for a certain period or for a longer period, the Club will perform its obligation in conformity with the Club's Regulation about rewarding.*" If at first sight it seems that these two articles are not that different from the usual employment law ones, there is still a big difference. There is no obligation for the club for provide medical treatment, but only to put its own medical infrastructure at disposition. With almost half of clubs competing in the first division with budget problems and without financial resources, it is obvious that the medical health is not at a proper level. In the second article, there is no obligation to pay the player in conformity with the contract, but in conformity with the Club's Regulations, which is an autonomous act and could be amended by the Club without consultation with the players or the players' trade union. Since players are not defined as workers, no trade union exists from the labour law point of view. The Croatian Union of professional players (a FIFPro member), is an ordinary union of persons (football players), but not a real trade union with its collective labour law rights including industrial actions rights.

⁶⁴ Standard contract of professional play of the CFF, *o.c.*

⁶⁵ Standard contract of professional play of the CFF, *o.c.*, Art. 5, point 14 and 15.

the club's approval (national team matches are an exception); take part alone or with other persons in sport betting on matches from the competition in which the club is taking part; to take part in club's merchandising (player's participation in media must be approved by the club); oblige to treat as a business secret any information prescribed as such by the club's acts; to present itself before the club's medical staff immediately in case of illness or injury and to inform its coach about what happened; upon the club's order to play for another club (loan)⁶⁶ and to appoint an accountant.^{67 68} By concluding the contract, the player agrees to confer its image rights completely to the club.⁶⁹ In regard to the legal status of professional players in Croatia it is quite unusual that since they are self-employed persons they issue an invoice to their club every month for their sports performances in the previous month.

As previously stated, professional football players in Croatia do not enjoy a well-deserved labour and social law protection. According to the current legal status, it is impossible for a football player to challenge an autonomous decision of the club's Board regarding the player's disciplinary responsibility⁷⁰ or for employers – clubs to subject themselves to the requirements of the relevant provisions of labour law and notably to the rules on unfair dismissal.

Furthermore, it is important to highlight that the primary duty of the club is to pay the player the remuneration (salary) agreed throughout the duration of the contractual engagement between the parties.⁷¹ As will be demonstrated in this chapter, the latter is not respected as it should be.

There were also cases in Croatia in which the sport clubs denied their professional players to take part in the training process and excluded them from the first team, simply because they did not want to conclude a new contract or to agree to a decrease in salary. In the (labour) relationship between the player and the club, there are rights but also obligations on both sides. The sport clubs are required to fulfil their obligations deriving from individual contracts with the players as well, or their obligations arising from the collective agreement, as is the case for example in Italy, Spain etc. In Croatia, since players are not workers, but self-employed persons, there is no collective agreement in Croatian sport in general, nor in football in particular.

⁶⁶ There is no obligation to obtain player's consent for that loan.

⁶⁷ Professional players in Croatian football are in a legal status of self-employed persons, so they have to have a contract stipulated with an accountant or drive its financial books on their own.

⁶⁸ Standard contract of professional play of the CFF, *o.c.*, Art. 5.

⁶⁹ Standard contract of professional play of the CFF, *o.c.*, Art. 6.

⁷⁰ See for example: Dinamo defender Vida fined £ 80,000 for opening a can of beer and Dinamo midfielder Sammir was fined Euro 270,000 for partying in night clubs, available *on line* at: www.dailymail.co.uk/sport/football/article-2208590/Dinamo-defender-Vida-fined-80-000-opening-beer.html (22-04-2013). The Disciplinary Regulation of the CFF, *o.c.*, Art. 45 (which stipulates the maximum of sanctions that a club may prescribe in its autonomous acts) is not implemented in a proper manner and players are helpless in this regard.

⁷¹ J. ANDERSON, *Modern Sports Law*, Hart Publishing, Oxford, 2010, 299.

6. *Sports offences*

As regards sport offences, special attention should be paid to the role of the NOC of Croatia concerning doping issues.⁷² The World Anti-Doping Code, besides addressing all issues related to doping control, substances and methods, procedures to determine doping, procedures following a positive doping test and sanctions, also establishes the role and responsibilities of the NOCs (point 20.4). The NOC of Croatia obligations arise as follows:

- to ensure that their anti-doping policies and rules conform to the Code;
- to require Athletes who are not regular members of a National Federation to be available for Sample collection and to provide accurate and up-to-date whereabouts information as part of the National Registered Testing Pool during the year before the Olympic Games as a condition of participation in the Olympic Games;
- to require as a condition of membership or recognition that National Federations' anti-doping policies and rules comply with the applicable provisions of the Code;
- to cooperate with their National Anti-Doping Organization;
- to withhold some or all funding, during any period of his or her Ineligibility, to any Athlete or Athlete Support Personnel who has violated anti-doping rules; and
- to withhold some or all funding to its member or recognized National Federations that do not comply with the Code.

Pursuant to the above cited the NOC of Croatia Statute contains provisions whereby the NOC of Croatia shall “combat doping and the use of substances and procedures prohibited by the IOC or international federations”. The NOC of Croatia has adopted the World Anti-Doping Code and cooperates with the Croatian Institute for Toxicology and Anti-Doping in combating doping in sports. In the process of giving approval to the statutes of national sports federations, in harmonising the statutes of national sports federations with the NOC of Croatia Statute, the inclusion of the following provision is essential: “participation in combating doping, the use of substances and prohibited procedures in federation member sports activities and competitions, pursuant to the World Anti-Doping Code”, if this provision has not already been included in the statute of a NOC of Croatia member national sports federation.

The NOC of Croatia Council has taken into account the Croatian Institute for Toxicology and Anti-Doping's Rules on Combating Doping as an indispensable act in conducting anti-doping in sports and the act has been forwarded to NOC of Croatia member national sports federations for implementation such that they will become a part of sports rules and the rights and obligations of their members and participants.

⁷² This paragraph about doping and NOC of Croatia competence is cited from: B. VRBEK, “*The role of the Croatian Olympic Committee in creating sports law*”, o.c., 141-142.

It should be said that according to the *Criminal Act of Croatia*,⁷³ there are some criminal offences that could be applicable to persons in the sport sector, such as unlawful production and trafficking of substances prohibited in sports;⁷⁴ bribery;⁷⁵ power trafficking;⁷⁶ and bribery connected with power trafficking.⁷⁷ Match fixing is not prescribed as a criminal offence in Croatian legislation, but there are opinions it should be qualified as fraud.⁷⁸

On the other hand, according to *Disciplinary Regulations of the CFF*, doping⁷⁹ and match fixing,⁸⁰ are regarded as disciplinary misdemeanour.

To conclude, none of the persons or entities under disciplinary proceedings can be exempted from responsibility because they were not aware of provisions (criminal, misdemeanour and disciplinary) that they have breached. All sports rules and of course state laws are immediately binding and presumed to be fully known by all persons and entities operating within CCF's organization following the publication of the relevant public statement issued by the Federation, with no room to provide evidence testifying to the contrary.

7. Sanctions on clubs and players

This part of the paper focuses on CFF's rules. According to *the Statute of the CFF* and *the Disciplinary Regulation of the CFF*, there are disciplinary sanctions applicable to clubs, players, officials, agents, trainers, staff and other persons registered with the CFF.⁸¹

Sanctions applicable to clubs are:

- warning;
- reprimand;
- fine;
- prohibition of playing matches in a certain stadium or in all stadiums of a certain region;
- prohibition of playing matches outside Croatia;
- playing one or more matches behind closed doors;
- transfer ban for one or two transfer windows;
- deduction of points or negative points; and

⁷³ Criminal Act (*Kazneni zakon*), Official Gazette (Narodne novine), No. 125/11, 144/12.

⁷⁴ Criminal Act, *o.c.*, Art. 191.a.

⁷⁵ Criminal Act, *o.c.*, Art. 293 and 294.

⁷⁶ Criminal Act, *o.c.*, Art. 295.

⁷⁷ Criminal Act, *o.c.*, Art. 296.

⁷⁸ M. PAJČIĆ, L. SOKANOVIĆ, "Manipulacija rezultatima sportskih natjecanja – kaznenopravna odgovornost za kazneno djelo prijave", *Collected papers of the Law Faculty of the University of Split (Zbornik radova Pravnog fakulteta u Splitu)*, vol. 48, 2011, no. 4, 857-873.

⁷⁹ Disciplinary Regulation of the CFF, *o.c.*, Art. 75.

⁸⁰ Disciplinary Regulation of the CFF, *o.c.*, Art. 80.

⁸¹ Statute of the CFF, *o.c.*, Art. 58; Disciplinary Regulation of the CFF, *o.c.*, Art. 8-49.

- exclusion from a competition and relegation to the lower divisions.

Players, officials, agents, trainers, staff, and other persons registered with the CFF and/or operating within the organization of the CFF may be sanctioned for their misconduct. These offences may be reported in the documents written by referees and other officials or resulting from the evidence during an investigation or disciplinary process. The persons charged with sports offences may be provisionally suspended during the disciplinary proceedings opened against them.

For the purpose of this book, the author will highlight the sanctions applicable to players, which are quite similar to those applicable to other persons in Croatian football. Sanctions applicable to players, include:

- warning;
- reprimand;
- fine for the players who have a contract with the club;
- suspension for a determined number of matches;
- suspension for a determined time frame;
- exclusion from a football club; and
- exclusion from the football organisation.

To conclude, upon finding that sports offences have been committed, the disciplinary bodies of the CFF impose on the persons and/or entities found guilty sanctions provided for by the relevant acts or other applicable sports rules and regulations. The disciplinary bodies of the CFF determine the type and extent of sanction according to the kind and gravity of the offence, while taking into account the applicable mitigating and aggravating circumstances, if any. Furthermore, the sanction may be reduced due to the collaboration of the party, and increased in the case of recidivism.

8. *Dispute settlements*

The wide variety of regulations, orders and provisions of a sports federation gives rise to different forms of dispute settlements, the most important of which will be illustrated hereafter. The following summary focuses on dispute settlement within the CFF.

8.1 *Technical disputes*

Like regulations of UEFA and other national football associations, *CFF's Regulations*⁸² make a distinction between referee's factual errors (incorrect assessment of facts during a game) and breaches of football rules (incorrect

⁸² CFF's Regulation on football competitions (*Pravilnik o nogometnim natjecanjima HNS-a*), available *on line* at: www.hns-cff.hr/file/document/file/148-Pravilnik_o_nogometnim_natjecanjima.pdf (22-04-2013); Regulation on referees, refereeing and referee instructors (*Pravilnik o sucima, sudenju i sudačkim instruktorima HNS-a*), available *on line* at: www.hns-cff.hr/file/document/file/163-Pravilnik_o_sucima_sudjenju_i_sudackim_instruktorima.pdf (22-04-2013).

interpretation of the rules of the game).

The referee's decisions during a match made based on his perception are considered to be factual decisions that are final and exempted from the judicial review within the association.⁸³ Since CFF's delegates monitor the game and the referee's performances, if the referee made big factual errors, he could be banned from referring a number of matches or relegated to a lower division.

In case of breach of football rules, official CFF committees for competition may subtract points from the club that made a misdemeanour (e.g. club played a match with a player who was not eligible to play the match); in some cases register the match with the score 3:0 (*par forfe*) in favour of the opponent; or annul the game's result and order a replay.⁸⁴

8.2 Disciplinary disputes

As regards disciplinary offences offenders will be charged for offences made with intention or negligence, except in the case of disorders on the stadium or in the case of supporters' insults on the grounds of racial or other forms of discrimination, whereas the club will be charged for whatever happens on its stadium. Clubs are responsible for maintaining safety and security and for the behaviour of their supporters, both inside and around the stadium before, during and after their matches.⁸⁵

During the match, the referee is in charge of imposing disciplinary sanctions and its decisions are final.⁸⁶ The disciplinary bodies are: the *Disciplinary committee of the CFF* in the first instance and the *Appeal committee of the CFF* in the second instance, with both having five members appointed by the Executive committee of the CFF and at least the president and one member should be lawyers.⁸⁷ In exceptional cases, the *President of the Disciplinary committee* gives judgments on his own.⁸⁸ The procedure should be urgent and economical, and in the first instance, it should not last more than three months.⁸⁹ The procedure in the second instance should also last not more than three months.⁹⁰

None of the persons or entities under disciplinary proceedings can be exempted from responsibility because they were not aware of the sports provision

⁸³ Disciplinary Regulation of the CFF, *o.c.*, Art. 107.

⁸⁴ CFF's Regulation on football competitions, *o.c.*, Art. 74-79. It is important to stress that annulment of the game's result *ex officio* is possible in case that a referee because of immoral reasons influenced the final result of the match (there should be a judicial or disciplinary decision in force for such misconduct), Disciplinary Regulation of the CFF, *o.c.*, Art. 80.

⁸⁵ Disciplinary Regulation of the CFF, *o.c.*, Art. 3.

⁸⁶ Disciplinary Regulation of the CFF, *o.c.*, Art. 107.

⁸⁷ Disciplinary Regulation of the CFF, *o.c.*, Art. 109 and 110.

⁸⁸ Disciplinary Regulation of the CFF, *o.c.*, Art. 111.

⁸⁹ Disciplinary Regulation of the CFF, *o.c.*, Art. 125

⁹⁰ Disciplinary Regulation of the CFF, *o.c.*, Art. 147.

they have breached, however in latter case they could be charged with a milder sanction.⁹¹ All sports rules are immediately binding and are presumed to be fully known by all persons and entities operating within CFF.

8.3 *Economic disputes*

As previously stated, the primary duty of the club is to pay to the player the remuneration (salary) agreed throughout the duration of the contractual engagement between the parties. Even though such obligation seems normal, as it is demonstrated in this paper, it is not always the case in Croatia. The main reason is that it is a civil law relationship governed by completely different system of legal principles, than the labour law one. As the author points out, professional players are facing an alarming situation. Only six out of sixteen clubs in the Croatian Premier League have in the season 2011/12 fulfilled their obligation towards their players; the salaries of footballers in ten clubs were not paid on time and the average delay period was six months.⁹²

It is important to emphasise that there is a strong mechanism of enactment of the Arbitration tribunal of the CFF's decisions,⁹³ especially in the question of due payment of contract obligations. In case that a football club does not fulfil its obligations derived from the decision of the Arbitration tribunal of the CFF and upon the proponent's demand, the Arbitration tribunal of the CFF will make a demand to the Disciplinary committee of the CFF for suspension⁹⁴ and the initiation of the disciplinary proceedings against the football club which did not fulfil its obligations⁹⁵ derived from the Arbitration decision.

For example in the case A-2671/05: *Stjepan Čordaš (coach) v NK Osijek (club)*, before the Arbitration tribunal of the CFF the club had not paid its due obligations derived from the contract to its coach. The coach made a claim before the Arbitration tribunal of the CFF seeking the payment. After that, the parties reached an agreement before the tribunal and the case was closed. In another interesting case A-42/08: *Ante Vitić (player) v NK Osijek (club)* the club had not fulfilled its contract obligation for payment, and the player made a claim. The Arbitration tribunal of the CFF made a decision and obligated the club to pay its debt. Since the club had not paid in the stipulated period and had not respected the Tribunal's decision, the claimant (player) made a demand to the Disciplinary committee to institute disciplinary proceeding against the club. The Disciplinary committee made a decision No. 129/09 and suspended the club. From the

⁹¹ Disciplinary Regulation of the CFF, *o.c.*, Art. 5.

⁹² Croatian Union of professional football players: Club suspensions are first step, available *on line* at: www.fifpro.org/news/news_details/1898 (10-04-2013). The worst examples are: FC Varaždin: 14 months delay. FC Šibenik: 12 months delay, FC Karlovac: 11 months delay.

⁹³ Even though under the Arbitration Act, the recognition and enactment of an arbitrary decision is made before ordinary state courts. Arbitration Acts, *o.c.*, Art. 47.

⁹⁴ The club may not play official and friendly matches.

⁹⁵ Disciplinary Regulation of the CFF, *o.c.*, Art. 136.

Arbitration tribunal's decision to the Disciplinary committee's decision 30 days passed. In the end, the club paid all the debts.⁹⁶

9. Conclusions

In Croatia sports law is developing slowly although it is gaining momentum. Sports justice as an integral part of it and of vital importance. As it was demonstrated in this chapter, there are not many decisions before ordinary (state) courts relating to sports. The arbitration tribunals, from the NOC of Croatia arbitration bodies to sports federations arbitration bodies, such as CFF's one, play the key role in this respect.

Although a substantial number of major sports federations provides real arbitration or proper tribunals, sports justice in Croatia still lacks the appreciation it deserves for the consideration of the specificity of sports and its influence on all the involved parties forming the basis of which, mostly it is not perceived as a discrete system of values.

Sports justice must respect the basic principles of law along with the principle of the specificity of sport. On the other hand, with the approaching change in the legal status of professional players with the accession of Croatia to the EU, where they will acquire labour law status because of the social dialogue outcome, the author is of the opinion that the number of cases before ordinary courts will rise. Likewise, it should be kept in mind that the specificity of sport and the principle of autonomy of sport are very important, however their aim is not to separate the sports world from the legal framework of the state. After all, the sports sector constitutes its inseparable part.

⁹⁶ V. PULJKO, "Arbitražno rješavanje sporova u nogometu", o.c., 62.

SPORTS JUSTICE IN THE CZECH REPUBLIC

by *Marketa Haindlova**

SUMMARY: 1. Autonomy of Sports justice – 2. Relationship between ordinary and Sports justice – 3. Sports legislation in the Czech Republic – 4. Sports associations – 5. The appeal and Audit Commission of the Czech FA – 6. Case study: decision of the Czech FA to fight match-fixing – 7. Case study: organisation of Sports justice in doping cases – Zapalač doping case – 8. Conclusions

Abstract:

This article examines when and how the sports law in the Czech Republic is applicable, what are the legal aspects of autonomy of sport, the relationship between ordinary justice and Sports justice as well as their main principles and legal basis. Sports law, generally speaking, is very heterogeneous and therefore it is not simply transnational, but due to international sports bodies more universal. Even more, this legal field is represented by specific legal order where we can find common legal principles such as separation of powers and relevant procedural principles and these principles seem to be essential to the most important elements of sports to the athletes. The central theme of the article is dedicated to a development and functioning of the major sports organization, i.e. the Football Association of the Czech Republic and its legislation and organisation. Finally, various issues in current sports law and specific examples that can be found in the Czech Republic are discussed in all its related particularities. The conclusion is trying to focus on the most sensitive topic, overlapping of the two areas, autonomy of sports organisations and the interests and power of the state bodies.

1. Autonomy of Sports justice

The practice of sport is the core human right exercised all over the world with

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reference to Art. 4 of the Olympic Charter that states, *inter alia*, that:

“Every individual must have the possibility of practicing sport, without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity and fair play”.

The Olympic Charter as a key document settling down main principles of all sports fields covers the principle of autonomy in Art. 5:

“Sports organisations within the Olympic Movement shall have the rights and obligations of autonomy, which include freely establishing and controlling the rules of sport, determining the structure and governance of their organisations, enjoying the right of elections free from any outside influence and the responsibility for ensuring that principles of good governance be applied”.

This fundamental principle sets the independence of any sports organisation and especially the inner structure of organs, e.g. disciplinary and arbitration committees that are fully competent to deal with any sports related issues within its particular sports field, to settle disputes, i.e. to solve all issues without any interference by state authorities.

On 11 July 2007, the European Commission presented the White Paper on Sport that stresses the need for the principle of autonomy:

“The Commission acknowledges the autonomy of sporting organisations and representative structures (such as leagues). Furthermore, it recognizes that governance is mainly the responsibility of sports governing bodies and, to some extent, the Member States and social partners. (...) Most challenges can be addressed through self-regulation respectful of good governance principles, provided that EU law is respected, and is ready to play a facilitating role or take action if necessary”.

However, the Czech law does not explicitly adopt the principle of autonomy. On the other hand, this principle is generally accepted as a rule and therefore recognized by state authorities. Nevertheless, the principle of autonomy is not absolute, i.e. shall not go beyond mandatory law and has to follow constitutional law principles.

With regard to the principle of autonomy, independent sports regulations might be and are often denoted as the quasi-legal system, *lex sportiva* or international sports law (when international dimension is put in place).

2. Relationship between ordinary and sports justice

Sports issues have a double dimension and must be considered both by sports justice and ordinary courts. However, sports justice offers a fast and a specialist assessment. Moreover, it requires a lower level of evidence than ordinary justice.¹

¹ According to CAS jurisprudence, see Arbitration CAS 2010/A/2172 O. v. Union des Associations Européennes de Football (UEFA), award of 18 January 2011, 1: *“According to CAS jurisprudence, the degree of proof requested in a case of match fixing is in line with the degree of proof requested for disciplinary doping cases. Therefore, the relevant facts must be established to the comfortable satisfaction of the Panel having in mind the seriousness of the allegations.*

The distinction between ordinary and sports justice originates from a specificity of sports generally that will be discussed further.

2.1 Sports legislation

Sports legislation might be described as sports regulations² in any appropriate sports field whose observance is required in connection with the exercise of a particular sports field and whose breach is (to various extent, with various intensity and consequences) sanctioned by special entities.

Similar aspects with ordinary legislation might be found when considering the purpose of its existence as well as the content, form, certainty, universality and other attributes necessary for a proper, quality and effective application as a rule of behaviour. The purpose of its existence is therefore of the same nature, i.e. to regulate behaviour of involved participants in order to accomplish followed aim and to ensure coexistence of participants with sufficient legal certainty.

However, sports legislation shall not be considered as an isolated phenomenon. To indicate the relationship between sports legislation and ordinary legislation it is of crucial importance to define a nature of sports activities.

On the one hand, sports activities might be seen as “rules of the game” that are predominantly regulated by sports organisations; this fact underlines the principle of autonomy. However, this approach is not absolute. Indirect intervention might be seen e.g. when taking account of a liability for sports injuries where criminal sanctions might be applied by criminal courts and these injuries are subject to compensation by an offender.

Ordinary legislation should define only borders to sports legislation and put the autonomy of sports organisations into practice. A “reverse brake” is then embodied into the possibility of judicial review of any sports decisions based on section 15 of Act No. 83/1990 Coll., Citizens Association Act, that states the following:

“If any member of the association considers the decisions of its bodies, against which there is not an appeal in accordance with statutes, be unlawful or contrary to the articles of association, he may within 30 days from the date on which he became aware of it, but not later than six months after the decision, ask the court to determine whether such a decision is in accordance with the law and the statutes of the association”.

This provision thus puts limited possibilities to review decisions made by sports associations. The ordinary court protection might be found with regard to further

Evidence of repeated contacts between the referee and the members of a criminal group involved in match-fixing and betting fraud, in particular the establishment of the fact that the referee had been contacted by persons who offered him money to manipulate the results of a match, constitutes not only a proof to the comfortable satisfaction of the Panel but indeed a proof beyond reasonable doubt”.

² M. SUP, ‘Sportovní normy (pravidla) a jiné nepravňní prameny pravidel chování sportovce’, in J. Kuklík, *Sportovní právo*, Prague, Auditorium, 2012, 82.

decisions:

- a. decision that breaches the law,
- b. decision that breaches statutes of the particular sports association,
- c. decision that differs from facts of a case,
- d. irrational decision.

Additional problems arise out of an intersection of sports legislation and ordinary legislation when certain issues are covered by both legislations. Decisions of the Court of Justice of the European Union are commonly known as an example of the aforementioned conflict (e.g. the *Bosman*, *Bernard*, *Mecca Medina*³ cases describing a conflict of international sports rules and European law).

On the other hand, sports activities may include mainly material, institutional, financial and other organisation of sports activities. Unlike the abovementioned, ordinary legislation dominates in this area. Legal issues such as tax benefits of sport organisations, subsidies from the state and other public budgets, sponsorship, employment contracts with athletes, etc. are primarily regulated by ordinary legislation.

2.2 Principles of sports justice

The application of principles associated with the right to a fair trial come into force. The degree of application of circuit procedural principles and their legal impact on the quality of the final decision will be subject to further consideration in this article.⁴

The “sports procedural law” has specific peculiarities compared to ordinary procedural law (civil and criminal justice). In general, sports associations did not establish regulations entirely comparable with ordinary legislation. The specificity of sport, in particular, puts stress on the need to make decisions as fast as possible that gives rise to the establishment of a quasi-judicial system. This premise is put into practice with regard to the principle of the independence of sports associations.

Despite the fact that relevant decision-making bodies are not usually given a deadline to put a decision, the need for accelerated procedure in the treatment of any disciplinary offense requires a higher level of flexibility of sports bodies, i.e. the procedure might not be tied by a disproportionately high formalism as the procedure before ordinary courts.

With regard to the specificity of sport and all of its aspects, the settlement of cases should be based at first on the following principles:

- a. quickness,
- b. flexibility,
- c. justice and equity.

³ D. CHALMERS, G. DAVIES, G. MONTI, *European Union Law*, Cambridge, Cambridge University Press, 2010, 799.

⁴ P. HAMERNÍK, ‘*V čem spočívá podstata sportovního práva?*’, in J. Kuklík, *Sportovní právo*, Prague, Auditorium, 2012, 22.

The quickness is considered as a key element of each sports related issue. The unique environment within a particular sports field puts stress on a fast procedure when dealing with any cases by appropriate disciplinary (and other) bodies. Simultaneously, the quickness distinguishes the sports procedure from ordinary court review and often prevents ordinary courts from dealing with sports related cases.

The quickness is of fundamental importance. The ordinary judicial review has no potential to handle the case, e.g. during the current competition season etc. In particular, if an athlete would seek judicial review of a sports body's decision to disqualify from a competition, after several years the ordinary court would additionally allow participation of this athlete in the competition. However, after such a long period, this result would be of negligible importance.

The abovementioned principle of flexibility should be perceived in relation to the quickness. The principle of flexibility represents the way of case-by-case dealing taking account of all specificities as well as the proportionate level of knowledge and specialism compared to ordinary courts. Further, the fact that disciplinary committees of sports associations might initiate proceedings with the offender without a motion to commence a procedure is also an attribute of flexibility.

The principle of justice and equity is, on the other hand, often in conflict with principles of quickness and flexibility. The need for fast dealing and following specific regulations often decreases the level of proper and deep handling with cases. However, sports justice deals with a substantially lower amount of cases and therefore the proper consideration of each case is still observed.

As well as the ordinary court procedure, standard procedural principles are also followed by sports justice, i.e. the principle of formal truth, principle of discretion in weighing evidence, disposition principle, equality of participants, straightness of a trial, public nature of a trial, economy of proceedings, etc.

As an example, a specification of main procedural principles might be found e.g. in the Regulations for Doping Control and Sanctions in Sports in the Czech Republic in the Art. 13.2.2.:

- *a timely hearing;*
- *fair, impartial and independent hearing body;*
- *the right to be represented by counsel at the person's own expenses; and*
- *timely written, reasoned decision.*

Despite the fact that sports justice adopts basic procedural principles, other principles are often affected to the detriment of parties whose case is challenged. Therefore, if fundamental principles are not observed, the ultimate way is an appeal to state authorities.⁵ However, this right shall be used as *ultima ratio* as a way of the preservation of justice.

⁵ Section 15 of the Act No. 83/1990 Coll., Citizens Associations Act.

2.3 *The right to a fair trial*

These principles constitute the so called right to a fair trial that is specified in Art. 6 of the European Convention on Human Rights. The Czech law covers this fundamental principle in Art. 36, paragraph 1 and also other related provisions of the Title V of the Charter of Fundamental Rights and Basic Freedoms of the Czech Republic (hereinafter “the Charter”) as well as in the Constitution of the Czech Republic.⁶

The right to a fair trial is further characterized by additional principles, i.e. independence and impartiality of courts (or other relevant bodies), equality of parties, oral proceedings, a straightness, a consideration without undue delay, a right to defence and a presumption of innocence.

The concept of a fair trial (reasonably granted also for legal persons) is, however, formulated as a principle towards state authorities that are obliged to meet given criteria and implement this fundamental human right. This concept applicable before ordinary courts and before other bodies legally competent (according to public law) to make decisions is undisputable.

On the other hand, sports associations do not have a public law character. They are regarded as self-governance authorities based on the principle of free association of citizens⁷ that do not represent a law monopoly. On the basis of constitutional and legal acts, it is not possible to infer direct application of the right to a fair trial in the sports sector in the Czech Republic.

As seen above, not all additional principles are fully applicable before sports bodies due to the need for a greater flexibility and therefore a lower formalism and a different structure of individual organs are established.

The sports procedural law further privileges a principle of procedural economy that is a key principle to achieve fast decisions in disputes within current sports association competitions. Increasing pressure on fast proceedings may be in contradiction especially to a principle prohibiting *ex parte* investigation and hearing (i.e. to what extent persons whose rights and obligations are deciding may be directly involved in the proceedings).

The impartiality (or the independence) of the sporting body and the principle of presumption of innocence are also fundamental parts of the fair trial principle. This element, however, does not have a systematic character as previously mentioned and is rather connected especially with a current structure of a sports body, moral quality of its members and a general culture in the particular sports field.

3. *Sports legislation in the Czech Republic*

In general, Act No. 83/1990 Coll., Citizens Associations Act set briefly a legal background for operations of sports associations in the Czech Republic. However,

⁶ Art. 90 of the Czech Constitutional Act.

⁷ Section 1 of the Act No. 83/1990 Coll., Citizens Associations Act.

the Czech legal system does not include a specific “sports act” that would regulate a sport field in detail, encourage and promote the role of sport in society and provide the establishment of sports justice.

The Czech legal system does offer a special act for sport, the Promotion of Sport Act.⁸ Nevertheless, this Act contains mainly declaratory provisions⁹ rather than specific articles dealing with complicated sports issues. This Act gives a legal definition of sport while further definitions that might bring a legal certainty in several sports where legal issues are missing.

In general, legal issues in sport are regulated by private law statutes such as the Czech Civil Code¹⁰ and the Commercial Code,¹¹ while tax matters are regulated by the Income Tax Act¹² and employment matters (not common and applicable in the Czech sports environment) are regulated by the Labour Code.¹³

The Czech sports legislation finds its place in the middle of an intersection between two areas. On the one hand there are unclear definitions of basic institutes in sport arising out of an absence of an unambiguous Sport Act, on the other hand there is an ordinary legislation that steps in the field of sport and therefore increases a legal uncertainty.

As might be seen, the aforementioned legal uncertainty causes several legal problems and disputes, where the basic legal principles and standards commonly present in the “rule of law” are not applied. Therefore, the current situation provided influence to set up a year long working group focused on creating an arbitration tribunal for sport, because of the experience with ordinary courts and with the situation in general that is no longer sustainable. The need for necessary changes in legislation is inevitable.¹⁴

4. *Sports associations*

In general, sports associations (predominantly civic associations according to the Association of Citizens Act) created a complexity of legislative framework as well as a structure of authoritative bodies to govern its particular sports field. These bodies might be recognized as authorities for creating internal normative regulations (especially general assembly), executive bodies (executive committees and expert committees) and quasi-judicial bodies (disciplinary, appeal and possibly arbitration

⁸ Act No. 115/2001 Coll. the Promotion of Sport Act.

⁹ Section 4 Act No. 115/2001 Coll. the Promotion of Sport Act: Ministry of Defence and Ministry of Interior creates conditions for the development of sport, for the preparation of the national sports representation and preparation of sports talents and establish their departmental sports centres and ensure their activities.

¹⁰ Act No. 40/1964 Coll., the Czech Civil Code.

¹¹ Act No. 513/1991 Coll., the Czech Commercial Code.

¹² Act No. 586/1992 Coll., the Income Tax Act.

¹³ Act No. 262/2006 Coll., the Labour Code.

¹⁴ Since 2012, a special working group prepares the conditions for a creation of the Arbitration Court for Sport of the Czech Republic.

committees) usually formed under statute provisions in order to settle disputes arising mainly from the application of internal regulations within the particular association.

Regarding the abovementioned, a traditional division of powers into legislative, executive, and judiciary might be recognized. On the other hand, sports associations are obliged to follow general basic legal principles and a Czech legal system including the Citizens Associations Act in order to ensure a properly working system in a particular sports association.

Sports associations should be based on the premise that these legal entities (in contrast to the state authorities and institutions) are entitled to exercise their “power” (normative, executive and quasi-judicial) only in relation to their members. This means that every entity (stakeholder) accepts rules that exist in a sports association and provides its eligibility (through its institutions) to determine rights and obligations of a sports association when becoming a member. Simultaneously, members might not be forced to maintain their membership in a sports association and are fully independent to leave this association anytime they wish.

Although the Czech legal system does not provide a strict regulation of sports (civic) associations, it is obvious these associations should intervene only in domains of their members closely connected to activities of a particular association. Nevertheless, they may not decide on matters that fall within state’s authorities, e.g. a decision regarding a deprivation of liberty of players who have intentionally and seriously injured opponents during a match or decisions on private claims among its members (with some exceptions of arbitration issues) especially in cases of liability. These issues are exclusively assigned to ordinary courts.

Sports associations, as discussed already above, are considered as private law entities. This private law character formulates restricted possibility to review decisions of sports associations by ordinary courts.

On the other hand, a legal doctrine occasionally assigns the public law character to sports associations. In this case, sports associations as public corporations would be part of a public administration, i.e. all decisions of sports associations would be considered as the result of administrative procedure and therefore reviewable before administrative courts.

Distinctive methods of settlements of disputes, reluctance to put disputes before ordinary courts and a preference of internal settlement of disputes with regard to the monopoly of sports associations shall exclude the chances of the court revision.

Finally, there is another aspect that should be highlighted – time consuming proceedings – because these cases dealing with sports issues in the Czech Republic are lasting for at least one year.

4.1 Sports justice of the Football Association of the Czech Republic

A descriptive example of a relatively sophisticated and a high-quality treatment

providing a decent guarantee of procedural rights to parties is the quasi-judicial system of the Football Association of the Czech Republic (hereinafter “the Czech FA”) as the biggest sports association in the Czech Republic.¹⁵

The Disciplinary Committee and the Appeal and Audit Commission of the Czech FA are two main committees that create a “football justice” in the Czech Republic, while the Arbitration Committee competent mainly in financial disputes between clubs and players completes the structure of quasi-judicial bodies of the Czech FA.

The Disciplinary Code and the Statute of the Appeal and Audit Commission of the Czech FA are two core regulations giving legal framework for particular stakeholders. The general framework of the operation of the Disciplinary Committee and the Appeal and Audit Committee of the Czech FA is already given by Statutes of the Czech FA, e.g. Article 28, paragraph 1 states that:

“The Czech FA authorities shall ensure that rights of members and participants of competitions were applied in accordance with the principles of fair play and the rules of morality”.

At district and regional level, a disciplinary procedure is governed by local disciplinary bodies. If a case is heard in the first stage before disciplinary bodies of district or regional football associations, an appeal shall be filed to executive committees of district football associations or specialized appeal and audit commissions of regional football associations. In addition, an inducement to review a case is admissible as the third degree regular remedial measure and therefore this review procedure is run by the Appeal and Audit Commission of the Czech FA.

The disciplinary procedure is regulated by the Disciplinary Code of the Czech FA:

“According to this Disciplinary Code of the Czech FA all disciplinary offences in Czech football are discussed, i.e. all participants’ offenses organized by any component of the Football Association of the Czech Republic and irrespectively whether the offender is a member of any of the organisations belonging to the Czech FA or not” (Article 1).

Further, the appeal/review procedure is regulated by the Statute of Appeal and Audit Commission of the Czech FA.

Basic procedural guarantees for individual parties, especially for the offender/appellant (a person whose guilt/appeal is under consideration) are made with regard to the participation in the procedure. Article 16, paragraph 1 of the Disciplinary Code accepts participation of an offender in a procedure and further even imposes an obligation to attend a hearing (this obligation is not absolute unless the offender is directly summoned).

Therefore, the Disciplinary Code always gives the opportunity to attend a hearing or submit written comments. This arrangement assumes that the offender will be acquainted in advance with the date of the meeting of disciplinary authority.

¹⁵ D. KOHOUT, ‘Uplatnění zásad tzv. Spravedlivého procesu v rámci orgánů občanských sdružení v oblasti sportu’, in J. Kuklík, *Sportovní právo*, Prague, Auditorium, 2012, 125.

These summons are usually performed via registered mail and also via e-mail or fax. The obligation to invite the appellant is briefly defined in the Article 10, paragraph 1 of the Statute of Appeal and Audit Commission of the Czech FA: *“The appeal body shall invite appellants by written invitation on time”*.

This basic arrangement represents a guarantee that the offender/appellant will have the opportunity throughout the procedure to get acquainted with all the facts to apply reasonable arguments. This conclusion is covered by Article 14, paragraph 3 of the Disciplinary Code that allows the disciplinary authority to carry out necessary factual investigations even before the commencement of the procedure or after the commencement of the procedure outside the held hearing. However, the result of the factual investigation is always announced to the offender.

With regard to the previously mentioned efficiency, a sports law procedure is characterized by flexibility and less formalistic approach than ordinary public proceedings, e.g. criminal proceedings. This approach seems to be appropriate with due regard to the differences and specificity of the sports field.

To strengthen the position of the offender/appellant within the Czech FA Article 9, paragraph 3 of the Statute of Appeal and Audit Commission states: *“The appeal body shall, on request, allow persons who are under regulations entitled to file an appeal, to get acquainted with a basis for appeal proceedings, or to take excerpts at any time”*.

This provision provides a logical connection with Article 20 of the Disciplinary Code that imposes an obligation to disciplinary authority to make a record of the hearing and keep a proper documentation. The party to whom a disciplinary punishment was imposed might be, prior to the appeal, acquainted with relevant facts and reasoning of the decision.

The Czech FA legislation regulates also other principles regarding the right to a fair trial. This is mainly due to requirements of the examination of the factual bases (Article 3 and Article 15 of the Disciplinary Code) as well as a fast process in the procedure in order to issue a sentence or a decision of acquittal. Even on appeal/review procedure new materials might be applied unless used before the lower instance (Article 11, paragraph 4), the Statute of Appeal and Audit Commission states:

“The appeal body shall proceed to determine as accurately as possible facts of a case, including an assessment of new evidence not known or presented at a hearing in the first instance”.

Further, Article 10, paragraph 4 explicitly states that:

“The appeal body under all conditions for a proper outset and course of proceeding shall decide about an appeal filed so that unnecessary delay has not occurred a threat to rights of members of the Czech FA and participants of competitions”.

In connection with Article 10, paragraph 3 that puts a right to be represented in the procedure before an appeal body it is possible, in general, to assess formal procedural rules in Czech football as relatively complex and (with some necessary specifics) in harmony with the requirements of the right to a fair trial.

4.2 System of sanctions within the Football Association of the Czech Republic

The specificity of sport is represented by imposing of sanctions within particular sports associations. However, in contrast with the above mentioned principles and standards, the system of sanctions applied by disciplinary authorities of the Czech FA is directly in breach of the right to a fair trial.

The appendix of the Disciplinary Code, i.e. the Tariff of Sanctions, contains an incomplete list of disciplinary offenses. Article 2, paragraph 3 of the Disciplinary Code states, inter alia, that:

“Characters of disciplinary offenses are listed in the Tariff of Sanctions - Annexes 1 to 5, that is an integral part of the Disciplinary Code. If such disciplinary offense not indicated in the Annexes is committed by an offender, the Disciplinary Committee shall impose a sanction according to a provision of the Tariff that is by its nature the closest”.

Although it is necessary to bear in mind that private law provisions are generally applicable in the procedure before sports bodies, it might be stressed that a disciplinary procedure should contain basic criminal proceedings principles. In this case, however, the Disciplinary Code openly admits the principle of analogy and violates herewith the *nullum crimen, nulla poena sine lege* principle. The system of sanctions should be considered as a system of regulations that provide a rigid and exhaustive list of offences and sanctions as commonly known in the field of criminal law.¹⁶

On the other hand, the inspiration by a criminal law is fully accepted in other provisions of the Czech FA regulations, e.g. Article 11, paragraph 3 of the Statute of Appeal and Audit Commission states that:

“The appeal body may change a sanction to the disadvantage of the appellant only if there has been a violation of law in the first instance and sanction was imposed at a lower rate or a treatment set was lighter than stated in the procedure”.

This provision thus incorporates a principle of prohibition of *reformatio in peius* principle and fully corresponds with ordinary criminal proceedings principles and standards.

The indicated fragmentation of law regarding dispute settlements disrupts a legal certainty and constitutes unequal position of several stakeholders before sports bodies of particular sports associations. This situation is absolutely inadmissible and seriously affects the independence of the sports justice.

5. The appeal and Audit Commission of the Czech FA

The Appeal and Audit Commission of the Czech FA (hereinafter “the Commission”) being the highest quasi-judicial organ within the Czech FA represents a final “brake” within the Czech FA and therefore deserves a detailed description.

¹⁶ D. KOHOUT, ‘Uplatnění zásad tzv. Spravedlivého procesu v rámci orgánů občanských sdružení v oblasti sportu’, in J. Kuklík, *Sportovní právo*, Prague, Auditorium, 2012, 128.

Article 8 of the Statutes of the Czech FA (hereinafter “the Statutes”) constitutes the Commission as a body of the highest – republic – authority within the structure of the Czech FA. Pursuant to Article 1 of the Statute of the Appeal and Audit Commission of the Czech FA (hereinafter “the Statute of the Commission”), the Commission and its decisions are completely independent of Executive Committees and other bodies of the Czech FA. Although the Commission cooperates with the Executive Committee of the Czech FA, any interference with activities of the Executive Committee is unacceptable and shall not be effective. Moreover, it is expressly stated in Article 1 of the Statute of the Commission that the Commission is for its activities responsible exclusively to the General Assembly of the Czech FA by which it is elected.

The competence of the Commission can be divided into three branches – the Commission acts as an appeal body, a review body and a financial (audit) body of the Czech FA.

Pursuant to Article 12 of the Statutes in connection with Article 2 of the Statute of the Commission, the Commission is an appeal body for appeals against competition, disciplinary, registration and transfer decisions, issued in the first instance by commissions or institutions governed by the Executive Committee of the Czech FA. Besides, the Commission expresses its implied power also for appeals in referee matters.

The Commission is also a review body for decisions rendered in appeal proceedings by Executive Committees and district and regional football associations in competition and disciplinary matters if the Statutes, rules and regulations of the Czech FA were allegedly violated.

Furthermore, it is a body deciding on whether all competition classes schedules are in accordance with the Statutes, rules and regulations of the Czech FA or whether a decision of a governing body is in accordance with the Statutes, rules and regulations of the Czech FA and with a schedule of the competition as well as an appellate body in matters of withdrawal of coach licenses.

Finally, the Commission is a review body for initiatives to review a decision of a governing body in cases of mergers and divisions of clubs and other decisions taken on the basis of the Organisational Directive for the Activities of Member Clubs of the Czech FA.

According to Article 3 of the Statute of the Commission, the Commission controls the compliance with Statutes, rules and regulations of the Czech FA by bodies of the Czech FA, it is further responsible for compliance with resolutions adopted by General Assemblies and Executive Committees of the Czech FA, monitors the compliance with generally binding legal regulations in the bodies of the Czech FA and carries out the management of means, assets, liabilities and claims of the Czech FA and Regional Football Associations.

Within its role as the financial supervisor of the Czech FA and pursuant to Article 11 of the Statutes of the Czech FA, the Commission performs audits of the finances of the Executive Committee of the Czech FA for which it co-operates with

experts and professional institutions and further verifies the implementation of the resolutions adopted by the General Assembly of the Czech FA.

The Commission is established as a standing body that meets as required, generally once a month. It is composed of five members elected by the General Assembly of the Czech FA for a period of four years whereas three members are elected by the delegates from Bohemia and two by the delegates from Moravia. A member of the Commission cannot concurrently be a member of any elected or appointed organ of the Czech FA at the republic level, including referees and delegates. Also the principle of independence and impartiality is provided in the Statutes under which a member of the Commission will be excluded from any proceedings and decision-making in any matter where the objectivity might be doubtful due to any involvement in the matter under discussion.

As an appeal body, the Commission shall reject an appeal if it comes to the conclusion that it is not justified or it may reject an appeal if the appeal is not completed despite the request as set out in relevant regulations and rules.

If it ascertains a breach or violation of the provisions of the Statutes and relevant regulations and rules of the Czech FA when dealing with appeals, it shall cancel the decision made in the first instance or issue a new decision. After considering all circumstances of a case it may change the length or type of sanctions imposed in the first instance. However, the Commission may change a sanction to the disadvantage of the appellant only if there has been a violation of law in the first instance and the sanction was imposed at a lower rate or a treatment set was lighter than stated in the procedure. As the Commission is not entitled to return the case to the first instance, it shall investigate a case if not sufficiently investigated by the first instance.

6. Case study: decision of the Czech FA to fight match-fixing

Recently, an unprecedented act was adopted by the Executive Committee of the Czech FA which interferes with the decisive power of the Disciplinary Committee and the Appeal and Audit Commission of the Czech FA and which might be considered as an infringement with the fundamental general principle of organizational structure that should be observed by all FIFA/UEFA member associations, namely the independence of judicial bodies.

In its extraordinary Act adopted on 23 January 2013¹⁷ the Executive Committee:

“recommends the Disciplinary Committee of the Czech FA and the Disciplinary Committees of the Steering Committees of the Czech FA to interrupt disciplinary proceedings filed with the Disciplinary Committee of the Czech FA and Disciplinary Committees of the Steering Committees of the Czech FA till 23rd January 2013 concerning infringements pursuant to the Appendix 1 to the

¹⁷In Czech: <http://nv.fotbal.cz/scripts/detail.php?id=124251&tmplid=1347>.

Disciplinary Code, concretely Art. 8, 9, 11 and 16 which were filed with the Disciplinary Committee of the Czech FA, except from cases which are solved by the Police of the Czech Republic on the incentive or on the basis of documents handed over by the chairman of the Czech FA or members of the Czech FA, resp. cases which arise from own knowledge and inquiry of the Police of the Czech Republic”.

This “*entirely extraordinary measure in favor of setting conditions for realization and mission of the Czech FA*” as explicitly stated in the Act of the Executive Committee of the Czech FA as a body managing activities of the Czech FA during the periods between the General Assemblies substantially influences the independent functioning of the disciplinary bodies of the Czech FA. As a consequence, the independence of judicial bodies as a fundamental general principle of organizational structure that should be observed by all FIFA/UEFA member associations might be breached.¹⁸

Furthermore, the following amendment of Art. 1 of the Disciplinary Code which came into effect on 24 January 2013 was adopted:

“In case of a reported or identified suspicion that conduct of members of the Football Association of the Czech Republic fulfills a crime according to Act No. 40/2009 Coll., Criminal Code (§ 331 acceptance of bribe, § 332 bribery, § 333 indirect bribery, § 334 common provisions), the Disciplinary Committee shall hand over its findings and documents to the bodies active in criminal proceedings according to Czech law. In order to secure a uniform procedure in investigation, evidence and evaluation of findings, the Disciplinary Committee shall use evidence, materials and findings of the bodies active in criminal proceedings.”

Even though the amendment could be seen as an effort to facilitate cooperation with the police in cases regarding corruption and match-fixing, it deprives *de facto* the disciplinary bodies of the Czech FA of their powers to investigate and punish disciplinary offenses when awaiting conclusions of police’s investigation and findings. As a practical matter, if the disciplinary bodies declined responsibility to prosecute cases of corruption or match-fixing (pending the final outcome of state criminal proceedings) then it might be expected that sports disciplinary proceedings might only be commenced several years after the relevant infringement had occurred, which seems highly undesirable. In this respect, the UEFA’s policy regarding the prosecution of match-fixing cases (which relies on strong cooperation with the state authorities but which does not entail waiting for the final outcome of criminal proceedings) is supported by the CAS jurisprudence.¹⁹

In this example, the disciplinary proceedings could be launched several years after the alleged breach, if at all. This deprivation of powers is generally considered to be in breach of interests of football industry in the Czech Republic. In addition, the Czech FA regulations currently contain appropriate provisions

¹⁸ Articles 85/1 and 146/3 of the FIFA Disciplinary Code.

¹⁹ Arbitration CAS 2010/A/2172 O. v. Union des Associations Européennes de Football (UEFA), award of 18 January 2011, 47.

covering match-fixing and disciplinary bodies may impose appropriate sanctions, while the Czech Criminal Code does not regulate match-fixing or sporting fraud as a specific offence.

This decision has also further consequences. It prevents also FIFA and UEFA powers to tackle match-fixing in football and denies relevant regulations of FIFA and UEFA as well as all long-term efforts of these organisations to exclude match-fixing from football.

The CAS jurisprudence further stresses the need for zero-tolerance approach implemented by UEFA: *“It is therefore essential in the Panel’s view for sporting regulators to demonstrate zero-tolerance against all kinds of corruption and to impose sanctions sufficient to serve as an effective deterrent to people who might otherwise be tempted through greed or fear to consider involvement in such criminal activities”*.²⁰ In this case, it seems that the zero-tolerance is not fully followed after the decision of the Czech FA.

With regard to all above mentioned aspects, it is evident that the Executive Committee hereby undermines UEFA’s zero-tolerance approach to corruption and match-fixing and does not follow the UEFA’s objective to prevent all methods or practices which might jeopardize the regularity of matches or competitions.²¹

7. *Case study: organisation of sports justice in doping cases – Zapalač doping case*

The special type of proceedings is established by particular sports fields regulations in connection with the Regulations for Doping Control and Sanctions in Sports in the Czech Republic.²² When dealing with doping cases in the Czech Republic, the Czech Olympic Committee Arbitration Panel (hereinafter “COC Arbitration Panel”) is the highest authority to issue a decision in the Czech Republic. Art. 2 of the Statute of the COC Arbitration Panel defines the authority when:

“(...) deciding on appeals against decisions of sporting bodies on anti-doping rule violation in the sense of the Regulations for Doping Control and Sanctions in Sports in the Czech Republic and deciding on appeals in cases where the authority is based on Statutes or regulations of the relevant sporting body.”

In that regard, the Disciplinary Committee of the Czech FA dealt with a case of a Czech professional footballer Mr. Petr Zapalač who was positively tested for clenbuterol – a performance enhancing drug – after a first league match in November 2011.

²⁰ Arbitration CAS 2010/A/2172 O. v. Union des Associations Européennes de Football (UEFA), award of 18 January 2011, 47.

²¹ Article 2/1/e of the UEFA Statutes.

²² Art. 13.2.2 of the Regulations for Doping Control and Sanctions in Sports in the Czech Republic: *“In cases involving national-level Athletes (...), the decision may be appealed according to Sports Federation’s statutes and further after appeal’s rejection to COC Arbitration Panel”*.

The Disciplinary Committee of the Czech FA that is competent in doping cases according to Art. 2 section 2 b) of the Disciplinary Code of the Czech FA defines, *inter alia*, disciplinary offences as:

“violation of rules, violations of the Regulations for Doping Control and Sanctions in Sport in the Czech Republic and any other standards governing a participation in competitions of the Czech FA organized by governing bodies of the Czech FA at all levels, including offences in the national team and regarding international relations.”

After due consideration, the Disciplinary Committee of the Czech FA sentenced Mr. Zapalač to 18 months of suspension. Subsequently, the player appealed to the Appeal and Audit Commission of the Czech FA that lowered the sanction of suspension from 18 months to 12 months, while the Anti-Doping Committee of the Czech Republic filed an appeal with the COC Arbitration Panel against the decision when it considers the player’s behaviour grossly negligent and insists on a sanction of suspension for 2 years.

Even though the Anti-Doping Committee of the Czech Republic was not a party before disciplinary bodies of the Czech FA, this Committee has a right to appeal on the basis of the Regulations for Doping Control and Sanctions in Sports in the Czech Republic that states in Art. 13.2.3 following:

“In cases under Article 13.2.2 (Appeals Involving National-level Athletes) the parties having the right to appeal to the COC Arbitration Panel shall be as follows: (a) the Athlete or other Person who is the subject of the decision being appealed; (b) the other party to the case which is the subject of the appeal including; (c) the relevant International Federation; (d) the Czech Anti-Doping Committee; (e) COC and (f) WADA. For cases under Article 13.2.2, WADA and the International Federation shall also have the right to appeal to CAS with respect to the decision of COC Arbitration Panel (...).”

The right to appeal was reasoned further on the fact that the Appeal and Audit Commission of the Czech FA lowered the sanction of suspension from 18 months to 12 months, i.e. issued a new decision that shall be subject to the appeal by the Czech Anti-Doping Committee.

As might be seen above, the COC Arbitration Panel therefore shall be considered as the highest deciding authority in Czech sport regarding all doping cases. Well-established jurisprudence as well as the constant approach to doping cases supports the authority of this body.

On the other hand, an authority to deal with any other related sports cases in the Czech Republic is also *de iure* established. However, this option to decide on appeals in cases where the authority is based on statutes or regulations of the relevant sporting body is currently not used by sports stakeholders in the Czech Republic.

8. Conclusions

As a matter of principle and in order to guarantee the autonomy of sport as well as

independent functioning of sporting bodies, it should be of great importance for these bodies to decide on a case-by-case basis, to either investigate or suspend disciplinary proceedings if they consider that appropriate and depending on circumstances of the case.

As might be seen above, the independence of judicial bodies is a fundamental general principle of organizational structure that should be observed by all sports organisations. This principle is already very well known in all legal systems and the rule of law is respected as a basic principle in all democratic legal systems.

In countries (and there are many of them) where sporting fraud such as match-fixing is not defined as a specific offence under a particular criminal code, there is a risk that match-fixing cases might not lead to conviction by competent state authorities. In other words, the fact that there is no successful criminal prosecution, e.g. for match-fixing, does not necessarily mean that there would be no successful sports disciplinary procedure in respect of the same conduct. Currently, match-fixing is apparently not defined as a specific offence in the Criminal Code²³ of the Czech Republic. Now, it is a matter of Czech government in order to make sporting fraud as a specific criminal offence in the Criminal Code.

As already discussed, the different nature of Sports Justice is underlined also by well-established CAS jurisprudence, when it is sufficient that relevant facts are established *“to the comfortable satisfaction of the deciding body”*.²⁴ Clearly, this is a lower standard of proof than is required before criminal courts (i.e. beyond any reasonable doubt). Therefore, it follows that sports disciplinary proceedings shall not (and should not) be dependent on e.g. the outcome of criminal prosecution by state authorities. This fact supports the importance of Sports Justice in match-fixing cases.

Regarding aforementioned principles of Sports Justice, the organisation of sports judicial bodies is the only way to settle sports related disputes with taking account of all particularities arising out of a specificity of sport.

Finally, it might be summoned that the Czech legal system currently does not provide sports stakeholders with a favourable legal environment. Labour contracts giving athletes sufficient legal protection, an independent arbitration tribunal as well as independent functioning of sporting bodies within sports organisations in order to guarantee the autonomy of sport itself are still missing.

In that regard, important issues such as doping, match-fixing, legal disputes between clubs and players are current topics in the Czech Republic. Sports judicial bodies are therefore the most important entities that regulate all sports related issues with a specific and significant approach.

²³ Act No. 40/2009 Coll., the Czech Criminal Code.

²⁴ Arbitration CAS 2010/A/2172 O. v. Union des Associations Européennes de Football (UEFA), award of 18 January 2011, 1.

SPORTS JUSTICE IN DENMARK

by *Jens Evald**

SUMMARY: Introduction – 1. Principles of sports justice – 2. The relationship between ordinary justice and sports justice – 3. The Danish Olympic Committée – 4. The Danish football association – 5. Clubs' and Players' rights and obligations – 6. Dispute settlements – 7. Conclusions

Abstract:

The article describes the Danish sports justice system with connotations on football. It is suggested that the sports justice system has become more and more akin to the ordinary justice system and one of the reasons is the influx of lawyers, judges etc. in sport particularly in the dispute resolution commissions. There is still room for improvement as some of the examples in the article show. Law gave civilization to sport and it is important that sports associations continue to follow the path of law and balance efficiency and the rule of law.

Introduction

1. Principles of sports justice

Under the Danish Constitution (DC), section 78, subsection 1, as under most European legal systems, associations including sports associations possess the power (autonomy) to adopt rules to be followed by their members and to apply disciplinary sanctions against members who violate those rules, on condition that their own rules and certain general principles of law are respected.

In recent years the principles of sports justice in Denmark have become still

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more akin to the ordinary justice system both when it comes to the structure and to the legal principles applied. One could say that sport has adapted its justice system to the ordinary justice system. This process has taken place not only in Denmark but all over Europe. There are several reasons for this development. *The first reason* is the development from amateur sport to Big Business which requires uniform regulation for business in general. *The second reason* is that as early as 1976 sport came on the agenda of the European States, which resulted in different conventions on sport, e.g. “European Sport for All Charter” (1976) and UNESCO’s “International Charter of Physical Education and Sport” (1978). The temporary result is the so-called sport article, article 165, of the Lisbon Treaty (2009). There is no doubt that the firm hand of EU and especially the Commission has had an enormous impact on sport and it is a fact that sport has embraced e.g. human rights, democracy, rule of law and the fight against racism and without any grumble has accepted these moral and legal values as inherent in sport. *The third reason* is the establishing of the Court of Arbitration for Sport (CAS) in 1986. CAS adopts and develops common legal principles, interprets sports law and thereby influences the rulemaking in Denmark and in the rest of the world, and it harmonizes global sports norms through its appeal procedure.¹ *The fourth reason* is the influx of lawyers, judges etc. in sport particularly in the dispute resolution commissions of sport. The significance of this can hardly be exaggerated as it is these lawyers and judges who are well acquainted with both the ordinary and the sports justice systems and therefore can adjust and adapt the sports justice system to the ordinary system. In fact that is what happened in Denmark. In addition to this a report was published in 1998 by the so-called Per Sorensen Committee (chaired by the Supreme Court Judge Per Sorensen) that included different recommendations on how to strengthen the rule of law and the legal rights of the athletes in DIF’s statutes.

If we should try to summarize what has just been said: *Law gave civilization to sport.*

Even though the subject of this article is principles of sports justice in Denmark, it is important to keep in mind that many of the principles of sports justice mentioned below are not just national legal principles, but are applied across the world. As an example, a general legal principle, such as the member’s right to have a fair hearing, is an inherent legal principle in all European legal systems and has been adopted by the CAS and most likely by all sports associations in Europe.

2. *The relationship between ordinary justice and sports justice*

It is commonly recognized that the freedom of association granted by section 78, subsection 1 DC includes the authority to apply disciplinary sanctions against members who violate the rules of the association. Every sports association, e.g. the Danish Football Association (DBU) and the Danish Handball Association (DHF),

¹ Cf. LORENZO CASINI, *The Making of a Lex Sportiva by the Court of Arbitration for Sport*, *German Law Journal*, Vol. 15, No. 5, 2010.

has its own dispute resolution commission with the right to appeal to the Appeals Commission of DIF, which is known as “the Supreme Court of Sports”.

The commissions are regarded as simple ‘association-tribunals’, and as a point of departure the state courts have the authority to review the rulings and decisions of the said commissions.² There are exemptions, e.g. DBU’s Football Arbitration Tribunal that constitutes a real arbitration court and therefore is covered by the Danish Arbitration Act (No. 553 of 24 June 2005). Section 4 of the said Act decides that in disputes solved by arbitration no court shall intervene except where so provided in the Arbitration Act. Section 37 regulates in detail the conditions where recourse to a court against an arbitral award may be made. DBU’s laws and regulations, section 34.2. state that the Tribunal’s ruling is final and binding, which means that the award cannot be appealed to CAS. In a pending court law case at the Eastern High Court in Denmark, it will be resolved if the arbitration system in horse sport constitutes a real arbitration system covered by the Arbitration Act or if the system is regarded as simple ‘association-tribunals’. Furthermore, a state court will have no jurisdiction where the statutes or regulation of the sports associations provide a right to appeal to CAS (arbitration clause) or the parties have concluded a specific arbitration agreement. The CAS award is “final and binding” and the Swiss Federal Tribunal has only limited authority to review the rulings and decisions of CAS, cf. “the Swiss Federal Code on Private International Law” (1987), article 190.

Danish case law is scarce and the cases in which state courts (ordinary justice) have reviewed the rulings and decisions of sports associations (sports justice) can be counted on one hand. There are different reasons for that. The first one is that most cases concerning professional athletes and cases with economic interests are solved within the sports justice system. This means that cases which can be brought before the ordinary justice have their roots in recreational sports, without an economic value, and are often petty quarrel cases not suitable to be tried in state courts. The only type of cases that has been tried in a Danish state court is on expulsion of association members. A city court ruling from 2008 (BS-10-1528/2008) illustrates that the courts are very reserved in an in-depth review of the rulings and decisions of dispute resolution commissions. Often the statutes are broadly formulated and give room for assessments. In expulsion cases the courts have been unwilling to set aside the assessment *if* the sport association has followed their procedural rules and *if* membership of the sports association is of no economic necessity for the member. The city court ruling is in line with similar case law on member’s expulsion of associations outside of sport.³

² Cf. JAN SIENICKI, *Sports Justice in Germany*, 2013, in this book.

³ Cf. Supreme Court case 1919 UfR 35, Eastern High Court case 1929 UfR 151, Eastern High Court case 1930 UfR 136, Supreme Court case 1933 UfR 301, Supreme Court case 1945 UfR 515, Eastern High Court case 1949 UfR 1035 and Supreme Court case 1990 UfR 1990 UfR 233/3.

3. *The Danish Olympic Committée*

There are three main sports organizations in Denmark, but only one of them is relevant in this context, that is *The National Olympic Committee and Sports Confederation of Denmark* (DIF) which is the umbrella organization of 58 national federations and has approx. 1.6 million members distributed on approx. 11,000 clubs. DIF is the National Olympic Committee for Denmark and as such responsible for the Danish participation in the Olympic Games.

The two other main sports organizations focus only on recreational sports. *The Danish Gymnastics and Sports Association* (DGI) which has more than 1.3 million members distributed on approx. 5,300 clubs (exclusive of the Association of Danish Rifle Clubs (DDS) which is an associate member of DGI); and *the Danish Federation of Company Sports* (DFIF) which organizes sports activities for company teams.

The more than sixty national federations have their own individual dispute resolution commissions but the federations have assigned their judiciary competence in appeal cases to the Appeals Commission (“the Supreme Court of Sports”) under DIF’s guidance.

According to the statutes of DIF (2013) *The Appeals Commission* is elected for a period of five years by the Council and has ten members. At least eight of the members must be lawyers. Members of the Commission cannot at the same time be members of a member organizations commission for appeals, the Doping Tribunal or the Executive Board of DIF. The Commission appoints a chairman and a deputy chairman who shall both have experience as judges. The tradition is that the Commission is chaired by a Supreme Court judge.

Pursuant to the Statutes, section 24 a decision by a member organizations commission for appeals, any corresponding body of a member organization, the Doping Tribunal, the Executive Board of the NOC of Denmark or the Council shall be submitted to the Appeals Commission. The Appeals Commission may dismiss a case, e.g. by the chairman/vice-chairman, *if* it has been tried in two instances, *if* it relates to a game/tournament that has been completed, *if* the case appealed is based upon a statement/report from an expert or a person who is appointed by a national federation, or *if* the case, according to its nature or extent, should be finally settled by the decision of a lower instance. Such a decision must be substantiated. The Appeals Commission must not dismiss a case concerning sanctions decided by the Executive Board or the Council.

“The Regulation of the Appeals Commission” (Lovregulativ II) comprises the procedural rules of the Commission. Furthermore, DIF has published a “Guide concerning the procedure in Appeals Commission cases” (2007).

As mentioned above, the Appeals Commission must be regarded as a simple “association tribunal”, and the state courts have the authority to review the rulings of the Commission. It should be mentioned that the statutes and other DIF regulation do not comprise provisions that ‘cut off’ the ordinary justice.

During the last decade the Appeals Commission has had a handful of ‘prominent’ cases on disciplinary and contractual matters (see below).

4. *The Danish football association*

4.1 *Introduction*

In order to grasp the full picture of football provisions and football case law concerning sports justice, it is necessary to know the structure of Danish football.

The Danish Football Association (DBU) is the governing body of football in Denmark. It was founded in 1889 and today (2013) it is an organization of 1,618 clubs with 321,222 members, of these 254,551 are men and 66,671 women. DBU runs the professional Danish football leagues and men’s and women’s national teams. DBU is a founding member of both FIFA and UEFA. DBU is the supreme body of football in Denmark, and all clubs, players, coaches etc. are governed by the rules and regulations promulgated by DBU. Formally DBU consists of two members, The Association of Local Unions (FLU) and The Association of Division Clubs (DF), who represent amateurs and professionals respectively.

The Association of Division Clubs (DF) is an interest and employers’ association for 60 clubs playing in the Premiere League (Super League), the 1st Division and the 2nd Division. DF was founded in 1969 by the then 1st Division and was later extended to include both the 1st and the 2nd Divisions. DF represents the clubs in the Board of DBU and is a member of the Association of European Professional Football Leagues (EPFL). According to the 2007 regulations of DF the purpose of the association is to create an “efficient frame” for the development and running of professional football in Denmark. The regulation emphasizes that as a member of DBU DF is bound by the rules and regulations promulgated by DBU.

The Association of Players (SPF) was founded in 1977 on the threshold of professional football in Denmark. SPF is the trade union of players in the Super League, the 1st and 2nd Divisions plus the women’s Elite Division. According to SPF’s regulations the purpose is to supervise, protect and promote the professional football player’s sporting as well as financial interests both during and after the player’s active carrier. SPF is a member of the umbrella organization Danish Elite Athlete Association (DEF), the Danish Trade Union (LO) and FIFpro (Fédération Internationale Des Associations De Footballeurs Professionnels).

4.2 *Dispute settlement*

The dispute settlement in DBU is two-stringed. The *Disciplinary Commission* deals with disciplinary matters and the *Football Arbitration Tribunal* deals with *civil disputes*.

DBU’s laws and regulations, section 21 comprises the rules on the *Disciplinary Commission* and its composition, tasks etc. The Commission consists of 5-7

members of whom the chairman and vice-chairman have to be lawyers. Section 30 comprises the sanctions in disciplinary matters. If a club, a manager, a coach, a player or a referee has violated the laws and regulations, failed to comply with a decision made by a competent authority, acted unsportsmanlike, behaved disloyally or misconducted himself, DBU's Disciplinary Commission has different sanctions, e.g. disapprovals and warnings, suspension of the right to play home games, deprivation of giving match points, relegation of clubs etc. As a rule all disciplinary disputes begin in the relevant local union. Important exceptions are made to this rule. All disputes related to the 4th Division ("Danmarks-serien") and higher levels begin in DBU's Disciplinary Commission. As a rule the disciplinary sanctions decided by either the local union or DBU's Disciplinary Commission cannot be appealed. Important exceptions are made to this rule, e.g. decisions on fines, compensations over 5,000 DKK, deprivation of match points can be brought before DBU's Appeal Commission. Decisions from DBU's Appeal Commission can be brought before DIF's Appeal Commission. It must be noticed that an appeal has no delaying effect. An exemption is made in DIF's statutes, section 24, sub-section 4, which gives the chairman/vice-chairman the right to give an appeal delaying effect in exceptional cases.

In 2011 DBU enacted rules on match fixing. Pursuant to DBU's Code of Conduct betting on matches is prohibited when the player is actively taking part in or in any other way is part of the match. For players, coaches, managers and referees betting in any form that either directly or indirectly can be connected to private economic or sporting interests is prohibited. The betting prohibition on own matches was implemented in the standard player contract, part 2, sections 4.1.-4.2., which state: (section 4.1.) "The player may not – directly or indirectly – place bets or take part in betting activities on matches in which the player participates. (section 4.2.) Any violation of section 4.1. constitutes a gross breach of contract". In November 2011 the betting prohibition was extended in DBU's Circular no. 73 on match fixing. In the Circular the concept of match fixing is defined as follows: "When a result of a football match or an event of a football match is either collusive or influenced by other interests than purely sporting interests". A violation of the prohibition can be sanctioned by the Disciplinary Commission pursuant to DBU's laws and regulations, section 30 (the sanction catalogue).

In a pending case the Disciplinary Commission sanctioned a player from the Danish Super League with six months suspension from all football because he had betted on a match in which he had participated, cf. *Decision February 4 2013 the Disciplinary Commission v. the player A*. The case was appealed to DBU's Appeals Commission. As was the case in the latest CAS Awards on bribery and match fixing⁴ the key question in the Danish case was connected to proof and whether the standard of proof should be of a criminal law or a civil law standard. As the CAS Panel had done in previous awards, the Commission stated that association rules

⁴Cf. CAS 2009/A/1920 Probeda v. UEFA, CAS 2010/A/2172 O. v. UEFA, CAS 2011/A/2490 Köllerer v. ATP, CAS 2011/A/2621 Savic v. ATP and CAS 2011/A/2625 Hamman v. FIFA.

are civil law and not criminal law.

DBU's laws and regulations, section 34 comprises the rules on the *Football Arbitration Tribunal*. The Tribunal consists of three arbitrators, one appointed by the plaintiff, one appointed by DBU who chairs the Tribunal, and one appointed by the defendant. Decisions by the Tribunal are final and binding. The Tribunal deals with all (civil) disputes between DBU's organizations, clubs, third parties on one hand and a player, a manager or a coach in one of DBU's organizations, clubs or third parties on the other, or disputes between individuals, when the dispute has connection to or arises from football. A dispute between DBU on one hand and DBU's organization, club or third party on the other cannot be brought before the Football Arbitration Tribunal, but must be brought before DIF's Appeal Commission. If DIF's Appeal Commission finds that it does not have the necessary jurisdiction, the parties must submit the dispute to ordinary arbitration according to the rules and regulation of the Danish Institute of Arbitration.

The football arbitration system is mandatory except for disputes arising from the standard contract, see below. According to part 4, section 4.1. of the standard contract the club, and the player ("the parties") can bring any civil dispute relating to the construction or effect of the contract either before the ordinary courts or before DBU's own Football Arbitration Tribunal. According to section 4.2. all civil disputes between the parties concerning the construction or effect of the contract that come under the jurisdiction of FIFA in accordance with the laws and regulations issued by FIFA from time to time can be brought before FIFA's competent arbitration bodies as the arbitration tribunal of first instance with the right to appeal to the Court of Arbitration for Sport (CAS) as the second instance in accordance with the rules laid down in this respect in the laws and regulations issued by FIFA and the CAS from time to time. Apart from the disputes specified in section 4.2., all other civil disputes between the parties concerning the construction or effect of the contract can be brought before the Football Arbitration Tribunal in accordance with the rules laid down in the laws and regulation issued by DBU.

The decisions from the Football Arbitration Tribunal are published on DBU's homepage.

5. *Clubs' and Players' rights and obligations*

Until July 1999 the legal aspects between professional football players and the clubs were regulated by the standard contract drawn up by DBU. The standard contract laid down that all contracts had to be approved by DBU to become valid and come into force. March 23 1999, DF and SPF signed two documents titled "Collective Agreement" and "Agreement". The "Collective Agreement" comprises the fundamental principles to be laid down concerning the relationship between DF and SPF. The "Agreement" is based on the "Collective Agreement" and comprises the minimum content of the players' working and payment conditions. With reference to these two agreements, DF and SPF in 1999 worked out a new standard contract

which stated that contracts should no longer be approved by DBU but should be entered according to the “Collective Agreement” and the “Agreement”. DBU stood out against the new standard contract and refused to issue player licenses unless all contracts used were those issued and approved by DBU. The conflict resulted in a compromise. On the front page of today’s player contract, you have to tick which of the alternatives applies. One says that the contract is entered according to the “Collective Agreement” and the “Agreement” while the other says that the contract does not follow the “Collective Agreement” and the “Agreement”. In 2003 SPF took legal action against DBU to test if the standard contract issued by DBU was legally binding for SPF and the players and if DBU was obliged to alter the standard contract according to the “Agreement”. The main goal of SPF was to convert the contractual system into an ordinary labour market system based on collective agreements and thereby invalidate DBU’s right to approve all contracts. The end result would be that clubs’ and players’ rights and obligations were laid down by the genuine parties of the labour market, namely SPF and DF. This goal was never realised and instead the Supreme Court (*Supreme Court case 2010 UFR 1*) ruled that DF and all clubs and players were covered by the rules and regulations of DBU. The Supreme Court argued that DBU was not obliged to follow the “Agreement”. The fact that DF is a member of DBU did not imply that DBU was a part of the “Agreement”. The Supreme Court stressed that DBU to a certain extent had addressed the “Agreement” between DF and SPF in the standard contract.

Today (2013) the legal status in the standard contract for players is the same as in 1999. The club and the player decide if they want to follow the “Agreement” by ticking either of the two boxes on the front page of the player contract as mentioned above. All clubs and players in the Super League and most clubs and players in the 1st and 2nd Divisions have chosen to follow the “Agreement”.

The existence of the “Collective Agreement” and the “Agreement” means that the contractual system of Danish football may be characterized as a quasi-labour market system, where you find the same legal remedies as in the ordinary labour market system, e.g. strike and lockout. In the *Decision of January 2004, SPF v. DF*, DF had given one month notice to terminate the “Agreement”. SPF claimed that the term of notice should be three months according to continuous labour law practice. The Tribunal ruled that the term of notice should be reasonable and decided that it should be three months. The decision can be interpreted as if the Tribunal implements ordinary labour law principles in football. Thus the decision supports what has been said above: that the sports justice system is adjusted to the ordinary justice system.

The labour market system combined with DBU exercising sovereignty over the standard contract both as draftsman and as the entity that approves all contracts between clubs and players has caused only a few problems, cf. DIF’s Appeals Commission, *Decision No. 19/2011 of July 11 2011*.

A player, A, in the Danish Super League had played for the same club, B, since 2006/2007. In the autumn 2010 A’s agent got in contact with different clubs in order to get a better contract for A. In January 2011 the club C signed a contract

with A. The club B was not informed of the negotiations between A and C. B brought the case before DBU's Disciplinary Commission, which ruled that the contract between A and C was a violation of DBU's and FIFA's Regulations of Status and Transfer of Players art. 18.2., and both A and C was fined 25,000 DKK. During the case the Commission was passed copies of A's contract with B including the appendix that was not approved by DBU, and on its own initiative the Commission started a disciplinary case against B. The Commission fined B 75,000 DKK for the lacking approval. B did not appeal the ruling and paid the fine. Instead C appealed and claimed that A should be ruled as looser of all the Super League games where A had participated. C claimed that B had used A unlawfully due to the lacking approval of the appendix. If the argument was accepted, B and not C would have to be relegated to the 1st Division. A lot was at stake for both clubs. DBU's Appeals Commission dismissed the appeal on the grounds that C was not part of the case as C had no substantial, individual interest in the case, but only an interest "in the consequences of the sanction that was laid upon B". The ruling was upheld by DIF's Appeals Commission with the same wording.

No doubt the case would never have been appealed by a third party (in this case C) if it had not been for the approval system.

According to the standard contract part 4, section 4.1., clubs and players ("the parties") can bring the effect of the contract before the Football Arbitration Tribunal. In a landmark case from September 2012 that shook many football clubs in Denmark, the Tribunal interpreted the standard contract in a way that has had a massive impact on the economy of the clubs. Part 2 ("Rights and obligations of the parties") of the contract includes among other things provisions on holiday leave and compulsory pension scheme. According to section 15, the player has a right to receive a holiday allowance amounting to 12.5% of the part of the player's qualifying pay from the club in the qualification year which was not basic salary or fringe benefits. During holiday leave, the player shall further receive a holiday supplement that is 1% of the player's qualifying pay from the club in the qualification year. In the *Decision of September 2012 SPF v. DF & Brøndby IF Football Club*, the Tribunal ruled in a split decision (2-1) that the way to calculate the holiday allowance was in breach with the contract. At the same time the Tribunal ruled that the club Brøndby IF had not paid the compulsory pension contribution for all players. Especially the ruling on pension caused an outrage among many clubs. For many years it has been a custom for several clubs to include the pension in the salary. In this particular case Brøndby IF had contracts that said "incl. pension", but the majority of the Tribunal found it "unlikely" that the players and the club had made an agreement on pension. The total additional payment to the players amounted to 26 million DKK.

6. *Dispute settlements*

The many different sports associations offer a variety of regulations on dispute

settlements. The larger sports associations have an internal two-way judicial recourse with the possibility to appeal to DIF's Appeals Commission. Many smaller sports associations provide only for an internal one-way judicial recourse with an appeal access to DIF's Appeals Commission, e.g. the Danish Canoe and Kayak Federation (DKF).

6.1 *Technical disputes*

Rules of some major team sports such as handball make a distinction between factual decisions and rule violations. Handball's rules of the game, article 17:11 says that the decisions of the referees made on the basis of their sense of occasion or their assessment cannot be appealed. The same provision states that objection can be made against a decision which is contrary to the rules of the play. DBU's rules of the game, article 5 (similar to law 5 of the FIFA laws of the game) prescribes that the decision of the referee regarding the facts connected with the play, including whether or not a goal is scored, and the result of the match are final. The same article states that the referee may only change a decision on realising that it is incorrect or, at his discretion, on the advice of an assistant referee or the fourth official, provided that he has not restarted the play or terminated the match.

There is no example from team sport where a referee's decision has been contested in an Appeals Commission, but it is safe to say that an Appeal Commission will not review decisions taken on the field-of-play in the absence of arbitrariness or bad faith. According to DIF's statutes (article 24) the chairman of the Appeals Commission can refuse to accept an appeal if it concerns a completed match or tournament.

A decision from DKF's Appeals Commission (Case No. 1/2007 A & B v. Chairman of the jury) may shed some light on how some appeals commissions deal with 'field-of-play' decisions. In the Danish Championship 2007 in short track for men under 18 years, K2, the winning kayak, was disqualified due to a weight difference of 4 grams. According to the rules, the kayak should weigh 18 kilograms but after passing the finish line the kayak was weighed to 17.96 kilograms. The two kayakers objected to the chairman of the jury arguing that the control weighing of the kayak before the race showed that the weight was 18.160 kilograms. In a report from the chairman of the jury to the Appeals Commission, the chairman stated that the difference between the three scales used at the championship was measured to 2.5 grams. In its decision the Commission found that the weighing of the kayaks before the race was done exclusively by the kayakers and was no official weighing and the fact that the scales were controlled on a daily basis and the difference was measured to as little as 2.5 grams could only lead to a dismissal of the protest. In another decision (Case No. 1/2009 A & B v. the Chairman of the jury), a team of relay kayakers was disqualified because one of the kayakers did not meet the age conditions. According to the rules, the competition was open for kayakers that met the conditions set up by the International Canoe Federation for

junior kayakers. According to the ICF rules, a kayaker was considered to be a junior from the year he or she was 15 years till the year he or she attained the age of 18 years. In the Danish Championship 2009 4 x 200 m relay, one relay team used a U14 (under 14 years) kayaker. The chairman of the jury disqualified the team. The team appealed the decision to the Appeals Commission. In its decision the Commission found that even though the team did not benefit from using the younger kayaker, the said provision clearly stated that a kayaker had to be 15 years of age to participate.

6.2 *Disciplinary disputes: The Anja Andersen case*

Even though the sports justice system at the very top represented by DIF's Appeals Commission has adapted to the ordinary justice system, there are exemptions when it comes to the hearings in many sports associations. One of them was the Danish Handball Federation (DHF) and the so-called Anja Andersen case from 2006. Anja Andersen was by far one of the best female Danish handball players in Denmark. In 2006 she was the coach of the club Slagelse FH. In a match against Aalborg on March 5 2006, Anja Andersen in frustration over a line of referee decision decided to leave the pitch with the whole team. After five minutes the team returned to the pitch and finished the match. Anja Andersen's behaviour provoked an avalanche of reactions in the press, and a disciplinary process was initiated by DHF.

The day after the match, DHF's Disciplinary Commission had received a report on Anja Andersen's behaviour and the leader of DHF's secretariat said that Anja Andersen could either send a report now or wait until she was formally contacted by DHF. Anja Andersen chose the latter. But on March 7 2006 DHF's Tournament Committee decided to sanction Anja Andersen and suspended her six months and gave Slagelse FH a penalty of 10,000 DKK. The decision was based only on the report by the referees and officials. The decision was not sent to Anja Andersen, but to DHF's executive committee as the executive committee according to DHF's statutes also had the possibility to sanction Anja Andersen. The same day DHF's administration asked Anja Andersen and Slagelse FH for a report and the deadline for the report was March 9. In the letter to Anja Andersen DHF wrote that the decision made by the Tournament Committee did not have delaying effect and therefore Anja Andersen was not allowed to side her team in the coming Champions League matches. On March 10 the Executive Commission (not to be confused with the Executive Committee) made its decision. The decision by the Tournament Committee was upheld and in addition to this Anja Andersen was suspended for another six months and the club was fined 90,000 DKK. All in all the two sanctions meant that Anja Andersen was suspended for 12 months from all handball activity, both national and international, and the total fine was 100,000 DKK. The decision made by the Executive Commission contained no written arguments or any reference to former DHF practice. The decision could be appealed to DHF's Executive Committee whose decision was final. Anja Andersen appealed the case even though

four members of the Executive Committee were members of the Tournament Committee. On April 5 2006 the Executive Committee upheld the decision, but at the same time the Committee found it necessary to let DHF's Legal and Arbitration Commission have a look at the case. On April 24 2006 the Legal and Arbitration Commission made a decision. The suspension was reduced to six months, but the fine was upheld. The Commission's decision contained no arguments or reflections on the process. Anja Andersen and Slagelse FH appealed to DIF's Appeals Commission which made its decision May 24 2006. In a prehearing in April, the Appeals Commission had denied to give the DHF's decisions delaying effect which meant that Anja Andersen missed the Danish Championship finals, where Slagelse FH lost to Viborg over three matches.

The decision by DIF's Appeals Commission was one long criticism of the process in DHF:

“Serious sanctions in the form of long suspensions, exclusions etc. to professional athletes or coaches may be of vital importance for the person's economic activity and for the economy of a club. It is therefore important that the procedure in all entities of the associations that have the authority in such matters is in accordance with the same general principles for due process as in the administration of justice and the public administration including the right to be heard and the right to know the facts on which the case is based. This must be hold together with the fact that there ought to be an easy accessible and fairly simple dispute resolution system, where the persons handling such cases have a common knowledge of those principles. The Appeals Commission refers to the remarks in the report published [by the Poul Sorensen Committee].”

The Appeals Commission found that Anja Andersen's suspension should be seven matches, which were the number of matches played during the process. At the same time the club was acquitted and did not have to pay the fine.

Without going into further details, the Anja Andersen case illustrates that not all sports associations have an up-to-date hearing and appeals system. It should be noted that DHF understood the writing on the wall and has subsequently altered its statutes.⁵ Unfortunately the statutes of many sports associations have not been altered since they came into force and a new Anja Andersen case may be just around the corner.

6.3 *Economic disputes*

In football the economic disputes between players and clubs are resolved either by the Football Arbitration Tribunal or by the courts. Some other important economic disputes in football are closely connected to the club licensing system developed by UEFA (UEFA Club Licensing and Financial Fair Play Regulations, 2012). According

⁵ The lawyer Lars Halgreen who represented Anja Andersen in the case subsequently wrote an article discussing the legal problems in the case, Cf. LARS HALGREEN, *Anja Andersen-sagen. En kommentar om de retssikkerhedsmæssige perspektiver i sagen*, *Idraetsjuristen* 2006, 9-18.

to DBU's Licensing Manual, section 7.4.6, a Super League stadium must have a minimum capacity of 10,000 spectators of which at least 3,000 must be seats. According to section 7.4.8, the stadium must have a pitch heating system. In May 2012 DBU's Club Licensing Committee decided not to give a license for the season 2012/2013 to the Super League Lyngby. The club's stadium did not contain more than 1,000 seats and the pitch was not heated. For the season 2011/2012 the club was granted an exemption, but the Club Licensing Committee decided not to prolong the exemption. The decision was brought before the Club Licensing System's Appeals Commission that upheld the decision (Decision of May 25 2012). In the end the decision meant very little as the club after the season was relegated to a lower division due to lack of points. But the case gives rise to some considerations first and foremost because most Super League stadiums are not owned by the club but by the municipal. A decision on renovating a stadium is not taken by the club's executive committee but by the town council where the wish for a million Euro renovation of the stadium has to compete with needs of renovating schools and help to elderly citizens.

7. *Conclusions*

Sports organizations around the world face enormous challenges in the years to come especially when it comes to doping and match fixing. The fight against doping is now harmonized and coordinated and now the time has come to match fixing, where both sports organizations and governments must set up rules and effective programmes with regard to detection, deterrence and prevention of match fixing and fraud in sport. In this process it is important to balance efficiency and the rule of law. Sports associations have an ongoing obligation to adapt the sports justice system to the ordinary justice system. Several cases from the past, e.g. the Anja Andersen case, are grim reminders of a sport injustice system that no one wants back. The goal must be that law continues to civilize every corner of sport.

SPORTS JUSTICE IN ENGLAND

by *Richard Parrish* and *Adam Pendlebury**

SUMMARY: 1. Introduction – 2. Principles of sports justice – 3. Relationship between ordinary and sports justice – 4. National Olympic Committee regulations – 5. English football regulation – 6. Rights and obligations of clubs and players – 7. Domestic sports law: sports judicial bodies, dispute settlements and procedures – 8. Arbitration – 9. Conclusions

Abstract:

This contribution highlights the complex and multi-faceted nature of sports justice in the UK, specifically in England. The key findings to emerge from this work are: (1) the state does not directly regulate sport although it does exert statutory and non-statutory influences on sport, (2) sports bodies must comply with the standards expected by ordinary courts, (3) contractual relations lie at the heart of many sporting relationships in the UK, (4) public law remedies, such as judicial review, are not available to challenge decisions of sports governing bodies but (5) the courts operate a private law supervisory jurisdiction over decisions of sports governing bodies meaning that the standards expected of sports governing bodies are very similar to those expected under judicial review, (6) in the law of tort courts have accepted that in sport a duty of care is owed by participants, match officials, governing bodies and event organisers, (7) criminal law prosecutions in sport are rare, particularly those concerning injury sustained on the field of play, (8) sports bodies are keen to insulate 'domestic sports law' from the influence of 'national sports law' and, therefore, (9) sophisticated disciplinary commissions and arbitral bodies play an essential role in resolving English sports disputes.

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1. Introduction

The United Kingdom of Great Britain and Northern Ireland is a constitutional monarchy operating a bi-cameral parliamentary system. The UK comprises England, Scotland, Wales and Northern Ireland, although since 1998 the latter three countries have certain devolved decision making powers. Whilst this chapter has sports justice in England as its focus, UK law, UK sports policy and the rules of the British Olympic Association apply to all four countries. Only English football regulations - located in Football Association, Premier League and Football League handbooks - are examined in this chapter.

2. Principles of sports justice

The UK operates a non-interventionist and non-consolidated sports model.¹ This model implies an 'arms-length' role for the state in sport in which sports are organized by the sporting associations themselves rather than through state legislation and the National Olympic Committee and the National Sports Federation are not combined. This model reflects the prevailing view in UK politics that sport is essentially a private pursuit to be organised and promoted by private interests. Nevertheless, the state has recognised that as sport performs some public and quasi-public functions, it should retain an interest in the sector, although this interest is generally elaborated through arm's length / semi-governmental organisations such as the Sports Councils. Consequently, in theory at least, sports bodies in the UK retain autonomy to determine their own organisational and regulatory choices free from state interference. In practice, these choices are restricted by three considerations: (1) direct statutory influences (2) indirect statutory influences and (3) non-statutory influences.

2.1 Direct statutory influences on sport: illustrative examples

Sports clubs and governing bodies in the UK are not statutory bodies requiring state authorization and there is no statutory requirement that they take any particular legal form.² Traditionally, many sports bodies took the form of *unincorporated associations*, although this form is now rare in professional sport and confined largely to amateur sports bodies. These bodies have no legal personality and therefore cannot sue or be sued in its own right with legal action having to be brought against or defended by its members. The relationship between the members of the association is a contractual one based on the rules of the association. Unincorporated associations are still subject to wider legal control when their activities engage ordinary statutory provisions, such as licensing laws regulating the sale of alcohol, health and safety laws, general employment

¹ See CHAKER, A.N. (1999), *Study of National Sports Legislations in Europe*, Strasbourg: Council of Europe.

² For a full discussion see LEWIS, A. & TAYLOR, J. (2008), *Sport: Law and Practice*, Tottel Publishing, 1014-1027 and BELOFF, ET AL., (2012), *Sports Law*, Oxford: Hart, 23-28.

laws and tax laws. Most famously in Britain, the Marylebone Cricket Club (MCC) operated as an unincorporated association until it changed its status in 2013 to that of a body incorporated by *Royal Charter*. This procedure required petition to the Privy Council, a body that advises the Sovereign on the exercise of Royal Prerogative. Incorporation is usually granted for a body that works in the public interest. It enables the sports club to hold assets in its own name, rather than through a custodian trustee, and it removes any potential liability of individual members. Royal Charter sports bodies are rare, although the Jockey Club was established in this way. The MCC case is reflective of the trend, encouraged by the commercialization of sport, which has seen many unincorporated associations changing their status and assuming *corporate* structures of which there are several forms. This includes those *private companies limited by guarantee* (such as many governing bodies), those *private or public companies limited by shares* (such as the Football Association and some football clubs) and ‘co-operative’ style sports bodies established as *Industrial and Provident Societies* (such as the Rugby Football Union). Limited companies limit the liability of its members, has the ability to hold property in its own name and can sue and be sued in its own name. Sports bodies assuming the status of a limited company must fulfill the rules which apply to all companies, such as registration and the filing of accounts and reports. UK company law also imposes certain duties on the directors of the company.

A particularly pronounced direct statutory influence on sport stems from the requirement that sports bodies must be compliant with the statutory framework covering safety at sports grounds. This statutory framework has itself been influenced by a number of serious safety lapses at sports grounds and by the findings of the subsequent inquiries, such as the Taylor Inquiry into deaths of 96 spectators at the Hillsborough stadium in Sheffield in 1989. These inquiries have influenced the statutory standards regulating safety at sports grounds. In addition to actions brought under tort, organisers of sporting events have been statutorily liable for injuries caused to spectators or participants since the Occupiers’ Liability Act 1957 which imposes a duty of care on the organisers / clubs to ensure the safety of lawful visitors and the Occupiers’ Liability Act 1984, which provides limited protection for trespassers. In addition, the Health and Safety at Work etc Act 1974 imposes a duty on the event organiser for protecting the health, safety and welfare of everyone working at, or attending, the event. The Safety of Sports Grounds Act 1975 provides for licensing of sports grounds and the Fire Safety and Safety of Places of Sport Act 1987 provides for a system of safety certification by local authorities for certain covered stands at sports grounds. The Football Spectators Act 1989 (s8) established the Football Licensing Authority (now Sports Ground Safety Authority) which is required to operate a licensing scheme to regulate the spectator viewing accommodation at Premier and Football League Grounds plus Wembley and the Millennium Stadium in Cardiff. The Sports Ground Safety Authority is also required to keep under review how local authorities discharge their functions under the Safety of Sports Grounds Act 1975 at those grounds.

Although sometimes confused in the popular press, the issue of regulating

public order at sports events is somewhat distinct from the question of safety at sports events. Initially, the government responded to acts of public disorder through public inquiries and reports although by the 1980s the legislature took action following incidents of public disorder at football matches and enacted, *inter alia*: the 1985 Sporting Events (Control of Alcohol) Act (as amended 1992); the Football Spectators Act of 1989 which provides for a system of Football Banning Orders as a means of controlling spectator behaviour;³ and the Football Offences Act 1991 which established specific football related offences including: the throwing of any object at or towards the playing area or any other area where spectators or others are present; indecent or racist chanting;⁴ and going onto the playing area.⁵ General public order statutes have also been applied to sporting contexts, most notably following John Terry's prosecution, and subsequent acquittal, for a racially aggravated public order offence under the Public Order Act 1986 and the Crime and Disorder Act 1998.⁶

Occasionally the legislature responds to the staging of specific events. The London Olympic Games and Paralympic Games Act 2006 established the legislative framework concerning the staging of the 2012 London Games. In addition, Parliament has legislated to guarantee the public's access to such events on television. The Broadcasting Act 1996 (as amended by the Television Broadcasting Regulations 2000) establishes the legal framework ensuring that sporting events that are deemed to be of national interest are shown on television platforms that guarantee wide public viewing. This has entailed constructing lists of protected events that are to be shown on free-to-air television.⁷

2.2 *Indirect statutory influence: illustrative miscellaneous acts*

A range of other non-sports specific statutes have an impact on the operation of sport in the UK. It is beyond the scope of the chapter to list them, and explain the impact on sport, but some of the key Acts are briefly discussed. Based largely on the competition provisions of the EU's Treaty on the Functioning of the European Union (TFEU) and enforced by the Office of Fair Trading (OFT), the Competition Act 1998 subjects some business practices of sport to regulation.⁸ UK merger control is governed by a range of provisions including the Enterprise Act 2002

³ See *Gough v Chief Constable of Derbyshire* [2002] EWCA Civ 351.

⁴ See *DPP v Stoke on Trent Magistrates Court* [2003] EWHC 1593 (Admin).

⁵ See *R (on the application of White) v Blackfriars Crown Court* [2008] EWHC 510 (Admin).

⁶ *R v Terry*, Westminster Magistrates' Court, 13 July 2012. See also *Butcher (Terry Ian) v Jessop* 1989 JC 55.

⁷ Facilitated by EU Directive 2007/65 EC, the Audiovisual Media Services Directive.

⁸ See for example the football kit price fixing case: OFT Decision of 1 August 2003 (CA98/06/2003) in respect of Allsports Ltd, Blacks Leisure Group plc, JJB Sports plc, Manchester United plc, Sports Soccer Ltd, the John David Group plc and Umbro Holdings Ltd. Appealed to the Competition Appeal Tribunal [2005] CAT 232 and the Court of Appeal [2006] EWCA Civ 1318.

(which also has implications for insolvent clubs).⁹ The National Lottery Acts 1993, 1998 & 2006 establishes sport as one of a number of ‘good causes’ which receives funding through the National Lottery Distribution Fund. The 2012 Olympics has benefitted from lottery funding. The Gambling Act 2005 modernises, consolidates and liberalises the legislative framework on gambling and establishes the Gambling Commission as the new regulatory body for most gambling in the UK. The Tobacco Advertising and Promotion Act 2002 has affected those sports traditionally supported via tobacco advertising as s10 of the Act prohibits most forms of tobacco advertising. The Misuse of Drugs Act 1971 & the Drugs Act 2005 regulates the use of drugs within society although the Act prohibits the use of some drugs which also appear on the list of banned substances developed by governing bodies. The Trade Marks Act 1994 & the Copyright Designs and Patents Act 1988 establish specific offences relating to trademarks and copyright.¹⁰ General insolvency and tax laws also affect sport, particularly when a club enters administration¹¹ or when clubs pay employees through tax avoidance schemes.¹² Finally, although not exhaustively, the costs of policing football matches have been challenged under the Police Act 1996.¹³

2.3 *Non statutory influence: UK sports policy*

The government exerts an indirect, yet persuasive, influence on sport via its sports policy which often links funding opportunities to the fulfilment of government objectives in relation to, for instance, non-discrimination, anti-doping and child protection. For example, state funding of sport is conditional on national governing bodies signing anti-doping agreements with UK Sport which commits them to adopt policies in conformity with the World Anti-Doping Code. In other areas the government favours a policy of self-regulation for sports bodies but ‘in the shadow of the law’. In other words, as the state recognises that its sports policy objectives

⁹ On merger control see Monopolies and Mergers Commission (MMC) *Report into the Proposed Merger between BskyB Group plc and Manchester United plc* (Cm 4305, 1999).

¹⁰ It should be noted that the landmark judgment of the Court of Justice of the European Union in *Football Association Premier League Ltd and Others v QC Leisure and Others* (Case C 403/08) & *Karen Murphy v Media Protection Services Ltd* (Case C 429/08), joined cases judgment of 4 October 2011, stemmed from preliminary references by the High Court on a matter related to the Copyright, Designs and Patents Act 1988. The publican’s conviction under the Act for using a foreign satellite decoder code to receive football matches in a pub was subsequently quashed following the judgment of the CJEU. See *Murphy v Media Protection Services Ltd* [2012] EWHC 466 (Admin).

¹¹ *Revenue and Customs Commissioners v Portsmouth City Football Club Ltd (in Administration)* [2010] EWHC 2013 (Ch).

¹² HM Revenue and Customs (HMRC) is appealing against a Tax Tribunal decision (*Murray Group Holdings v Revenue and Customs Commissioners* [2012] UKFTT 692 (TC)) that found in favour of the use by Glasgow Rangers Football Club of a contested Employee Benefit Trust scheme to pay players. At issue is whether the payments were loans, not earnings, and so were not liable for income tax and National Insurance contributions. See also the image rights case of *Sports Club, Evelyn and Jocelyn v Inspector of Taxes* [2000] STC (SCD) 443.

¹³ *Leeds United Football Club Ltd v Chief Constable of West Yorkshire* [2013] EWCA Civ 115.

can be delivered by private sports bodies, such as governing bodies, so it conditions self-regulation on the acceptance by the sports bodies that they adhere to minimum standards of governance.¹⁴

UK sports policy has been significantly affected by the decision of the Labour government in 1997 to embark on a process of constitutional reform (devolution) in the UK which resulted in the establishment of a Parliament for Scotland and National Assemblies for Wales and Northern Ireland. Sports policy is a partially devolved competence meaning that the devolved National Executives and National Assemblies (Parliament in Scotland) play a role in developing sports policy within each country. As a consequence, UK sports policy is now more diffuse. The Labour administration also negotiated amendments to existing EU Treaties which resulted in the passage of the TFEU. With the introduction of Article 165 TFEU (the sports competence), and the devolved structures, the sources of sports policy in the UK are now essentially five-fold: *International/European, UK, national, regional and local*.

TABLE 1: SPORTS POLICY IN THE UK: THE MAIN PLAYERS¹⁵

	Government Structures	Intermediary Structures	Non-governmental Structures
International / European Level	EU Institutions and the Council of Europe	WADA	IOC, International Sports Federations.
UK Level	Department of Culture, Media and Sport (DCMS) - accountable to Westminster Parliament.	UK Sport (elite sport focus)	Sport and Recreation Alliance (SRA), British Olympic Association (BOA), UK National Sports Federations
National Level (England, Scotland, Wales & Northern Ireland).	National Executive sport departments in Scotland, Wales and Northern Ireland – accountable to devolved Parliament / Assembly sport committees. English sports council (Sport England) accountable to Westminster Parliament through DCMS.	Sports Councils: Sport England and National Sports Councils of Scotland, Wales & Northern Ireland.	National Sports Governing Bodies of England, Scotland, Wales & Northern Ireland.
Regional Level		County Sports Partnerships, Sport England Regional offices.	Regional and County Sports Bodies.
Local Level	Local Authority sport and leisure provision.		Sports Clubs

¹⁴ See for example DCMS (2011), Football Governance: Response to the Culture, Media and Sport Committee of Inquiry, HC 792-I, October, para. 75.

¹⁵ Adapted from HENRY, I. (2004), in Tokarski *et al*, *Two Players One Goal? Sport in the European Union*, Oxford: Meyer and Meyer, 270. See also BERGSGARD, N. ET AL, (2007), *Sport Policy: A Comparative Analysis of Stability and Change*, Butterworth Heinemann, pp.114-15. Thanks also for the advice provided by Dr Iain Lindsey and Dr Jimmy O’Gorman, both Edge Hill University.

3. Relationship between ordinary and sports justice

3.1 Sports law or sport and the law?

There is a debate in the UK, often exercising the minds more of academics than practitioners, on whether a discrete jurisprudential category of law exists identifiable as 'sports law'. Until the 1980s, and to a large extent still today, sports governing bodies fiercely resisted the notion that sport was subject to the law at all. Former Football Association (FA) Chief Executive Ted Crocker remarked, "I don't approve of the police and the law's involvement with sport, and football in particular. We can look after our game ourselves, and it's all the fault of Edward Grayson, who invented sport and the law".¹⁶ Grayson, an eminent barrister who came to specialise in sports litigation, firmly rejected this view but was himself not convinced that *sports law* actually existed. He argued, "no subject exists which jurisprudentially can be called sports law. As a sound bite headline, shorthand description, it has no juridical foundation; for common law and equity create no concept of law exclusively relating to sport".¹⁷ Grayson favoured the label 'sport and the law' reflecting his view that "[e]ach area of law applicable to sport does not differ from how it is found in any other social or jurisprudential category...".¹⁸

Grayson's view did not take hold within the academic press and the title *sports law* is now a common title within this literature. For example, in *Sports Law*, Beloff et al claim, "the law is now beginning to treat sporting activity, sporting bodies and the resolution of disputes in sport, differently from other activities or bodies. Discrete doctrines are gradually taking shape in the sporting field, which are not found elsewhere...".¹⁹ Similarly, also in a text entitled *Sports Law*, James highlights two sources of sports law, one operating within a public legal sphere, the other in the private sphere. The public face of sports law refers not only to the sports specific statutory framework outlined above, but also to the work of the ordinary courts of law such as national courts and the Court of Justice of the European Union. The sports related jurisprudence of these courts generates "national sports law" and "European sports law".²⁰ The private face of sports law refers to the internal laws of sport as codified in various constitutions and applied domestically by sports tribunals, and globally by the dispute resolution chambers of international federations and, where permitted by the respective sports, the Court of Arbitration for Sport (CAS). James labels the jurisprudence of nationally rooted sports tribunals as "domestic sports law" and the activity of international tribunals and the CAS as "global sports law".²¹ It has become common to refer to the private face of sports

¹⁶ GRAYSON, E. (1994), *Sport and the Law* 2nd ed., London: Butterworth & Co.

¹⁷ GRAYSON, E., *Sport and the Law*, (1994), pxxxvii.

¹⁸ GRAYSON, E., *Sport and the Law*, (1994), pxxxvii.

¹⁹ BELOFF, M., KERR, T., DEMETRIOU, M., & BELOFF, R., (2012), *Sports Law*, Oxford: Hart, 4.

²⁰ JAMES, M., (2010) *Sports Law*, Basingstoke: Palgrave Macmillan, 4-5

²¹ For a discussion on the concept of 'global sports law' see FOSTER, K., (2003), *Is There a Global Sports Law?* 2(1) *Entertainment Law*, Spring, 1-18.

law as the *lex sportiva* – an essentially private contractual order established between sporting bodies and those subject to their sporting jurisdiction.

3.2 *The contract lies at the heart of sports law*

The specific causes of action to be found in ‘domestic sports law’ are discussed elsewhere in the chapter. The remainder of this section discusses the role of ‘national sports law’, in other words the relationship between sport and the ordinary Courts in the UK. This relationship, although still developing, has been traditionally founded on the belief that whilst sport possesses a public character, it is organised in the UK through private agreements, such as a contract. These contracts regulate the relationship between the key stakeholders including that between the governing body and clubs, athletes and commercial partners, that between an athlete and their employer and that between participants such as clubs competing against one another. Therefore, for a party aggrieved at the behaviour of another, one cause of action lies in the terms of the contract. This contract will either have been expressly entered into by the parties,²² or it will be inferred due to the conduct of the parties.²³ Establishing contractual relations is important for an aggrieved party because even though alternative causes of action might exist (such as the private law supervisory jurisdiction of the courts) establishing a breach of contract allows the injured party to seek damages. Traditionally, Courts in the UK have not been minded to invent fictitious contracts.²⁴ However, more recently, the Courts have been more willing to establish contractual relations in order to “confer effective rights on players and participants who have been supposedly badly treated at the hands of a sports governing body”.²⁵

Employment contracts lie at the heart of the relationship between a club and its employees (players and managers). Breach of contract claims often arise following the dismissal or resignation of these employees. In English law, dismissal can give rise to a common law claim (wrongful dismissal / breach of contract) or a claim for breach of statute (regulated by the Employment Rights Act (1996)). Breach of statute claims, such as unfair and constructive²⁶ dismissal, are heard by specialist Employment Tribunals whereas common law claims can be heard by Tribunals, County Courts or the High Court. Due to compensation limits being

²² See *Aberavon and Port Talbot Rugby Football Club v Welsh Rugby Union Ltd* [203] EWCA Civ 584.

²³ See *Korda v ITF Ltd* (unreported) High Court (Ch), 29 January 1999 and *Korda v ITF Ltd* (unreported) Court of Appeal (Civ), 25 March 1999.

²⁴ See *Nagle and Feilden* [1966] 2 QB 633.

²⁵ LEWIS, A. & TAYLOR, J. (2008), *Sport: Law and Practice*, Tottel Publishing, p228. On the grounds for establishing contractual relations see *Modhal v British Athletic Federation Ltd* [2001] EWCA Civ 1447.

²⁶ Constructive dismissal is a resignation by an employee in response to a serious breach or repudiation of the contract by the employer. This will entitle the employee to argue that he has been dismissed for the purposes of bringing a claim both for breach of contract and for unfair dismissal.

applicable to Tribunal awards, and given that many footballers and managers are well remunerated, few football cases are heard by Employment Tribunals. One such case involved the dismissal of Leicester City player Dennis Wise following an altercation with a team mate in a hotel room during a pre-season tour. The case, heard by the Employment Appeals Tribunal, reminds employers that the dismissal of an employee must be made for not only good substantive reasons but must also be done in a procedurally correct manner.²⁷ In *Macari v Celtic Football and Athletic Co Ltd*, a breach of contract claim heard in an ordinary court, the club manager was dismissed for failing to live within a contractually stated distance of Glasgow.²⁸ This, the Scottish Court of Session determined, amounted to a breach of contract – a failure to comply with a lawful employer instruction. In *McCormack v Hamilton Academical Football Club Ltd*, an assistant football manager was successful in his wrongful dismissal claim against the club.²⁹ McCormack was dismissed for gross misconduct, after allegations of aggressive and intimidating behaviour towards players, swearing, and inappropriate behaviour towards female staff. The Court of Session found that the claimant had a reputation as a hard man before he was appointed and that had the football club wanted him to adopt a different style of coaching, he should have been given appropriate instructions at the outset and he should have been given appropriate warnings about his behaviour.

Disputes can also arise following contract termination where compensation sums are disputed. In *Manchester City Football Club Plc v Royle* the parties disputed the amount of compensation owed to ex-manager Royle following his dismissal from the club as a result of the clubs' relegation from the Premier League.³⁰ The contract provided for a higher rate of compensation in the event the club prematurely terminated his contract if the club was in the Premier League as opposed to the league below. Royle argued that at the time of his dismissal following the clubs' final match of the season, the club was still a Premier League shareholder and that consequently he was owed the higher sum. The Court of Appeal held that the correct test to be applied was whether a reasonable person with knowledge of the game would understand that relegation from a division is effective following the final game of the season and not when the club transferred its shareholding. Royle was to be compensated at the lower amount.

English law, along with many internal regulations of sports bodies, also recognises that where a contract has been lawfully entered into, it is unlawful for a party to induce a breach of it. The tort of procuring a breach of contract can result in damages being sought by the injured party. Commonly in sport inducement to breach a contract is connected to approaches to players or managers already under contract. Litigation in the ordinary courts is relatively rare³¹ although more developed

²⁷ *Dennis Wise v Filbert Realisations* UKEAT/0660/03/RN.

²⁸ *Macari v Celtic Football and Athletic Co Ltd* [1999] IRLR 787 CS.

²⁹ *McCormack v Hamilton Academical Football Club Ltd* [2010] CSOH 124 CS.

³⁰ *Manchester City Football Club Plc v Royle* [2005] EWCA Civ 195.

³¹ See *Middlesbrough Football and Athletic Co (1986) Ltd v Liverpool Football and Athletic Grounds Plc* [2002] EWCA Civ 1929. See also *Greig v Insole* [1978] 1 WLR 302.

under the rules of sports bodies themselves. The related tort of unlawful interference with the performance of a contract was unsuccessfully raised in a case involving serious injury sustained to a professional football player following a tackle by an opponent.³²

3.3 *Restraint of trade*

Where a contract exists, and even in the absence of one, the common law doctrine of restraint of trade provides another avenue through which the decisions of a sports governing body can be challenged. This doctrine asserts that rules or actions restraining trade (meaning denying or restricting the opportunity to earn a living) are void unless they can be justified.³³ Traditionally, governing bodies have argued that restraints are justified *inter alia* with reference to the need to: promote competitive balance; incentivise youth development, encourage solidarity between participants; maintain the integrity, stability and proper functioning of competitions; protect national teams; and maintain the commercial viability of sport. The doctrine requires that restraints are reasonable not only in the interests of the parties imposing the rule, but also in the wider public interest. Restraint of trade has been raised by both clubs and players. In *Stevenage Borough Football Club v Football League Ltd*, the club, having won their respective league, challenged the Football League's refusal to grant the non-league club promotion to the Football League.³⁴ In *Eastham v Newcastle United FC & others* [1964] the Chancery Division of the High Court ruled that the 'retain' element of the English retain and transfer system substantially interfered with the player's right to seek employment and therefore operated in restraint of trade.³⁵

3.4 *Public law remedies*

The existence of contractual relationships generally means that public law remedies are denied to those who wish to challenge the decision of a governing body. Thus far judicial review, a tool for allowing for the review of the decisions of public authorities, has been denied to sport despite the jurisprudential widening of the judicial review criteria to include non-statutory bodies.³⁶ Nevertheless, the courts operate a private law supervisory jurisdiction over decisions of sports governing bodies and in this regard, the standards expected of sports governing bodies are very similar to those expected under judicial review. As Lewis and Taylor point out, governing bodies must abide by certain standards established at common law,

³² *Watson and Bradford City Association Football Club (1983) v Gray and Huddersfield Town Association Football Club Ltd* [1998] *The Times*, 26 November.

³³ *Nordenfelt v Maxim Nordenfelt Guns* [1894] AC 535.

³⁴ *Stevenage Borough Football Club Ltd v Football League Ltd* (1997) 9 Admin LR 109.

³⁵ *Eastham v Newcastle United Football Club Ltd and others* [1964] Ch. 413, 430.

³⁶ On the denial of judicial review see *R (Mullins) v Appeal Board of the Jockey Club* [2005] EWHC 2197 (Admin).

in particular, they must: arrange and administer internal proceedings in compliance with the governing body's own rules and the general law; act with procedural fairness and in accordance with the principles of natural justice; take into account only relevant considerations; act only following the establishment of a sufficient factual basis; not act contrary to a legitimate expectation and; not act unreasonably. In addition, parties to a proceeding should not generally rely on arguments before a court that were not raised before the governing body's internal proceedings and should not generally bring an action before a court unless internal remedies had been exhausted.³⁷

3.5 *The law of tort*

Specific causes of action in English law also bring sport to the attention of the courts. The use of the law of tort to secure compensation for injuries is the most commonly occurring example of national sports law in action.³⁸ If catastrophic injury is caused then there is the potential for an aggrieved party to bring a legal action against the alleged wrongdoer. By far the most frequently utilised tortious action is brought in the law of negligence. Since the seminal case of *Condon v Basi*,³⁹ which involved a participant successfully suing an opponent for a late, high and dangerous tackle in an amateur football match, the growth in litigation has been rapid. In addition to participant / participant litigation, negligence actions for injuries caused on the field of play have been brought against match officials,⁴⁰ governing bodies⁴¹ and organisers of the event.⁴² It is, however, important to note that the courts have understood that in fast moving sports it is inevitable that there will be injury causing contacts that occur outside of the rules of the game and that not all of them should result in tortious liability.⁴³ This applies not only to a claim by a participant⁴⁴ but also to other areas of sporting liability.⁴⁴ In applying this approach

³⁷ Lewis, A. & Taylor, J. (2008), *Sport: Law and Practice*, Tottel Publishing, 57.

³⁸ For a thorough account of the development of the law of negligence in this area see James, M. (2010) *Sports Law*, Palgrave Macmillan, 67-107.

³⁹ [1985] 1 WLR 866.

⁴⁰ *Vowles v Evans and the Welsh Rugby Union Ltd* [2003] EWCA Civ 318.

⁴¹ *Watson v British Boxing Board of Control* [2001] QB 1134.

⁴² *Wattleworth v Goodwood Road Racing Company Ltd & Ors*, [2004] EWHC 140.

⁴³ *Caldwell v. Maguire and Fitzgerald* [2001] EWCA 1054 at paragraph 11 where the Court of Appeal stated: "Given the nature of sport ... the threshold for liability would be high and that proof of a mere error of judgement or a lapse of skill or care would not be sufficient to establish a breach of the duty ... Finally, that in practice, it may be difficult to prove a breach of duty unless there is proof of conduct amounting to reckless disregard for a co-participant's safety."

⁴⁴ See in particular the match official liability case of *Smoldon v Whitworth & Nolan* [1997] P.I.Q.R. P133, in which the Court of Appeal stated at page 139: "The level of care required is that which is appropriate in all the circumstances, and the circumstances are of crucial importance. Full account must be taken of the factual context in which a referee exercises his functions, and he could not be properly held liable for errors of judgment, oversights or lapses of which any referee might be guilty in the context of a fast-moving and vigorous contest. The threshold of liability is a high one. It will not easily be crossed."

to participants in sport, only where a tackle is late, high and significantly misjudged will it amount to negligent conduct.⁴⁵ If the action of the defendant player does amount to negligence then the employing club will be vicariously liable for the acts of their employee player.⁴⁶

3.6 *The criminal law*

Whereas the law of tort seeks to establish the liability of sports participants, the criminal law establishes a defendant's guilt.⁴⁷ It is only in the most serious cases that criminal prosecutions will be warranted. This is most apparent in professional football where there have only been a handful of prosecutions.⁴⁸ These have included attacks on supporters,⁴⁹ fighting with one's own teammate⁵⁰ and gratuitous "off-the-ball" violence against an opponent.⁵¹ Even in amateur football the criminal law is reserved for the most severe of incidents. On-the-ball incidents with close proximity to the play are unlikely to result in criminality.⁵² The Court of Appeal in the leading case of *R v Barnes*⁵³ summarises this non-interventionist approach:

"In determining what the approach of the courts should be, the starting point is the fact that most organised sports have their own disciplinary procedures for enforcing their particular rules and standards of conduct. As a result, in the majority of situations there is not only no need for criminal proceedings, it is undesirable that there should be any criminal proceedings ... A criminal prosecution should be reserved for those situations where the conduct is sufficiently grave to be properly categorised as criminal".⁵⁴

The *Barnes* case expressly accepts the concept of playing culture which is a principle specific to sport. It allows for acts of injury-causing foul play to be included within the boundaries of legal consent to criminal assault.⁵⁵ The approach of the England and Wales Court of Appeal clearly allows for sport to be afforded special treatment and is an example of a sporting exception to the general law of the land. English law will not in general allow for legal consent to apply to contacts

⁴⁵ See *McCord v Swansea City Football Club* [1997] *The Times*, February 11, *Watson v Gray and Huddersfield Football Club* [1998] *The Times*, November 26 and *Gaynor v Blackpool Football Club* [2002] CLY 3280.

⁴⁶ *Ibid.*

⁴⁷ For a thorough analysis of what role the criminal law has in regulating sports field violence see, ANDERSON, J. (2010), *Modern Sports Law*, Hart Publishing, 173-199.

⁴⁸ One example being: *R v Blissett* [1992] *Independent*, 4 December.

⁴⁹ *R v Cantona* (1995) *The Times*, 25 March.

⁵⁰ *R v Bowyer* (Unreported) Magistrates' Court (Newcastle), 5 July 2005.

⁵¹ *R v Kamara* (1988) *The Times*, 15 April.

⁵² For an analysis of the regulation of on-the-ball incidents in sport, see Pendlebury, A., (2012), 'The Regulation of on-the-ball Offences: Challenges in Court', *Entertainment and Sports Law Journal* 10(1).

⁵³ [2004] EWCA Crim.

⁵⁴ *Ibid* at para.5 per Lord Woolf.

⁵⁵ *Ibid* at para. 15.

that result in actual bodily harm or greater.⁵⁶

Despite the express acceptance of the playing culture of sport in *Barnes*, it is important to note that there is no sporting exemption from the criminal law. Acts of gratuitous violence with no correlation to the sport should, in theory, lead to a finding of criminality. The state prosecution body the Crown Prosecution Service (CPS) made this clear in 2005 when it produced draft guidelines dealing with how and when the CPS and police should act in relation to sporting misconduct. “We don’t want a situation where sportsmen are getting away with something on the pitch that they would be prosecuted for if it happened in the high street”⁵⁷ In conclusion, the criminal law does have a role to play in the regulation of sporting violence but its role is very much limited to incidents of gratuitous violence, that are sufficiently grave, to go beyond the mere imposition of an internal disciplinary sanction.

3.7 *EU and human rights law*

Sports bodies must also be mindful of their obligations arising out of the UK’s membership of international bodies. For example, EU law, specifically that relating to freedom of movement and competition law, applies to the actions of sports bodies⁵⁸ and can be relied upon before the courts. In addition, the UK’s accession to the European Convention on Human Rights has implications for sport. Although it was one of the first states to sign the Convention, the UK only incorporated it into domestic law by way of the enactment of the Human Rights Act (1998). The practical effect of this incorporation is that a complainant can rely upon Convention rights before a national court. The Act imposes an obligation on public authorities not to contravene the rights contained within the Convention. In other words the Act carries vertical effect in that it can only be invoked by individuals against the actions of the state. The Act would therefore appear to be of limited use for those wishing to challenge the actions of private sports bodies. Thus far, no sports governing body has been found by the courts to be acting as a public authority for the purposes of the Act.⁵⁹ Nevertheless, primary and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights and this, as with all other legislation, applies to statutes effecting sport. Furthermore, and perhaps more importantly, the Act states that a ‘public authority’ includes the court and tribunal system in the UK meaning that these judicial bodies must consider the human rights of the parties regardless of whether the dispute arose in the public or private domain. Whilst the Human Rights Act does not establish a cause of action for cases involving purely private parties, a complainant may bring a case in, for

⁵⁶ *R v Brown* [1993] 2 WLR 556.

⁵⁷ HARRIS, N., (2005), ‘CPS Plans Crackdown on Player Violence’ *The Independent*, June 4 2005, 67.

⁵⁸ Case 36/74 *Walrave and Koch* [1974] ECR 1405.

⁵⁹ See for example *R (Mullins) v Appeal Board of the Jockey Club* [2005] EWHC 2197 (Admin).

instance, restraint of trade and ask the court, as a public authority, to consider the human rights of the complainant.⁶⁰

4. *National Olympic Committee regulations*

The British Olympic Association (BOA) is the National Olympic Committee (NOC) for Great Britain and Northern Ireland.⁶¹ It was formed in 1905 in the House of Commons, and at that time consisted of seven National Governing Body members from the following sports: fencing, life-saving, cycling, skating, rowing, athletics, rugby, football and archery. The BOA now includes as its members the thirty-four National Governing Bodies of each Olympic sport, both summer and winter. The BOA is independent and privately funded. It receives no funding from the lottery or government and has no political interests. The success of the BOA's mission is entirely dependent upon the income received from fundraising and events. It is the independent voice for British Olympic Sport and is responsible for promoting the Olympic Movement throughout the United Kingdom.

The BOA's mission is to transform British lives through the power of the Olympic values and the success of Team Great Britain (GB).⁶² Its principal role is to prepare and lead Great Britain's finest athletes at the summer, winter and youth Olympic Games. Working with the National Governing Bodies, the BOA selects Team GB from the best sportsmen and women who will go on to compete in the 27 summer and 7 winter Olympic sports at the respective Games. The BOA is one of 204 NOCs currently recognised by the International Olympic Committee (IOC). The IOC's role is to lead the promotion of Olympism in accordance with the Olympic Charter, which details the philosophy, aims and traditions of the Olympic Movement. The IOC co-opts and elects its members from among such persons as it considers qualified. A member of each of the Olympic sports makes up the BOA's decision and policy-ratifying body. The BOA elects four officers: a President, Chairman and two Vice-chairman, each for a four year term. Six sports representatives are also elected to the Board. As a member of the IOC the BOA must adhere to the Olympic Charter⁶³ and incorporate the World Anti-Doping Code (WAD Code)⁶⁴ into its constitution.

The BOA is a private company limited by guarantee, subject to the law of England and Wales. Its objects include, acting in accordance with the Olympic Charter and promoting the WAD code. It is important to note that voting members of the BOA have the power to make bylaws which provide them with regulations specific to Great Britain. One of the key regulations provided by bylaw is that referring to eligibility. This is a key role in the fact the BOA invite athletes to

⁶⁰ For more on Convention rights applicable to sport see LEWIS, A. & TAYLOR, J. (2008), *Sport: Law and Practice*, Tottel Publishing, 509-536.

⁶¹ For further information see: www.teamgb.com/ (Last accessed 18/03/2013).

⁶² Rule 27 Olympic Charter.

⁶³ Rules 25 and 27(2.1) Olympic Charter.

⁶⁴ Rules 25 and 27(2.6) Olympic Charter.

compete on behalf of Team GB at the Olympic Games. On the 25th March 1992 members of the BOA Executive Committee enacted BOA Bylaw 25. The Bylaw states that any athlete found guilty of a doping offence by any authority recognised by the World Anti-Doping Agency (WADA) shall not thereafter be eligible for consideration as a member of Team GB at *any* future Olympic Games. The Bylaw sets up an Appeals Panel and allows athletes with minor doping offences to appeal their ineligibility to this panel. The BOA's rule differed from rule 45 of the Olympic Charter, which was only applied following a six month doping suspension. Further, the ineligibility period solely applied to the next Olympic Games. Despite the BOA having legal authority to enact bylaws that differ in effect from the Olympic Charter, the consequences of them have to conform to the WAD code. It was for this reason that Bylaw 25 was declared invalid and unenforceable following the infamous CAS opinion in *British Olympic Association v. World Anti-Doping Agency*.⁶⁵

5. *English football regulations*

The Football Association (FA) is the governing body of football in England. The period following its creation in 1863 witnessed a rather haphazard system in which teams competed in the FA Cup and played friendly matches. In 1888 the newly formed Football League offered clubs guaranteed fixtures, regular revenues and the stability of a set of rules and regulations. The clubs, keen to exploit the commercial potential of the game, embraced this new structure and established rules designed to ensure that a balanced competition brought with it financial stability. Hence, in 1891 the so-called retain-and-transfer system was established and in 1900 the League introduced the maximum wage. From the outset of English football a tension therefore existed between the FA, a body imbued with the spirit of amateurism, and the Football League, the organiser of the commercial leagues and the Football League Cup.

This tension is still evident today albeit with a new structure for the FA to contend with. In 1992 the first division of the Football League resigned its membership and, with FA approval, formed the Premier League. The formation of the Premier League represented a significant break from the old model of football governance in England insofar as the new league established new rules and negotiated its own broadcasting and sponsorship contracts independently of the clubs remaining in the Football League. It also complicated the governance structure of English football which is currently based on the following structure:

The FA: is England's national governing body and is affiliated to the European (UEFA) and global (FIFA) football regulators. It is a member association of clubs and County Football Associations (counties being a regional entity in the UK) who are its shareholders. The FA is guardian of the Laws of the Game in England and it is responsible for conducting or supervising disciplinary proceedings at all levels of

⁶⁵ CAS 2011/A/2658. The Olympic Charter's rule 45 had earlier been considered as invalid by the CAS opinion in CAS 2011/Ot2422 *USOC v. IOC*.

the game from the Premier League to the grassroots. In addition, the FA organises the FA Cup and manages the England national team and its related infrastructure such as Wembley Stadium and the national training facility. The FA operates a dual-board organisational structure: The FA Board and the FA Council.⁶⁶ In practice, the FA Board is the main decision maker although many powers are delegated to committees and boards such as the National Game Board, the Professional Game Board and the Football Regulatory Authority, the latter being the FA's regulatory, disciplinary and rule making authority. The Premier League and Football League jointly hold a share in The FA which grants these bodies an influence in FA affairs. The rules of the FA are extensive and located in its 'Rules and Regulations of the Association Season 2012/13' handbook.⁶⁷ In addition to its comprehensive list of disciplinary matters, the FA also have *inter alia* regulations on: the sanctioning and control of competitions; referees; kit and advertising; equality; child protection; anti-doping; football agents; third party ownership; owners' and directors' test for clubs competing below the Football League level; and youth development.

The Premier League: is a private company wholly owned by its 20 member clubs. This membership changes each season as the Premier League and the Football League retained promotion and relegation between the two leagues. The clubs within the league identify themselves as 'Premier League clubs' and the league acts not only as their trade association but it also organises their competition, exploits their rights, and passes and enforces rules specific to Premier League competition. The FA plays a very limited role in the running of the Premier League, but it exerts influence by way of a special (21st) share it holds in the company which entitles it to a veto over changes to various Premier League corporate and operational matters. The rules of the Premier League are laid out in the 'Premier League Handbook Season 2012/13'.⁶⁸ The handbook contains regulations pertaining to: finance and governance; insolvency; owners' and directors' test, disclosure of ownership, managers and their conduct; player contracts; player registrations; and player transfers (including a prohibition on third party ownership); disciplinary matters and dispute resolution. In February 2013 the Premier League agreed to a new set of Financial Fair Play regulations. A home grown player rule took effect from season 2010/11.

The Football League: is a private company representing the interests of the 72 professional football clubs outside of the Premier League who compete within the Football League's competitions - the Championship, Football League One and Football League Two. The Football League has an extensive rule book covering *inter alia*: financial issues and Financial Fair Play; home grown player

⁶⁶ This structure has attracted criticism and calls for reform. See House of Commons (2011), Culture, Media and Sport Committee, '*Football Governance*', Seventh Report of Session 2010-12, HC 792-I, London: The Stationary Office Limited. See also the response of the FA, Premier League and Football League to this inquiry: www.premierleague.com/content/dam/premierleague/site-content/News/publications/other/response-to-dcms-report-on-football.pdf.

⁶⁷ Available *on line* at: www.thefa.com/football-rules-governance/more/rules-of-the-association.

⁶⁸ Available *on line* at: www.premierleague.com/content/dam/premierleague/site-content/News/publications/handbooks/premier-league-handbook-2012-2013.pdf.

requirements; player registration; player transfers; prohibition on third party investment; player agents; player contracts; player approaches and inducements; media requirements and disciplinary issues.⁶⁹

6. *Rights and obligations of clubs and players*

The relationship between a football player and his club is a contractual one. In English law employees have a different status to those who work on their own account (the self-employed) or those dependent entrepreneurs who are self-employed but who are largely dependent on a single employer (workers). Employees receive the full suite of employment rights, including the right not to be unfairly dismissed, whereas workers benefit from limited rights and the self-employed fewer still. The English courts have developed a series of tests to distinguish an employee from other forms of employment status and the courts have not been willing to allow contractual statements defining employment status to conflict with the reality of the employment relationship.⁷⁰ Footballers in England have been defined as employees for over a century.⁷¹ A player must have the capacity to enter into a contract with a club. In this regard, two considerations are relevant. First, whilst those under the age of 18 do not normally possess this capacity, in football a contract of employment is enforceable if it is in the minor's benefit, for example if it provides for his training and development as opposed to one which solely seeks to protect the clubs financial interest in the player.⁷² Second, players from outside the EU might require a work permit issued by the UK Borders Agency in order to be considered legally employed in the UK.

In the English Premier League and Football League, all contracts between clubs and players must be concluded on the prescribed form (the 'Standard Contract').⁷³ This standard contract, which is governed and construed in accordance with English law, outlines the obligations of clubs and players. The terms and conditions of the standard contract form part of a number of collective agreements between the club (through the League) and the player (through the Professional Footballers' Association) and the contract reflects the obligations both parties have in relation to FA, UEFA and FIFA rules. In addition to the standard express terms, the parties will agree personal terms detailing issues such as salary and bonuses. Some players might also negotiate an image rights clause and many players also enter into a representation agreement with an agent.

⁶⁹ Available *on line* at: www.football-league.co.uk/page/RegulationsIndex/0,,10794,00.html.

⁷⁰ *Autoclenz Ltd v Belcher and others* [2011] IRLR 820 SC.

⁷¹ *Walker v Crystal Palace Football Club* [1910] 1 KB 87.

⁷² *Aylesbury Football Club (1997) Ltd v Watford Association Football Club Ltd* (12 June 2002, unreported).

⁷³ The Premier League Standard Contract (Form 26) is located in the Premier League Handbook 2012/12.

6.1 *Obligations of players*

In the standard contract the player agrees to a series of obligations including to attend and participate in club matches and to participate in training and match preparation at any reasonable place. He also agrees to play to the best of his skill and ability at all times; maintain a high standard of physical fitness except where prevented from doing so through illness or injury; not to indulge in any activity sport or practice which might endanger his fitness or inhibit his mental or physical ability to play practise or train; and to undertake such other duties and to participate in such other activities as are consistent with the performance of his duties. Additionally, the player must allow the release to the club of his medical records; comply with all lawful instructions of the club; play football solely for the club or as authorised by the club or as required by the rules of the governing bodies; observe the Laws of the Game when playing football; observe the relevant rules of the governing bodies; submit to medical and dental examinations as the club may reasonably require; and to undergo at no expense to himself such treatment as may be prescribed by the medical or dental advisers of the club or the club's insurers. On the termination of his contract the player must also agree to return to the club any property, including any car, which has been provided to him.

Elsewhere in the standard contract the player agrees to refrain from acting in such a way that might invoke any exclusion of the player's insurance cover; refrain from wearing anything whilst training or playing which could be dangerous to him or any other person; accept that the club might deem his place of residence as unsuitable for the performance of his duties; accept restrictions on his ability to be engaged in any other employment or business without the prior written consent of the club (although the player can make investments in any business so long as it does not conflict or interfere with his contractual obligations). The player must also not act in a way that brings the club into disrepute. A player must give the club reasonable notice of his intention to make any contributions to the public media. The player, except in the case of an emergency, must secure the consent of the club before arranging or undergoing any medical treatment; player's must be available for up to six hours a week for the promotional community and public relations activities of the club, league and sponsors. In exercising these functions the player also accepts rules relating to marketing activities. The contract also allows the club to deduct from the player, by way of forfeiture, wages due to breaches of discipline. Whilst the above obligations are expressly provided for in the contract, in English law certain duties are also implied at common law into contracts of employment. These include *inter alia* the duties of obedience and loyalty.

6.2 *Obligations of clubs*

The standard contract also establishes the obligations of the club. The club agrees to pay the player the stated remuneration and benefits and to reimburse any expenses incurred by the player when undertaking authorised club business. The club is

committed to observe the statutes and regulations of FIFA, UEFA, the FA, the League Rules, the Code of Practice and the Club Rules. These are made available to the player. The club must promptly arrange appropriate medical and dental examinations and treatment for the player at the club's expense in respect of any injury to or illness (including mental illness or disorder) of the player except for injury or illness which is caused by an activity or practice on the part of the player which breaches his contract. It must comply with all relevant statutory provisions relating to industrial injury and maintain and observe a proper health and safety policy. In any case where the club would be liable as employer for any acts or omissions of the player in the lawful and proper performance of his playing practising or training duties under his contract, the club also agrees to defend the player against any proceedings threatened or brought against him and indemnify him from any damages awarded. The club also agrees to support a player wishing to follow any course of further education or vocational training which he wishes to undertake. The club must release the player to the national association for representative matches as required by the statutes and regulations of FIFA. The club shall not without the consent in writing of the player take, use or permit to be used photographs of the player, except in those circumstances provided for in the contract; or use or reveal the contents of any medical reports or other medical information regarding the player obtained by the club except for the purpose of assessing the player's health and fitness, obtaining medical and insurance cover and complying with the club's obligations under the rules of the football governing bodies.

As with the obligations of players, common law implies certain employer duties into contracts of employment. Of particular interest is the duty to provide work, the duty of care and the duty of trust and confidence. The duty to provide work is not commonly found in employment contracts unless expressly provided for. As long as the employee is being paid, there is no requirement to provide work. However, the courts have recognised that in certain professions where publicity is important, such as acting, there may be a need to provide work.⁷⁴ Following *William Hill Organisation Ltd v Tucker*⁷⁵ an implied duty to provide work arguably exists for workers who need to exercise their skills. An employer should not unreasonably withhold work such as in instances where a club refuses to play a player who has refused an offer to sign a contract extension. As Lewis and Taylor point out, this does not necessarily mean that footballers must be allowed to play in the first team but it might be unreasonable for a club to deny a player the opportunity to hone skills in, for example, reserve team football.⁷⁶ According to the FIFA regulations, an established player who has, in the course of the season, appeared in fewer than ten per cent of the official matches in which his club has been involved may terminate his contract prematurely on the ground of sporting just cause.⁷⁷

⁷⁴ *Herbert Clayton and Jack Waller Ltd v Oliver* [1930] AC 209, HL.

⁷⁵ *William Hill Organisation Ltd v Tucker* [1998] IRLR 313, CA.

⁷⁶ LEWIS, A. & TAYLOR, J. (2008), *Sport: Law and Practice*, Tottel Publishing, 548.

⁷⁷ Article 15 FIFA Regulations on the Status and Transfer of Players, 2010 edition.

The implied duty of care owed by the club to its players has a relevance in the context of the provision of a safe working environment, the provision of adequate materials and to circumstances in which a third party acts on behalf of the club. Whilst a breach of this duty might give rise to an action in tort, a player could cite breach of his employment contract should the duty be broken by his employer. Finally, the duty of trust and confidence requires the employer not to act in such a way that fundamentally undermines the relationship with the employee. This has implications for, amongst other things, the way in which a club speaks publically about a player. Article 14 of the FIFA Regulations on the Status and Transfer of Players provide that a contract may be terminated by either party without consequences of any kind (either payment of compensation or imposition of sporting sanctions) where there is just cause.⁷⁸ This duty also has a relevance for a club's relationship with other employees such as coaches. In *McBride v Falkirk Football & Athletic Association*, the Employment Appeal Tribunal found that an employer cannot rely on an industry norm, such as the autocratic style of management in the world of football, to justify what would otherwise amount to a breach of the implied term of trust and confidence.⁷⁹ McBride, a football coach, was told by the club that he would be in charge of the under 19 side without interference. The club acted in a manner inconsistent with this assurance and McBride resigned citing constructive dismissal.

In English law, contracts of employment must also include an equality clause, either expressly provided for or implied according to the terms of the Equality Act 2010. The equality clause prohibits discriminatory practices connected to: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation. The Equality Act also regulates equal pay between men and women. A 'sporting exception' is provided for in section 195 of the Act which places limits on the ability of a complainant to rely on its provisions in relation to sporting competitions – such as sex discrimination designed to ensure fair competition or the safety of competitors.

The standard contract also contains the following relevant provisions:

Injury/illness and permanent or prolonged incapacity: The provisions establish the remuneration a player is to receive if injured or ill and the circumstances in which the club can terminate a contract for permanent or prolonged incapacity.

Disciplinary provisions: Disciplinary procedures are annexed to the contract. The club will first undertake an investigation into the alleged incident, convene a hearing and allow for an appeal. Disciplinary penalties are also set out. A grievance procedure is also provided for in the contract. In any disciplinary or grievance procedure the player is entitled to be accompanied by or represented by his club captain or a Professional Footballers' Association delegate and/or any officer of the PFA.

⁷⁸ Article 14 FIFA Regulations on the Status and Transfer of Players, 2010 edition.

⁷⁹ *McBride v Falkirk Football & Athletic Club* EATS/0058/10.

Contract termination by the club: At common law serious breaches of a contract are taken to mean that the innocent party can be released from their obligations given that the party in breach has repudiated their side of the bargain. The standard contract makes this orthodoxy express. By giving fourteen days' notice the club can terminate the employment of the player for reasons of gross misconduct by the player;⁸⁰ if he has failed to heed any final written warning given under the disciplinary provisions; or if he is convicted of any criminal offence where the punishment consists of a sentence of imprisonment of three months or more (which is not suspended).⁸¹ If a player appeals against his dismissal, the club, pending the hearing, may suspend the player for up to a maximum of six weeks from the date of notice of termination without pay. Upon termination of his contract, the club is required to release the player's registration. Non-renewal of a fixed term contract is considered, in English law, a dismissal and the dismissed party can, assuming they have two years continuous service, make a statutory claim for unfair dismissal.⁸² The standard player contract contains provision that if on the expiry of his contract the club has not made to the player an offer of re-engagement on terms at least as favourable to the player as those applicable over the last twelve months of this contract, then the player will continue to receive from his club a payment equal to his weekly basic wage for a period of one month from the expiry of this contract or until the player signs for another club, whichever period is the shorter. The maximum amount payable to the player under this provision is double the maximum sum which an Employment Tribunal can award as a compensatory award for unfair dismissal.

Contract termination by the player: The player can terminate his contract with fourteen days' notice in writing to the club if the club: is guilty of serious or persistent breach of the terms and conditions of the contract; or fails to pay any remuneration or other payments or bonuses due to the player. The club can lodge an appeal with the league. Upon termination of his contract, the club is required to release the player's registration. The English courts have thus far refused to grant injunctive relief in order to enforce a contract for personal services. This leaves damages the remedy for breach of contract.⁴ English law dictates that, so far as is possible, the injured party is restored to the position they would have enjoyed had the contract been performed. Damages clauses in employment contracts are unenforceable if they are designed to penalise the party breaking the contract rather than reflecting the actual loss incurred by the party suffering the breach.

⁸⁰ See for example the dismissal of Adrian Mutu by Chelsea FC for substance abuse. Note that the Professional Footballers' Association has proposed that racial abuse should amount to gross misconduct in the standard players' contract.

⁸¹ See for example the dismissal of Marlon King by Wigan Athletic FC following a criminal conviction for assault and the dismissal of Lee Hughes by West Bromwich FC for a conviction of causing death by dangerous driving.

⁸² Ss.95(1)(b) and 136(1)(b) of the Employment Rights Act 1996.

⁸³ Remedies for breach of statute (unfair dismissal) include compensation, reinstatement and re-engagement.

Arbitration: Any dispute between the club and the player not provided for by those provisions relating to grievance, discipline and dismissal shall be referred to arbitration in accordance with the League Rules or (but only if mutually agreed by the club and the player) in accordance with the FA Rules. In this regard, the standard contract also contains a *specificity of football* clause requiring the parties to confirm and acknowledge the special relationship and characteristics involved in the employment of football players. The parties agree that all matters of dispute in relation to the contract are subject to the jurisdiction and decisions of tribunal panels or other bodies established under the relevant football rules. The specificity of sport clause brings the standard contract into line with clauses located elsewhere in the wider football rulebook, particularly in the FIFA Regulations on the Status and Transfer of Players.⁸⁴ However, the reference in the standard contract to the application of English law and to obligations arising out of UK employment law means that the specificity of sport clause cannot be read as implying immunity from ordinary law.

Supplemental provisions: In order to comply with the Employment Rights Act 1996, the standard contract requires the parties to state when the player's employment with the club commenced, the date of termination of the contract (30 June), the date of continuous employment (employment with a previous employer does not count as part of the player's continuous period of employment); the player's hours of work (are such as the club may from time to time reasonably require of him to carry out his duties and the player shall not be entitled to any additional remuneration for work done outside normal working hours); the place of employment (being the club's ground and training ground but the club is entitled to require the player to play and to undertake his duties at any other place throughout the world); pension provisions and remuneration and benefits. The normal retirement age of players is given as 35.

The Professional Football Negotiating and Consultative Committee (PFNCC) considers questions concerning players' remuneration and other terms and conditions of employment, including contractual obligations, minimum pay, bonuses governed by League rules, pensions, fringe benefits, holidays, standard working conditions and insurance, as well as procedural matters involving the negotiating machinery, and the contract appeals machinery. No major changes in the regulations of the Leagues affecting a players' terms and conditions of employment can take place without full discussion and agreement in the PFNCC. For the sake of completeness it should be pointed out that the EU wide professional football social dialogue committee has concluded an autonomous agreement on minimum requirements for standard player contracts.⁸⁵

⁸⁴ The FIFA Regulations refer to the 'specificity of sport'. For a discussion see *European Sports Law and Policy Bulletin* (2011), Contractual Stability in Football, Issue I-2011.

⁸⁵ Signed in Brussels on April 19, 2012.

7. Domestic sports law: sports judicial bodies, dispute settlements and procedures

Most disputes in sport are not settled before ordinary courts ('national sports law') but within the internal legal system of sport ('domestic sports law'). The remainder of this chapter focuses on the actual disputes which may occur in English sports justice, specifically disciplinary, economic and technical disputes within football and the Olympic movement.

Disciplinary disputes: Common offences include: acts of violence against participants, match officials or supporters; the use of indecent or insulting words against participants, match officials or supporters; bringing the sport into disrepute; using performance enhancing substances; corruption; financial rule infringements including inter alia financial fair play rules and entering into administration; and failing to fulfill a fixture. Typically the sanctions for such offences include: disqualification; suspension; points deductions; warnings; fines; and permanent exclusion.

Technical disputes: Common disputes include those relating to: licenses; eligibility; selection; promotion and relegation; and club relocation.

Economic disputes: Common disputes include: financial disputes between clubs; compensation assessments following a unilateral breach of contract;⁸⁶ and contractual disputes.

7.1 Disputes relating to the BOA

Sport Resolutions UK (SRUK)⁸⁷ provides a one-stop shop service for all UK sports disputes. It facilitates the resolution of disputes which place the integrity of sport at most risk such as doping, match-fixing, safeguarding the welfare of children, athlete selection and eligibility and other regulatory and commercial disputes. Its key aim is to provide an affordable, accessible and expert alternative to internal appeals processes and court based litigation. Its services include arbitration, mediation, panel appointments, investigations and reviews and advisory opinions. The resolution mechanism that is of most pertinence to the BOA is the eligibility⁸⁸ and selection⁸⁹

⁸⁶ Signed in Brussels on April 19, 2012.

⁸⁷ See www.sportresolutions.co.uk/page.asp?section=43§ionTitle=About+Us.

⁸⁸ For an eligibility dispute see: *Christine Ohuruogu v BOA*, *International Sports Law Review*, 2008, 2/3. Ohuruogu successfully appealed against her ineligibility to compete at the Summer Olympic Games as a result of WAD code infringement. At the time the BOA's bylaw 25 would have made her ineligible to represent Team GB. Her appeal before SRUK was on the grounds of significant mitigating circumstances. The Panel accepted the UK Athletics Disciplinary Committee's finding that Ohuruogu had no intent to take any prohibited substance and that she had never attempted or had the intent of avoiding the rules.

⁸⁹ For a selection dispute see: *Great Britain Rhythmic Gymnastics Group v British Amateur Gymnastics Association*, 29 February 2012. In this case the applicants had failed to attain the qualification standard for the Olympic Games and therefore, they were not selected for Team GB. In the appeal to SRUK the applicants claimed that the selection criteria were not clear. Arbitrator Graeme Mew agreed and allowed the appeal. Therefore the applicants were able to compete at the

panel. The BOA invites athletes to compete on behalf of Team GB at the Olympic Games. In essence the relevant governing body e.g., UK Athletics puts forward an athlete and the BOA must ratify the selection. Any disputes relating to this process of selection will be referred to SRUK. It is important at this juncture to note that not all selection / eligibility decisions will be open to challenge. In the case of *Belcher v British Canoe Union and SRUK*,⁹⁰ the Panel Chairman, William Norris QC, set out the test to determine whether a selection decision of an NGB would be open to challenge. The Panel in the *Belcher* appeal stated that a decision may be open to challenge if, but only if:

“(i) It is not in accordance with selection policy as published; and / or (ii) The policy has been misapplied or applied on no good evidence and / or in circumstances where the application of the policy was unfair (for example, because someone with selectoral authority had given a categorical assurance to an athlete that the policy would not be applied); and / or (iii) The decision maker has shown bias or the appearance of bias or the selection process has otherwise been demonstrably unfair; and / or (iv) Where the conclusion is one that no reasonable decision maker could have reached.”⁹¹

If the selection dispute is within the remit of SRUK, any decisions handed down by the panel are final and binding on the parties.⁹²

7.2 *Disputes relating to football*

Professional football in England has developed dispute resolution mechanisms to deal with the multi-faceted nature of the potential disputes that may arise. The type of dispute will govern which regulations apply and impact upon the judicial body that hears the case. However, taken as a whole, the dispute resolution mechanism forms a complete code by which all disputes are resolved within football.

The *Football Association Judicial Panel* is established by the FA Council as the group of individuals from which Regulatory Commissions and Appeal Boards will be drawn by the Judicial Panel Chairman or in his absence, his nominee, to hear cases or appeals in connection with disciplinary and other regulatory processes of the FA.⁹³ The *Football Association Regulatory Commission and the Appeal Boards* are drawn from members of the Judicial Panel. Their main role falls within a disciplinary context. Issues pertaining to misconduct, contrary to rule E1(a) of the FA regulations will fall exclusively within the FA’s remit.⁹⁴ Rule E1(a) concerns

London 2012 Games.

⁹⁰ *Belcher v British Canoe Union and SRUK* - Arbitration Judgment of William Norris QC, 5 July 2012.

⁹¹ *Ibid* at para. 49.

⁹² It was made clear in the Aaron Cook appeal against his omission from Team GB 2012 that there would be no appeal to the Court of Arbitration for Sport. See Mclaran, R., (2012), ‘Arbitration: Olympic selection: Aaron Cook case & CAS jurisdiction’ World Sports Law Reports, Volume: 10 Issue: 8.

⁹³ Rules of the Association 2012-13, Judicial Panel, paragraph 3.1.

⁹⁴ Rule G(1) FA regulations.

incidents that infringe the actual Laws of the Game. FIFA law 12 states that it will be an infringement of the Laws of the Game if a player intentionally:

- a) kicks or attempts to kick an opponent;
- b) trips an opponent, i.e., throwing or attempting to throw him by the use of the legs or by stooping in front of or behind him;
- c) jumps at an opponent;
- d) charges an opponent in a violent or dangerous manner;
- e) charges an opponent from behind unless the latter is obstructing;
- f) strikes or attempts to strike an opponent or spits at him;
- g) holds an opponent;
- h) pushes an opponent;
- i) handles the ball, i.e., carries, strikes or propels the ball with his hand or arm; (this does not apply to the goalkeeper within his own penalty-area).

In relation to any of the aforementioned issues the Premier League (PL) will not involve itself in the disciplinary process. Other types of misconduct include *inter alia*:

- a) Violent conduct.⁹⁵
- b) Bringing the game into disrepute.⁹⁶
- c) Threatening, abusive, indecent or insulting words or behaviour.⁹⁷
- d) Discrimination.⁹⁸
- e) Taking bribes.⁹⁹
- f) Illegal betting.¹⁰⁰

In these cases the FA shall have the power to take disciplinary action but it may not be an elite power.¹⁰¹

Having ascertained that the case falls within the FA's jurisdiction the next issue to explore is the actual role of the regulatory commissions.¹⁰² Law 12 violations which result in a sending off are subject to a range of sanctions.¹⁰³ A player and his club may seek to limit the disciplinary consequences of the dismissal of a player from the field of play by demonstrating to the FA that the dismissal was wrongful.¹⁰⁴ A claim of wrongful dismissal may be lodged only for on-field offences which result in a sending off.¹⁰⁵ The role of the Regulatory Commission in considering a claim of wrongful dismissal is concerned with only the question of whether any sanction of a suspension from play is one which should be imposed in view of the facts of the case. This role is not to usurp the role of the referee and the dismissal

⁹⁵ Rule E(3) FA regulations.

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ Rule E(4) FA regulations.

⁹⁹ Rule E(5) FA regulations.

¹⁰⁰ Rule E(8) FA regulations.

¹⁰¹ Rule G(2) FA regulations.

¹⁰² In this context we are exploring the regulatory commission in its role as a disciplinary commission.

¹⁰³ FA disciplinary procedures paragraph A(8).

¹⁰⁴ FA disciplinary procedures paragraph A(5a).

¹⁰⁵ FA disciplinary procedures paragraph A(5b).

from the field of play will remain on the record of the club and the player.¹⁰⁶ A Regulatory Commission can in exceptional circumstances hear claims that the standard punishment was clearly excessive.¹⁰⁷ Conversely they can increase the suspension if the circumstances of the dismissal under review are truly exceptional, such that the standard punishment should not be applied and the standard punishment would be clearly insufficient.¹⁰⁸ *FA v Thatcher*¹⁰⁹ provides an example of truly exceptional circumstances. On 23 August 2006, during a Premier League football match at the City of Manchester Stadium, and as two players chased the ball going out of play, Manchester City player Ben Thatcher hit opponent Pedro Mendes in the face with his elbow; Mendes was hospitalised as a result of the challenge, which had rendered him unconscious. Thatcher was only cautioned by the match official and in ordinary circumstances this would bring an end to the matter. However, this incident was held to be sufficiently grave to warrant an additional sanction being imposed. The Regulatory Commission decided to impose an eight match suspension onto Thatcher.

The preceding paragraph explored the role the Regulatory Commission plays when infringements are sanctioned on the field of play. This next section discusses the Commission's responsibilities in relation to incidents on the field of play which fall within Law 12, that were not seen by match officials, but were caught on video. In these circumstances, the FA has the power to charge a player with misconduct.¹¹⁰ The charge may be accompanied by an offer of the standard punishment that would apply to the offence had it been seen and reported by the match official(s) during the match. Where a charge is denied by the player the Regulatory Commission will decide whether the charge is proved or not proved. In the event that the charge is not proved, the charge will be dismissed. In the event that a charge is proved or admitted, the Regulatory Commission will decide on the penalty to be served by the player. The standard punishment may be decreased or increased by the Regulatory Commission only in exceptional circumstances. The player will have a right of appeal only in the event that a penalty is ordered in excess of a three-match suspension. The player may only appeal against the level of penalty imposed and only in respect of that part of the suspension in excess of three matches. No other appeal (for instance, against the decision that the charge was pursued) is allowed.¹¹¹

¹⁰⁶ FA disciplinary procedures paragraph A(5c). See *Steven Nzonzi v FA* [2013] www.thefa.com/News/governance/2013/jan/steven-nzonzi-wronful-dismissal-claim-southampton.

¹⁰⁷ FA disciplinary procedures, para. A(6).

¹⁰⁸ FA disciplinary procedures, para. A(7g).

¹⁰⁹ Independent Disciplinary Commission, 12 September 2006.

¹¹⁰ FA disciplinary procedures, schedule A (a). See: *FA v John Terry* Independent Disciplinary Commission, 24-27 September 2012. In this case the FA charged Terry with Misconduct pursuant to Rule E.3(1) of its Rules and Regulations, which included a reference to the ethnic origin and/or colour and/or race within the meaning of Rule E.3(2). The independent panel found Terry guilty of the misconduct. He was suspended for four matches and fined £220,000.

¹¹¹ FA disciplinary procedures, schedule A(e).

The most commonly occurring disciplinary issues away from the field of play concern comments made to the media which bring the game into disrepute. Cases involving media comments or comments made on social networking sites¹¹² are charged under FA Rule E3(1). Should the comments include a reference to any one or more of a person or person's ethnic origin, colour, race, nationality, faith, gender, sexual orientation¹¹³ or disability, these are considered 'aggravating factors' and FA Rule E3(2) may apply. This allows for a Regulatory Commission to consider the imposition of a doubled sanction.

Having considered the procedural and jurisdictional issues it is worth making brief mention of rules relating to the actual disciplinary proceedings. The Regulatory Commission will consider its decision in private, and first consider whether or not the charge of misconduct is proved. If it is so proved, then the Regulatory Commission shall inform the person or club subject to the charge of this decision and invite them to raise matters in mitigation. However, if the charge is admitted the Regulatory Commission shall deem it proved and move straight to considering submissions as to mitigation. Having heard such submissions as to mitigation, the Regulatory Commission shall retire to consider the appropriate sanction.¹¹⁴ A decision of the Regulatory Commission will be determined by a majority. Each member of the Regulatory Commission shall have one vote, save that the chairman of the Regulatory Commission shall have a second and casting vote in the event of a deadlock.¹¹⁵ The applicable standard of proof shall be the civil standard of the balance of probability.¹¹⁶

Disciplinary issues which fall within the jurisdiction of the Premier League will be heard before the FA Premier League Disciplinary Commission. As a general rule facts or matters giving rise to alleged misconduct under Rule E1(b) to (f) inclusive of the FA rules, which also give rise to an alleged breach of the rules and/or regulations of the PL shall be dealt with under the PL disciplinary rules.¹¹⁷ There will of course be certain disciplinary issues that are solely violations of PL rules. Quite evidently these will be dealt with by the PL. For example PL rules exist to regulate matters specific to Premier League Clubs which are not covered by FA rules. These include issues such as making illegal approaches to players registered at another club,¹¹⁸ the prohibition on third party influence over clubs¹¹⁹ and sanctions for a club or its parent undertaking suffering an event of insolvency.¹²⁰ Under

¹¹² For examples see: *FA v Ryan Babel* [2011] and *FA v Ashley Cole* [2012].

¹¹³ *FA v Suso* [2012].

¹¹⁴ FA disciplinary procedures, para. 7.1.

¹¹⁵ FA disciplinary procedures, para. 7.2.

¹¹⁶ FA disciplinary procedures, para. 7.3.

¹¹⁷ Rule G(4) FA regulations.

¹¹⁸ Premier League Rules 2012-13 section T.3. See *Football Association Premier League LTD v Ashley Cole, Chelsea Football Club and Jose Mourinho*, 1st June 2005.

¹¹⁹ Premier League Rules 2012-13 sections U.36. – U.37. See *Football Association Premier League LTD v West Ham United*, 27th April 2007.

¹²⁰ Premier League Rules 2012-13 section E.5. See *Football Association Premier League LTD v Portsmouth FC*, 17th March 2010.

section W of the PL Rules, the PL has power to enquire into an alleged breach of the rules and subject any Club, Club official or player responsible for such a breach to the PL's disciplinary procedures.

8. *Arbitration*

8.1 *Football Association arbitration*

The relevant regulations concerning FA arbitration are contained in Rule K of the FA regulations....

K. ARBITRATION

AGREEMENT TO ARBITRATION

1 (a) Subject to Rule K1(b), K1(c) and K1(d) below, any dispute or difference between any two or more participants (which shall include, for the purposes of this section of the Rules, The Association) including but not limited to a dispute arising out of nor in connection with (including any question regarding the existence or validity of):

(i) the Rules and regulations of The Association which are in force from time to time;

(ii) the rules and regulations of an Affiliated Association or competition which are in force from time to time;

(iii) the statutes and regulations of FIFA and UEFA which are in force from time to time; or

(iv) the Laws of the Game, shall be referred to and finally resolved by arbitration under these rules.

(b) No arbitration shall be commenced under these rules unless and until the party or parties wishing to commence an arbitration under these Rules (the "Claimant(s)") has exhausted all applicable rights of appeal pursuant to the Rules and regulations of the Association.

c) Rule K1(a) shall not apply to any dispute or difference which falls to be resolved pursuant to any rules from time to time in force of any affiliated Association or competition.

(d) Rule K1(a) shall not operate to provide an appeal against the decision of a Regulatory Commission or an Appeal Board under the Rules and shall operate only as the forum and procedure for a challenge to the validity of such decision under English law on the grounds of ultra vires (including error of law), irrationality or procedural unfairness, with the Tribunal exercising a supervisory jurisdiction.

(e) The parties agree that the powers of the court under Sections 44, 45 and 69 of the Arbitration Act 1996 are excluded and shall not apply to any arbitration commenced under these Rules.

It is important to note that the role of FA arbitration is supervisory. The role very much equates to the position of the courts' inherent supervisory jurisdiction as

articulated above.¹²¹ An example of this approach was seen in the case of *Wimbledon FC LTD v The Football League*.¹²² In this case Wimbledon FC won the right to have their case for moving to Milton Keynes re-examined by the Football League. A three-man Football Association arbitration panel ruled that the league needed to look at Wimbledon's proposals in greater detail before reaching a decision. It was decided by the panel that the specific Football League rule, requiring clubs not to move outside of their area of origin without the permission of the league, would amount to an unreasonable restraint of trade. The club successfully argued that it had a pressing need to relocate its ground in order to be able to trade effectively.

8.2 Premier League arbitration

The PL has a similar arbitration clause to that of the FA's Rule K. Membership of the PL shall constitute an agreement in writing between the league and clubs and between each of the respective clubs to submit all disputes which arise between them, whether arising out of the rules of the PL or otherwise, to final and binding arbitration.¹²³ This can include a challenge to a disciplinary decision by a member club, but like the FA's arbitration remit, this process is purely supervisory.¹²⁴ Financial disputes between member clubs are also referred to arbitration.¹²⁵ It is important to note that under the arbitration rules of the PL there is no appeal available to the CAS as the clubs by becoming members of the PL have entered into a final and binding arbitration agreement.¹²⁶

Any dispute arising between the parties to a Manager's contract of employment shall be determined by the Premier League Managers' Arbitration Tribunal.¹²⁷ In English football managerial dismissals are common. The purpose of the mandatory arbitration clause is to avoid lengthy and expensive employment disputes being pursued through the courts.¹²⁸ The arbitration panel has in recent

¹²¹ See *Bradley v Jockey Club* [2005] EWCA Civ 1056.

¹²² *Wimbledon FC LTD v The Football League*, 29th January 2002.

¹²³ Premier League Rules 2012-13, Section X2.1.

¹²⁴ *Sheffield United FC LTD v FA Premier League LTD* [2007] ISLR, SLR 77. In this case Sheffield United challenged the decision of the Premier League disciplinary commission in the case of *Football Association Premier League LTD v West Ham United*, 27th April 2007. The disciplinary commission decided to not deduct points from West Ham United after a premier league rule infringement. This resulted in Sheffield United's relegation from the Premier League. The arbitration tribunal upheld the findings of the disciplinary commission and declared that its final decision to fine West Ham was within the range of appropriate responses which it could have reached.

¹²⁵ *Sheffield United FC LTD v West Ham United FC PLC* [2009] ISLR, SLR 25. In this case Sheffield United sued West Ham United for breach of contract to recover earnings as a result of it being relegated. The action was successful and Sheffield United was awarded somewhere in the region of £20 million.

¹²⁶ See *Sheffield United Football Club Ltd v West Ham United Football Club PLC* [2008] EWHC 2855 (Comm) in which Sheffield United successfully applied for an injunction to prevent West Ham United appealing to the CAS.

¹²⁷ Premier League Rules 2012-13, Section Y.1.

¹²⁸ *Joe Royle v Manchester City Football Club* (Court of Appeal, March 2005). This case highlights

years been able to resolve such issues relating to constructive dismissal¹²⁹ and wrongful dismissal.¹³⁰

9. Conclusions

This contribution highlights the complex and multi-faceted nature of sports justice in the UK, specifically in England. The key findings to emerge from this work are: (1) the state does not directly regulate sport although it does exert statutory and non-statutory influences on sport, (2) sports bodies must comply with the standards expected by ordinary courts, (3) contractual relations lie at the heart of many sporting relationships in the UK, (4) public law remedies, such as judicial review, are not available to challenge decisions of sports governing bodies but (5) the courts operate a private law supervisory jurisdiction over decisions of sports governing bodies meaning that the standards expected of sports governing bodies are very similar to those expected under judicial review, (6) in the law of tort courts have accepted that in sport a duty of care is owed by participants, match officials, governing bodies and event organisers, (7) criminal law prosecutions in sport are rare, particularly those concerning injury sustained on the field of play, (8) sports bodies are keen to insulate ‘domestic sports law’ from the influence of ‘national sports law’ and, therefore, (9) sophisticated disciplinary commissions and arbitral bodies play an essential role in resolving English sports disputes.

the problems with litigation prior to the enactment of the arbitration clause. Royle was actually dismissed from his managerial position at Manchester City in the May of 2001.

¹²⁹ *Keegan v Newcastle United Football Club LTD* [2010] ISLR, SLR 1.

¹³⁰ *Alan Curbishley v West Ham United Football Club* 17th June 2010.

TABLE 2: DOMESTIC SPORTS LAW EXAMPLES

	Case	Type of Dispute	Nature of the Dispute	Dispute Resolution Mechanism
1	<i>Wimbledon FC LTD v The Football League</i> 29th January 2002	Technical	Club Relocation	Football Association Arbitration
2	<i>Keegan v Newcastle United Football Club LTD</i> [2010] ISLR, SLR 1,	Economic	Claim for Constructive Dismissal	Premier League Managers Arbitration Panel
3	<i>Alan Curbishley v West Ham United Football Club</i> 17th June 2010	Economic	Claim for Wrongful Dismissal	Premier League Managers Arbitration Panel
4	<i>Football Association Premier League LTD v West Ham United</i> [2007]	Disciplinary	Breach of FA Premier League Rules	FA Premier League Disciplinary Commission
5	<i>Sheffield United FC LTD v FA Premier League LTD</i> [2007] ISLR, SLR 77	Technical	Challenging the decision in case number 4.	FA Premier League Arbitration Panel
6	<i>Sheffield United FC LTD v West Ham United FC PLC</i> [2009] ISLR, SLR 25.	Economic	Breach of Contract Claim	FA Premier League Arbitration Panel
7	<i>FA v John Terry</i> [2012] 24-27 September	Disciplinary	Misconduct – on-the-field	FA Independent Disciplinary Commission
8	<i>FA v Ashley Cole</i> [2012]	Disciplinary	Misconduct – off-the-field	FA Independent Disciplinary Commission
9	<i>Steven Nzonzi v FA</i> [2013]	Disciplinary	Wrongful Dismissal	FA Independent Disciplinary Commission
10	<i>FA v Ben Thatcher</i> 12 September 2006.	Disciplinary	Misconduct – on-the-field Retrospective Punishment.	FA Independent Disciplinary Commission
11	<i>FA v Suso</i> [2012]	Disciplinary	Misconduct – off-the-field	FA Independent Disciplinary Commission
12	<i>FA v Ryan Babel</i> [2011]	Disciplinary	Misconduct – off-the-field	FA Independent Disciplinary Commission
13	<i>Ohuruogo v British Olympic Association</i> [2008] ISLR, SLR 113	Technical	Eligibility to compete at the Olympic Games after a doping infringement.	Sports Resolutions UK
14	<i>Great Britain Rhythmic Gymnastics Group v British Amateur Gymnastics Association</i> , 29 February 2012	Technical	Olympic Selection Dispute	Sports Resolutions UK
15	<i>Belcher v British Canoe Union and Sports Resolutions UK</i> , 5 July 2012	Technical	Olympic Selection dispute: Justifiability	Sports Resolutions UK
16	<i>Football Association Premier League LTD v Portsmouth FC</i> , 17 th March 2010	Disciplinary	Sporting Sanction imposed as a result of the Club entering into administration	FA Premier League Disciplinary Commission

SPORTS JUSTICE IN FRANCE

by *Jean-Michel Marmayou**

SUMMARY: 1. Principles of French Sports justice – 2. Relationship between ordinary and Sports justice – 3. Relevant NOCs regulations – 4. Relevant football regulations – 5. The sports judicial bodies – 6. The procedure – 7. Dispute settlements – 8. ADR and interim relief – 9. Sanctions on clubs and players – 10. Implementation of decisions and awards

Abstract:

This article aims at providing an overview of sports justice in France with its main principles and its most important legal institutions. It sets out the basic principles in which sports justice in France operates, provides input as to the interaction between sports justice and ordinary justice and deals with the main judicial bodies operating within the sports justice system.

This article presents the rights and obligations of the main actors in sports, the penalty system, the procedure applicable by the disciplinary commissions in solving technical, disciplinary or economic litigations.

It presents the french specificity of collaboration between the State administration and sports bodies who had obtained the State's recognition, public subsidies and special regulatory powers.

1. Principles of French Sports justice

There is no doubt that sport requires a system of justice that is adapted to its own

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specific needs: that is to say rapidity of intervention so as to meet the specific time demands encountered in sport; a system that overcomes state boundaries and better accommodates the global nature of sport; and finally, a system that is close to the needs of the participants in a sport.

Unlike certain foreign systems, and despite certain proposals that have been put forward in this respect,¹ the French legal system has chosen not to answer these needs by creating a specific jurisdiction capable of dealing with all sport-related disputes. That is to say that, even though sporting activities encompass a certain number of specificities, justice in sporting matters still comes under jurisdiction of the ordinary legal system.

Hence, as is perfectly normal, sport is subject to public justice. Even so, it is also, to a large extent, governed by private justice.

Within every social organisation, the natural reflex is to seek to ensure that disputes are settled “in-house”, at least initially. The world of sport is no exception. First of all, conflicts often tend to be settled internally through a spontaneously established system of justice. The law itself then encourages the development of an alternative system of justice by providing that certain disputes shall be submitted to mandatory preliminary conciliation hearings brought before the CNOSF [National Committee for French and Olympic Sports]. Finally, arbitration has become a particularly favoured route for resolving disputes in sporting matters.

Many disputes in the world of sport tend not to be brought before the state courts due to the existence of an effective filter in the form of a dispute settlement system set up within the national sports associations themselves. Of course, this internal system of dispute settlement is not unique to sport since other social groups also self-regulate their disputes. But none has created an organisation that has the complexity and sophistication of the national sports federations.

In France, national sports federations are free to set up bodies to deal with disciplinary matters. However, this freedom is closely linked to the associative structure of the federations, which is very specific to France.

Although the law on associations dating from 1 July 1901 enshrines the principle of freedom of association and therefore the almost unlimited possibility of contractually setting up an internal system of dispute settlement reserved to the members of an association, it must nevertheless be immediately said that in France, national sports federations are not in practice subject to the law on associations alone. Although this may be the case, it will only arise when the federation in question has decided to do without public funding. If they wish to benefit from public subsidies and special regulatory powers, they are required to comply with the Code du Sport [codified laws on sport] which governs the State’s recognition of a certain number of obligations, thereby creating a *de jure* restriction on the original freedom of association.

In this respect, it is worth mentioning Article L131-8 of the Code du Sport that stipulates that ministerial approval can only be granted to federations that have

¹ CONSEIL D’ÉTAT, *Sports: pouvoirs et discipline*, La Documentation française, 1991.

“adopted articles of constitution containing certain mandatory provisions and disciplinary rules compliant with model regulations”.

If we add to this that Ministerial approval is the *sine qua non* condition for the delegation of a public service mission, it follows that the organisation of a national sports federation’s internal dispute settlement system is largely unified and goes beyond the specific differences of the various sporting disciplines.

Obviously, the weight of state law in the organisation of French sport explains why certain principles of justice applicable in sport are enshrined directly in the Code du Sport. They will be examined later in this paper and not in this first section.

The role played by state law also explains why the principles underlying dispute settlement in sport in France more particularly concern internal dispute settlement in the system organised by the judicial authorities.

This role also explains why the so-called sports justice is not able to deal with disputes when the substance is more financial than purely disciplinary.

2 Relationship between ordinary and sports justice

The organisation of sports justice in France is influenced by both the French legal system’s adherence to the Romano-Germanic family of continental law and the very particular model of French sports’ organisation.

The dual hierarchy (national and Olympic federations) and the global nature of modern-day sport lead to an increased generation of norms and tiers dealing with disputes. This constitutes a real headache for specialists, especially in France where the organisation of sport, although delegated to organisations established under private law (the national sports federations), is nevertheless covered by a state framework and public authority prerogatives.

In France, a sportsperson encountering legal problems is faced with a series of difficulties which seriously complicate his or her courses of action.

He/she must first seize the instance with the appropriate physical and geographical competence within his national federation. He/she must then respect the jurisdictional hierarchy of the sports federation. He/she must still further submit to prior conciliation in the form of a hearing before the CNOSF. Lastly, he/she has to decide whether the judicial or the administrative courts are competent to hear his/her case.

The dispute settlement systems within sports federations are not self-sufficient and there is no reason why they should be allowed to override the state courts.² It results from this principle in particular that “exclusion” clauses are void, and this tends to prevent members of sports federations from having recourse to the state courts.³ Moreover, these clauses contaminate the smooth running of

² F. BUY, *La justice sportive*, Cah. dr. sport n° 2, 2005, 13. J.-P. KARAQUILLO, *Un pluralisme judiciaire complémentaire original. La résolution par les institutions sportives et par les juridictions d’Etat de certains litiges sportifs*, D. 1996, 87.

³ TGI Paris, 26 January 1983, D. 1986, somm. 366, obs. G. Baron. – CE, 11 May 1984, n° 46828 et

disciplinary proceedings, and equitable rulings, insofar as they prevent any subsequent vetting by a judge, from having to comply with the requirements of Article 6 of the European Convention on Human Rights.⁴

Attribution – Disputes in sport fall into one of three categories: disputes concerning administrative decisions taken by sports federations, disputes concerning general disciplinary matters, and disciplinary hearings concerning doping offences. We will focus on only those disputes concerning general disciplinary matters.⁵

Litigation concerning general disciplinary matters – This is sanctionable litigation and arises when a national sports federation takes disciplinary action against one of its members. It is necessary to establish, in particular, whether this decision is to be submitted to a judicial or an administrative court.⁶

Attribution to the administrative or the judicial court – Pursuant to *FIFAS*⁷ case law, two conditions are to be satisfied for an action instigated by a sports federation holding delegated powers [from the Ministry] to be considered of an administrative nature and therefore subject to the jurisdiction of the administrative court. First of all, the action has to have been instigated in pursuit of the public service mission vested in the sports federation in question, in other words it must concern the organisation of a competition. Thereafter, when fulfilling this mission, the sports federation in question has to exercise a public authority prerogative.

The regulatory power held by public authorities covers all the technical rules referred to in Article R.131-32 of the Code du Sport, as well as the standards relating to sports equipment covered by Article R.131-33.⁸ However, the concepts of organisation and public authority prerogative are subject to wide interpretation by the administrative court.

Consequently, the administrative jurisdiction concerns the following:

– *cancellation disputes*: the purpose of these proceedings, including the action for abuse of power, is to obtain the cancellation of a unilateral administrative act (e.g. a sports federation's regulation). An action is open to any person with an interest, even the Minister for Sports, by application of Article L.131-20 of the Code du Sport, who bring before the administrative court acts by virtue of Ministerial

47935. – Cass. 1^{re} civ., 4 November 2010, LPA 11 April 2011, 7, obs. F. Buy.

⁴ CA Bruxelles, 8 February 2007, LPA 1 October 2007, 6, obs. J.-M. Marmayou.

⁵ Proceedings concerning administrative decisions taken by sports federations are actions against an abuse of powers. Strictly speaking, this type of dispute does not concern sports justice litigation.

⁶ The theory governing this attribution is as follows: when the action is undertaken by a body governed by private law (such as a sports federation), it is administrative (and as such submitted to the administrative court) only when it involves a public service activity and the application of public authority prerogatives. In France, it is generally considered that a national sports federation with simple approval does not hold public power prerogatives whereas a national sports federation holding delegated powers does, although not all the actions taken by it involve these special prerogatives.

⁷ CE, 22 November 1974, n°89-828, Rec. CE, 577, concl. J. Théry; AJDA 1975, 19, chron. Franc et Boyon.

⁸ CE, avis, 20 November 2003, JCP A 2004, I, 1385, note G. Simon; Cah. dr. sport n° 2, 2005, 49, note J.-M. DUVAL. – N. Ros, *La réglementation fédérale des équipements sportifs*, Cah. dr. sport n° 6, 2006, 11.

delegation but that the Minister considers contrary to the law. Any action is time-barred two months after notification or publication of the decision contested or refusal to withdraw or modify the unlawful standard. The plea of unlawfulness is itself perpetual;

– *full jurisdiction disputes*: the court has the broadest powers to rule on the dispute in both fact and law. This concerns contract and liability litigation in particular. The prior decision rule requires the applicant to first seek compensation from the person whose liability is being sought out;

– *disputes regarding the assessment of legality and interpretation*: generally, the administrative court judge rules most often following a question on prejudice put by the judicial court judge, or on the meaning or the legality of a regulation. It is not for the non-punitive judicial court to hear appeals for annulment and the administrative court is in principle the only court qualified to rule, unless the unlawfulness is obvious or when it involves vetting the legality of the regulation under EU law.⁹

Obviously, the competence of the administrative court also includes, and above all, disciplinary decisions.¹⁰ Thereafter, through different rulings,¹¹ the Council of State sets out a series of rules that are fairly constant and may be described by their practical consequences:

- if a sportsperson is sanctioned by an approved sports federation for acts committed in France or abroad, he/she has to seek a ruling by the judicial court;
- if a sportsperson is sanctioned by a delegated sports federation for acts committed in France, he/she has to seek a ruling by the administrative court;
- if a sportsperson is sanctioned by an international federation for acts committed in France or abroad, he/she has to seek a ruling by the judicial court;
- if a sportsperson is sanctioned by the delegated sports federation extending an international sanction by virtue of an international federation's regulation, he/she has to seek a ruling by the judicial court;
- if a sportsperson is sanctioned by the delegated federation extending an international sanction by virtue of its own internal regulations, he/she has to seek a ruling by the administrative court;
- if a sportsperson is sanctioned by an international federation or a delegated national federation for doping offences committed in France, or abroad in the case of an international competition, he/she has to seek a ruling by the TAS.¹²

Even so, it is possible to stress that the sanctioned athlete does not have any information on the attributions and in all cases he/she will be sanctioned and

⁹ T. confl., 17 October 2011, D. 2011, 3046, note F. DONNAT.

¹⁰ T. confl., 7 July 1980, JCP G 1982, II, 19784, note B. PACTEAU.

¹¹ CE, ass., 31 July 1942, Rec. CE, 239; D. 1942, 138, concl. Ségalat. – CE, 19 March 2010, n° 318549, AJDA 2010, 581, note J.-M. PASTOR; LPA 2010, n° 127, 6, obs. M.-C. Rouault; Cah. dr. sport n° 20, 2010, 45, note F. COLIN; LPA 2011, n° 71, 10, obs. B. Brignon. – CE, sect., 26 November 1976, n° 95262, Rec. CE, 513; AJDA 1977, 139, concl. Galabert, note F. MODERNE.

¹² Ord. n° 2010-379 du 14 April 2010.

the disciplinary sanctions will be of comparable nature (fines, suspension, etc.) in all cases.

The attribution of jurisdiction between the judicial or administrative courts satisfies well-known principles. However, difficulties may exist and in such cases the court responsible for settling conflicts of jurisdiction will decide on the attribution.¹³

Within the administrative system, it has to be underlined that there is a public order attribution between the first instance competences of the Council of State and the first instance competences of the administrative court. Moreover, this distinction has changed as a result of the reform of the administrative procedures by decree 2010-164 dated 22 February 2010. Henceforth, litigation concerning individual decisions (such as selection, demotion, delivery of permits to practice a sport) taken by a delegated sports federation, which until then came within the compass of the Council of State in both first and second instances, have been transferred to the administrative court.

Thus, the administrative court now has first instance competence and most of the actions by delegated sports federations come under the authority of the administrative court (disciplinary rulings, disputes concerning a federation's regulations for organising competitions, etc.). Litigation concerning the liability of federations also comes within the competence of the administrative court when a prejudice has been caused by a delegated sports federation when exercising its public authority prerogatives to accomplish its public service role of competition organiser. Indeed, these sports federations commit faults that may engage their liability when they apply unlawful sanctions.¹⁴ On the assumption that claims for damages resulting from unlawful sanctions are applied, the applicants are required to comply with the prior action rule, that is to say submit a request for compensation to the federation in question before seeking redress before the courts. If not, their application will be ruled inadmissible.¹⁵

Even so, it still remains true that all these powers are exercised on the condition that the subject of the dispute and/or the interests of correct administration of justice do not lead to the case being assigned to the Council of State.¹⁶

The latter, which is the supreme administrative court in France, is able to rule in the first and last instance on certain matters which are specifically assigned to it.¹⁷ This is particularly the case of appeals against non-individual decisions, such as approval of rankings, and appeals against decisions taken by the French anti-doping authority (AFLD).¹⁸

¹³ T. confl., 7 July 1980, n° 02158, JCP G 1982, II, 19784, note B. PACTEAU. – T. confl., 21 June 2010, LPA 11 April 2011, 13, obs. F. RIZZO; Cah. dr. sport n° 21, 2010, 54, note F. COLIN.

¹⁴ Ex.: CE 12 February 1990, n° 57952. – CAA Bordeaux 9 February 2010, n° 09BX01069.

¹⁵ CE 25 June 1990, n° 96835.

¹⁶ CJA art. L.311-1 et L.321-1.

¹⁷ CJA art. L.311-1 to L.311-12.

¹⁸ CE 21 March 2011, n° 341572.

Proceedings for annulments, which dominate sports litigation, show that the administrative court is increasingly concerned with regulating the administrative actions of federations and in this respect asserts its role as “*judicial counterweight*”.¹⁹ For instance, it may decide to exercise control over not only the contents of federations’ regulations, but also their purpose. Another example is the increasingly closer control exercised over sanctions, even though the choice of sanction has long been subject to only a limited control. Henceforth, the court exercises a normal right of review whereas the choice of the sanction was long subjected to restricted control. This arises in doping offences.²⁰ The transition to full litigation, enabling the courts to override a sanction applied by the sports federation, is not yet on the agenda.²¹ Even so, the law has already ruled against sanctions decided by the AFLD.²²

Preliminaries to state court referrals – Referral to the state courts is a right open to any defendant in a sports dispute. However, this right is restricted by a procedure that acts as a filter against litigation reaching the courts.

The first filter is the rule of “prior exhaustion of internal remedies” instigated by the administrative court at the beginning of the 1980s.²³ It implies that all successive actions that may be contained in a federation’s regulations have been exercised before a case can be brought before the judicial court. This rule is certainly original since it is generally accepted that judicial review cannot be subordinated to a prior administrative action unless stipulated by law or the regulations. Nevertheless, this solution is not specific to French law and is found in many foreign legal systems, for example in Italy or in Germany. The reason is that the exhaustion of internal remedies is a pragmatic response to the dual aims of proximity and filtering of litigation. It consists in recognising that the natural vocation of sport is to resolve differences internally and that the state courts should therefore only be called in as a last resort.

The second filter consists of a mandatory conciliatory hearing before the CNOSF, the specific details of which will be examined later.

For the time being this filter has to be combined with the two procedures within which it operates, that is to say, a federation’s internal dispute settlement and state judicial system.

Although Article R 141-5 of the Code du Sport stipulates that “referral to the commission for conciliation is a prerequisite of any appeal, when the conflict

¹⁹ B. FOUCHER, *Les litiges sportifs et le juge administratif*, in *Mélanges D. Labetoulle*, Dalloz 2007, 361. – C. MAUGÛE, *L’arbitre du Palais-Royal et le contentieux sportif fédéral*, in *Mélanges B. Genevois*, Dalloz 2009, 763. – R. PROUVÈZE, *Quand les prolongations se jouent devant le Conseil d’État*, LPA 19 December 2007, 3.

²⁰ CE, 2 March 2010, AJDA 2010, 664, note S.-J. LIEBER ET D. BOTTEGHI; LPA 11 April 2011, 9, obs. B. Brignon.

²¹ V. cep. TA Strasbourg, 25 June 2009, Lettre Lamy Dr. sport, March 2010, 1, note J.-M. DUVAL.

²² Art. L. 232-24, C. sport. – CE, 1 December 2010, Cah. dr. sport n° 25, 2011, 154, note M. PELTIER; LPA 15 May 2012, 16, obs. B. Brignon.

²³ CE, 13 June 1984, n° 42454, Rec. CE 1984, 217, D. 1985, I.R., 142, obs. J. Morange.

results from a decision, capable of internal settlement or not, taken by a sports federation in the exercise of its public power prerogatives or by application of its articles”, account must be taken of the “exhaustion of internal remedies” principle. Generally speaking, the sports federations’ internal rules concerning disciplinary matters provide for two levels of intervention: a first instance commission and an appeal commission. Should the CNOSF be seized as early as the first instance commission, the question then arises as to whether it is possible to seize the state courts directly or if it is necessary to pass before the federation’s appeal commission first.

Case law has long since applied this principle of the “exhaustion of internal remedies” as a prerequisite to the admissibility of appeals directed against sports federations’ decisions, whatever the nature of the dispute.²⁴ However, since the introduction of compulsory proceedings before the CNOSF (National Committee for French and Olympic Sports), the “exhaustion of internal remedies” had lost its inevitability. For certain trial judges, once the conciliation procedure had failed, the applicant was free to take direct legal action even though the internal remedies had not been exhausted.²⁵ For its part, the Council of State adopted an opposite position in its judgement of 26 July 2011.²⁶ It stated that: *“The remedies stipulated by the internal regulations [of the sports Federation] shall [...] be necessarily exercised before any judicial action for annulment”*. It follows that *“any judicial action brought before the administrative court shall be ruled inadmissible unless it has been preceded by the exercise of the remedies stipulated by a federation’s internal regulations, even though the conciliation of the CNOSF had been sought in accordance with Article R 141-5 of the Code du Sport”*. In other words, the conciliation procedure cannot be used to *“bypass the exhaustion of internal remedies”*²⁷ and referral to the CNOSF does not relieve the person or the entity wishing to appeal against a disciplinary decision from the mandatory exercise of the remedies stipulated by a federation’s regulations.

This position has since been clarified by two appeal court decisions.

The first²⁸ sets out the additional principal that *“the exhaustion of internal remedies” rule is enforceable against any person or entity regardless of their capacity as member of the federation*”. The meaning of this formulation is as follows: when a dispute arises concerning a national sports’ federations issue of a licence to practice the sport in question, this “exhaustion of internal remedies” rule

²⁴ CE, 13 June 1984, n° 42.454, Rec. CE 1984, 217, D. 1985, I.R., 142, obs. J. Morange.

²⁵ TA Lyon, 13 July 2000, n° 0001257 and 0001258. – CAA Paris, 3^e ch., sect. B, 8 April 2003, n° 02PA02538, D. 2003, 2539, obs. J.-C. Breillat.

²⁶ CE, 26 July 2011, n° 341199, AJDA 2011, 2491, note F. BIN; LPA 14 May 2012, 3, obs. G. Rabu; Cah. dr. sport n° 26, 2011, 51, note G. RABU, J. BÉRENGER ET D. REMY, *Compatibilité entre conciliation obligatoire et épuisement des voies de recours interne: le Conseil d’Etat tranche*, Dict. Perm. Droit du sport, Bull. n° 182, 2011.

²⁷ F. BIN, note prev. – contra, J.-C. BREILLAT, *Conciliation et épuisement des voies de recours internes*, D. 2005, chron. 1667.

²⁸ CAA Nantes, 5 January 2012, Cah. dr. sport n° 29, 2012, 62, note G. RABU.

shall apply to actions by the sportsperson, even assuming that he/she is not a member of the federation. In this case, the sportsperson is considered an “interested third party” and as such obliged to follow the same procedural rules as any full member.

The second²⁹ asserts that it is sufficient for a federation’s regulations to list the different ways of contesting disputes before its internal tribunal’s for the applicant to be obliged to fulfil this prior approach before being able to contest (subject to compliance with the prior mandatory conciliation procedure before the CNOSF) the disputed federal decision before the administrative judge.³⁰ In other words, the federation rules making the “exhaustion of internal remedies” mandatory before engaging the judicial court, have little effect.

That said, it must not be forgotten that although the CNOSF conciliation procedure constitutes the main method for resolving disputes, it can also constitute a preventive approach. For example, when imposed as a prerequisite to any appeal, conciliation proceedings may be engaged against a federation’s decision before the exhaustion of any internal remedies, as rendered possible by Article R 141-5 of the Code du Sport. In such a case, the complaint has already been made but no final ruling has been issued. This ruling will only be issued on completion of the conciliation procedure and based on its results (if necessary therefore, on the agreement reached between the parties).

3. *Relevant NOCs regulations*

The CNOSF was created in 1971 by a merger between the French Olympic Committee and the National Sports Committee. It is a public service body whose articles have been approved by Council of State decree. This latter point, compounded by the fact that it receives public subsidies, means that the CNOSF is under the “light” supervision of the Ministry of the Interior and the Ministry for Sports. According to Article L 141-1 and thereafter of the Code du Sport, which formally establishes its legal existence, the CNOSF is a representative body which takes charge of the interests of the different sports associations and any businesses created by them, sports federations and their members.

After consultation with the National Commission for Elite Sport, the CNOSF also enforces a sport ethics charter.

The creation of the CNOSF and the different actions it has been led to develop has made it a key player in French sport. The dual investiture enjoyed by the CNOSF has led it to take on two clearly distinct tasks.

²⁹ CAA Douai, 21 June 2012, n° 11DA00151, Cah. dr. sport n° 29, 2012, 57, note S. LE RESTE. – TA Paris, 22 May 2012, n° 10-19205. – TA Besançon, 26 July 2007, n° 0700573.

³⁰ This latter case law goes against the position defended by the board of conciliators which tends to consider that once the conciliation ruling has been issued, the prior conciliation obligation has been fulfilled, and the way is open to a hearing before the judicial courts without resubmitting the matter to the federation’s appeal commission.

As an Association representative of French and Olympic sport abroad and Olympism in France, it is vested with various legislative and regulatory competences. However, the law also assigns a conciliatory role to the CNOSF, a sort of alternative pre-judicial settlement of disputes role, and an arbitration role for which it was assigned a Sports Arbitration Tribunal in 2008.

The CNOSF is therefore both executive, legislative and to a lesser degree judge. Its exact role will be clarified in the following chapters.

This desire for hegemony by the French Olympic movement is perfectly natural, since the trans-alpine example of an all-powerful Italian National Olympic Committee has a certain appeal. However, this may be disputed when it ventures into the economic and business fields. Indeed, the Olympic movement does indeed fulfil its role when it determines, evaluates and proposes rules of conduct and ethics in sport, but it also reaches the limits of its mandate when it seeks to regulate the profession of the sports' agent or impose rules on the management of amateur or professional groups.

4. *Relevant football regulations*

There are few differences between the different sports federations in France as they all have to adopt model disciplinary regulations consistent with the provisions of the Code du Sport. Even so, football is one of the most successful examples.

Through numerous disciplinary regulations (bylaws, rules, and disciplinary regulations and a reference scale of sanctions for unsporting behaviour, national anti-doping regulations, charter of football ethics, regulations governing sports agents, etc.), the French Football Federation has built up a very comprehensive system of rules and procedures that are enforceable by appropriate sanctions.³¹ These rules are combined with those of the professional football league.³²

In order to try cases involving the policing of grounds, players', coaches', directors' and supporters' misdemeanours, and to prosecute breaches of sporting ethics, damage to the image or the reputation of football, the Federation, its local and national leagues or one of their directors, by any person subject to the jurisdiction of the Federation,³³ the regulations have established the following in particular: for competitions run by the Federation itself, a first instance hearing shall take place before the Federation's disciplinary commission and on appeal before a higher appeals commission. For competitions managed by the professional league, hearings take place before an LFP [French professional league] disciplinary commission or judicial commission ruling on disciplinary matters, and on appeal, by a higher appeals commission.³⁴ Territorial and material decentralisation of the Federation's competences, established by law,³⁵ has also led the French Football Federation to

³¹ www.fff.fr/la-fff/reglements-fff/tous-les-reglements/.

³² www.lfp.fr/corporate/reglements.

³³ Art. 5, Règlement disciplinaire FFF.

³⁴ Art. 4, Règlement disciplinaire FFF.

³⁵ Art. L. 131-11, C. sport.

set up disciplinary bodies to deal with competitions run by local leagues.

5. *The sports judicial bodies*

5.1 *Federation tribunals*

For resolving disciplinary matters – Sports' federations' bodies set up to deal with disciplinary matters have to satisfy the requirements set out in the Code du Sport, failing which a federation cannot be approved or receive delegated authority from the Ministry of Sport.

These requirements are set out in Annex I-6 to Articles 131-2 and R 131-7 of the Code du Sport that establishes model disciplinary regulations. This Annex stipulates that “one or more first instance disciplinary tribunals and one or more disciplinary appeal tribunals vested with disciplinary powers over associations affiliated to national sports federations, members of these associations and members of the federation” are created.

A first instance disciplinary body may be set up in those federations that have entrusted the organisation of competitions between professional clubs to a professional league, but the exercise of disciplinary and appeal powers remains vested in the federation.³⁶

It has to be noted that special measures concerning doping offences are dealt with separately from general disciplinary matters. Articles L. 232-21 and R. 232-86 of the Code du Sport stipulate that approved sports federations adopt disciplinary rules that conform to the model regulations in Annex II-2 of Article R. 232-86. These state that “*a first instance and appeal disciplinary body shall be set up vested with powers to discipline federation members having contravened the provisions of Articles L. 232-9, L 232-10, L 232-15 and 232-17 of the Code du Sport*”.

Moving on to the “very specific”, we will show that model disciplinary rules concerning the doping of animals are set out in Annex II-3 of Article R 241-12 of the Code du Sport, which also lays down the foundations for a specific disciplinary organisation.

In matters of general discipline, the first instance and appeal tribunals shall consist of least five members chosen for their expertise in legal and ethical matters. Each disciplinary body consists of a majority of members who do not belong to the governing bodies. Neither can the president of a federation be a member of a disciplinary body. It is also stipulated that the members of disciplinary tribunals may not be contractually bound to the federation, other than through their membership. The term of office is four years.

In anti-doping matters, trial and appeal tribunals consist of five members chosen for their expertise. At least one member is drawn from the medical profession, at least one member for his/her legal expertise, and one member at the most from

³⁶ Art. R. 132-10, C. sport.

the federation's governing bodies. The same requirements are found in matters of general discipline. The president of a federation cannot sit on a tribunal. Members cannot be contractually bound to the federation other than through their membership. The term of office is four years.

Due to the multiplicity of the federations' regulations and the types of offences that may be committed, not all disciplinary tribunals will have the same expertise. Each federation's articles and regulations have to be consulted in order to know them all.

Apart from the case of tribunals established to deal with doping litigation, certain tribunals may have a broader jurisdiction while others more limited, depending on the nature of the dispute or the persons referred to them.

Furthermore, it has to be said that the French national sports federations have adopted a decentralised organisation throughout the country. Article L 131-11 of the Code of Sport has opened up this possibility by stipulating that "approved federations may vest national, regional or county authorities with part of their duties". Conflicts of an exclusively local nature are heard first of all by the county or regional authorities and are not referred to the central tribunal at national level.

Each local tier (county committees or regional leagues), created in the form of associations, has the same institutional framework (first instance and appeal tribunals) as at national level.

Bodies ruling on disputes other than disciplinary – Most sports federations have set up internal commissions responsible for dealing with disputes other than disciplinary.³⁷ These freely established commissions are assigned various duties: dispute settlement between a federation and its members (for instance concerning transfers, player's qualification or approval of results) and disputes that do not involve the federation directly (such as between a player and his club).

"Judicial commissions" generally have a broad range of competences. For example, the legal committee of the National Rugby League hears both disciplinary and non-disciplinary matters.

In general, judges are aware of the usefulness of these organisations and encourage their intervention. The Court of Cassation [Supreme Court] has ruled that the intervention of the judicial commission of the French Professional Football League offers employees a fundamental guarantee that ensures that any breach of contract decided by a club without meeting the requirements of the professional football charter, which requires a prior hearing before this commission, is abusive.³⁸

5.2 *The CNOSF's board of conciliators*

The board of conciliators is the most original body in the CNOSF. In accordance with Article L 141-4 of the Code du Sport, its procedures are established by the

³⁷ J. BARTHÉLEMY, *Instances internes des fédérations sportives nationales : litiges juridiques*, in *Le règlement des litiges au sein du mouvement sportif*, Dalloz, Juris éditions, 2012.

³⁸ Cass. soc., 4 June 2009, JCP G 2009, 333, note D. JACOTOT.

regulatory part of this same code.³⁹ The board groups together persons recognised for their legal expertise and their knowledge of sport, and who volunteer to be available for the duration of an Olympiad and accept the conciliation duties incumbent on the CNOSF without charge. Made up of a minimum of 13 members and a maximum of 21 members, all bound by a nondisclosure obligation, it is headed by a chairman who coordinates the work, assigns the workload, and prepares an annual report of its activity which is presented to the General Meeting of the Federation.

Since 1992, around 3000 cases have been dealt with by the CNOSF, including 393 during 2012. In around 70% of cases, the conciliation proposals are accepted and bring the dispute to an end. These figures bear witness to the success of this type of dispute settlement in sports.

5.3 *The Sports' Arbitration Chamber*

The so-called "Mazeaud law" 75-988, enacted in France on 29th October 1975, made the CNOSF the main body for dispute settlement in French sport. Article 14 of this law states that "*the CNOSF settles disputes opposing practitioners, groups and federations, when requested*". These powers were not put into practice at the time as disputes in the field of sport essentially involve the individual sport federations themselves (which derive their authority from the state) and therefore concern public law, which excludes resolution by arbitration. This meant that the French sports movement preferred a prior conciliation approach. Today, in a concern to adopt a position as the preferred body for the settlement of sports disputes, and no doubt due to pressure from the world of professional football which has been very critical of the conciliation approach, the CNOSF has sought to create an arbitral body for resolving disputes in sport: la Chambre arbitrale du sport.⁴⁰

The CAS' Rules of Procedure were published in January 2008 together with a list of the first 40 arbitrators.⁴¹

By creating the French CAS, the CNOSF demonstrated its determination to transpose the undeniable international success of the Court of arbitration for sport based in Switzerland onto a national platform. However, a different approach has been adopted. The CNOSF prefers to follow the approach adopted by certain European Olympic committees, that is to say, a national arbitration institution for sports as an internal body created within the National Olympic Committee, the

³⁹ Art. R. 141-10 à R. 141-14, C. sport.

⁴⁰ M. MAISONNEUVE, *La chambre arbitrale française du sport*, RJES n° 88, 2008, 7. J.-M. MARMAYOU, *The chambre arbitrale du sport (CAS) : a new body for dispute settlement in french sport*, *Int. Sport law journal* 2010/1-2, 12. J.-M. MARMAYOU, *Création de la chambre arbitrale du sport*, LPA 19 January 2009, n° 13, 13. P. MISSIKA, *Chambre arbitrale du sport du CNOSF*, in *Règlement des litiges au sein du mouvement sportif*, Dalloz-Juris éditions 2012, 77.

⁴¹ Today: 44 arbitrators. Since 2008, the French CAS has had to deal with only one case: Ch. arb. sport, 3 July 2009, LPA 29 March 2010, n° 62, 10, obs. J.-M. Marmayou.

highest authority in the domestic sports movement.⁴²

The Secretariat. According to the *Chambre's* Rules of Procedure, the Secretariat is the body that administers the CAS. It functions in the same way as a court clerk's office and manages the day-to-day workings of the CAS. It receives applications, checks on payment of registration fees, fixes the budgets for general and administrative expenditure, refers disputes to the arbitration panel, receives all the documents exchanged between the parties and the panel, and establishes the amount of the arbitrators' fees on an hourly rate.

Chairperson and vice-chairpersons. The chairperson of the CNOF's panel of arbitrators is also the CAS Chairperson. This approach has been preferred in order to avoid conflicts of interest between conciliation and arbitration. The Chairperson is assisted by two Vice-chairpersons that he/she appoints from the list of arbitrators. When a defendant is silent or one of the parties puts forward one or several arguments to challenge the existence, the validity or the scope of the arbitration agreement, the Chairperson may decide that arbitration is to be pursued only if the parties first recognize the existence of an arbitration agreement setting out the rules of procedure.

Appointments Committee. The Appointments Committee consists of the CAS Chairperson and its two Vice-chairpersons. Article 1 of the CAS' Rules of Procedures stipulate that it has the authority to rule on any questions concerning the appointment of arbitrators. More precisely, the Chairperson only chooses the arbitrators for a particular case from those on the list drawn up by the CNOF's board of administration on a proposal from its Committee of Ethics.

Any appointment of an arbitrator by one party has to be confirmed by the Appointments Committee which is under an obligation to answer the notification of appointment within eight days. The Appointments Committee organizes the replacement of an arbitrator in the event of death, challenge, resignation or impediment. When the arbitration agreement does not stipulate the number of arbitrators, the Appointments Committee will base its decision on the importance of the dispute. Generally, the Appointments Committee rules on the appointment, confirmation, challenge or replacement of an arbitrator. Its decisions concerning the composition of an arbitration panel are without right of appeal.

CAS' Rules of Procedure. The CAS has to apply the Rules of Procedure enacted by the CNOF. The text of these rules, at present undated, was published in January 2008. It contains 28 articles and an appendix.

This body of text has four parts in addition to the preliminaries and an introduction intended to explain the fundamental mechanisms of the arbitration procedure. These parts are: constitution of the arbitration panel, the arbitration procedure, the award and costs. An Appendix discusses the fees of the arbitrators and sets up a scale for the general and administrative costs of arbitration.

The CNOF's board of administration has authority for enacting the Rules of Procedure with its general assembly constituting the final recourse in case of

⁴² F. BUY, J.-M. MARMAYOU, D. PORACCHIA, F. RIZZO, *Droit du sport*, LGDJ 2012, n° 242.

discord. The Committee of Ethics is able to issue opinions on the contents of the rules.

Arbitrators. Under Article 7 of the CAS' Rules of Procedure, only the persons on the list drawn up by the CNOSF board of administration may be appointed as arbitrators for a dispute, and on a proposal from its Committee of Ethics. The first list contains 40 arbitrators including lawyers, university academics, CNOSF mediators, and court officers. This list, which can be added to as the need arises, demonstrates a desire to see various sports represented.

Every arbitrator is required to be impartial and has to remain independent of the parties. Therefore, before his/her appointment or confirmation, an arbitrator signs a statement of independence that he/she communicates to the Secretariat, and when applicable, gives any information or circumstances which could undermine his/her independence in the minds of the parties. Similarly, when facts or circumstances of this kind arise during the arbitration process, an arbitrator has to immediately inform the Secretariat and the parties in writing.

An arbitrator is also bound to observe strict rules of non-disclosure concerning all the information they receive. In this respect, it is surprising that nothing is set down in writing obliging the Chairperson, Vice-chairpersons and Secretariat to satisfy this same obligation.

By accepting a brief, an arbitrator who has a right to receive remuneration for his/her intervention, undertakes to fulfil this obligation through to its conclusion.

Arbitration panels. Disputes submitted to the CAS may be heard either by a single arbitrator or a panel of three arbitrators. The parties are free to decide which of these options they prefer, but if they do not agree and the principle of arbitration is not disputed, the Appointments Committee will choose the arbitration panel.

Instructions. Unlike the TAS which offers mediation services and was able to deliver opinions, the CAS has only one purpose: to resolve disputes and disagreements arising from a sports activity or relating to a sport and which have been submitted to it by the parties, if necessary by summary proceedings.⁴³ Sports federations and their national and regional bodies, and affiliated sports groups and their members, may submit disputes concerning their rights to the CAS.

However, it must not be forgotten that disputes arising in the context of a sport regulated by a state-appointed federation will implicate public authority prerogatives and therefore come within the competence of the Court of Administration and be excluded from any arbitration procedure. Consequently, the CAS competence does not cover disciplinary aspects but rather economic ones (sponsorship contracts, TV and radio contracts, relations between agents and professional players or clubs, relations between clubs themselves, etc.).

⁴³ TGI Nanterre, ord. réf. 30 June 2009, Cah. dr. sport n° 17, 2009, 61, note P.-D. CERVETTI; D. 2009, 2964, obs. T. Clay; Rev. arb. 2009, 604, obs. M. Maisonneuve; LPA 12 October 2010, n° 203, note X. FAVRE-BULLE.

6. The procedure

6.1 Before the federations' internal tribunals

Mock trial, real procedure – As a result of the organisation of internal dispute settlement in the federations, a difference arises between those disciplinary disputes that concern matters of general discipline and those that concern doping offences. The applicable regulations differ, the competent tribunals differ, and the procedures differ.

A “procedure without trial” is acted out before the federation’s tribunals.⁴⁴ Indeed, a federation which rules on a disciplinary sanction or decides on an internal dispute complies with a so-called “judicial” procedure, but which in reality is a fiction. Its decision is administrative when the Federation is approved or holds delegated powers. Otherwise it is contractual. However, it does not involve a trial ruling, which is the reserve of a court judge. The reason for this is that federations’ tribunals are not jurisdictions in the strict sense of the term.⁴⁵

Nevertheless, their rules of procedure tend to match those of the state courts, quite simply because otherwise their rulings would be destined to give rise to complaints and therefore sow the seeds of future litigation (a decision against one of the parties may be disputed before the courts). These decisions are therefore taken based on a procedure which resembles a trial.

For there to be a procedure, there has to be a trial at the end of which the *res judicata* ruling has authority. This is not the case within the French sports federations. It can only be the case when the organisation of the competent tribunal satisfies the requirements of an arbitral hearing, that is to say is heard by an institutionalised, independent and impartial body.⁴⁶

Fundamental principles governing hearings - In France, the model disciplinary regulations take on board most of the basic principles governing tribunal proceedings.

Hence, the following may be noted as regards general disciplinary matters:

- the right to be heard before an independent and impartial tribunal, crystallised by a ban on the members of a disciplinary body with a contractual relationship with the Federation⁴⁷ (other than resulting from their membership), taking part in the deliberations when they have a direct or indirect interest in the matter, or sitting on the appeal body once they have sat on the first instance body;⁴⁸
- the right to a two-stage procedure;⁴⁹
- the right to a public trial;⁵⁰

⁴⁶ Certain instances set up on a parity basis (sportspersons/clubs) may claim to act as real trials although a hearing before a single judge destroys this parity.

⁴⁷ Art. 2, annexe I-6, prev.

⁴⁸ Art. 5, annexe I-6, prev.

⁴⁹ Art. 2, annexe I-6, prev.

⁵⁰ Art. 4, annexe I-6, prev.

- the right to a trial within a reasonable time, in this case six months;⁵¹
- respect for the rights of the defence, which involves an obligation to communicate to the interested party claims and documentary evidence, to issue proper convocations⁵² to allow sufficient time to prepare a defence,⁵³ to enable the defendant to be heard through written or oral submissions,⁵⁴ and to be assisted or represented by a lawyer;⁵⁵
- respect for the obligation to notify and give reasons for any rulings;⁵⁶
- respect for the ruling by the administrative court prohibiting increased penalties on appeals made by the interested parties.⁵⁷

It is a sign of the strong commitment to these requirements that certain decisions consider that they are required even when the French Federation simply transposes an international sporting sanction.⁵⁸

However, judges do not consider that the legality of the procedure requires compliance with Article 6 §1 of the European Convention on Human Rights.⁵⁹ This exclusion of the conventional text also excludes the disciplinary proceedings concerning all decisions regarding “*policing actions*”, when they are not punitive.⁶⁰

General principles of association law - It is self-evident that any disciplinary procedure by a federation can only concern a member of that federation. This is a logical principle of association law which is not without problems when the person was a member of a federation at the time of the offence but whose membership has expired at the time of the procedure.^{61 62}

General principles of punitive law - Most of the general principles of punitive law are applicable. This is the case for the legality of penalties which have to be stipulated in the regulations⁶³ and are predefined by the model regulations.⁶⁴

The principles of necessity, proportionality and personalisation of the penalties also apply.⁶⁵ A system of automatic sanctions for doping offences would

⁵¹ Art. 16, annexe I-6, prev.

⁵² Art. 9, annexe I-6, prev.

⁵³ CE, 23 May 1986, RJES 1987, n° 2, 119, obs. J. Carbajo.

⁵⁴ CE, 13 June 1984, Rec. CE, 217.

⁵⁵ Art. 9, annexe I-6, prev.

⁵⁶ Art. 12, annexe I-6, prev. When a sanction results from an action before an administrative court, the sanctioned party has the right to be immediately informed of the reasons in accordance with Article 1 of the law dated 11 July 1979 concerning the grounds for administrative court rulings.

⁵⁷ Art. 16, annexe I-6, prev.

⁵⁸ TA Paris, 5 August 2004, D. 2005, 828, note M. MAISONNEUVE.

⁵⁹ CE, 5 May 1995, Rec. CE, 197. – CE, 28 November 2007. However, case law considers that Article 6 applies to the AFLD. (CE, 18 July 2011, FFSU, n° 338390).

⁶⁰ Cass. 1^{re} civ., 5 November 2009, JCP G 2010, 150, note F. BUY.

⁶¹ CE 25 May 2010, n° 332045, Cah. dr. sport n° 21, 2010, 111, note F. COLIN. – TGI Paris, 5 January 2010, n° 09/16490, D. 2011, 705, obs. P. Rocipon.

⁶² CE, 4 November 1983, D. 1984, IR, 485, obs. M. Hécquard-Théron. This explains why in doping matters, the AFLD has been assigned powers to deal with the cases of any athlete who is not a member of a Federation. (art. L.232-22, C. sport).

⁶³ TA Marseille, 29 October 2009, LPA 29 March 2010, 9, obs. F. Rizzo.

⁶⁴ Art. 18, annexe I-6, prev. – art. 32, annexe II-2, prev.

⁶⁵ CE, 22 October 1993, Lorentz, D. 1995, somm. 58, obs. J.-P. Karaquillo. – CE, 20 October 2008, n° 320111.

be contrary to the Constitution.⁶⁶ Without ignoring the objectives assigned to it in Article L 100-1 of the Code du Sport, the sport authority is also required to take into account the effects that the sanction is likely to produce on the education, integration and social life of the sanctioned sportsperson.⁶⁷

As in criminal law, an equivalent to the principle of “the legality of offences” may be found. This principle applies to doping offences, the texts defining with precision the actions that could constitute a disciplinary offence. However, this is not always the case in matters of general discipline where the regulations of the various federations do not always compensate for the silence of the model disciplinary regulations. As to the definition of the offence (whether objective or subjective such as in criminal law), litigation has left a contrasting impression: in principle, the offence involves a subjective aspect,⁶⁸ although there are exceptions to this.⁶⁹

6.2 Before the CNOSF conciliator

There are several ways of beginning a conciliation procedure. Firstly, it can be implemented spontaneously: the parties decide to try to reconcile their points of view, either alone or with the help of the third party (the conciliators), once a dispute has arisen or even before any dispute thanks to a contractual conciliation clause.⁷⁰ Nothing other than the wishes of the parties requires them to use this conciliation procedure. It is with this in mind that the first draft of the act of 16 July 1984 established an optional and preliminary conciliation procedure before the CNOSF in all disputes that oppose members, sports groups and the federations. But without much success due to the optional nature of this procedure.

Occasionally, the conciliation procedure will be imposed on the parties against their wishes. Not that this forces them to come to an agreement, but rather obliges the parties to at least enter into discussions. This is covered by clauses inserted in certain collective agreements, but requires prior submission to a judicial commission.⁷¹ This system was also chosen by the legislator in 1992: by pursuing the conciliation hearing before the CNOSF, which appeared to offer a good compromise between the ordinary law and specific law, it was decided that the

⁶⁶ TA Besançon, 13 April 2011, AJDA 2011, 1638, rapp. A. Pernot.

⁶⁷ CE, 28 November 2007, n° 249916, Cah. dr. sport n° 11, 2008, 154, note F. COLIN, and 159, note J.-M. DUVAL. – J.-M. MARMAYOU, *Les dopés à vie*, Cah. dr. sport n° 24, 2011, 7.

⁶⁸ CE, 15 July 2004, Cah. dr. sport n° 1, 2006, 126, obs. F. Rizzo.

⁶⁹ CE, avis, 29 October 2007, LPA 19 January 2009, 7, obs. J.-M. Marmayou. – CE, 2 March 2010, prév. –M. MAISONNEUVE, *De la faute disciplinaire en matière sportive*, Lettre Lamy Dr. sport, n° 58, 2008, 1.

⁷⁰ In principle, this clause is valid and amounts to the rejection and the dismissal of the action. Cass. ch. mixte, 14 February 2003, RTD civ. 2003, 294, obs. J. Mestre et B. y, and 349, obs. R. Perrot. Nevertheless, the question of its validity in employment contracts has not been resolved. (Cass. soc., 7 December 2011, LPA 15 May 2012, 6, obs. F. Buy).

⁷¹ On the sanction applicable if the seizure of the judicial commission fails. Cass. soc., 4 June 2009, JCP G 2009, 333, note D. JACOTOT.

preliminary conciliation procedure would henceforth be compulsory.⁷²

Article R 141-5 of the Code du Sport now states that “*referral to the conciliation commission is a prerequisite to any appeal when the dispute results from a decision, whether or not open to internal appeal, taken by a federation exercising its public powers or by application of its articles*”. It follows that any legal action exercised without prior referral to the CNOSF will be declared inadmissible.⁷³

Preliminary conciliation cannot cover all the litigation that may arise in sport.

On the one hand, the CNOSF has a conciliation duty only in conflicts between “members, agents, associations and sports businesses and approved sports federations”.⁷⁴

On the other hand, disputes can only be heard before the CNOSF when the conflict arises as a result of a decision by a federation in the exercise of its public powers or by application of its articles.⁷⁵ Disputes concerning employment, liability, or even taxes are excluded from this procedure.⁷⁶

Moreover, the Code du Sport excludes doping offences from the CNOSF’s jurisdiction and it should be noted that the constant position of the CNOSF consists in refusing requests for conciliation in cases involving damages, at least for now.

Concerning disputes arising out of a decision by a federation when exercising public authority powers, the CNOSF is competent to hear cases when the administrative court has jurisdiction over acts by the federations. However, the law excludes from the conciliation procedures disputes that involve doping offences.⁷⁷

This means that disciplinary sanctions issued in similar cases by a federation are not covered by the conciliation procedure even though they consist of administrative acts. Case law also excludes, as the occasion arises, if not regulatory type acts,⁷⁸ at least “non-individual” decisions, a hybrid category which includes decisions approving championship results⁷⁹ but not those by which a federation refuses or allows the accession of a club to a higher division.⁸⁰

With regard to decisions taken by the federations, whether holding delegated powers or not, pursuant to their articles, the CNOSF has competence to hear and rule on all decisions concerning the workings of the federation bodies. Essentially this concerns elective and general meeting disputes.

⁷² C. CHAUSSARD, *Procédure de conciliation devant le Comité national olympique et sportif français*, Encyclopédie droit du sport, www.droitdusport.com, Étude 624.

⁷³ CE, 22 November 2006, Cah. dr. sport n° 7, 2007, 89, note F. COLIN.

⁷⁴ Art. L. 141-4, C. sport.

⁷⁵ Art. R. 141-5, C. sport.

⁷⁶ These disputes are neither arbitrable nor capable of compromise.

⁷⁷ Art. L. 141-4, C. sport.

⁷⁸ Although there are few rulings in this field they are not altogether lacking (ex. CE, 19 January 2009, n° 314049).

⁷⁹ CE, 25 June 2001, Rec. CE, 281.

⁸⁰ CE, 27 July 2005, n° 249426.

In all cases, the applicant has to have a direct and personal interest in bringing an action,⁸¹ has to submit his/her request in the time stipulated for lodging an appeal, that is to say two months in the case of an action before the administrative court. Nevertheless, when the notification of the decision taken by a federation has no indication of the time delay and the channels for appeals, including prior compulsory referral to the CNOSF, the two-month period during which referral to the commission should be made cannot be enforced against the applicant.⁸²

The chairman of the board of conciliators has powers to execute prior checks on requests for conciliation. If the request is tainted by an obvious inadmissibility that cannot be covered later or is manifestly unfounded, the Chairman shall forthwith issue a reasoned ruling for rejecting the application. If the application is tainted by an inadmissibility, the Chairman invites the applicant to remove the obstacle and, failing compliance with the time delay, will reject the application if inadmissible. The Chairman shall then appoint a conciliator to examine the case.⁸³ Notification of the appointment of a conciliator overrules the stay of execution on contested rulings, but only if the decision is an individual one.⁸⁴

The conciliation procedure is adversarial.⁸⁵ It does not take place in public. The parties attend the proceedings themselves and may be represented or assisted by counsel of their choice. They may call any witnesses or experts, at their own expense.⁸⁶

When an agreement is reached at the hearings, the conciliator confirms this by a report signed by himself and the parties.

Failing agreement at the hearing, the conciliator notifies the conciliation proposal to the parties immediately and by any means.⁸⁷ In this respect, he enjoys wide powers and is able to rule both with regard to applicable law and with regard to equity. For example, the conciliator may recommend that the application of a new federation regulation or the execution of a federation president's decision be suspended, a sportsperson rank after a control has been shown to be a regular be reinstated, or invite an athlete to accept a refused selection which was not tainted by an obvious error of appreciation.

Suspension of the disputed individual decisions then ends.⁸⁸ The proposal put forward by the conciliators is taken as accepted by the parties and has to be applied immediately, unless written opposition is put forward by one of the parties within a period of one month.⁸⁹ This opposition makes it possible to seize the competent state court.

⁸¹ Art. R. 141-15, C. sport.

⁸² TA Paris, 23 May 2000, D. 2001, somm. 1664, obs. J.-C. Breillat.

⁸³ Art. R. 141-16 à R. 141-18, C. sport.

⁸⁴ Art. R. 141-6, C. sport.

⁸⁵ Art. R. 141-21, C. sport.

⁸⁶ Art. R. 141-22, C. sport.

⁸⁷ Art. R. 141-22, C. sport.

⁸⁸ Art. R. 141-6, C. sport.

⁸⁹ Art. R. 141-23, C. sport.

It has to be pointed out that prior conciliation requires that it is the CNOSF that is seized. Even if this seizure is declared inadmissible by the Chairman of the Board of Conciliators, the party concerned retains the right to seize the state courts. Even so, the declaration that an application formulated under the stipulations of Article R 141-5 of the Code du Sport is inadmissible is not an act with an adverse effect that could be the subject of an appeal for abuse of power.⁹⁰

6.3 Before the CAS

Arbitration cases brought before the CAS do not escape the common law rules applicable to internal arbitration governed by articles 1442 and thereafter of the Code of Civil Procedure and by articles 2059 to 2061 of the Civil Code.

Article 2059 of the French Civil Code lays down that persons “*may compromise rights that are freely available to them*”. Hence, disputes may be submitted to arbitration by the CAS when their scope concerns contracts of sponsorship or media rights, but not disputes that may involve criminal law or public law, such as those generated by the sports federations delegated to exercise their public authority prerogatives.

In France, these matters are considered public order issues.

However, the law may stipulate exceptions. Hence, law 2011-617 of 1 June 2011 concerning the organisation of the European football championship in France stipulated that the “*Euro 2016 administrative contracts*”⁹¹ may provide for recourse to arbitration, thereby bypassing the principle according to which public entities cannot submit to arbitration.

Disputes involving the employment laws have to be set aside. Indeed, although the employment laws are not entirely hostile to arbitration clauses, which are not systematically null and void, it must be borne in mind that these clauses are unenforceable against the employee.⁹² In France, arbitration in the case of an employer/employee dispute requires that the employee accept the authority of the arbitration tribunal.⁹³

Today, French arbitration law takes a rather benevolent view of arbitration clauses and Article 2061 of the Civil Code validates the clauses in contracts signed for professional employment, with the sole proviso that they comply with specific statutory provisions.

Even so, since the reform of arbitration law initiated by decree 2011-48 of

⁹⁰ CAA Nancy, 18 February 2013, n° 12NC00890.

⁹¹ M. MAISONNEUVE, obs. Rev. arb. 2011, 802.

⁹² Cass. soc., 30 November 2011, n° 11-12905: the clause is unenforceable against an employee in accordance with Article L1411-4, C. trav. The answer was already raised concerning the clauses inserted in contracts for international works: for example, Cass. soc., 12 March 2008, n° 01-44654 (cyclist).

⁹³ J. BARTHÉLÉMY, *L'arbitrage des conflits du travail : une solution pour le sport*, Jurisport n° 129, 2013, 27.

13 January 2011, the parties are under no obligation to clarify the procedures for setting up the arbitration tribunal. Unless they have designated the CAS, the procedure is carried out in accordance with the stipulations of article 1451 to 1454 of the Code of Civil Procedure.⁹⁴ However, the arbitration agreement must be in writing to be valid.⁹⁵

The arbitration agreement confers jurisdiction to decide the dispute on the arbitrator. When the dispute is brought before the state court, this declares its incompetence to rule on the matter when the arbitrator has not yet been seized and the arbitration agreement is manifestly null and void or unenforceable.⁹⁶ Correlatively, the arbitration tribunal shall have exclusive jurisdiction to decide disputes relating to its judicial powers,⁹⁷ apart from matters relating to employment law.⁹⁸

Disputes are heard before the CAS by an arbitrator or a panel of three arbitrators chosen freely by the parties. If not covered by the arbitration agreement, the CAS' Rules of Procedure state that the Appointments Committee will take this decision. If the parties decide that the dispute will be heard before a panel of arbitrators, each party designates an arbitrator chosen from a list of three arbitrators, with a Appointments Committee taking the decision in the event of disagreement or omission by the parties in this respect. A third arbitrator is appointed by the two appointed arbitrators, or by the committee if the two arbitrators disagree.⁹⁹

In accordance with Article 1464 of the Code of Civil Procedure, the arbitrators will decide on the arbitration procedure without being obliged to follow the rules laid down by the courts. However, certain procedural guidelines are always applied.

According to the CAS' Rules of Procedure, the arbitration panel establishes a brief describing the claims and any documents communicated by the parties. This brief gives the timetable for the procedure. The procedure enables the panel to hear any witnesses and experts designated by the parties. It may also order any investigation if it feels necessary, or take any measures of a provisional or protective nature.¹⁰⁰

When it considers that it has received sufficient information, the panel closes the proceedings and fixes the dates for hearing the arguments of the parties.¹⁰¹

The CAS decision takes the form of an award, which is a sort of judgement.

⁹⁴ Art. 1444, CPC.

⁹⁵ Art. 1443, CPC.

⁹⁶ Art. 1448, CPC. The judge made declare himself unqualified to hear the matter when the decision has to be taken within a very short period of three days (TGI Nanterre, ord. réf. 30 June 2009, Cah. dr. sport n° 17, 2009, 61, note P.-D. CERVETTI; D. 2009, 2964, obs. T. Clay; Rev. arb. 2009, 604, obs. M. Maisonneuve; LPA 12 October 2010, n° 203, note X. FAVRE-BULLE).

⁹⁷ Art. 1465, CPC.

⁹⁸ Only the employment tribunals are competent to rule on these matters.

⁹⁹ Art. 8, CAS Rules.

¹⁰⁰ Art. 18, Règl. CAS. – Art. 1468, CPC.

¹⁰¹ Art. 20, CAS Rules.

It is delivered within six months of notification of the brief, based on a majority decision by panel members when there are several arbitrators.¹⁰²

The arbitration procedure is governed by the legal system chosen by the parties or when no system has been chosen, according to French law.¹⁰³ If the parties so desire, it will also rule on the fundamental fairness of the case as “*amiable compositeur*”, as authorized by article 1478 of the Code of Civil Procedure.

Lastly, it has to be remembered that the effect of the award is to release the arbitrator and, once made known, constitutes a conclusive judgement binding on the parties (*res judicata*).

Since the reform of 13 January 2011, it is no longer subject to appeal unless otherwise agreed between the parties.¹⁰⁴ But this involves no change to existing practice insofar as the CAS rules had already used a waiver of appeal clause as allowed under the previous law. An appeal for annulment is the only course that remains open and is heard before the Court of Appeal in the limited case stipulated under Article 1492 of the Code of Civil Procedure, and provided that the litigant does not contradict himself to the detriment of his opponent by invoking an irregularity that he did not notify in a timely manner before the arbitration tribunal.¹⁰⁵

6.4 Before the state courts

The provisions of the Code of Administrative Justice or the Code of Civil Procedure and Code of Criminal Procedure will apply depending on whether the dispute is heard before the administrative court or the judicial court. All this is without any particularities that would be applicable in sporting matters.

7. Dispute settlements

The wide variety of regulations, orders and provisions of a sports federation gives rise to different forms of dispute settlements, the most important of which being displayed hereafter.

7.1 Technical disputes

Disputing arbitration decisions or approving the results raises three series of difficulties:

- firstly, it is generally difficult and even impossible to rescind their effects since they are part of a quasi-indivisible whole (the sporting event) or because they involve the interests of third parties (the other participants in a

¹⁰² Art. 1461 and 1480, CPC. – Art. 21 and 22, Règl. CAS.

¹⁰³ Art. 17, CAS Rules.

¹⁰⁴ Art. 1489, CPC.

¹⁰⁵ Art. 1466, CPC.

- championship);
- secondly, in most cases it concerns decisions that involve technical data tainted by subjective appreciations making the persons responsible for vetting them, in particular the state judges, reluctant to challenge them;
 - lastly, in order to carry out his/her duties effectively, the arbitrator has to hold an authority that would prevent his/her decisions from being too easily open to challenge.

Nevertheless, the judicial review of these decisions cannot be automatically, entirely and absolutely excluded. This is why, even if the chances of success are limited, there is still a right to challenge these decisions in the courts, whether they are taken through arbitration or by decisions approving results of competitions.

As a matter of principle, the administrative court refuses to review decisions adopted by referees during sports competitions, or those taken before or after events.¹⁰⁶ These decisions concern the essence of the refereeing: i.e. awarding a penalty in rugby, sending off a player in football, declaring a ball out in tennis, confirming the playing of a match or cancelling it until a later date. The judge refuses to allow the performances of athletes to be discussed before the court, or the application of techniques specific to each discipline.

However, the French administrative courts consider that when it involves elite sports, the rules shall be subject to review by the ordinary courts insofar as their application has affected the financial status of the participants in the competition or rights belonging to the latter. The decisions by sports event judges and referees must not undermine general legal principles, nor the principle of the equality of participants in sports events, nor concern the nature of referees' actions.¹⁰⁷

The importance of the decisions taken by judges and referees, especially regarding the financial consequences caused by the loss of a professional competition, leads to the conclusion that without judicial review of their legality, the administrative court should have the right to question the extra-contractual liability of the sports federation for the loss suffered as a result of an incorrect refereeing decision. In this case, the Council of State would probably require proof of an error demonstrating the characterised incompetence of the referee, or even showing favour to one of the parties in breach of sporting ethics. In other words, although the case has never arisen in a sports event, an applicant who believes that he is the victim of a loss due to a refereeing error could have the federation concerned condemned to pay damages and interest. To do this, he would have to prove that the error in question led to the

¹⁰⁶ B. FOUCHER, *Les litiges sportifs et le juge administratif*, Mélanges D. Labetoulle, Dalloz, 2007 – CE, 18 June 1984, Rec. CE, 218. – J.-C. BONICHOT, *Le Conseil d'État et les fédérations sportives*, RJES 1987, n° 3, 3 et s. – CE, 26 July 1985, Rec. CE, 784; D. 1988, somm. 387, obs. M. Hecquard-Théron. – CE, 31 January 1990, n° 82493. – CE, 21 July 2006, n° 295008, Cah. dr. sport n° 7, 2007, note J.-M. DUVAL – CE, 13 December 2006, n° 292245, LPA 2007, n° 77, 15, note F. RIZZO.

¹⁰⁷ CE, 25 January 1991, n° 104497, Rec. CE, 29; AJDA 1991, 391, concl. Leroy. – CE, 27 January 1997, n° 135964, Dict. perm. Dr. sport, Bull. n° 66, 7917. – CE, 29 September 2003, n° 248140, RJES 2004, n° 70, 66, obs. F. Lagarde. — TA Rennes, 20 May 2009, Cah. dr. sport n° 16, 2009, 93, note F. RIZZO – CE, 10 June 2011, n° 327158.

loss and was particularly serious, even bordering on the absurd, or even malicious.¹⁰⁸

Decisions approving results of sports events taken by the federations, leagues or their associated bodies are in principle administrative decisions in accordance with *FIFAS* case law. However the question arises as to whether these are individual or regulatory decisions. This is an important distinction for two sets of reasons.

First of all, because the answer to this question determines the attribution of competence within the administrative jurisdiction; the individual nature of the decision would prevent the Council of State's jurisdiction in the first and last resort from applying. As such, a distinction should be made between decisions approving final championship rankings (*which are "non-individual"*¹⁰⁹ decisions), and decisions concerning the various matches played during the season (individual decisions subject to the jurisdiction of the first instance administrative court).¹¹⁰ Generally, seized with both types of dispute at the same time, the Council of State accepts their connectivity in order to hear all the applications.¹¹¹

Secondly, because the possibility of inadmissibility due to the requirement for mandatory preliminary conciliation before the CNOSF can only be envisaged in order to challenge a decision which is individual. The decision to approve a ranking therefore escapes preliminary conciliation, but remains subject to the rule requiring that all a federation's internal remedies have been exhausted.¹¹²

"*Patere legem quam ipse fecisti*" is the important principle of administrative law that applies to the federations and the leagues (or to their associated bodies) and requires them to comply with their own regulations when issuing an approval. For example, when it results from the French Football Federation's regulations that a false identity of a player has resulted in the automatic loss of a match, a proper challenge made in the appropriate delays by a competing club will constrain the Federation's commission to declare that the sanction stipulated by the regulations shall apply.¹¹³ Similarly, when a club uses a player recruited outside the transfer window, the National Football League will not be able to approve the result without breaching its own regulations which stipulated that the penalty is loss of the match.¹¹⁴

When the regulations stipulate that the results cannot be challenged after their approval, the Council of State considers that, once approved and not challenged according to the procedures stipulated by the regulations, the result must stand.¹¹⁵

This rule applies even if the irregularities affecting matches, such as players with false passports, are only discovered once the time delay for appeals against

¹⁰⁸ CA Rennes, 25 June 2002, 1^{re} ch. A, n° 587, RJES, 2003, n° 65, 48.

¹⁰⁹ CE, 25 April 2001, n° 228171. – CE, 25 June 2001, LPA 28 September 2001, 4, concl. I. de Silva; AJDA 2001, 887, note G. SIMON.

¹¹⁰ I. DE SILVA, concl. sur CE, 3 March 2003, LPA 9 July 2003, 13.

¹¹¹ CE, 3 March 2003, prev. – CE, 3 April 2006, Cah. dr. sport n° 4, 2006, 9, note J.-M. DUVAL; RJES, 2006, n° 81, 73, note J.-F. LACHAUME.

¹¹² CE, 3 March 2003, RJES, 2003, n° 68, obs. J.-C. Breillat.

¹¹³ CE, 25 June 2001, prev.

¹¹⁴ CE, 3 April 2006, prev.

¹¹⁵ Par ex. CE, 3 March 2003, prev.

the approving decision has lapsed.¹¹⁶ Thus, case law shows itself favourable to a “*principle of sporting certainty*”¹¹⁷ which enhances the sporting standard and conveys the idea that “*there is a particular interest in ensuring that the decisions taken on the playing field are definitive*”.¹¹⁸

Correspondingly, the principle that states that “*fraus omnia corrumpit*” [fraud corrupts everything] is being undermined since any fraud that has an adverse effect on the results of a sports encounter does not corrupt its approval. This reasoning appears questionable insofar as it implies that the purpose of approval is limited to simply recording the results of the encounter. In fact, although it does indeed perform this function, it does not undermine it since its duty is also to certify the proper conduct of a competition and thus ensure the authenticity of a result. Any fraud that is revealed during an encounter should therefore, in our opinion, lead to the imposition of the stipulated penalties.

Nevertheless, the *fraus omnia corrumpit* principle is not entirely invalidated once the Council of State has not opposed a decision tainted by fraud being withdrawn after the period of time available for an administrative or judicial appeal has lapsed.¹¹⁹

When the judge tries to limit the number of challenges to sports results, the only path open to him is to cancel the approving decision when it appears to be incorrect. The Council of State also considers that an illegal action which vitiates a decision taken during the season on the outcome of an encounter, taints the legality of the decision approving the championship ranking at the end of the season. Deemed indivisible, this ranking cannot be the subject of partial modification; it is the entire approval of the final ranking that should be cancelled.¹²⁰

The distinction between the approval of meetings and the final ranking retains considerable interest for the right to take action. Indeed, third-party clubs are not entitled to seek the cancellation of the results of a match. They can only challenge its legality through an objection supporting arguments submitted against the championship ranking.¹²¹ This remedy is available, moreover, only if the result is not definitive, that is to say prior to its approval or well before the period for making an appeal against the approving decision has expired.

The Council of State, deciding on an abuse of power, is not able to decide on a new ranking following the decision to cancel. However, outside the conventional limits of its role, it can be seen that this does not hesitate to indicate to the sporting bodies the procedure to be followed in order to establish the correct ranking. If

¹¹⁶ CE, 25 June 2001, *prev.* – CE, 25 April 2007, *Cah. dr. sport* n° 9, 2007, 121, note F. RIZZO.

¹¹⁷ B. FOUCHER, *Les litiges sportifs et le juge administratif*, *prev.* – F. BUY ET F. RIZZO, *Peut-on encore avoir confiance dans les normes sportives?*, *Journal des sociétés* 2009, n° 63, 56.

¹¹⁸ I. DE SILVA, *concl. prev. sur CE*, 25 June 2001.

¹¹⁹ CE, 25 June 2001, *prev.*

¹²⁰ CE, 3 April 2006, *prev.*

¹²¹ CE, 4 April 2008, *Cah. dr. sport* n° 12, 2008, 84, note F. RIZZO; RJES n° 88, 2008, 73, obs. J.-F. Lachaume. – TA Amiens, 24 June 2008, *Cah. dr. sport* n° 14, 2008, 110, note F. RIZZO. – TA Lyon, 9 October 2002, D. 2003, 2538, obs. J.-F. Lachaume.

necessary, this high jurisdiction will use its powers of injunction.

Finally, we note that although the incorrect decision is incapable of being challenged due to the applicant's failure to have complied with the procedure set out in the regulations, nothing prevents a victim from submitting the dispute to the administrative court,¹²² even the judicial court,¹²³ in order to seek compensation for the damages it considers that it has suffered.

7.2 *Disciplinary disputes*

Justice tribunals and commissions within French sports federations are divided according to the type of misdemeanour. In general disciplinary matters or doping offences, the disciplinary commission has jurisdiction, although there is an anti-doping disciplinary committee within each federation. However, when a dispute involves the relations between a sports club's employee and the club/employer, the dispute will not be submitted to the disciplinary commission, but to the legal commission with wider powers and more original procedural rules.

Generally, the legal affairs commission functions in a more participatory manner by bringing together employees' representatives and employers according to the principle of equal representation. This is why it devotes most of its efforts to resolving conflicts through preventive conciliation and mediation. In addition, its competences extend upstream and it is able to propose amendments to collective agreements, monitor and approve compliance with contracts. It has to be said that these cases concerned more economic matters than disciplinary and that the disciplinary rules of the sports court only become involved in questions of labour relations in order to pacify working relationships on questions of integrity and fair competition.

7.3 *Economic disputes*

As has already been said, disputes concerning employer/employee relations are generally financial in nature. They are dealt with in an original manner. Hence, in the professional federations (including the French football and rugby federations), collective employment agreements require a preliminary hearing before a legal commission which has the task of reconciling the positions of the parties in the event of a failure to comply with the obligations contained in contracts between a club and the player or coach. Reserved for situations when a breach of contract is to be feared or envisaged, this pre-litigation procedure may, if not avoid, at least put forward adapted solutions.

This procedure is mandatory in football; the social chamber of the High Supreme Court (Cour de Cassation) has even considered that this preliminary

¹²² CE, 21 March 2011, n° 318140, Cah. dr. sport n° 24, 2011, note F. COLIN.

¹²³ T. com. Nancy, 15 November 2004, Cah. dr. sport n° 1, 2005, 117, note F. RIZZO.

prerequisite was a considerable guarantee for the employee not to be ignored.¹²⁴

This same kind of pre-litigation mechanism, involving the creation of sports agent commissions is to be found in dedicated professional sports federations. These commissions have been assigned a conciliation role in disputes arising between agents and their contractors, that is to say athletes, coaches, sports groups or organisers of competitions. Even so, almost all disputes between agents and their clients concerning financial matters are heard before the courts and in the case of disciplinary matters (such as compliance by agents with the control of their activities by a Federation), a truly disciplinary procedure is implemented. It should also be noted in this respect that the most recent reform has changed the composition of these sports agents' commissions hearing disciplinary matters. Indeed this commission may not include representatives of agents, representatives of clubs or sports coaches. This reflects the principle of impartiality that is fundamental to all sound justice.

Finally, a last comment on financial disputes which escape the realm of sports justice: the new Article L131-16-1 of the Code du Sport inserted by law 2012-158 of 1 February 2012 provides that in order to implement disciplinary proceedings against a player who participated in a sporting event having bet on the result, a delegated sports federation may access personal information concerning betting operations recorded by an accredited online betting organisation. To do this, it has to apply to the regulatory authority which communicates the information required in accordance with law 78-17 of 6 January 1978 concerning personal information and liberties. Therefore, it is perfectly understandable that a financial dispute between a person placing a bet and a betting operator (which will be heard before the state courts) may have additional consequences in the field of sports justice.

8. *ADR and interim relief*

8.1 *Disciplinary hearings before federation commissions*

The disciplinary regulations established by the Code du Sport for use by approved federations contain no specific provisions concerning emergency procedures or provisional decisions. At most, the regulations stipulate that the normal period of 15 days between the calling and holding of the hearing may be reduced to 8 days if urgent.¹²⁵ This period may be even further reduced on the request of a sportsperson.

This absence of specific provisions does not mean that federations are totally prevented from including such a regulation. Indeed, they are perfectly free to add to the model regulations provided they do not circumvent their substance. Most federations have set up specific procedures for urgent hearings. This applies

¹²⁴ Cass. soc., 4 June 2009, n° 07-41631, JCP G 2009, 333, note D. JACOTOT.

¹²⁵ Annexe I-6 aux articles R. 131-2 et R. 131-7 du Code du sport, art. 9.

particularly when an athlete is to participate in the finals of the competition and he or she is subject to a disciplinary procedure.¹²⁶

Furthermore, associations are not without lists of the provisional and protective decisions that the disciplinary courts or commissions may decide before finalising the matter. For example, as a precaution they may decide to extend the automatic suspension of a player excluded by a referee until a definitive ruling is issued. If warranted, and especially in view of the seriousness of the matter in question, they may also take, immediately and until a ruling is issued, all the decisions (suspension, exclusion from competitions, etc.) that are to apply to a person or entity whose disciplinary responsibility could be engaged. Generally, these decisions can only intervene if disciplinary proceedings are currently ongoing, and the disciplinary commission pronounces within a reasonable period, and provided that this does not attribute a definitive nature to the provisional measure.

8.2 *Before the CNOSF*

The Code du Sport does not cover specific emergency procedures before the CNOSF. This is fairly logical insofar as the period of one month for a conciliation proposal to be issued is fairly short, and is not a maximum.

Moreover, the CNOSF practice of conciliation, i.e. its justification, shows that the CNOSF is capable of responding very quickly, in 2 to 3 days, to emergency applications.

The conciliator is able to put forward proposals for resolving the dispute and it is accepted, in theory at least, that he is able to propose protective and provisional measures.

Even so, he is unable to impose a solution since the parties have to agree that the solution in question will apply.

8.3 *Before the CAS [Arbitration Court for Sport]*

Flexibility and a willingness to adapt to the time aspect that is so important in sport mean that the CAS does not organise specific summary procedures. Its Article 26 merely states that “any party may request that the dispute be examined according to an summary procedure. In this case, the arbitration panel will implement all measures necessary to ensure early treatment of the dispute.” From this, it will be seen that the arbitrators have wide freedom to satisfy a need for speed if expressed in the referral submitted by the parties.

This freedom is particularly notable and has been recognised by the state courts even before anyone had time to try it out. In the first case that the CAS had to deal with, one of the parties challenged its jurisdiction, in particular its ability to

¹²⁶ In this case, the sports person who requests a shorter delay will not be able to claim non-compliance with sufficient delay when preparing his or her defence.

hear a dispute urgently, just before the start of the Tour de France. The state court confirmed the jurisdiction of the CAS and noted that the CAS has an emergency procedure, referred to in Article 26 of its regulations, and therefore was able to issue a ruling before the Tour de France began.¹²⁷

In order to back up its position, the court relied on a letter from the President of the CAS in which he indicated that this court “*is used to intervening quickly and effectively, provided a dispute is submitted to it*”. This argument raised some eyebrows since, until this case arose, the CAS had never dealt with litigation, urgent or otherwise. The sport’s regulatory body did not fail in its first task since, receiving the referral on 30 June 2009, it issued a ruling on 3 July, on the eve of the Tour de France 2009.¹²⁸

8.4 Before national courts

Urgent matters brought before the national courts have to be examined differently depending on whether the administrative court or the judicial court deals with the matter.

Before the administrative court – The right of appeal against administrative decisions have no suspensive effect. This is quite an obstacle in sporting matters when it is often impossible to review a past decision once a certain time has elapsed. This rule can be usefully overcome by submitting the matter to summary procedure.

The speed with which rulings are then issued becomes a vital aspect of its effectiveness.

Two types of summary (or urgent) procedure may be envisaged. The “*Référé-Suspension*” which allows the court to suspend the enforcement of an administrative decision or some of its effects when urgency so requires and the applicant has made a submission to the court that is sufficient to create a serious doubt as to the legality of the decision.¹²⁹ The “*Référé-Liberté*” which, in urgent matters, allows the court to order all necessary measures be taken to protect a fundamental freedom when an entity, established under public or private law and holding responsibility for the management of a public service, may have caused, in the exercise of its powers, serious and manifest prejudice, and this within 48 hours.¹³⁰

After a few years of practice, the outcome of these summary procedures has shown quite contrasting results:¹³¹ whereas the “*Référé-Liberté*” does not seem destined to have a great future, at least as long as the right to practice a sport and take part in a competition is not considered a fundamental freedom,¹³² The “*Référé-*

¹²⁷ TGI Nanterre, ord. réf. 30 June 2009, Cah. dr. sport n° 17, 2009, 61, note P.-D. CERVETTI; D. 2009, 2964, obs. T. Clay; Rev. arb. 2009, 604, obs. M. Maisonneuve; LPA 12 October 2010, n° 203, note X. FAVRE-BULLE.

¹²⁸ Ch. arb. sport, 3 July 2009, LPA 29 March 2010, n° 62, 10, obs. J.-M. Marmayou.

¹²⁹ Art. L. 521-1, C. just. adm.

¹³⁰ Art. L. 521-2, C. just. adm.

¹³¹ B. STIRN, *Droit du sport et juge des référés*, AJDA 2007, 1627.

¹³² CE, ord. réf., 22 October 2001, D. 2002, somm. 2709, obs. J.-F. Lachaume.

Suspension”, on the other hand, has proved to be very successful. The Council of State has ruled that there is a serious doubt as to the legality of a decision whenever a disproportionate disciplinary sanction is applied to a club¹³³ or a sport.¹³⁴ As to the question of urgency, this appears to be easily fulfilled when it consists in a professional athlete being prohibited from participating in a competition.¹³⁵ However, the Council considers that there is no urgent need to suspend a decision under which sports authorities have rejected the claims of several clubs against approved championship rankings, even though the beginning of the next season is imminent, and that the execution of the decision may cause prejudice to these clubs in terms of human and financial resources. The very pragmatic reason for this is that suspension “would extend the inconveniences they have claimed to the other clubs engaged in the championship, without providing them with any guarantee as to the merits of the challenge”.¹³⁶ The answer could lie in the subject of the challenged decision: dismissal when the club is denied access to an upper division or sees its ranking simply changed, whereas urgency is more readily accepted when a club is demoted.¹³⁷

Since the compulsory conciliation procedure before the CNOSF also allows it to suspend the execution of certain decisions, the question arises as to whether a summary procedure could be combined with this procedure. It seems that the action is inadmissible when no conciliation procedure has been instituted or when, having been instituted, a conciliator has already been appointed. On the other hand, an appeal is admissible after the conciliator has put forward his conciliation proposal.

Before the ordinary courts – The rules of procedure do not testify to any specificity before the judicial courts. However, there is no doubting the practical importance of the summary procedure, such as in administrative matters.¹³⁸ The purpose is always the same: to address the delays that occur in a conventional trial and are not suited to the particular time constraints of sports.

Summary procedure before the civil courts is currently governed by Articles 484 to 491 and 808 to 811 of the Code of Civil Procedure. This was the inspiration behind the works tribunal [prud’homal] summary procedure contained in Articles R 1455-1 and thereafter of the Code du Travail [Labour Laws], and the commercial summary procedure as per Articles 872 and thereafter of the Code of Civil

¹³³ CE, 20 October 2008, Cah. dr. sport n° 14, 2008, 105, note F. COLIN.

¹³⁴ CE, 2 December 2008, Cah. dr. sport n° 15, 2009, 100, note F. COLIN. – CE, 3 July 2009, Cah. dr. sport n° 17, 2009, 121, note F. COLIN.

¹³⁵ CE, 4 November 2005, n° 277741. – CE, 30 July 2008, LPA 19 January 2009, 11, obs. F. BUY; Cah. dr. sport 2008, n° 14, 159, note F. COLIN. – CE, 22 March 2010, Cah. dr. sport n° 20, 2010, note F. COLIN.

¹³⁶ CE, 29 August 2008, Cah. dr. sport n° 14, 2008, 115, note F. COLIN. – CE, 11 July 2002, n° 248139.

¹³⁷ CE, 16 September 2010, Cah. dr. sport n° 22, 2010, 94, note F. COLIN; D. 2011, 707, obs. J.-F. Lachaume.

¹³⁸ A. LACABARATS, *L’urgence dans les activités sportives. Les interventions du juge judiciaire des référés dans le domaine du sport*, RJES, 1999, n° 52, 7.

Procedure. It has to be remembered that the judge appointed to hear urgent applications to the court has competence in four sets of hypotheses:

- first of all, in urgent referrals, which is the primary function of the summary procedure: the judge may order the application of any measures that cannot be seriously challenged or that justify the existence of a dispute;
- secondly, even in the absence of urgency, cases of imminent or manifestly illegal damage: the judge may then issue interim orders, injunctions or orders to make good any damage;¹³⁹
- furthermore, and still in the absence of urgency and when the obligation cannot be seriously disputed: the judge may grant a provisional sum to a creditor (“référé-provision”)¹⁴⁰ or order a debtor to perform its obligation (“référé-injonction”);
- finally, even in the absence of urgency or when facing a serious challenge, but before any trial: the judge may order measures to facilitate any future proceedings based on Article 145 of the Code of Civil Procedure.¹⁴¹

It is to be noted that the interim order does not in principle constitute *res judicata* authority. However, it is fully enforceable on a provisional basis.

9. Sanctions on clubs and players

National sanctions – In accordance with the Code du Sport, in matters of general discipline and in doping matters, disciplinary sanctions are exhaustively listed by both model regulations that each federation has to enact.

They range from simple sports penalties (disqualification, withdrawal of points awarded, etc.) to disciplinary sanctions such as warnings, reprimands, suspension from playing or exercising functions, monetary penalties, general interest activities, provisional withdrawal of a licence to practice a sport, disqualification or ineligibility for a period specified by governing bodies.

International applications – When a national federation rules against one of its members, for instance on a disciplinary matter, it has to be determined whether this decision will be vetted by the judicial or administrative court. This attribution is particularly complicated when a French national sports federation sanctions misconduct by one of its practising members during an international competition, and to do so applies the regulations enacted by the international federation.

Little by little as rulings are issued, it would appear that the attribution is based on the criteria established by the former *Montpeurt*¹⁴² decree, i.e. when the act is by a body governed by private law, it is only considered administrative if it takes place in the context of a public service activity and involves the implementation

¹³⁹ Cass. com., 1 March 1994, D. 1995, somm. 61, obs. A. Lacabarats.

¹⁴⁰ Cass. com., 12 November 1997, n° 96-13137.

¹⁴¹ CA Paris, 26 October 1983, in *L'activité sportive dans les balances de la justice*, Dalloz, 231, obs. F. Alaphilippe. – CA Aix, 7 September 2011, LPA 18 May 2012, 3, obs. C.-A. Maetz.

¹⁴² CE, ass., 31 July 1942, Rec. CE, 239 ; D. 1942, 138, concl. Ségalat.

of public powers. It is these criteria that the Council of State recalled in its *Chotard*¹⁴³ ruling according to which a delegated federations' decisions leading to a disciplinary sanction taken on the basis of an international federation's regulations for acts that did not take place on French territory do not constitute administrative acts but have to be considered simple associative acts that may be referred to the judicial courts. The *Pigeon*¹⁴⁴ ruling has provided a different interpretation when a national federation applies a sanction on national territory that, although decided by the international federation, is applied based on its own national regulations that were themselves enacted as part of its delegated public service mission. In this case, the decision applied in an international context is administrative.

In any event, when applying an international sanction, a French federation has to exercise its full powers and cannot simply endorse the international sanction issued by the International disciplinary body without checking the materiality and the seriousness of the facts in order to determine the sanction to be imposed according to its own regulations, even if they substantially reproduce those of the international body.¹⁴⁵

10. *Implementation of decisions and awards*

France does not have the same tradition of case law as common law countries. For example, the rulings of the supreme courts are very brief. There is indeed a certain mystique in the written, abstract and general norms, and case law struggles to gain recognition as a veritable source of law.

In the world of sports justice, this results in the virtual non-existence of publications. Indeed, although all disciplinary decisions have to be reasoned and communicated to the parties, the bodies issuing them do not build up collections of decisions that may be consulted by the public.

They only need to publish the ruling in the bulletin of information issued by the sports federation in question,¹⁴⁶ it being understood that they cannot include in the publication names that could breach a person's right to privacy or nondisclosure in medical matters. In practice, when federations report on sanctions issued and the parties against whom they have been issued, they never give the exact grounds for their decisions.

CNOSF conciliation is no exception from this principle of non-disclosure and no conciliation proposal is published. Nor are the CAS awards which are covered by the rules of private arbitration.

Finally, it is relatively difficult to make a substantive analysis of the decisions

¹⁴³ CE, 19 March 2010, n° 318549, AJDA 2010, 581, note J.-M. PASTOR; LPA 2010, n° 127, 6, obs. M.-C. Rouault; Cah. dr. sport n° 20, 2010, 45, note F. COLIN; LPA 2011, n° 71, 10, obs. B. Brignon.

¹⁴⁴ CE, sect., 26 November 1976, n° 95262, Rec CE, 513; AJDA 1977, 139, concl. Galabert, note F. MODERNE.

¹⁴⁵ Adde: CAA Lyon 7 July 2011, n° 10LY01811, LPA 14 May 2012, n° 96, 7, obs. J.-M. Marmayou.

¹⁴⁶ Art 17 Règlement disciplinaire-type.

that aliment sports justice. And even those subject to the state courts are not fully adopted in the submissions which are themselves compiled and published on an official website¹⁴⁷ in compliance with the general principles governing public justice.

The French legal adviser is therefore reduced to only considering the unseen part of the iceberg.

¹⁴⁷ www.legifrance.gouv.fr.

SPORTS JUSTICE IN GERMANY

by *Jan Sienicki**

SUMMARY: 1. Principles of German sports justice – 2. Relationship between ordinary and sports justice – 3. Relevant NOC regulations – 4. Relevant football regulations – 5. The sports judicial bodies – 6. Dispute settlements – 7. ADR and interim relief – 8. Conclusion

Abstract:

This chapter elaborates on the basics and provisions of sports justice in Germany and the implementation by the sports associations and its decision making bodies, as well as the judicial review thereof by ordinary courts in light of possible violations of basic (constitutional) rights. Particular importance has been dedicated to the establishment and the procedure of arbitration in the sports associations courts in light of §§ 1025 ff. ZPO, especially in the case of football, and its influence on the associated members of the pertinent federation with regard to its deployment. The latter is being illustrated by significant case law and concrete examples pertaining to the relevant regulations, including those that apply to alternative dispute resolution.

1. Principles of German sports justice

The sports federations' constitutional basis is stipulated in Art. 9 par. 1 GG¹ which sets forth the freedom of association. It does not only comprise the gathering of individual athletes in sports federations/clubs (and beyond them) but also grants an association the right to decide on its organization, its decision making process and its administration. Hence the content of the sports federations' autonomy assured

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¹ GG: Grundgesetz (German Constitution).

by Art. 9 par. 1 GG also applies to their establishment and enactment of statutes.²

The provisions of §§ 21 ff. BGB³ serve as the sub-constitutional basis for the association's autonomy. Precisely, § 25 BGB states that *the constitution of an association with legal personality is (...) determined by the articles of association*. Thereby the right to self-legislation by sports federations is being explicitly codified as the core area of the associations' autonomy.⁴

Thus, the articles of association constitute the major instrument of the sports associations' internal law-making. It contains the constitution of the association, being its legal basic order.⁵ In addition, the association is also entitled to regulate its operations by means of further abstractly-worded provisions, which are of lower degree as the articles and statutes respectively, and are *inter alia* often referred to as rules, regulations and orders. Apart from regulations pertaining to the operating of the company's organs, financial regimes or the actual laws of the game, these regulations also deal with penalties for offences and the settlement of disputes within the association or the control of the law established and applied by which.⁴

However, sports associations, being private rule-setters, do not make their law in extralegal spheres. Nor the freedom to internal organisation granted by Art. 9 par. 1 GG nor the general freedom of action laid down in Art 2 par. 1 GG (*lex generalis* to Art. 9 GG) approve unrestrained law-making. Likewise ordinary law, regulations of sports associations will only be effective if certain formal and substantive conditions are met.⁷

The formal entry into force of a certain sports regulation depends on competence, procedure and form.

A regulation will only be valid if the association in question was competent to enact it. This is a matter of if the relevant regulation is to be reached on the same association level where it actually has been enacted [e.g. a federal sports association, a regional (state) sports association etc.]. The competences arise from the articles of association but oftentimes also result from the nature of things (the top national football championship league *Bundesliga*, which in its literal translation stands for 'Federal League' is managed by the federal football association and not by single state football associations).⁸

² P. TETTINGER, K. VIEWEG, U. STEINER, *Gegenwartsfragen des Sportrechts*, Berlin, Duncker & Humblot, 2004, 31; J. FRITZWEILER, B. PFISTER, T. SUMMERER, *Praxishandbuch Sportrecht*, 2 ed., Munich, C.H. Beck, 2007, 41.

³ BGB: Bürgerliches Gesetzbuch (German Civil Code).

⁴ F. ANDEXER, *Die nationale Sportgerichtsbarkeit und ihre internationale Dimension*, Hamburg, Verlag Dr. Kovac, 2009, 45.

⁵ J. ELLENBERGER, in Palandt, *Bürgerliches Gesetzbuch Commentary*, 70 ed., Munich, C.H. Beck, 2011, § 25, marg. no. 1.

⁶ J. ADOLPHSEN, M. NOLTE, M. LEHNER, M. GERLINGER, *Sportrecht in der Praxis*, Stuttgart, Kohlhammer, 2011, 61 f.

⁷ E. LOHBECK, *Die Vereinsordnungen*, MDR, 1972, 381 ff.; J. ADOLPHSEN, M. NOLTE, M. LEHNER, M. GERLINGER, *Sportrecht in der Praxis*, Stuttgart, Kohlhammer, 2011, 69.

⁸ For a detailed demonstration of the structures in professional football in Germany, please view the

Another essential prerequisite for the legitimacy of a regulation is the intra-company competence, which also is determined by the articles of association and complementarily by §§ 25 ff. BGB. Hence, even when the association level is accurate, it is only the entitled organ which can pass the regulation. Otherwise said regulation will be unlawful, which is precisely what would happen to an ordinary act upon such a violation of competences.⁹

As far as substantive requirements are concerned, §§ 134, 138 and 242 BGB constitute limits for the association's autonomy pertaining to their private-law regulations.¹⁰

As a general rule, the interests of the clubs and associations on the one hand as against those of their members will not be protected by this autonomy when the rule(s)/regulation(s) violate a statutory interdiction (§ 134 BGB) or morality (§ 138 BGB).¹¹ § 242 BGB narrows the association's latitude insofar as it specifies the principle of good faith.

§§ 134, 138, 242 BGB are sweeping clauses of German Civil Law. The interpretation and practice of these blanket clauses shall be carried out with reference to the basic rights, since apart from their state-aimed "defence-function" basic rights deploy an objective scale of values which also affects legal relations between private entities. This is being achieved by means of the so-called basic rights' horizontal effect, which indicates, that a) the interpretation and application of any private-law rule has to be carried out in light of the basic rights and b) the reciprocal balancing of opposing interests (e.g. athlete vs. club/federation) shall result from practical concordance, i.e. the basic right violated the most should precede the others only if no compromise can be achieved.¹² The regulation(s) on training compensation in German football were subject to such a balancing on the basis of the aforementioned statutes in the context of far-reaching judgement of Germany's highest courts. In 1999, the Federal Court of Justice (BGH) ruled¹³ that the payments of lump-sums in the amount of 25.000 Deutsche Mark as training compensation upon the transfer of a contract-amateur (football) are inappropriately high and constitute an infringement of the freedom to choose and exercise a profession (art. 12 GG). The freedom of association granted by art. 9 GG does not take effect here, and even if it did, in this case the freedom to choose a career has to prevail as it can be restricted only to avert serious and demonstrable risks for a supremely important community asset.¹⁴

introductory display of section 4. *Football regulations (relevant provisions)*.

⁹ VGH Munich, decision of 21 January 2009 – 7 N08.1140 – juris marg. no. 35.

¹⁰ F. ANDEXER, *Die nationale Sportgerichtsbarkeit und ihre internationale Dimension*, Hamburg, Verlag Dr. Kovac, 2009, 31, 60.

¹¹ OLG Celle, decision of 05 October 1987 – 1 U 69/86, WM 1988, 495.

¹² M. NOLTE, *Sportrecht in der Praxis*, Stuttgart, Kohlhammer, 2011, 9 f.

¹³ BGH, NJW 99, 3552 = SpuRt 1999, 236.

¹⁴ In extenso: H. HILPERT, *Sportrecht und Sportrechtsprechung im In- und Ausland*, Berlin, De Gruyter Recht, 2007, 199 f.; even the amendment of the regulation pertaining to training compensation (§ 23 a DFB SpielO) has been declared null and void by the higher regional court Oldenburg on

In contrast, sports-regulations and statutes are not considered to be general terms and conditions since they rank amongst contracts in the field of company law which are explicitly exempted from the application of the section concerning the incorporation of standard business terms into contracts (§ 310 par. 4 sent. 1 BGB).¹⁵

2. *Relationship between ordinary and sports justice*

Being part of the federal constitution the following two provisions raise the question whether the autonomy of association in terms of art. 9 par. 1 GG is limited as far as the association's law making (hence the association's sports justice) towards its members is concerned.

Art. 92 GG, on the one hand, reads as follows:

The judicial power shall be vested in the judges; it shall be exercised by the Federal Constitutional Court, by the federal courts provided for in this Basic Law, and by the courts of the Länder. (= the federal states).

In addition, art. 101 par. 1 GG determines that:

Extraordinary courts shall not be allowed. No one may be removed from the jurisdiction of his lawful judge.

By virtue of their autonomy the goal of almost any sports federation is to adjudicate exclusively and definitely upon internal disputes by means of their panel(s) of judges, taking into account the federation's ideals and values.¹⁶ This would be impeded if the state's exclusive right to jurisdiction as per art. 92 GG (*supra*) precluded private law-making (in the sense of a coactions of legislation and dispensation of justice resulting in the implementation of its penal power) as the wording of which might indicate.

This is not the case, though. In fact, the state is authorised to approve private legislation as long as it ensures that the ultimately authoritative power of decision remains with it. Likewise, art. 101 par. 1 GG does not force anybody to seek redress at ordinary courts when the dispute is of non-sovereign kind. The purpose of both provisions is to avoid random 'court-determination' by the state, hence they do not apply to private courts, arbitral tribunals and their arbitrators. This perception gives due consideration to the fact that the competence of a given association's decision-making body arises from a private-law agreement in place of

similar grounds, OLG Oldenburg, SpuRt 2005, 164; after all the DFB Bundesgericht declared the invalidity of § 27 SpielO which stipulated lump-sums to be paid to a player's former clubs (last 5 years) upon the conclusion of his licence contract, decision of the DFB Bundesgericht of 28.07.2006, SpuRt 2006, 262.

¹⁵ K. VIEWEG, *Normsetzung und -anwendung deutscher und internationaler Verbände*, Berlin, Duncker & Humblot, 1990, 231. The effects of the rule of law and § 242 BGB on the associations' penal power and their proceedings is being discussed in par. 6.2 *Disciplinary disputes*.

¹⁶ V.M. STRÖBELE, *Die Auswirkungen der "Besonderheiten des Sports" auf die Anwendung von Verfahrensgrundsätzen im sportgerichtlichen Verfahren am Beispiel des Fußballs*, Tübingen, 2010, 62.

a governmental interference so that speaking of being ‘removed’ from the jurisdiction of one’s lawful judge would be rather inappropriate.¹⁷

Via §§ 1025, 1029 ff. ZPO¹⁸ sports federations are given the possibility to close an arbitration agreement regarding pecuniary and non-pecuniary¹⁹ claims by which they meet the aforementioned requirement of the ultimately authoritative power of decision remaining with the state, since § 1055 ZPO literally sets forth that *amongst the parties, the arbitration award has the effect of a final and binding judgment handed down by a court.*

Sports federations are free to insert an arbitration clause into their articles of association (§§ 1029 par. 2, 1066 ZPO), but in order to effectively constitute an ultimate alternative to the ordinary legal recourse the arbitration panel will have to comply with several standards which are in accordance with the rule of law and which must find expression in the arbitration clause:

According to §§ 1034, 1036 ZPO, both the arbitrators and the panel on the whole must be impartial and independent as regards the institution.

With regard to the arbitration procedure, the ZPO stipulates various principles such as the right to be heard (1034 par. 1 sent. 2 ZPO), the right of refusal of an arbitrator (§ 1036 ZPO) and the provision pertaining to the petition for the reversal of an arbitration award pursuant to § 1059 ZPO (motion for dissolution at higher regional courts).

Furthermore the parties’ submission to arbitration must be the consequence of their voluntary declaration.²⁰ Despite the monopoly position of numerous global and national sports federations, this criterion will be conformed to on a regular basis, as the athlete’s interest to participate in competitions and to have certainty as regards possible sanctions correspond to the federation’s goal to govern their sport homogeneously without the obligation to comply with every single national requirement.²¹

Another indication for the existence of arbitration within the framework of the ZPO is the notice of the arbitration award’s enforceability as per § 1060 ZPO.²²

If the aforementioned prerequisites are on hand, the federation disposes of a ‘real’ arbitration panel within the scope of §§ 1025 ff. ZPO by which the recourse to ordinary courts is being waived bindingly. However, the aggrieved party may be

¹⁷ F. ANDEXER, *Die nationale Sportgerichtsbarkeit und ihre internationale Dimension*, Hamburg, Verlag Dr. Kovac, 2009, 31, 73.

¹⁸ ZPO: Zivilprozessordnung (German Code of Civil Procedure).

¹⁹ If the parties are entitled to conclude a settlement regarding the subject matter of the dispute, cf. § 1030 par. 1 ZPO.

²⁰ D. MONHEIM, *Die Freiwilligkeit von Schiedsabreden im Sport und das Rechtsstaatsprinzip*, SpuRt 2008, 8 ff.; „Körbuch-decision” BGH, NJW 2000, 1713.

²¹ F. ANDEXER, *Die nationale Sportgerichtsbarkeit und ihre internationale Dimension*, Hamburg, Verlag Dr. Kovac, 2009, 294.

²² K. HOFMANN, *Zur Notwendigkeit eines institutionellen Sportschiedsgerichtes in Deutschland – Eine Untersuchung der nationalen Sportgerichtsbarkeit unter Besonderer Beachtung der §§ 1025 ff. ZPO*, Hamburg, Verlag Dr. Kovac, 2009, 82.

entitled to have the arbitration award reversed in accordance with and to the effects of § 1059 ZPO. The reasons legitimating a possible reversal are enumerated exhaustively in par. 2 of this provision and basically apply to severe mistakes pertaining to the conclusion of the arbitration agreement, the constitution of the panel or the adherence to the *ordre public*.²³ As it can be gathered from the preamble pertaining to the ZPO, however, a successful application for reversal merely brings about that the respective arbitral tribunal shall decide on the concrete issue again.²⁴

In the absence of the criteria mentioned above, the deciding body in question is to be regarded as a simple ‘association-tribunal’ judging over its members’ offences and disputes as well as over the implementation of its own rules and regulations. Here, the state courts’ authority to review these rulings and decisions entirely remains unaffected.²⁵

In this context, art. 20 par. 3 GG has to be mentioned, though. It dictates that *the legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice*, latter being considered to be the substantiation of one’s right to the administration of justice. Yet, this is not to be put on a level with a right to go to ordinary courts directly before even having a decision of the highest instance of the association’s highest legal/disciplinary body. All channels of appeal must be exhausted before recourse to ordinary courts will be admissible. Otherwise, that is if the stages for appeal stipulated in the relevant regulation of the sports federation was circumvented, the associations’ constitutionally protected self-regulation (*vide supra*) would be violated. Given that in the case of a party willing to challenge the ruling taken against it, a) it is able to achieve its goals with the association court(s) already and b) the ordinary jurisdiction by no means is excluded but only put back,²⁶ such a contravention of the association’s autonomy (art. 9 par. 1 GG) would be illegitimate.²⁷

²³ In 2002, the German Football club SpVgg Unterhaching (as intervening party) in fact did appeal to the OLG Stuttgart (higher regional court) to set aside the decision of the DFB arbitration panel for clubs and leagues, which decided beforehand that Eintracht Frankfurt does meet the licensing requirements for playing in the 2. Bundesliga. Unterhaching based its petition on various alleged procedural errors mentioned by § 1059 ZPO. The court however argued, that Unterhaching failed to plead possible violations immediately, whereupon its objection is to be precluded; OLG Stuttgart SpuRt 2002, 207 f., 213 f.

²⁴ Bundesdrucksache 13/5274 (SchiedsVfG), 60.

²⁵ K. VIEWEG, *Normsetzung und -anwendung deutscher und internationaler Verbände*, Berlin, Duncker & Humblot, 1990, 106; The measures which are being taken as a basis by the ordinary courts in those judicial reviews are being discussed under section 6. *Dispute settlements*.

²⁶ And c) it may seek interim relief with the state court in the meantime without the exhaustion of the association’s court sequence, vide section 7. *ADR § interim relief*; M. BUCHBERGER, *Die Überprüfbarkeit sportverbandsrechtlicher Entscheidungen durch die ordentliche Gerichtsbarkeit*, Berlin, Duncker & Humblot, 1999, 180.

²⁷ Nevertheless, there are scenarios where in the balancing of interest the association’s autonomy must recede against the of one’s right to the administration of justice: This is conceivable when e.g. the competent body rejects decision-making, the association’s appellate court refrains from initiating the proceeding for a certain period, the decision making body maliciously slows up the reaching of a verdict, the applied measures are clearly against the law and the articles of association respectively,

3. Relevant NOC Regulations

The German Olympic Sports Confederation (DOSB) was founded on 20 May 2006 by a merger of the *Deutscher Sportbund* (DSB), and the *Nationales Olympisches Komitee für Deutschland* (NOK).

However, so far the DOSB (and its predecessors) was (were) unable to convince the single sports federations to assign their judiciary competences to a superior arbitral tribunal under the DOSB's guidance. That is the reason why almost any sports association in Germany disposes of its own judicial system and consequently is creating its proper sports justice.

Nonetheless, the DOSB combines the dispute resolution methods which have been exercised by the DSB and the NOK. On the one hand, there are regulations for corporate disputes arising inside the DOSB and disputes with an Olympic basis respectively. On the other hand, it provides for a model-convention for athletes which contains an arbitration clause and which can be used by the particular sports federations and athletes with the effect that a DOSB arbitration panel will adjudicate over the dispute.²⁸

The statutes of the DOSB furthermore provide for an arbitration panel which - to the exclusion of the normal judicial recourse - shall adjudicate on issues between the DOSB and its members (§§ 32, 33 statutes). Members of that arbitration tribunal are independent and are not subject to directives. Moreover, the panel of judges is not a DOSB-organ (§ 32 par. 4 statutes).

In light of the criteria prescribed by §§ 1025 ff. ZPO, the DOSB arbitration panel for corporate disputes definitely constitutes a real arbitration court.

Same applies to the court stipulated by the model-convention for athletes (*Athletenvereinbarung*)²⁹ in connection with the arbitration order (*Schiedsordnung*),³⁰ which is based on a contractual instead of a by-law³¹ submission. Consequently, it is not very surprising to notice different approaches and preferences which the parties seek to have employed in the convention: while the text of the DOSB commits the parties to sign a separate arbitration agreement (*Schiedsvereinbarung*),³² the version of the advisory council of the athletes³³ in

or the implementation of the procedure would just make up a pointless technicality. Regardless of that, the internal channel of appeal does not have to be followed, if the articles of association do not explicitly indicate that same must be gone through prior to bringing an action with an ordinary court; F. ANDEXER, *Die nationale Sportgerichtsbarkeit und ihre internationale Dimension*, Hamburg, Verlag Dr. Kovac, 2009, 197 with further proofs.

²⁸ The seat of that panel is in Frankfurt (Main), the agency of which is the DOSB's legal division, cf. § 3 arbitration order.

²⁹ www.dosb.de/fileadmin/fm-dosb/downloads/athletenvereinbarung.doc; point 6 refers to legal process and the arbitration agreement (*Rechtsweg/ Schiedsvereinbarung*).

³⁰ www.dosb.de/fileadmin/fm-dosb/downloads/schiedsordnung.doc

³¹ In terms of the arbitration clause being incorporated into the articles of association.

³² www.dosb.de/fileadmin/fm-dosb/downloads/schiedsvereinbarung.doc

³³ In German: *Beirat der Aktiven*. It is the organisation of all spokesmen of a national team's members. It is supposed to advise the DOSB's top management.

this regard abstains from such an obligation and calls for an option.³⁴ The arbitration agreement in question reads as follows:

The association and the athlete agree that all the disputes arising from the convention³⁵ for athletes shall be decided under exclusion of ordinary courts and in accordance with the adjacent arbitration order.

The advisory council explicitly substantiates its position with its reservation towards arbitration.³⁶ Besides, its text in the model-convention also dictates that in case of the athlete having opted for the recourse to ordinary course, the association waives the plea of the existence of an arbitration agreement.³⁷

This might be an indication of how ‘scared’ athletes still are when it comes to arbitration. On the one hand, this might result from the ignorance of arbitral jurisdiction (and the advantages thereof) but may also be an issue of some athletes’ suspiciousness towards sports associations.³⁸

In any case, according to point 6.1 of the model convention for athletes and regardless of whether arbitration has been chosen or not, at first the parties are due to exhaust the association’s stages for appeal.

4. Relevant football regulations

Prior to the elaboration of football provisions concerning Sports Justice, it is essential to illustrate the structure of German football.

In its capacity as an umbrella association, the *Deutsche Fußball-Bund* (DFB) is governing the sports section ‘football’ on the national level. The DFB’s legal form is the one of an association in terms of §§ 21, 55 BGB.

In 2000/2001, German Football was subject to a drastic restructuring. Licensed football, i.e. 36 professional clubs from the *Bundesliga* and 2. *Bundesliga*, became independent and established a proper league association, the *Ligaverband*, which is a member of the DFB by virtue of § 3 of the league association’s statutes and § 7 no. 2 b) DFB-statutes. For the management of the operational business, in particular match operation, commercialisation and licensing, the *DFL Deutsche Fußball Liga GmbH*³⁹ has been founded. The league association is the 100%-shareholder of the DFL.

Football clubs become full members of the league association upon the conclusion of a licence contract. Simultaneously they acquire the indirect

³⁴ Compare the 2 different formulations of point 6.2. in the model convention for athletes.

³⁵ Apart from the legal process and the arbitration agreement (6.), the model-convention deals with the following matters: 1. Preamble, 2. Legislative Basis, 3. Performance of the association, 4. Performance of the athletes, 5. Breach of contract, 7. Temporal validity, 8. Severability provision.

³⁶ See seq. No, 1 of the notices pertaining to point 6.2 ff. of the convention.

³⁷ 6.2. sentence 1 model-convention for athletes.

³⁸ K. HOFMANN, *Zur Notwendigkeit eines institutionellen Sportschiedsgerichtes in Deutschland – Eine Untersuchung der nationalen Sportgerichtsbarkeit unter Besonderer Beachtung der §§ 1025 ff. ZPO*, Hamburg, Verlag Dr. Kovac, 2009, 188.

³⁹ GmbH: Gesellschaft mit beschränkter Haftung (private limited company).

membership of the DFB.

As it can be derived from the term ‘licence-player’, the players of the Bundesliga and 2. Bundesliga do possess a licence as well. As prescribed by the player licence regulation LOS,⁴⁰ that licence is being assigned inter alia upon the conclusion of a licence contract between the individual player and the leagues association (§ 2 no. 1 LOS). Another fundamental prerequisite for players to be granted a licence is the conclusion of a contract with his club (§ 2 par. 2, §§ 6 ff. LOS).

Therefore, alongside the statutes of the DFB and the league association, Sports Justice in German football is being significantly framed by the following regulations/orders and contracts:

- Order for law and procedure, RuVO (Rechts – und Verfahrensordnung, DFB)
- Licensing regulation, LO (Lizenzordnung, league association & DFL)
- Player licence regulation, LOS (Lizenzordnung Spieler, league association & DFL).

By making use of its law-making power guaranteed by § 25 BGB (*vide supra*) the DFB has established the RuVO as its order for law and procedure. Apart from provisions pertaining to the competences of the DFB-legal bodies and the different kinds of possible sanctions,⁴¹ the RuVO incloses special procedures, as the appeal against the booking of a player (§ 12 RuVO), the appeal against the scoring (ranking) of a match (§ 17 RuVO), the objection to match-fixing (§ 17a RuVO) and the proceeding upon the non-execution of a national league match (§ 18 RuVO).

The licensing regulation LO determines the necessary conditions for the issuance and the forfeiture of a club’s licence by which it is qualified for the participation (the utilization) of the *Bundesliga* and the 2. *Bundesliga* respectively (§§ 2 - 10 LO). Pursuant to the league association statutes, the membership in the league association is being earned via the licence and expires with its deprivation.⁴² Thus the LO governs the details concerning the membership in the league association.

All these regulations have in common that decisions based upon which may be challenged by the parties by means of the recourse to the DFB association courts and arbitral tribunals.⁴³

5. *The sports judicial bodies*

The sequence of courts and appeals varies from federation to federation. The majority of sports federations however provide for an internal 3-way judicial recourse, where the person/entity concerned may raise an objection before an association court followed by the possibility to file an appeal and an appeal on points of law with the superior instances.

⁴⁰ LOS= *Lizenzordnung Spieler* (player licence regulation).

⁴¹ § 5 Nr. 1 RuVO (by referring to §§ 38-44 DFB-statutes).

⁴² § 8 league association statutes.

⁴³ Amongst others, these courts/tribunals are being portrayed in the following section.

As per § 38 no. 1 DFB-statutes, the DFB's judicial bodies are the Sports Court, *Sportgericht*, and the Federal Court, *Bundesgericht*.⁴⁴ They penalize violations against the DFB-law and adjudicate upon disputes pertaining to DFB-law unless that ruling explicitly does not remain with another organ of the federation. Besides, both courts are in charge of disputes concerning matters of the League Association, which itself does not dispose of proper judicial bodies.⁴⁵ Consequently, also infringements of the statutes, orders and regulations of the League Association are being sanctioned. The Supervisory Committee, *Kontrollausschuss*, on the contrary, is an administrative body with tasks and competences similar to which of a state-owned prosecution body,⁴⁶ by which the principle of the separation of powers is being implemented.

In the vast majority of cases, the Sports Court decides as first instance.⁴⁷ The matters in dispute include sporting offences in (and in connection with) matches of federal dimension, the scoring of such matches or the action against referees. The Federal Court is the appellate court regarding the decisions of the Sports Court as long as the relevant judgement has been declared as reviewable.

Not only because the Sports Court and the Federal Court are actual organs of the DFB, but also due to the fact that the eligible arbitrators' are basically associated with the federation,⁴⁸ their institutional and personal independence has to be denied. They do not constitute real arbitration courts as set out by §§ 1025 ff. ZPO.

However, within the scope of their licencing procedure, the clubs playing in the Bundesliga and the 2. Bundesliga did submit themselves to the arbitration of a permanent arbitration panel for the clubs and capital companies⁴⁹ of the license leagues, *Ständiges Schiedsgericht für Verein und Kapitalgesellschaften der Lizenzligen*, by signing the arbitration agreement attached to the LO, thereby complying with § 4 Nr. 6 LO.

This arbitration panel adjudicates upon any dispute between League Association/DFL/DFB (severally or as joinder of parties) and the club on the other hand. Prior to the reference to this panel, a final decision from a (judicial) organ of the League Association, the DFL or the DFB must have been issued.⁵⁰

There are no substantial objections pertaining to the appointment of the

⁴⁴ The DFB's huge number of members (approx. 6,8 million) was inter alia the reason for illustrating its judicial bodies in detail at this point.

⁴⁵ Cf. § 30 league association statutes, § 42 no. 2 a) DFB statutes.

⁴⁶ V.M. STRÖBELE, *Die Auswirkungen der "Besonderheiten des Sports" auf die Anwendung von Verfahrensgrundsätzen im sportgerichtlichen Verfahren am Beispiel des Fußballs*, Tübingen, 2010, 137.

⁴⁷ § 42 no. 1 DFB statutes; Scenarios in which the federal court acts as first instance: cf. § 43 no. 4 DFB statutes.

⁴⁸ For details vide: §§ 39, 40, 19 no. 5, 38 par. 2 DFB statutes.

⁴⁹ Due to fiscal legislation, some clubs did outsource their licence division (professional sport) to capital companies, being the clubs' subsidiary, e.g. Borussia Dortmund GmbH & Co. KGaA.

⁵⁰ § 2 no. 1 arbitration agreement for licence clubs.

arbitrators (assessors) or the arbitration procedure so that the arbitration panel for clubs and capital companies of the licence leagues is to be considered as a real arbitration court in terms of §§ 1025 ff ZPO.⁵¹

Similarly, the licence contract between the player and the League Association is complemented by an arbitration agreement, too.⁵² By virtue of that agreement the parties commit themselves to bring any matter between League Association/DFL/DFB (severally or as joinder of parties) and the player on the other hand before a permanent arbitration panel for licence players, *Ständiges Schiedsgericht für Lizenzspieler*. The arbitration agreement noticeably follows the model of the one applying to licensed clubs (*supra*), by which the conditions for the proper creation of a real arbitration panel are being met, as well.^{53 54}

Although the sports federations in Germany so far have abstained from submitting their appeals to an universal umbrella association (e.g. DOSB, *vide supra*), since 1 January 2008, legal sports disputes can be brought before a national, independent German sports arbitration tribunal, *Deutsche Sportschiedsgericht*, which has been established by the German Institution of Arbitration (DIS) upon the initiative of the National Anti Doping Agency (NADA). The procedural rules for sports arbitration developed by the DIS are comparable to which of the CAS-Code.⁵⁵

However, the parties are free to appoint arbitrators from beyond the arbitrators list⁵⁶ and as regards anti-doping issues an appeal to CAS is admissible.⁵⁷

Nevertheless and keeping in mind that corresponding arbitration agreements would need to be drafted and concluded plus the pertinent statutes would have to be altered, it may be assumed that it will be a long process until sports federations will include the DIS-sports arbitration tribunal into their channel of appeal, not to mention in non-anti-doping matters.⁵⁸

6. Dispute settlements

The wide variety of regulations, orders and provisions of a sports federation gives rise to different forms of dispute settlements, the most important of which being displayed hereafter.

⁵¹ K. Hofmann, *Zur Notwendigkeit eines institutionellen Sportschiedsgerichtes in Deutschland – Eine Untersuchung der nationalen Sportgerichtsbarkeit unter Besonderer Beachtung der §§ 1025 ff. ZPO*, Hamburg, Verlag Dr. Kovac, 2009, 106.

⁵² Appendix II of the LOS.

⁵³ L. Weber, *Rechtliche Strukturen und Beschäftigungsverhältnisse im Fußballsport*, Hamburg, Verlag Dr. Kovac, 2008, 217.

⁵⁴ The DFB also provides with an Ad-hoc tribunal as per § 17 DFB-statutes (real arbitration panel but of very marginal relevance in practice).

⁵⁵ T. Klich, 'Deutsches Sportschiedsgericht startet im Januar 2008', *SpuRt*, 2007, 236.

⁵⁶ § 3.2 DIS-sports-arbitration-rules (SportSchO).

⁵⁷ § 38. 2 DIS-sports-arbitration-rules (SportSchO).

⁵⁸ The German Athletics Federation (DLV) and the German Triathlon Union (DTU) have signed cooperation agreements pertaining to arbitration regarding doping.

6.1 Technical disputes

The system of rules of the major team sports in Germany differentiate between factual decisions and rule violations.

The referee's decisions during a match/competition made on the basis of his perception are considered to be factual decisions which are final and exempted from the judicial review within the association.⁵⁹

In contrast, in case of a rule violation being on hand, § 13 no. 1 lit d) RuVO, for instance, prescribes that an objection against the scoring of the match may be submitted. Pursuant to § 17 no. 2 lit. c) RuVO, this is subject to the condition that the referee's rule violation in all likelihood did have an effect on the match's outcome as 'lost' or 'drawn'. A rule violation is to be affirmed where the referee applies wrong sporting rules on his factual decisions, regardless of whether the latter were correct or not.⁶⁰ In the famous *Helmer* decision⁶¹ ('phantom-goal') where the referee awarded Bayern Munich a goal although the ball rolled out of bounds, the *Sportgericht* substantiated a rule violation of the referee on his failure to verbally consult his linesman.⁶² The match had to be repeated.

In 1978, the DFB-Bundesgericht even accepted the existence 'apparent faultiness' alone to be sufficient for annulling the outcome of the match Borussia Neunkirchen vs. Stuttgarter Kickers (2. Bundesliga at that time) upon it evaluated the TV-coverage of the situation in question (goal awarded but ball never crossed the goal line).

The resolution of both cases hardly withstands the FIFA's notion pertaining to the alteration of factual decisions as per law 5 of the FIFA laws of the game and the DFB in the meantime refrained from such line of reasoning.⁶³ This is all the more evident from the implementation of § 18 Nr. 6 within the RuVO, which sets forth that where a decision pro the replaying of a match has been taken according to § 17 no. 2 c) in connection with § 13 no. 1 lit. d) RuVO, the final decision is to be brought before the FIFA for a closing appraisal.

A referee's factual decisions should also be revisable when his bias or even his bribery has been proven [§§ 17 no. 2 e), 17 a RuVO]. In the course of the Bundesliga referee scandal 2005, Wacker Burghausen's (football club) objection to the outcome of the match against LR Ahlen, which Ahlen has won 1:0 due to a

⁵⁹ F. ANDEXER, *Die nationale Sportgerichtsbarkeit und ihre internationale Dimension*, Hamburg, Verlag Dr. Kovac, 2009, 193.

⁶⁰ G. EILERS, 'Tatsachenentscheidung oder Regelverstoß? Das Urteil des DFB-Sportgerichts zur Aufhebung der Wertung des Spiels zwischen dem FC Bayern München und dem 1. FC Nürnberg', *SpuRt* 1994, 79 f.

⁶¹ Decision of the DFB-Sportgericht of 11.05.1994, *SpuRt* 1994, 110.

⁶² Critical of this reasoning: D. MONHEIM, *Sportlerrechte und Sportgerichte im Lichte des Rechtsstaatsprinzips - auf dem Weg zu einem Bundessportgericht*, Munich, Herbert Utz Verlag, 2006, 118.

⁶³ H. HILPERT, 'Tatsachenentscheidung und Regelverstoß im Fußball - Neuere Entwicklungen und Tendenzen - *SpuRt*', 1999, 49.

wrongly awarded penalty, has been allowed by the *Sportgericht*.⁶⁴ The referee in charge acknowledged having manipulated the match in favour of LR Ahlen. He got a lifetime suspension from the DFB and besides was prosecuted by criminal courts.

The principle of a referee's factual decision's incontestability (especially by state courts) can also be constructed on the statutory level with reference to § 661 BGB which governs prize competition. In fact the organization and regulation of sports competitions is a 'contest': sport federations offer a prize in a competition governed under its rules. The promised reward may be prize money, a title, the right to be promoted etc. It results from § 661 par. 2 BGB that the jury's decisions are binding, what can be equated with the decision of a referee.⁶⁵ In particular, ordinary courts must not review a referee's decision on the basis of its own interpretation of the laws of the game and potentially even annul the result of the game.⁶⁶

6.2 *Disciplinary Disputes*

The sports association's penal power regularly reveals itself when it takes punitive measures against the associated athletes and/or clubs. As already indicated above, the sweeping clauses of private law, in particular § 242 BGB, constitute boundaries of the federation's penal power as they secure the third party effect of basic rights in private law relationships. Hence, the core question of disciplinary disputes is, whether both the measure/ruling/decision per se and the procedure upon which it is taken abide by constitutional principles.

Alongside other general standards, the terms control within the scope of § 242 BGB as such, which states that *an obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration*, provides for various requirements which the associations' measures and sanctions in particular must comply with in order to bear up against a judicial review and be lawful.

First and foremost the measure taken by the association needs to abide by the principle of certainty, i.e. the threat of sanction already must have been incorporated into the articles of association before the contravention to which it is applied has occurred. The aggrieved party (player, coach, club etc.) must have been able to perceive and comprehend the rule which is supposed to be applicable upon a certain conduct and occurrence respectively.⁶⁷ Here it has to be taken into account that the harder the rule interferes with the membership rights or e.g. the athlete's right to take part in a specific tournament or event, the more stringent

⁶⁴ *Sportgericht*, Judgement of 15 February 2005.

⁶⁵ Cf. OLG Frankfurt am Main SpuRt 1998, 236.

⁶⁶ That whole perception of § 661 BGB with regard to technical-sports rules is gathered from: J. FRITZWEILER, B. PFISTER, T. SUMMERER, *Praxishandbuch Sportrecht*, 2 ed., Munich, C.H. Beck, 2007, 19 – and the further proofs therein.

⁶⁷ J. FRITZWEILER, B. PFISTER, T. SUMMERER, *Praxishandbuch Sportrecht*, 2 ed., Munich, C.H. Beck, 2007, 229.

the demands as regards the certainty of that rule must be.⁶⁸

Furthermore, a sporting sanction may only be imposed as a result of culpable behaviour.⁶⁹ Culpable behaviour according to § 276 par. 1 BGB is when *the obligor is responsible for intention and negligence, if a higher or lower degree of liability is neither laid down nor to be inferred from the other subject matter of the obligation (...)*. Thus it is sufficient that the athlete (here: obligor) disregards the prudence being incumbent upon him/her. The application of a sporting sanction does not necessarily imply the existence of a conscious and deliberate violation of a rule but a penalty may also be inflicted for carelessness.

Another basic principle being inherent in German Sports Justice is the inadmissibility of double punishment (*ne bis in idem*) as it also is effective in ordinary penal law and as it is in line with art. 101 par. 3 GG.

Besides, the competent body has the obligation to substantiate the imposed sanction. Same applies to the impartial gathering of evidence in the event of the underlying facts being contested.⁷⁰ Moreover, the body having instituted the proceedings is allowed to also be the body eventually imposing the sanction, as long as it also is up to hearing evidence which argues against a penalty.⁷¹

Finally, the sanction against a member of the association always has to adhere to the principle of proportionality. That is crucial on two different levels: On the one hand, the order referring to sanctions should not stipulate disproportionate measures but rather provide for a graded sanctioning system. On the other hand, the actual application of the sanctioning rule should also be scrutinised against the background of the objective severity of the violation and the subjective scale of fault and if the violation occurred for the first time. Latter is of paramount importance in the light of the indirect effect of constitutional rights on a third party (as opposed to the effect on the state) since the disqualification of an athlete from a particular competition will also regularly constitute an interference in his/her freedom of profession laid down by Art. 12 par. 1 GG.⁷²

Further principles applying particularly to the legal procedures within the association is the right to be heard⁷³ and the entitlement to legal assistance

⁶⁸ J. ADOLPHSEN, M. NOLTE, M. LEHNER, M. GERLINGER, *Sportrecht in der Praxis*, Stuttgart, Kohlhammer, 2011, 71.

⁶⁹ OLG Frankfurt, SpuRt 2001, 159, 162.

⁷⁰ J. ADOLPHSEN, M. NOLTE, M. LEHNER, M. GERLINGER, *Sportrecht in der Praxis*, Stuttgart, Kohlhammer, 2011, 75.

⁷¹ B. DAUNER-LIEB, T. HEIDEL, G. RING, *Anwaltkommentar zum BGB*, vol. 2/1 Schuldrecht, Baden-Baden, Nomos, 2005, § 25, marg. no. 42; J. ADOLPHSEN, M. NOLTE, M. LEHNER, M. GERLINGER, *Sportrecht in der Praxis*, Stuttgart, Kohlhammer, 2011, 75.

⁷² J. ADOLPHSEN, M. NOLTE, M. LEHNER, M. GERLINGER, *Sportrecht in der Praxis*, Stuttgart, Kohlhammer, 2011, 75.

⁷³ Which surprisingly is not always adhered to, although all the relevant sport federations stipulate provide for this principle: cf. Resolution of the federal court of the German Handball Federation (DHB) of 13.01.1978 in U. Haas, T. Haug, E. Reschke, *Handbuch des Sportsrechts*, Neuwied, Dokumentation 12.19.1. Press release of the Kammergericht Berlin of 06.02.2006 regarding the decision of the LG Berlin (Az. 5 O C 39/06); Der Spiegel No. 42/2004, 151; LG Gießen, Judgement of 22.02.1995 – 1 S 403/94, SpuRt 1997, 104.

by a lawyer.⁷⁴

In contrast, the policy *in dubio pro reo*, as it applies in criminal law, does not take effect in the sports federations' anti-doping proceedings.⁷⁵ By means of the strict liability principle and *the prima facie* evidence respectively, the proof of an individual fault of the athlete is waived. It is sufficient when prohibited substances are found in the samples. By means of a proof of exoneration, though, the athlete has the possibility to verify that he/she is not at fault as regards the objective violation of anti-doping rules.

6.3 Economic disputes

Neither the DFB nor the league association provide the clubs and players with arbitrating bodies concerning disputes between the latter two. This is because §§ 4, 104 ArbGG⁷⁶ states that arbitration cannot be agreed upon as far as employment relationships are concerned. Permanent arbitral bodies for issues between clubs are not designated either by the Football governing bodies in Germany.

Notwithstanding such circumstances, economic disputes in German football are far from being a matter of ordinary sports justice only.

In football justice, it is the two arbitral panels, one for licence players on the one hand and one for licence clubs on the other hand (*vide supra*), which are responsible for the resolution of economic disputes. This however only applies subject to a complaint concerning a measure of the DFB/DFL/League Association being on hand, as it can be shown by the following two examples:

Some football clubs have outsourced their licence division (professional sport) to capital companies, same being the club's subsidiary. In order to margin the control of investors, § 8 par. 2 league association statutes sets forth that the original club (parent club) has to hold a share in the subsidiary of at least 50% (so-called '50+1 rule'). The league association may decide upon exceptions hereto if a commercial enterprise (as a potential shareholder) by the 01.01.1999 has been supporting the club significantly and continuously for over 20 years.⁷⁷

Based on objections as regards the EC-law-conformity of the said rule, the Hannover 96 GmbH & Co.KGaA in January 2010 issued proceedings with the arbitration panel for the clubs and capital companies⁷⁸ of the license leagues seeking the declaration of nullity concerning the said rule.

The arbitration panel decided⁷⁹ that the principle of equal treatment conflicts

⁷⁴ F. ANDEXER, *Die nationale Sportgerichtsbarkeit und ihre internationale Dimension*, Hamburg, Verlag Dr. Kovac, 2009, 140 ff.

⁷⁵ OLG Frankfurt am Main, NJW-RR 2000, 1117 f.

⁷⁶ ArbGG = Arbeitsgerichtsgesetz (German Labour Court Law).

⁷⁷ Only the Volkswagen AG (VfL Wolfsburg Fußball GmbH) and the Bayer AG (Bayer 04 Leverkusen Fußball GmbH) fall in that category.

⁷⁸ Due to fiscal legislation, some clubs did outsource their licence division (professional sport) to capital companies, being the clubs' subsidiary, e.g. Borussia Dortmund GmbH & Co. KGaA.

⁷⁹ Award of 25.08.2011, SpuRt, 2011, 259 ff.

with the exemption referring to the 20-year-exception of the rule and declared it null and void. As to the rule per se however, the panel did not confirm any infringement of European Community Law and declared that the establishment of the rule is the extension of the right of self-regulation deriving from art. 9 par. 1 GG.

The association's measures may interfere with a player's pecuniary interests, as well. Disputes dealing with the admission concerning the player's use of the Bundesliga rank among the issues governed by the arbitration agreement enclosed to the LOS. They have an effect on the player's employment relationship as the suspension of a player may e.g. affect the amount of bonuses (for being fielded, wins, points etc.) he is entitled to receive from his club. Furthermore, the revocation of the licence may justify a dismissal for cause by the club in terms of § 626 BGB.⁸⁰ Hence the unjust cancellation of the right of utilisation of the Bundesliga can lead to a player's claims for damages against League Association/DFB/DFL.

To the player's benefit though, the arbitration panel is also in charge of mitigating unreasonable contractual penalties (*inter alia* a fine of max. 100.000,00 Euro⁸¹) upon its equitable discretion.⁸²

7. *ADR and interim relief*

Labour courts are in charge of disputes arising from contracts between the club and the player. Prior to the recourse to the labour court, any party is entitled to request a resolution by a conciliation committee from the league association. The other party participates in that conciliation.

This is the wording of § 9 no. 1 par. 1 LOS which verifies that there is an alternative to the intervention of ordinary jurisdiction as regards employment disputes.

The conciliation committee consists of one representative appointed by the player and one representative appointed by the club, as well as a third independent and neutral one designated by both parties. The conciliation committee should provide the parties with an economic, rapid, confidential and informal resolution of the dispute. This also includes the determination of whether and to what extent a compensation is to be paid to the club upon the termination of a player's contract with (alleged) sporting just cause. Upon successful conciliation between the parties, a legally binding settlement shall be reached. As a result of this arrangement, the immediate permission to play regarding the transfer periods I and II can be issued.⁸³

As to disputes between the player and his club pertaining to the interpretation of transfer regulations, the DFB as per § 26a of its Playing Order grants its member associations (regional and federal state associations) the possibility to install conciliation committees.

⁸⁰ § 10 no. 2 model employment contract for licence players.

⁸¹ § 3 par. 5 player's licence contract.

⁸² § 1 par. 2 licence player arbitration agreement.

⁸³ § 9 no. 1 par. 2 LOS.

German football also regulates mediation regarding the relationship DFB - league association: By virtue of § 16 DFB statutes they undertake to settle disagreements arising from the interpretation, design and application of a) the statutes and b) the rights and obligations under the basic treaty, in the spirit of partnership and sporting fairness and in due consideration of the overall responsibility for the game of football. In these cases, before referring to the arbitration panel (§ 17 DFB-statutes) the mediation process according to § 16 DFB-statutes is to be executed.

Whereas, in comparison with arbitration in terms of §§ 1025 ff. ZPO, conciliation and mediation do not guarantee the remedy which is equivalent to the one obtainable from state jurisdiction,⁸⁴ interim relief, under certain conditions and following the explanation of the *DIS Sportschiedsgericht* hereafter, can.

In particular situations during the main proceedings, a legal protection cannot be obtained in time, e.g. in case of the requested permission to start within a sports competition. In order to have provisional measures being implemented, it is possible to bring forward an action for an injunction in the arbitration. Apart from the existence of a substantive claim, in such an application the petitioner must explain the urgency of the matter. The arbitration panel may decide on the request with or without hearing the other party. The decision, however, is temporary at first and does not substitute the final award on the merits.⁸⁵

The German football governing bodies hold a very similar view, as it is recorded in both arbitration agreements [a) for players and b) for clubs]⁸⁶ and § 21 RuVO.

The statutory basis for interim relief pertaining to arbitration – and therefore effective to all real arbitration panels of sports federations – is laid down in § 1041 ZPO.⁸⁷ However, § 1033 ZPO stipulates that *an arbitration agreement does not rule out that a [ordinary] court may order, before or after arbitration proceedings have commenced, and upon a party having filed a corresponding petition, that a provisional measure or one serving to provide security be taken with regard to the subject matter of the dispute being dealt with in the arbitration proceedings, which proves that provisional measures may also be sought before state courts.*

⁸⁴ K. HOFMANN, *Zur Notwendigkeit eines institutionellen Sportschiedsgerichtes in Deutschland – Eine Untersuchung der nationalen Sportgerichtsbarkeit unter Besonderer Beachtung der §§ 1025 ff. ZPO*, Hamburg, Verlag Dr. Kovac, 2009, 62.

⁸⁵ DIS-SportSchO, definition of interim relief (Rechtsschutz, einstweiliger), www.dis-sportschiedsgericht.de/Material/DIS-SportSchO-2008.pdf, 6f.

⁸⁶ §§ 1 par. IV, 2, 5 licence club arbitration agreement; §§ 1 par. IV, 2, 5 licence player arbitration agreement.

⁸⁷ § 1041 par. 1 ZPO reads as follows: *Unless the parties to the dispute have agreed otherwise, the arbitral tribunal may direct, upon a party having filed a corresponding petition, provisional measures or measures serving to provide security as it deems fit with a view to the subject matter of the litigation. The arbitral tribunal may demand, in connection with such measure, that each of the parties provide reasonable security.*

8. Conclusion

In order to be as effective as possible, Sports Justice in Germany which derives its *raison d'être* from the German federal constitution is based and oriented on basic legal principles. This is proven not only by the requirements which the association has to be aware of when enacting and implementing its regulations, especially concerning punitive measures (horizontal effect of basic rights, especially through § 242 BGB). The provisions pertaining to the establishment and the procedure of arbitration panels as per §§ 1075 ff. ZPO also make great demands on the sports federations' goal to have a widely recognised alternative to the ordinary judicial recourse. And, as far as football is concerned, the DFB alongside the DFL do make the grade in the form of their two most relevant permanent arbitration panels.

However, although a substantial number of major sports federations provides real arbitration or proper association courts, Sports Justice in Germany still lacks the appreciation it deserved for its consideration of the specificity of sports and its influence on it. That problem is illustrated by both the difficulties the DOSB is facing with persuading the sports federations of a universal arbitration court and the slow acquisition of cooperating sports federations of the *DIS Sportschiedsgericht*. Likewise, the fact that employment disputes are subject to the jurisdiction of labour courts only and are not arbitrable at all by virtue of §§ 4, 104 ArbGG is not advantageous regarding the development of German Sports Justice towards the best international (association-) standards. Furthermore provisions pertaining to the possibility to obtain immediate legal protection before ordinary courts in a far more substantial manner than by e.g. by ADR or proceedings of 'un-real' arbitration courts (so-called association courts) supposedly constrain the acceptance of sports arbitration from the perspective of the sports federations associated members. As a result, one can acknowledge that, despite the fact that e.g. the adjudication of technical and disciplinary disputes meanwhile does resemble the international sports federations' judicial (and legislative, e.g. concerning the enactment of punitive orders) norms, Sports Justice in Germany, unlike in various other Civil Law Countries, by all the involved parties forming the basis of which, mostly is not perceived as a discrete system of values, yet.

SPORTS JUSTICE IN ITALY

by *Mario Gallavotti** and *Stefano La Porta***

SUMMARY: 1. Principles of Italian sports justice – 2. Relationship between ordinary justice and sports justice – 3. Relevant Italian Olympic Committee regulations – 4. Relevant football regulations – 5. Clubs and players’ responsibilities – 6. Sports offences – 7. Sanctions on clubs and players – 8. The sports judicial bodies of FIGC – 9. The procedure – 10. The collection of evidence in match fixing cases – 11. Conclusions

Abstract:

This article presents a concise overview of sports justice in Italy, with a focus on football, which features a rather developed and sophisticated system. Football litigation occurs frequently in Italy and the disciplinary courts of the Federation hear thousands of cases every season: the most controversial (rectius: the most sensitive from a financial perspective) are often submitted to state courts after sports courts have already rendered their decisions. Not all sports decisions, however, can be appealed before state courts and not in all cases can sports decisions be overruled by state courts. The final part of this article is dedicated to the collection of evidence in match fixing cases and the cooperation between the relevant sports authorities and state criminal authorities.

1. Principles of Italian Sports Justice

1.1 CONI

In Italy the entire national sports movement is supervised and governed by the National Olympic Committee (“CONI”) which, since its incorporation,¹ has been a

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¹ By law n. 426/1942.

governmental agency and is funded through subsidies derived from the annual Government budget. CONI is under the surveillance of the Government, generally through a special agency for sports.

The management of CONI, however, is independent from the Government, as the President, the Secretary General and the Executive Committee of CONI are elected by sports stakeholders,² with no other external influences nor stakeholders.

The mission of CONI is to coordinate the whole national sports movement; this is achieved, *inter alia*: a) by issuing the “fundamental principles for the organization of sports activities in the Italian territory”; b) by promoting and endorsing all sports disciplines in accordance with the directives and the values of the International Olympic Committee (“IOC”); c) by preparing and organizing the participation of the Italian athletes in the Olympic Games.

1.2 National Sports Federations

For a long time,³ National Sports Federations have been subjects of CONI. Today they are independent private associations with not-for-profit objectives, which are supervised by CONI.⁴ They carry out their mission and objectives using the revenues that are generated from the exploitation of their own media and marketing rights⁵ and being financed through the contributions granted by the Government,⁶ whereby the amounts are determined on an annual basis. The Federations are obligated to use the funds received by the Government to pursue activities that lie in the scope of public interest.⁷

National Sports Federations have therefore a double nature: on the one hand they represent the expression of the freedom of association, set forth by article 21 of the Constitution,⁸ and are regulated by the provisions of the Italian civil code⁹ and special laws, whilst, on the other hand, they manage public money and are subject to the control of CONI. This coexisting of boundaries between private and public has a large influence on the organization of National Sports Federations, including on the management of sports justice and the relationship between sports justice and state justice.¹⁰

Every National Sports Federation can enact its own set of rules regarding organized sports activities in the national territory and regulate the operations of

² I.e. the presidents of the National Federations, the Italian members of the International Olympic Committee, and the representatives of athletes, trainers and staff, the representatives of local branches of CONI and the representatives of other sports institutions affiliated to CONI.

³ Until the enactment of law decree 23 July 1999 n. 242.

⁴ See *infra* under para. 3.

⁵ Most of such rights are related to the activity of national teams.

⁶ Through CONI.

⁷ E.g. the development of juvenile sport, see *infra* under para. 3.

⁸ “Citizens have the right to associate freely, with no need of authorization, to pursue purposes that are not prohibited by the law”.

⁹ I.e. articles 14 - 35.

¹⁰ See *infra* under para. 2.

the bodies and offices of the Federation. Among these rules, those concerning disciplinary matters can impose a code of conduct on all persons and entities operating within the sport environment and can set provisions for the application of sanctions regarding any violation thereof.¹¹

2. *Relationship between ordinary justice and sports justice*

Over the years, the internal debate about the relationship between ordinary justice and sports justice has been very intense and has led to the production of an extensive number of contributions from commentators as well as the issuing of many decisions from both sports bodies and state courts.

As a general rule, all statutes of National Sports Federations provide obligations for all participants in sport activities to accept as binding and final all decisions adopted by sports courts and bodies. This obligation, that reflects the principle of independence of sports, prevents (or prohibits) in effect that the decisions of sports bodies can be challenged before state courts.

The validity of such preventions, however, has often been challenged before state courts, claiming the violation of the right of action granted by the Constitution¹² and such law provisions that prohibit the waiving of non-disposable rights.

In 2003, when some professional clubs appealed the decisions of football disciplinary bodies before ordinary courts, and after the latter, declaring their jurisdictions, overruled the decisions of the sports bodies, the independence of sports was seriously jeopardised and the chaos that followed put at risk the commencement of the football season. This suggested the Government to set out specific law provisions to address the matter in a coherent manner and regulate the competence of ordinary courts and sports courts in all sports matters.

The decree issued by the Government¹³ confirmed the independence of sports, but – at the same time – set out that some sports matters are not confined within the boundaries of sports, because they affect individual rights and interests; therefore, in order to safeguard the latter, the right of action before ordinary justice must be guaranteed.

Specifically, at the purpose of regulating the relationship between ordinary justice and sports justice, the decree of the Government identified three kinds of sports disputes:

- for those concerning matters of financial nature among clubs, players and/or other persons or entities registered with the Federation,¹⁴ ordinary civil courts have jurisdiction (without prejudice to the alternative dispute resolution methods¹⁵ that may be provided for by the agreements between the parties or

¹¹ See *infra* under paras 5-7.

¹² See art. 24 of the Constitution: “everyone has the right of action to protect his rights and interests”.

¹³ Law decree 19 August 2003 n. 220, converted into law, with amendments, by law 17 October 2003 n. 280.

¹⁴ I.e. team managers and directors, coaches or relevant staff, etc..

¹⁵ E.g. the submission of the dispute to an arbitration panel.

- by sports rules and regulations);
- for those pertaining to sports technical or disciplinary matters or the organization of sports institutions and bodies, no jurisdiction of ordinary courts exists and any dispute must be resolved by sports bodies and courts;
 - for all other disputes, once the internal remedies made available by the National Sports Federation concerned have been exhausted,¹⁶ the Administrative Regional Tribunal of Lazio (“TAR Lazio”)¹⁷ has exclusive jurisdiction.

Since 2003, the decisions of TAR Lazio, Italian Supreme Court¹⁸ and Italian Constitutional Court¹⁹ have intervened to carve out the jurisdictions of such bodies and courts in specific kinds of sports disputes.

One of the most recurrent disputes that has to be submitted to the scrutiny of TAR Lazio is that related to the license, released at the beginning of the season by National Sports Federations, which enables the participation of clubs in professional competitions. According to sports rules, the club that is denied such license is entitled to file an appeal against the Federation before the High Court of Sports Justice²⁰ and, in case the appeal is rejected, in accordance with the abovementioned law decree n. 220/2003 of the Government, file a petition before TAR Lazio.²¹ The decision of TAR Lazio may then be further appealed before Consiglio di Stato.²² For this kind of dispute, therefore, the decisions of sports bodies can be indeed appealed before state courts, and the latter have the power to examine the grounds of the decisions appealed and, if deemed appropriate, overrule them.

The typical disputes for which no jurisdiction of state courts exists, are those concerning the decisions of disciplinary nature taken by the internal courts of Sports Federations to impose sports sanctions on persons or entities found guilty of disciplinary offences. Such sports decisions fall within the exclusive competence of sports bodies and courts and cannot be overruled by state courts,²³ in accordance with the provisions of law decree n. 220/2003.

¹⁶ The previous exhaustion of the internal remedies represents a condition precedent for the filing of a petition before the Administrative Regional Court of Rome. In case such condition is not met, the petition is declared not admissible.

¹⁷ TAR Lazio is a specialized Court seating in Rome instituted by the Italian Government in 1971 to rule over disputes that involve the exercise of powers and privileges by the Government. The competence of TAR for sports matters derives from the public nature of some tasks performed by National Sports Federations - see *supra*, under para. 1 - and the management of public money by the same.

¹⁸ I.e. Corte di Cassazione.

¹⁹ I.e. Corte Costituzionale.

²⁰ See *infra* para. 8.

²¹ TAR Lazio has jurisdiction over such disputes because the granting of the license is a typical activity of public interest exercised by National Sport Federations, as indicated in article 23 of CONI Statutes.

²² Consiglio di Stato is (the Administrative Court) of last instance which hears all appeals filed against the decisions of TAR Lazio.

²³ If all conditions are met, they can only be appealed before the National Tribunal for Arbitration in Sports or the High Court of Sports Justice, see *infra* para. 8.

In 2010 the abovementioned exclusion of jurisdiction of state courts over this kind of disputes was suspected of being in breach of the right of action granted by the Italian Constitutional Chart.²⁴ The matter was, therefore, submitted to the scrutiny of the Constitutional Court and the Court²⁵ interpreted the law provision ruling that no violation of the Constitutional Chart exists. Notably, the Court stated that, even if the decisions on disciplinary matters rendered by sports bodies cannot be overruled by state courts,²⁶ the latter can however hear the case for compensation purposes only. This protects the right of action, even if only in the form of compensation.

In other words, the Court ruled that, while the decisions of the disciplinary bodies of Sports Federations remain final and cannot be overruled by state courts, the clubs or the persons that are condemned for sports offences are entitled to bring a lawsuit against the Federation before TAR Lazio for the purpose of seeking compensation for the damages suffered because of such decisions.²⁷

It goes without saying that damages are actually granted only in case TAR Lazio finds that the decision of sports courts is ungrounded or unjust and it has actually caused damages.

3. Relevant Italian Olympic Committee regulations

3.1 The mission of CONI in the matter of sports justice

In the matter of sports justice CONI plays a role of paramount importance: firstly by issuing the “fundamental principles to be adopted by National Sports Federations in their statutes”, that represent the general rules that must be incorporated by the Federations into their own systems of sports justice.²⁸

Furthermore, CONI examines and approves the statutes of National Sports Federations and any amendments thereof. In order to grant its approval, CONI checks that the statutes are compliant with the law, CONI Statutes and the abovementioned “fundamental principles”. In case they are found to be non-compliant, CONI may require the Federation to make some modifications and, in case no amendments are timely and duly made, CONI is empowered to appoint a commissioner to perform all necessary changes on behalf of the Federation.

Among the other competences of CONI, CONI Statutes identify those

²⁴ See *supra*.

²⁵ Decision of Italian Constitutional Court of 11 February 2011 n. 49.

²⁶ Being the expression of the independence of the Federations in accordance with the principles set forth under article 21 of the Constitutional Chart.

²⁷ The typical example is that of a football player suspended for a certain period of time for committing a sports offence. While the period of suspension is final and cannot be revoked by appealing the decision before state courts, the player can bring a lawsuit before TAR Lazio against the Football Federation to seek the damages suffered (e.g. in terms of lack of profits, for the termination of his employment agreement) as a direct consequence of the sports sanction.

²⁸ See article 15 - “principles of sports justice” - of the now current “principles” adopted by CONI on 2 February 2012.

activities and purposes of the National Sports Federations that are considered of public interest, for which the financial support that the Federations receive from the Government must be used.²⁹

Finally, CONI represents the National Anti Doping Organization in all doping matters coordinated by the World Anti Doping Agency and, in this capacity, conducts all investigations and prosecutes all persons and entities charged with violations of anti-doping rules.

3.2 *The National Court for Arbitration in Sports and the High Court of Sports Justice*

CONI Statutes provide for the implementation of two courts of sports justice:³⁰ the National Court for Arbitration in Sports (“TNAS”) and the High Court of Sports Justice (“ACGS”).³¹

TNAS has jurisdiction over all disputes among persons and/or entities registered with one of the National Sports Federations or operating within the Federation, according to the relevant arbitration clause contained in the Federation’s Statutes. The condition for access to TNAS is the exhaustion of all internal remedies, if any, provided for by the Federation.

TNAS proceedings are heard by an arbitration panel of three members, whom the parties choose³² among the lawyers, judges or professors of law disciplines whose names are listed in the “role of TNAS arbitrators” compiled by ACGS on the basis of the candidacies received. Arbitration proceedings before TNAS are regulated by sports rules on the substantive side and by TNAS’ own procedural rules and by the Italian code of civil procedure³³ on the procedural side. The parties are entitled to ask the panel to carry out a further evaluation of the merits of the case and submit new pieces of evidence and/or ask for the audition of testimonies.³⁴ At the end of the proceedings³⁵ a motivated award is rendered and

²⁹ The most relevant activities of public interest, in the current version of CONI Statutes, are: the affiliation of clubs, the registration of players, trainers, etc., the use of public funds, the controls over the regular course of competitions, anti-doping matters.

³⁰ See article 13, 13^{bis} and 13^{ter} of CONI Statutes.

³¹ The roles and competences of the two courts are in the process of being re-defined following a recent reform that should be implemented within the next months. Their current roles and competences are described herein.

³² Each party designates an arbitrator, and the two so designated appoint the president of the panel. In case the dispute is among three or more parties and they do not agree on the designation of the two arbitrators, or in case the two arbitrators appointed by the parties cannot agree on the name of the president of the panel, the President of TNAS intervenes to designate the arbitrator/s.

³³ I.e. Decree 28 October 1940 n. 1443.

³⁴ Testimonies can be heard only in those kinds of proceedings where testimonies can be heard before sports courts.

³⁵ The award is usually rendered within 90 days, but such term can be reduced, in case of urgency, up to 30 days by order of the President of TNAS or can be extended, in case of complex matters, with the consent of the parties.

the decision(s) that was/were appealed before TNAS can be confirmed, overruled or modified.

The ACGS is composed of five members designated by CONI and chosen from prominent judges, lawyers or professors of law disciplines with an undisputable experience in sports matters.

The cases that can be heard before ACGS are sports disputes that are of major relevance for the whole sports movement. The Court decides the case by applying sports rules and the general principles of good and fair administration³⁶ and can overrule or confirm the decision appealed or render the final interpretation of the sports regulations concerned.

The rulings of ACGS are considered the decisions of last instance of sports justice and can be appealed before TAR Lazio as long as they do not involve technical, disciplinary or organizational matters that, according to decree n. 220/2003, are reserved for sports courts.³⁷

4. *Relevant football regulations*

In Italy football has the most sophisticated and complex system of sports justice. Reference to sports justice is contained in all major regulations of the Italian Football Federation (“FIGC”).

FIGC Statutes set out the following basic principles of sports justice in football:³⁸

- all persons and entities registered with FIGC or - in any form - operating within FIGC (such as professional and amateur players, coaches and staff, leagues, associations of players, coaches, referees, etc.), are subject to all sports rules and regulations enacted by FIGC or the international sports entities which FIGC is affiliated with;
- the same persons and entities accept as final and binding all decisions taken by bodies and courts of FIGC, or by FIFA and/or UEFA;
- all disputes among the same persons and/or entities - provided that all internal remedies made available before bodies and courts of FIGC have been exhausted - may be submitted to the jurisdiction of TNAS and/or ACGS, in accordance with the provisions of the rules and regulations of FIGC;³⁹
- in exceptional cases the Executive Committee of FIGC may authorize persons or entities registered with FIGC to start proceedings before state courts against other persons or entities registered with FIGC.⁴⁰

³⁶ I.e. the principles that regulate the activity of Governmental agencies and bodies.

³⁷ See para. 2 *supra*.

³⁸ See article 30 of FIGC Statutes.

³⁹ The following disputes cannot be brought before TNAS and/or ACGS: a) those resolved in arbitration before FIGC’s arbitration panels; b) those concerning the result of football matches; c) those concerning sanctions of minor importance; d) those concerning the partial stadium closure or the obligation to play behind closed doors or in a third city.

⁴⁰ No authorization is needed to seek the nullity of the awards rendered by FIGC’s arbitration panels

Besides the provisions of FIGC Statutes, the whole system of football sports justice is set out in the Code of Sports Justice of FIGC (“CGS”), a comprehensive set of rules of both substantive and procedural nature that describe persons and entities’ rights and obligations and the disciplinary measures that can be imposed on them by the disciplinary bodies and courts of FIGC.⁴¹

Parallel to CGS, further sports rules and regulations concerning sports justice are enacted on a continuous basis by FIGC and the leagues for the purpose of regulating and organizing both professional and amateur football competitions.⁴² Such rules are legally binding for all persons and entities operating within FIGC following their publication on the periodical “public statements” issued by FIGC through their posting on FIGC’s web site.

5. Clubs and players’ responsibilities

5.1 General obligations

It has been said⁴³ that FIGC Statutes provide for the general obligation upon all persons and entities operating within FIGC to abide by the sports rules set forth by FIGC, FIFA and UEFA, while CGS contains a code of conduct that must be followed by all those who are subject to the sports rules of FIGC.

Going into the details of such rules, article 1 of CGS states that all persons and entities registered with FIGC or operating within the Federation must conduct themselves according to the principles of loyalty, honesty and integrity.

These standards of conduct represent the pillars on which FIGC’s sports justice is based. Not only do all sports offences described by CGS or other sports rules and regulations represent a specification of – and can be related to – these principles, but any other behaviour not compliant with the general principle of sportsmanship, even if not expressly codified, can be sanctioned by sports courts on the basis of the violation of article 1 of CGS.

Turning back to the obligations imposed on persons and entities, the former must refrain from disclosing any information pertaining to an open and on-going disciplinary investigation and are bound to appear before FIGC Inspector or other bodies of sports justice, if and when so requested.

As for clubs, not only the persons who officially represent or manage the club, but also those persons who – directly or indirectly – control the club or carry out any activity on behalf of the club that may be relevant for the organization of FIGC are bound to comply with sports rules.

before the competent civil courts (in accordance with the ordinary law provisions concerning the appeal of arbitration awards), as well as no authorization is needed to appeal the decisions of ACGS before TAR Lazio.

⁴¹ See *infra* under para. 5.

⁴² E.g. at the purpose of setting out rules promoting juvenile football and impose on all teams to line up a minimum of young players during their matches.

⁴³ See par. 4 *supra*.

None of the persons or entities under disciplinary proceedings can be exempted from responsibility because they were not aware of the sports provisions that they have breached. All sports rules are immediately binding and are presumed to be fully known by all persons and entities operating within FIGC's organization following the publication of the relevant public statement issued by the Federation, with no room to give evidence to the contrary.

5.2 Responsibility of individuals and clubs

In principle all individuals bound by the rules and regulations of FIGC can be sanctioned for the breach of sports rules, whether the breach occurred for negligent or wilful misconduct. This principle, however, is not applicable in some cases where a principle of strict liability applies; for example, the captain of a football team is strictly liable for the assault against the referee or other officials committed by fellow team players who cannot be identified.

Clubs are directly responsible for the violation of sports rules committed by the persons by whom they are represented (so called "direct responsibility"). Likewise, they are responsible for the behaviour of their directors, registered players and/or technical staff, or persons who, directly or indirectly, control the club or carry out any activity on behalf of the club that may be relevant for FIGC's organization (so called "objective responsibility", another case of strict liability). In both cases, the club is always responsible, regardless of any negligence or wilful misconduct ascertained. It has to be noted, however, that the sanctions provided for direct responsibility are harsher than those imposed for objective responsibility.

Clubs are also responsible for maintaining safety and security and for the behaviour of their supporters, both inside and around the stadium, before, during and after their matches. In relation to these kinds of offences,⁴⁴ the club can be excused and avoid any sanction in case it gives evidence that it has:

- implemented suitable measures aimed at preventing the facts occurred;
- established a proper cooperation with police forces;
- intervened immediately to remedy the facts;
- implemented adequate security measures.

Whenever the club can give evidence that only some of the circumstances mentioned above have actually happened, the club cannot be excused, but the sanction is mitigated.

Clubs, finally, are responsible for the match fixing violations⁴⁵ committed by persons who do not have any relationship with the club⁴⁶ whenever the match fixing is beneficial to the club. For this kind of responsibility (so called "presumed responsibility") the club is only presumed responsible and is entitled to be exempted by any sanction if it can provide evidence that it was not part of the fraud or was

⁴⁴ E.g. in case racist choirs are sung by supporters or disorders happen inside or around the stadium.

⁴⁵ See *infra* in this paragraph.

⁴⁶ Otherwise it would be a case of direct or objective responsibility.

fully unaware of it.

6. *Sports offences*

It has already been mentioned⁴⁷ that, among the offences provided for by the system of sports justice of FIGC, some of them are expressly described and indicated in CGS or other sports rules and regulations, while others derive from a conduct not compliant with the general standards of loyalty, honesty and integrity.

Among the former, some of them are the consequence of the violation of the rules of the game,⁴⁸ while others refer to the “out of competition” conduct of clubs’ players, officials and members.

The most relevant “out of competition” offences sanctioned by CGS are:

- *betting and failure to report*:⁴⁹ players, officials and members of professional clubs are prohibited to bet, directly or indirectly, on football matches organized by FIFA, UEFA or FIGC. Anyone registered with FIGC who is aware of the breach of this provision by a third party must immediately report the facts to the Federation;
- *match fixing and obligation to report*: match fixing is committed by anyone who tries to manipulate, or actually manipulates, the ordinary course of a match or a competition or tries to procure, or actually procures, a competitive advantage for a club. Anyone registered with FIGC who is aware of the breach of this provision by a third party must immediately report the facts to the Federation;
- *financial violations*: represents a sports offence the submission to FIGC of false documents and/or any other conduct aimed at eluding the periodical controls carried on by FIGC on the financial standing and the management of professional clubs or at obtaining the license for the participation in a competition;
- *violations related to the registration of players*: they concern arrangements that are prohibited by sports rules and regulations⁵⁰ or the intervention of persons not authorized⁵¹ in the negotiation of player transfer agreements;
- *the failure to remunerate players, trainers and technical staff in a timely fashion*: FIGC’s rules sanction the failure of professional clubs to pay the salaries due to such persons and/or the relevant taxes, pensions and/or social security contributions within the time limits set by the Federation;⁵²
- *violation of the prohibition to appeal the decisions of sports courts and*

⁴⁷ See art. 5.1 *supra*.

⁴⁸ E.g.: rough play, violent protests against the officials, etc..

⁴⁹ See art. 6 CGS.

⁵⁰ E.g.: those economical arrangements that are contained in side letters kept confidential and off the official contracts filed with the Federation.

⁵¹ E.g. the intervention of a players’ agent not licensed by FIFA.

⁵² Sports regulations fix to professional clubs periodical time lines to give evidence of the payment of salaries due to players, trainers and technical staff.

bodies before state courts: represents a sports offence the filing of a petition before state courts without the express authorization of FIGC Executive Committee⁵³ save for the strict cases permitted by sports rules and regulations.

7. *Sanctions on clubs and players*

When they find that sports offences have been committed, the disciplinary courts of FIGC impose on the persons and/or entities found guilty the sanctions provided for by CGS or other applicable sports rules and regulations. Courts determine the type and extent of the sanction according to the kind and the gravity of the offence, and taking into account the applicable mitigating and aggravating circumstances, if any. The sanction may also be agreed upon between the party charged and FIGC Inspector and ratified by the competent disciplinary court. Furthermore, the sanction may be reduced following the collaboration of the party charged with the Inspector, while it is always increased in the case of recidivism or whenever it is committed by three or more people who have joined together for the purpose of committing the offence.

There is a statute of limitations on prosecution of sports offences, which is barred:

- at the end of the season following the season during which the offence was committed, for all the offences that are committed on the occasion of a football match;
- at the end of the sixth season following the season during which the offence was committed, for all the offences related to financial matters;
- at the end of the eighth season following the season during which the offence was committed, for match fixing and anti-doping cases;
- at the end of the fourth season following the season during which the offence was committed, for all other cases.

Persons and clubs sanctioned may be pardoned⁵⁴ by FIGC Executive Committee with the agreement of the President of FIGC and the Court of Federal Justice.⁵⁵

7.1 *Sanctions on clubs*

Whenever the ordinary course of a match is altered by facts for which one or both clubs are responsible, the match is declared forfeit and the club/s responsible is/are deemed to have lost the match 0-3, unless the actual result is less favourable to the club/s at fault. This sanction is not applicable in case a club is responsible⁵⁶ for the

⁵³ See para. 4 *supra*.

⁵⁴ This provision does not apply to anti-doping offences.

⁵⁵ See para. 8 *infra*.

⁵⁶ E.g. for the behaviour of its supporters.

opponent team's loss of sporting performances,⁵⁷ while it is always applied in case a club's player/s participate(s) in a match whilst suspended or whilst not eligible to play according to sports rules.⁵⁸

The actual occurrence of facts that have altered the ordinary course of a match is evaluated by the referee during the match or by disciplinary courts.

Besides this specific case, the sanctions that may be imposed on a club – also combining two or more sanctions – depend, on a case by case basis, on the type of offence committed and the specific sports regulations violated. The sanctions applicable to clubs are:

- reprimand;
- fine;
- fine with warning;
- playing one or more matches behind closed doors;
- partial stadium closure;
- playing in a third city for a determined time frame⁵⁹ or for a determined number of matches;
- deduction of points;⁶⁰
- relegation to the lower division;
- exclusion from a competition and, if applicable, inclusion in one of the lower divisions;
- withdrawal of a title or award;
- transfer ban for one or two transfer windows.

7.2 *Sanctions on persons*

Players, officials, trainers and staff and other persons registered with FIGC and/or operating within the organization of FIGC may be sanctioned for their misconduct on the field of play and its proximities. These offences may be reported in the documents written by referees and other officials or resulting from the evidence collected by FIGC Inspector during an investigation. The persons charged with sports offences may be provisionally suspended during the disciplinary proceedings opened against them. All sanctions are immediately enforceable and effective following the publication of the relevant decision through a public statement.⁶¹

The sanctions that may be imposed on persons – also combining two or more sanctions – depend, on a case by case basis, on the type of offence committed and the specific sports regulations violated. The sanctions applicable to persons are:

⁵⁷ I.e. when an opponent player is unfit to play or to continue playing.

⁵⁸ E.g. in case he has not been duly registered with the Federation.

⁵⁹ Up to 2 years.

⁶⁰ Whenever the deduction results to be ineffective in the current season, it may be imposed with effects on the next season's ranking.

⁶¹ See para. 4 *supra*.

- reprimand;
- reprimand with warning;
- fine;
- fine with warning;
- suspension for a determined number of matches;⁶²
- suspension for a determined time frame;⁶³
- prohibition to access sports facilities where matches organized by FIGC, UEFA and/or FIFA are played;
- prohibition to carry out any football related activity within FIGC for a determined period.⁶⁴

8. *The sports judicial bodies of FIGC*

Several sports judicial bodies are organized and managed by FIGC on the domestic soil. Some of them are deployed on the territory and have jurisdiction over local amateur competitions, while others are set up at national level and are competent for national amateur competitions and all professional competitions.

All sports disciplinary bodies operate in compliance with the principles of full independency, impartiality and confidentiality. The members of FIGC disciplinary bodies are appointed by the Commission of Sports Justice, an *ad hoc* organ of FIGC the members of which are designated, by FIGC Executive Committee, among reputable professors of law, judges or lawyers. All members of disciplinary bodies of FIGC carry out their tasks on a voluntary basis and with the reimbursement of their expenses only.

The evaluation of the match official reports, both at local and at national level, is reserved to sports judges,⁶⁵ sitting as sole judges, who are in charge of the imposition of sanctions on persons and entities on the basis of the facts described in the reports. The disputes concerning the regularity of football matches are brought before the Sports Judges as well.

Disciplinary Committees⁶⁶ are composed of three to five members and operate at both local and national level. Disciplinary Committees act as courts of second instance when they hear the appeals lodged against the decisions of Sports Judges. They act as courts of first instance whenever they hear the cases opened following an investigation of FIGC Inspector.⁶⁷ In 2011 the National Disciplinary Committee heard and decided 649 cases.

The Court of Federal Justice⁶⁸ hears cases of second instance with three or

⁶² In case of acts of particular gravity, for not less than 4 matches.

⁶³ Up to 5 years. In cases of particular gravity, a final ban may be imposed.

⁶⁴ Up to 5 years. In cases of particular gravity, a final ban may be imposed.

⁶⁵ I.e. “Giudice Sportivo”.

⁶⁶ I.e. “Commissione Disciplinare”.

⁶⁷ National Disciplinary Committee acts as court of second instance to hear the appeals filed against the decisions of first instance of local Disciplinary Committees.

⁶⁸ I.e. “Corte di Giustizia Federale”.

five members⁶⁹ present, when an appeal is lodged against the decisions of national Sports Judges or the National Disciplinary Committee. In 2011 758 cases were discussed before the Court.

The office of FIGC Inspector is composed of a national chief prosecutor, local deputy chief prosecutors and several collaborators. The office manages sports investigations and charges persons and entities with sports offences, asking sports courts to render a decision on their responsibility. In 2011 FIGC Inspector opened 2.147 investigation files.

“Arbitration Panels”⁷⁰ are bodies of alternative dispute resolutions to which, in accordance with the rules and regulations of FIGC and the agreements between clubs and/or players, trainers and staff, the disputes among the same persons and/or entities are remitted. Arbitration Panels have jurisdiction whenever this is provided for by the agreements between the parties⁷¹ or the applicable sports rules and regulations.

9. *The procedure*

Disciplinary proceedings may be opened following the exam and evaluation of match official reports or when FIGC Inspector asks the Disciplinary Committee to impose sanctions on persons and/or clubs whom, on the base of the evidence collected during his investigation, FIGC Inspector deems responsible for sports offences. The text of all decisions rendered by the disciplinary bodies and courts of FIGC are made public through public statements that are issued by FIGC and posted on its web-site.

The disciplinary procedure follows different paths depending on the kind of proceedings concerned.

9.1 *Proceedings based on the evaluation of the Match Official Reports*

Whenever the proceedings are based on the match reports written by match officials, the persons and/or entities charged are the sole parties to the proceedings, since FIGC Inspector is not even present nor plays any role therein. In first instance, the case is decided by Sports Judges by examining the sole match reports and without any hearing nor participation of the parties charged, who cannot even submit written arguments nor present any kind of evidence.⁷²

The content of the reports written by the officials represents the last and final word on the facts that have happened on the field of play and its proximities;

⁶⁹ The Court seats with 7 members when in “full chambers”.

⁷⁰ I.e. “Collegi Arbitrali”.

⁷¹ The typical example is that of the employment agreement between a club and a player, that remits to Arbitration Panels any and all disputes concerning the interpretation, the performance and the termination of the agreement between the parties.

⁷² Save for the TV footage if and when admissible, see *infra*.

never can match reports be rebutted, save for the following cases where TV footage may be used:

- sports courts can use TV footage for the purpose of sanctioning the player who committed an offence and was not identified by the officials and the latter, instead, sanctioned another player;
- in case the serious misconduct⁷³ of professional players remains unseen by the officials during the match, FIGC Inspector can submit the footage to the competent national Sports Judge to integrate the match official reports;
- players and clubs can submit the footage to national Sports Judges to give evidence in respect of the innocence of a player who was sanctioned by the officials for serious and grave misconduct.

Besides the use of TV footage in the cases mentioned above, no other opportunity is available for the submission of evidence aimed at contradicting the match official reports. For example, never is the written or oral testimony of witnesses admitted.

Within the time limit set by the applicable rules and regulations, persons and/or entities condemned in first instance may file an appeal before the competent Disciplinary Committee⁷⁴ against the decision of sports judges. The statement of appeal must include the reasons for the appeal and – to the extent admissible⁷⁵ – the pieces of evidence on which the appeal relies on. The appellant has the right to be heard before the court and be assisted by a lawyer or another counsel or representative of his election. The court can ask the match officials to clarify the facts described in their reports, either in writing or appearing before the court during a hearing. In the latter case, however, never is the confrontation between the appellant and the officials admissible.

The decision of second instance rendered on the merits of the case and the court may reduce, cancel or even raise the sanction, as it deems fit.

9.2 *Proceedings based on the investigations of FIGC Inspector*

FIGC Inspector is fully independent in the commencement and the leading of the investigations on possible sports offences. Although any member of the Federation is entitled to report to FIGC Inspector any alleged violations to the CGS, the Inspector has full discretionary power with respect to the subject of the investigation and to the persons or entities to be investigated. Once the investigation is completed, FIGC Inspector is the only authority entitled to submit the case to the judging bodies of the Federation.

At the end of any investigation, the deputy Inspector who worked on the case writes and submit to the chief prosecutor a detailed final report, summarising the activities carried on and the evidence collected, and drawing the conclusions as

⁷³ E.g. simulation, goal scored with hands, goal of the opponent team avoided with hands, etc..

⁷⁴ Or before the Court of Federal Justice whenever the decision was taken by national Sports Judges.

⁷⁵ See *supra*.

to the responsibility of the persons and/or entities involved. On the base of such report, if the chief prosecutor considers that one or more offences have been committed, he addresses his conclusions in the form of an act of accusation to the competent Disciplinary Committee for decision. Whenever the Inspector decides to do so, he sends copies of the act of accusation to the persons and/or entities charged and to the Disciplinary Committee which has jurisdiction over the case, describing in summary the evidence gathered and the disciplinary violations that he believes have been committed.

With the service of such written notice, the disciplinary proceedings commence and the parties⁷⁶ are entitled to present their case before the Committee. The persons and/or entities charged are entitled to: a) receive a full copy of the file of the case open by the Inspector; b) submit written arguments; c) ask for the acquisition of documents or the testimony of witnesses; and d) be assisted by a lawyer or another counsel of their election. The Committee schedules a hearing, and after that the parties have presented their case orally before the court, the decision is rendered.⁷⁷

Against the decision of first instance either party may lodge an appeal before the competent sports court⁷⁸ within the time limits set by CGS.⁷⁹ The statement of appeal has to be served to the other party and must include the reasons for the appeal and the pieces of evidence which the appeal relies on, if any. The party to whom the appeal is served is entitled to submit counter-arguments and further evidence and to file a cross-appeal. After that the parties have presented orally their arguments before the court, a decision is rendered. The decision is given on the merits of the case but is limited to the issues raised by the parties with their appeal and cross-appeal, if any. As a consequence thereof, the sanctions inflicted in first instance cannot be raised by the appeal body unless FIGC Inspector has submitted an appeal or a cross-appeal.

Whenever the appeal body finds that the Disciplinary Committee which rendered the decision of first instance was wrong in declining its jurisdiction, or finds that the parties were not given sufficient space to fully participate in the proceedings,⁸⁰ it refrains from deciding and remits the case to the body of first instance for a new decision.

9.3 *Further remedies*

The President of FIGC is entitled to lodge an appeal before the Court of Federal

⁷⁶ I.e. the Inspector, on the one side, and the persons and/or entities charged, on the other side.

⁷⁷ Usually on the very same date of the hearing.

⁷⁸ I.e. before the National Disciplinary Committee whenever the decision was rendered by a local Disciplinary Committee or before the Court of Federal Justice whenever the decision was rendered by the National Disciplinary Committee.

⁷⁹ For urgent matters the time limits can be reduced by FIGC.

⁸⁰ E.g. in case the parties were not given enough time to submit written arguments or evidence, or they were denied the request to be heard.

Justice - even after that the time limit for the appeal of the parties has expired⁸¹ - against the decisions of first instance that are deemed to be against sports rules and regulations or to be inadequate.

Moreover, all parties to the proceedings of second instance may file a petition before the Court of Federal Justice for the revocation of the decision whenever they can give evidence that:

- the decision was adopted because of the fraud of one party against the other; or
- the evidence on which the decision was taken has been found false; or
- a party was not able to provide decisive evidence due to *force majeure*; or
- new facts or new pieces of evidence that have emerged prove that the decision is wrong; or
- the file of the proceedings show that the court has committed a mistake in the understanding or interpretation of the facts of the case; or
- the findings of the decision are irremediably inconsistent with another decision of sports courts.

Decisions of second instance can be appealed before TNAS or ACGS within a deadline of 30 days, when so permitted by the rules and regulations of FIGC.⁸²

10. *The collection of evidence in match fixing cases*

Disciplinary investigations are usually carried on by FIGC Inspector through the hearing of persons registered with the Federation and the gathering of all documents and other pieces of evidence available at the Federation's bodies and offices.⁸³

As a matter of fact, FIGC Inspector does not have any police powers and, as a consequence, cannot arrange wiretappings, nor search personal belongings or premises, oblige persons not registered with FIGC to present at the Inspector's office to render their testimony and/or disclose any useful information or documents they may have for the purposes of an on-going investigation.

For this reason, the collection of evidence in match fixing cases is extremely difficult, given that this kind of sports offence usually takes place within maximum secrecy among the persons involved, who act with all due care in order not to be found guilty of an offence that is sanctioned with a minimum of three years of suspension. Furthermore, it is nearly impossible to achieve adequate proof of the actual manipulation of a football match through the observation of the game: the competitive features of professional football competitions make it nearly impossible to detect, for example, the wilful purpose of some of the players to direct the match towards a pre-determined result illicitly agreed upon with the opponent team or other persons. Likewise, the coach of a team may exclude talented players from

⁸¹ In any case the appeal must be filed within 60 days from the publication of the decision appealed.

⁸² See para. 3 *supra*.

⁸³ E.g. employment agreements, representation contracts with agents, etc..

a match (not for malicious purposes, but) for several reasons relating to their physical conditions, or of disciplinary or contractual nature. Also in these cases, the malevolent intent to manipulate the result of a match is nearly impossible to be ascertained and proven.

It has to be considered, however, that match fixing represents a major threat for the reputation and the integrity of football and is always more severe given the increasing financial interests connected to football matches: not only those directly linked to the football industry, but also those related to the gambling on football competitions.

In this context, in Italy nearly all cases of match fixing have been discovered thanks to the collaboration between state authorities and sports authorities.

10.1 Match fixing as a criminal offence

After the discovery – in the 80's – of two major match fixing cases in football, the Italian Parliament enacted a law⁸⁴ to fight the phenomenon by providing for the criminal offence of manipulation of sports competitions. Such provisions describe the match fixing, which carries a punishment with the imprisonment for up to 2 years and a fine of up to 25.000 euro to whoever offers or promises money or other benefits to any players or officers attending sport competitions organized by Sports Federations affiliated to CONI for the purpose of altering the regularity of the competitions.

Match fixing, as a consequence, is prosecuted not only by sports bodies but also by state courts and the office of the public prosecutor, who dispose of extremely effective means⁸⁵ to lift the veil of the conspiracy of silence among all those who join together to alter the ordinary course of a competition.

10.2 The cooperation between state bodies and sports bodies

The law mentioned above further provides that, notwithstanding anything to the contrary provided for with regard to data protection and secrecy of criminal investigations, sports disciplinary bodies⁸⁶ may ask for copy of the evidence collected during the on-going (or closed) investigations led by the public prosecutor for the benefit of sports disciplinary proceedings. The same law specifies that, when the examination of such documents gives start to sports proceedings, the two proceedings⁸⁷ continue their own paths on parallel tracks, with no influence of one on the other. Notably, the outcome of the criminal proceedings cannot have any influence over the result of the matches suspected of being altered, nor on the findings of sports bodies, which can carry on their investigations with full autonomy

⁸⁴ I.e. law 13 December 1989 n. 401.

⁸⁵ I.e. all those described under para. 10 *supra*, that are not available to FIGC Inspector.

⁸⁶ I.e. the office of FIGC Inspector.

⁸⁷ I.e. the sports proceedings and the proceedings before state courts.

and independence and evaluate the matter on the base of the applicable sports rules and regulations only. It goes without saying that, likewise, the proceedings before state courts are not affected in any fashion by the findings of sports proceedings.

10.3 The results of such cooperation

The cooperation between the public prosecutors' offices and FIGC Inspector has brought very good results in the last years. In many cases it has transpired that the manipulation of football matches was strictly linked to organized crime activities on an international scale. In some of these cases, the findings on the manipulation of football matches came out incidentally during the ongoing investigation activities led by special units of the police forces deployed against organized crime or other forms of illicit enterprises.

Recently, more sophisticated cases of manipulation of football matches are being investigated by sports bodies: it seems that some domestic matches of Italian clubs may have been manipulated for the purpose of letting international gamblers earn remarkable revenues from the betting made via the Internet from countries in Asia or Eastern Europe.

Taking into account that the phenomenon is of international magnitude, the competent bodies of FIGC, as well as those of all other major national football federations, have stipulated agreements with international police forces⁸⁸ and with international entities⁸⁹ to control the flow of bets on each professional match in order to detect unexpected figures and to try to prevent any attempts of manipulation before the match is actually played.

11. Conclusions

Due to the importance of football in Italy, FIGC has received valuable contributions from sports bodies and external sources over the years. This has led the system of sports justice to be one of the most sophisticated and progressive in the entire European sports system. The independence of all bodies and courts of justice that operate within FIGC guarantees a fair and timely resolution of the disputes. Time is of the essence in sports matters, particularly as often decisions of a disciplinary nature impact on the integrity of football competitions. In the cases of match fixing, the cooperation between sports bodies and state authorities is essential in order to secure successful outcomes of sports investigations as demonstrated by some excellent exemplary results over the last few years.

⁸⁸ I.e. Interpol.

⁸⁹ Through FIFA and UEFA.

SPORTS JUSTICE IN JAPAN

by *Takuya Yamazaki**

SUMMARY: 1. Principles of Japanese sports justice – 2. The relationship between “ordinary justice” and “sports justice” – 3. Laws related to “sports justice” in Japan – 4. The realisation of “sports justice” – dispute settlements – 5. Conclusion

Abstract:

This article examines the development and significance of sports law in Japan and critically analyses whether the concept of “sports justice” is applicable and how it can be more effectively realised. A central tenet of this article is an analysis of Japan’s Basic Act on Sports, which was enacted in June 2011; the act is significant as it is the first piece of legislation that recognises the concept of “sports rights” in Japan. Consideration is also given to how “sports justice” is applied to dispute resolution processes in Japan’s main two professional sports (football and baseball), amateur sports and within various sports bodies and organisations in Japan. Also covered is how recent sporting scandals have rocked the country and how in turn these have focused the attention of the public, politicians and legal profession on the need for greater “sports justice” in Japan.

1. Principles of Japanese sports justice

1.1 The present situation concerning “sports justice” in Japan

In the sports world in Japan, historically, discussion on the term “sports justice” was carried out against a very severe environment.

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Traditionally in Japan, sport was recognised as physical education. Thus, in Japan sports were often practised based on the hierarchical relationship between teacher and student. This relationship is also rooted in Confucian culture and the samurai spirit, with the rule that it is essential to value superiors.

Also from this superiority system, athletes could not object to the actions of these superiors even though they excessively restricted human rights. Thus, human rights continued to be widely restricted as often nobody could voice their opinions (for athletes, objecting was seen as a protest against authority, and as such they risked their sporting activities being discontinued). Correspondingly, even if such issues occurred, they were frequently dealt with internally by the sports world. Given the small possibility that sports disputes were resolved using legal dispute resolution mechanisms, few instances of human rights violations in sports were unmasked.¹

However, lately this situation has gradually started to change.

For example, in January 2013 fifteen Japanese female judokas, including London Olympic judokas, brought accusations of ongoing corporal punishment against their head coach. This incident was treated with furore by the Japanese mass media and became a big scandal.

Against the background of these accusations, was another tragic incident that occurred prior to this in December 2012, namely, the suicide of a second year student (17 years old) who belonged to the basketball club of Sakuranomiya Senior High School in Osaka, following repeated corporal punishment by his coach. Accusations of this corporal punishment arose from a suicide note left by the student. Also, corporal punishment in sport in Japan has been heavily criticised around the world. As a result of this turmoil the head coach of the women judo's team was forced to take responsibility by resigning, and Sakuranomiya Senior High School's basketball coach was subject to a disciplinary dismissal.

For Japan, these incidents negatively impacted on Tokyo's 2020 Olympics bid in early 2013 (nevertheless Tokyo was granted the event by the IOC in September 2013); at that time, Japan's media heavily rebuked the governing structure of Japan's sports which had for a long time done nothing to remedy such situations. This then prompted Japan's Minister of Education, Culture, Sports, Science and Technology ("MEXT")² in a press conference on 5 February 2013 to call for the eradication of violence in sports instruction and state that, "*This is the biggest crisis in the history of Japanese sport*".

The Diet Members Federation for Sports also began reforming the content of relevant laws, including to allow for the establishment of a third party body to counsel afflicted athletes and to apply appropriate corrective measures.

Furthermore, on 13 February 2013 the Japan Federation of Bar Associations³

¹ M. Dougauchi & Y. Hayakawa (eds.), *An Introduction to Sports Law*, Kyoto, Minerva Shobou Ltd., April 2011, 92.

² The MEXT website in English is available *on line* at: www.mext.go.jp/english/.

³ The Japan Federation of Bar Associations website in English is available *on line* at: www.nichibenren.or.jp/en/.

also announced its: “President’s Statement Demanding the Eradication of Violence by Sports Coaches and Instructors”. The statement identified the following:

- “*In the field of sports, due to its very nature and background, it is very difficult for the rule of law to be influential. There is a high need for the establishment of the rule of law in this field*”.
- “*We need to ensure that this never happens again; it is imperative to immediately establish and research reasonable methods of sports instruction that do not use violence and to carry out measures to facilitate impartial and high-level consultation, reporting and whistle-blowing*”.
- “*It is also essential to change the whole closed, clandestine nature of sports associations*”.

On the following day, 14 February, the Japan Sports Law Association (“JSLA”),⁴ in line with its long held calls for “*a transformation to the rule of law from the rule of people*”, also made an announcement on the situation. The announcement recommended that with such violence and conduct violating human rights, in order to realise the “rule of law”, it is necessary: to strengthen governance in sports organisations and compliance with laws and regulations by relevant parties; to facilitate a method of consultation for afflicted athletes; and to establish an impartial and fair third party investigative body.

1.2 The necessity for “sports justice” in Japan

It is a known fact that in sports in Japan corporal punishment has consistently been carried out.

However, due to the nature of the aforesaid sports world, rather than neglecting to see this type of “customary practice” as problematic, there was actually a propensity to admire the coaches who meted out corporal punishment as being “dedicated and enthusiastic coaches”. The philosophy behind all this was that the coach’s commands must be obediently followed. Even if corporal punishment was committed by the coach, this was because the coach thought he was doing it in order to benefit the athlete, and that, actually, the athlete should be thankful for it.

In fact up until now, when considering this, it is easy for instructors to go too far in keenly instructing their students (referred to as *Shigoki*) which has resulted in cases of human rights violations, such as injury causing death,⁵ and

⁴ The JSLA website in English is available *on line* at: <http://jsla.gr.jp/E/mokuji.htm>.

⁵ *Tokitaizan* Death:

On 26 July 2007, *Tokitaizan*, a young wrestler of the *Tokitsukaze* sumo stable, died from multiple traumatic shocks. In relation to this tragic incident, the stable master and three senior wrestlers were prosecuted with the crime of injury causing death (manslaughter). At first instance the court handed down a guilty verdict with a suspended sentence to the three wrestlers. The stable master received a prison sentence without suspension. In the stable master’s trial at first instance, the court in recognising the illegal assault stated that the purpose of the sparring session for *Tokitaizan* was to sanction him. The court also noted that, “The wrestler was forced to train in an exceptionally long sparring session, at which he was brutally beaten, including being smashed with a metal bat and repeatedly punched and kicked in the sumo training ring. This conduct obviously deviated from the realm of normal

excessive corporal punishment.⁶

The type of conduct that violates human rights is recognised under the so-called “specificity of sport”.

Indeed, for all types of sports associations, the right to enact such rules and regulations is derived based on the freedom of assembly and association provisions contained in Article 21 of the Constitution of Japan.⁷ Furthermore based on this article the freedom, to a certain extent, to enact disciplinary rules, including penalties, is guaranteed. However, even within this special society of sports in Japan, the Constitution is the highest system of national law; therefore, the general civil legal order is not without effect. Thus, in relation to conduct that excessively limits human rights or that goes beyond the guaranteed autonomy of sports associations, it becomes necessary to exercise regulations by national law.

Accordingly, sports law has an important mission in protecting players and athletes in a weak position, including from having their human rights infringed by the sports associations. The role of sports law and “sports justice” has therefore become significant in realising a balance between guaranteeing the autonomy of sports associations and the rule of law.

Over the past ten years or so, together with an improvement in players’ awareness of their rights, the realisation of “sports justice” by the players has been increasing. Here, a case in point is the aforementioned accusations of the female judokas. Also, the past decade has seen professional players become much more active towards the realisation of “sports justice”.

For example, in professional baseball (Nippon Professional Baseball – “NPB”)⁸ from 2000 onwards when the Japan Professional Baseball Players Association’s (“JPBPA”)⁹ activities really gained momentum, including for: the introduction of the players’ agent system in relation to negotiating players’ contracts; the holding of a strike against the unilateral plans of the NPB team owners to reduce the numbers of teams; and systematic reforms to the rookie draft system and the reserve system (restrictions on player transfers). In professional football (“J-League”)¹⁰ this greater action includes: the *Kazuki Ganaha* doping incident,

practice.” (author’s translation from Japanese). Nagoya District Court judgment, 29 May 2009.

⁶ According to the MEXT report “The Position Regarding Disciplinary Action against Educators in 2008”, in 2008 for acts of corporal punishment: 140 educators (an increase of sixteen from the previous year) were subject to disciplinary action; and 376 educators (a rise of five from the previous year) were subject to disciplinary action, including warnings. Out of the 376 educators, fifty eight were subject to the said disciplinary action, including warnings for acts of corporal punishment committed during “after school club activities” held at “sports grounds and gymnasiums” (Tokyo: MEXT, 1 Apr. 2009. The report is available *on line* in Japanese at: www.mext.go.jp/a_menu/shotou/jinji/1288132.htm).

⁷ The *Constitution of Japan*, Article 21 states, “Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed. 2) No censorship shall be maintained, nor shall the secrecy of any means of communication be violated”.

⁸ The NPB website in English is available *on line* at: www.npb.or.jp/eng/.

⁹ The JPBPA website in Japanese is available *on line* at: <http://jpbpa.net/>.

¹⁰ The J-League website in English is available *on line* at: www.j-league.or.jp/eng/.

where the player *Ganaha* successfully brought his appeal against a J-League imposed playing suspension to the CAS;¹¹ the eventual abolition of the “domestic transfer compensation system”, after the J-League long-flouted FIFA rules by permitting clubs the right to demand domestic transfer fees for players who were out of contract; and the Japan Pro-Footballers Association (“JPFA”)¹² becoming a labour union.

1.3 *The significance of Japan’s “Basic Act on Sports” (“BAS”) in embodying “sports justice”*

It was in amongst all this that Japan in 2011 enacted the BAS, the first law to stipulate “sports rights” as human rights.¹³

Although in essence the BAS was enacted as a revised law for the 1961 Sports Promotion Act (“SPA”),¹⁴ in terms of sports, the SPA merely defined measures for the promotion of sports by public administration bodies. The BAS, from the perspective of the human rights of sports participants, has brought about a wholesale revision of matters including for the rights of players and athletes, fairness, impartiality, due process, the maintenance of governance in sports associations and the ensuring of thorough compliance therein.

Originally in Japan, human rights for sports participants, namely the debate on “sports rights”, had long been carried out by sports law scholars. Prior to the adoption by the 20th United Nations Educational Scientific and Cultural Organization (UNESCO) General Assembly in November 1978 of the “International Charter of Physical Education and Sport”, in Japan debate on sports rights had already begun. The bases for this, in the sense of the freedom to play sports, are contained in the Constitution of Japan at Article 13¹⁵ (the right to pursue happiness), and at Article 25¹⁶ (minimum standards of wholesome and cultured living). (Furthermore, Article 1 of the Basic Education Act¹⁷ contains provisions relating to the cultivation of the peoples’ health both mentally and physically. The bases for such educational objectives, in the sense of the right to sports/physical education, are guaranteed in Article 26¹⁸ of the Constitution).

¹¹ CAS judgment, 26 May 2008, CAS 2008/A/1452, available *on line* at: <http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/1452.pdf>.

¹² The JPFA website in Japanese is available *on line* at: www.jpfa.or.jp/.

¹³ *Basic Act on Sports*, law no. 78 of 2011.

¹⁴ *Sports Promotion Act*, law no. 141 of 1961 and amendment law no. 97 of 1997.

¹⁵ *The Constitution of Japan*, Article 13 states, “All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs”.

¹⁶ *The Constitution of Japan*, Article 25 states:

“All people shall have the right to maintain the minimum standards of wholesome and cultured living. In all spheres of life, the State shall use its endeavours for the promotion and extension of social welfare and security, and of public health”.

¹⁷ *Basic Education Act*, law no. 120 of 2006.

¹⁸ *The Constitution of Japan*, Article 26 states:

Article 2(1) of the BAS stipulates sports rights as: “all the people have the right to maintain a wholesome and happy lifestyle through participation in sports”.

As aforementioned in relation to the traditional model of sports in Japan, the enactment of the BAS and its basic philosophy therein (namely, its provisions on sports rights, fairness, impartiality, due process, the maintenance of governance in sports associations and the ensuring of thorough compliance) has signalled the realisation of “sports justice” and the move towards “*a transformation to the rule of law from the rule of people*” in sport. The BAS is a very significant law, which it can be said has finally led to the era where “sports justice” is enshrined at the national legislative level in Japan.

2. *The relationship between “ordinary justice” and “sports justice”*

For all types of sports associations, the right to enact certain rules and regulations is derived based on the freedom of assembly and association provisions contained in Article 21 of the Constitution of Japan. Furthermore based on this article the freedom, to a certain extent, to enact disciplinary rules, including penalties, is guaranteed.

In accordance with this, in fact, there are many cases where Japan’s sports organisations stipulate their own internal regulations and have facilitated dispute resolution bodies within their structures to handle violations of these regulations. In this sense, it can be said to a certain extent that Japan’s sports organisations are playing a role in the realisation of “sports justice”.

However, even within this special society of sports in Japan, the Constitution is the highest system of national law; therefore, the general civil legal order is not without effect. Accordingly, in relation to conduct that excessively limits human rights or that goes beyond the guaranteed autonomy of sports associations, it becomes necessary to exercise regulations by national law.

In Japan, it is an issue whether internal disputes within such partial societies (sports associations) can be accepted in the legal systems under the Constitution. Therefore, when courts need to determine whether they have jurisdiction to hear such disputes, the general interpretation is that they should positively take judicial review on the scope of the relevant association’s internal regulations and conduct. In fact, this type of interpretation has even appeared in court judgments.¹⁹

Accordingly, to a certain extent under Japan’s national legal system “sports justice” and “ordinary justice” are recognised as being different. Nevertheless, this does not mean that sports organisations are given complete discretion; in fact,

“All people shall have the right to receive an equal education correspondent to their ability, as provided by law.

All people shall be obligated to have all boys and girls under their protection receive ordinary education as provided for by law. Such compulsory education shall be free”.

¹⁹ Tokyo District Court judgment, 2 Feb. 1988, Decision Times (=Hanrei Taimuzu) no. 663, 230.

in the sense that violations of fundamental legal principles (including, fundamental human rights guaranteed under the Constitution) are not tolerated, it can be said that “sports justice” and “ordinary justice” are commonly related.

As stated above, the BAS, which came into force 2011, stipulated provisions concerning sports rights, fairness, impartiality, due process, the maintenance of governance in sports associations and the ensuring of thorough compliance therein. Due to this, “sports justice” in Japan must be constituted of these principles and be interpreted as such.

3. *Laws related to “sports justice” in Japan*

3.1 *The content of the BAS*

As aforementioned the enactment of the BAS in 2011 was significant for the embodiment of “sports justice” in Japan.

Article 1 stipulates the legal purpose of the Act, with Article 2 covering the basic principles. Articles 3-8 oblige the State and regional/prefectural public bodies to further these principles, as well as providing similar requirements in relation to the initiatives of sports associations.

Articles 9 and 10 also lay down that the State and regional/prefectural public bodies should implement initiatives for the promotion of sport based on the principles in Article 2.

In relation to formulating basic measures for sports, the Act stipulates the following provisions for the State and regional/prefectural public bodies:

- Basic Conditions for Equipment and Facilities (Articles 11-20);
- Promotion of Regional Sports (Articles 21-24); and
- Promotion of Competitive Sports (Articles 25-29).

Furthermore, Articles 30-32 oblige the State and regional/prefectural public bodies to establish systems in relation to the promotion of sports (including the duty on the State to set up a Sports Promotion Council). The supplementary costs for the parties to achieve these aims are regulated by Articles 33-35.

There are several regulations worthy of specific note in the BAS when considering the aforementioned opinions on sports rights. Within the basic principles, Article 2(5) (The Promotion of Sports for Disabled People) provides that no participants in sports should be subjected to *unjust discriminatory treatment*. Article 2(8) lays down the provision that all sports activities should be *fairly and appropriately administered*.

In relation to the obligations of the sports associations, Article 2(2) stipulates that the main purpose of the work of these associations is for the promotion of sports. In light of this there are two regulations below which are particularly pertinent.

- Article 5(2):
“Sports associations shall, for the purpose of appropriately carrying out work

to promote sports, endeavour to ensure transparency in such work as well as establishing standards in relation to the said work activities which the sports associations themselves must strictly observe”.

– Article 5(3):

“Sports associations shall endeavour to achieve swift and appropriate resolution to all disputes involving sports”.

Article 5(2) has been dubbed the “Sports Association Governance” article. In Japan, MEXT declared on 26 August 2010 in its report (entitled “The Strategy for Sports Nation: Sport Community – Nippon”)²⁰ at Article 4 (entitled “Improving the Transparency, Fairness and Impartiality in Sports”) that it was necessary to strengthen the governance in sports associations as well as to create greater transparency in their management and administration. These provisions are now recognised in Article 5(2) of the BAS.

Article 5(3) of the BAS places a duty on sports associations to strive for swift and appropriate resolution of disputes involving sports. As shall be outlined in the “Dispute Settlements” section below, when sports disputes occurred in Japan originally there were very few dispute settlement bodies within the sports associations to deal with these. In fact, even where such bodies existed, these were in no way impartial as the adjudicators were often unilaterally selected by the sports associations.

Furthermore, even despite the establishment of the impartial Japan Sports Arbitration Agency (“JSAA”)²¹ in 2003, there are still many sports which are reluctant to use this body. Thus there remain a high number of sports associations that lack awareness of the concept of “swift and appropriate” dispute resolution. In relation to this Article 4 of the above MEXT report stipulates:

“It is required of sports associations that they demand the swift and smooth resolution of sports disputes. In order to promote development in effective dispute resolution systems it is necessary to enhance the understanding of associations and athletes in dispute resolution procedures, and also to cultivate the skills of arbitrators and mediators. On top of this, we support a strengthening in the functions of the Japan Sports Arbitration Agency”.

Article 15 of the BAS stipulates the State’s duties in relation to swift and appropriate sports dispute resolution:

“The State shall take necessary measures for guaranteeing the neutrality and impartiality of arbitrations and mediations for sports disputes as well as any measures that contribute to the swift and appropriate resolution of such disputes; and shall guarantee the rights and interests of participants in sports, through taking measures such as supporting arbitrations and mediations in sports disputes, enhancing the quality of arbitrators and mediators, and increasing understanding of dispute resolution procedures for sports associations”.

²⁰ MEXT, ‘The Strategy for Sports Nation: Sport Community - Nippon’ (Tokyo: MEXT, 2010), the report is available *on line* in English at: www.mext.go.jp/english/sports_promotion/1303932.htm.

²¹ The JSAA website in Japanese is available *on line* at: www.jsaa.jp/.

3.2 Sports organisations in Japan and their regulations

The regulations of the sports organisations in Japan contain little or no resemblance to the “sports rights” stipulated above.

Broadly speaking, the sports world in Japan is supported by its school, corporate (corporate sports clubs) and professional sports systems. However, sports in Japan are typically governed by the following organisations (each organisation is within the jurisdiction of the MEXT):

- Japan Olympic Committee (“JOC”: referred to in Japan as the National Olympic Committee);²²
- Japan Sports Association (“JASA”: the umbrella organisation for amateur sports);²³
- The All Japan High School Athletic Federation (the umbrella organisation for high school sports);²⁴
- The Nippon Junior High School Physical Culture Association (the umbrella organisation for junior high school sports);²⁵
- Japan Professional Sports Association (“JPSA”: this association includes fifteen professional sports bodies);²⁶ and
- Japan Top League (“JTL”: this alliance represents the ballgame sports of the corporate sports system).²⁷

It should also be noted that the body covering sports for the disabled is the Japan Sports Association for the Disabled (“JSAD”),²⁸ which comes under the jurisdiction of Ministry of Health, Labour and Welfare (“MHLW”).²⁹ The Japan Paralympics Committee is also part of the JSAD.

For instance, Article 2 (entitled: “Principles of Sports Athletes”) of JASA’s sports charter never mentions “sports rights”. It just stipulates the principles that athletes should comply with JASA regulations and respect the spirit of fair play. There exists no mention of the issues of “sports justice” as set out in the basic principles of the BAS, such as impartiality, fairness, due process, the maintenance of governance in sports organisations and ensuring compliance therein.

As a consequence, in sport in Japan although Article 5 of the BAS led to the establishment of certain endeavour obligations for sports organisations, it can be said that there are many organisations which have not yet adopted these provisions, namely:

²² The JOC English website is available *on line* at: www.joc.or.jp/english/.

²³ The JASA English website is available *on line* at: www.japan-sports.or.jp/english/index.html.

²⁴ The All Japan High School Athletic Federation Japanese website is available *on line* at: www.zen-koutairen.com/.

²⁵ The Nippon Junior High School Physical Culture Association Japanese website is available *on line* at: www18.ocn.ne.jp/~njpa/.

²⁶ The JPSA Japanese website is available *on line* at: www.jpasa.jp/.

²⁷ The JTL Japanese website is available *on line* at: www.japantopleague.jp/.

²⁸ The JSAD Japanese website is available *on line* at: www.jsad.or.jp/.

²⁹ The MHLW English website is available *on line* at: www.mhlw.go.jp/english/.

Article 5(1) – promoting sports in consideration of “safeguarding the rights and benefits of sports participants” and “retaining and increasing mental & physical health and guaranteeing safety”;

Article 5(2) – for the purpose of carrying out appropriate work, endeavouring to ensure transparency in sports organisation operations as well as establishing compliance standards; and

Article 5(3) – endeavouring to achieve swift and appropriate resolution to all disputes involving sports.

In other words, even now Japanese sport is still based on old history, with the operators of sports organisations being mired in absolutist thought processes; there are many cases where “sports justice” is still completely at the discretion of the operators of sports organisations.

At present and as mentioned above, it is frequently the case that many sports organisations have established their own internal dispute resolution bodies which are administered by their own people. Therefore, in turn many sports organisations do not respect procedural justice.

However, on this point, a particular progressive set of regulations has been established in Japan’s most popular representative sport, baseball, by the Japan Student Baseball Association (“JSBA”: the association for high school and university baseball;³⁰ the JSBA is an independent sports organisation, not affiliated with the JOC or JASA). In April 2010 the JSBA undertook a major overhaul of its regulations (entitled: the Japan Student Baseball Charter (“JSBC”)). Basically, for baseball in the school sports system, this new JSBC is centred on the basic philosophy of student rights; “the right to be educated (as enshrined in Article 26 of the Constitution of Japan)”.

The new JSBC represents a fully fledged revision of the previous charter, where the purpose was to control student baseball through top-down regulation. The new JSBC drastically re-examined this thinking, by changing the focus of the student baseball framework to student “rights” through implementing bottom-up regulation.

Additionally the new JSBC is centred on the basic philosophy of student rights. The charter, even in relation to adverse dispositions such as disciplinary punishments, stipulates procedural and human rights guarantees, including the improvement of dispute resolution bodies and the impartiality of their procedures to provide due process.

In Japan, where a hierarchical sports culture still remains, the rights of athletes and due process being guaranteed by impartial dispute resolution bodies, has yet to be realised even in professional sports.

The new JSBC, as well as establishing an internal dispute resolution body for the student baseball associations, also provides specific recourse for appeals against this body to a fair and impartial external body, the JSAA. Thus, even within amateur sports, this emergence of the concept of athletes’ and players’ rights in

³⁰ The JSBA Japanese website is available *on line* at: www.student-baseball.or.jp.

regulatory form represents a major breakthrough.

4. The realisation of “sports justice” – dispute settlements

4.1 The realisation of “sports justice” by the judiciary

As aforementioned, in general due to the *partial society* nature of the sports world there is a tendency to resolve disputes internally within the relevant sports associations. It is rare that disputes are brought to external judicial bodies such as the courts.

On the other hand, this does not mean that the dispute resolution bodies within sports associations in Japan are well developed and reliable. Originally, these bodies themselves did not exist within such organisations, and even where they did these were often highly unfair structures with the adjudicator (the person with the role of judge) being elected by only one side in the dispute. For instance, as aforementioned there are major concerns over the impartiality of adjudicators in professional baseball and the J-League, as these parties are selected by those on the side of the clubs.

Although there have been no specific judicial precedents in relation to sport, it has been judged that where the authority to elect adjudicators is inequitably defined (e.g. where only one side in a dispute can elect the mediator), this will be void under Article 90 of the Civil Code as an act against public policy.³¹

Accordingly, in order to ensure equitable settlements to sports disputes, the existence of an external dispute resolution body is an absolute necessity. The primary body conceivable for this role is the courts. However, according to Article 3(1) of the Court Act,³² courts are only supposed to handle “legal disputes”. Here, “legal disputes” are interpreted by the Supreme Court as such:

*“When there is a dispute concerning the existence or not of specific legal rights and obligations, and, which can be permanently resolved through the application of law”.*³³

Correspondingly, the courts cannot be the forum by which to resolve disputes concerned with decisions in sports and related competition qualification/selection issues. In relation to this point, the Tokyo District Court has struck down a case from a party who demanded the revocation of a penalty imposed by a car racing association for breaching race track rules, because the case was not recognised as a “legal dispute”.³⁴

By the same token, various other cases have been decided by the courts

³¹ Please refer to: Osaka District Court judgment, 2 Feb. 1989, Decision Times (= *Hanrei Taimuzu*), vol. 717, 222; and Supreme Court of Japan judgment, 6 Sep. 1984 Civil Decisions Reporter (= *Minshu*), vol. 142, 293.

³² *Court Act*, law no. 59 of 1947 and amendment law act no. 36 of 2006.

³³ Supreme Court of Japan judgment, 8 Sep. 1989 Civil Decisions Reporter (= *Minshu*), vol. 43, no. 8, 889 (author’s translation from Japanese).

³⁴ Tokyo District Court judgment, 25 Aug. 1994, Decision Times (= *Hanrei Taimuzu*), vol. 885, 264.

on the basis that sports disputes are not “legal disputes”. For instance, there was a case where a dancer contested a three year membership suspension imposed by the Japan Ballroom Dance Federation: Eastern Japan Division.³⁵ In another case, a golfer challenged the decision of the Japan Senior Golfers’ Association to enrol members into a certain class of membership.³⁶

On the other hand, there have been some sports dispute cases that have been decided by the courts on the premise that these are “legal disputes”. For instance, there was a case where a boxer’s registration was revoked for his lack of amateur status and was subsequently banned from competing in various tournaments for one year.³⁷

In a further case there were continuous challenges by judokas of the All Japan University Judo Federation against alleged unjust qualification limits imposed by the All Japan Judo Federation. The judokas in question could not participate in the Japan selection trials for the 1984 World Judo Championships; thus, they were effectively shut out from the championships. However, the Tokyo District Court accepted the judokas’ damages claim against the federation for pain and suffering due to the imposition of the aforesaid qualification limits, and ruled in their favour.³⁸

4.2 *The realisation of “sports justice” in sports arbitration*

Courts are limited in their capacity to resolve “sports disputes”, to the extent that these are classified as “legal disputes”. Furthermore, in general, court settlements can take a long time and be expensive, so courts are restricted here in their suitability for dealing with sports disputes. Also, the settlement of sports grievances requires a high-level of specialist knowledge that ordinary courts do not possess. Thus, there has been much judicial reticence in this field.

In Japan all this led to the recognition of the need for a specialist ADR body to deal with sports disputes. Consequently the first such body in Japan, the JSAA, was established in 2003. The JSAA was founded by the JOC, JASA and JSAD.

A major reason behind the establishment of the JSAA was a January 1998 report entitled “The Anti-Doping System in Japan” by the “Committee on the Anti-Doping System” which was jointly formed by the JOC and JASA. The report identified that as swift judgments were demanded for doping issues ordinary courts were not a suitable forum for resolving such issues. Rather, it stressed the need for sports specific arbitration. This led to the JOC Sports Arbitration Research Group being set up in 1999.

It was during this process in the following year when the swimmer *Suzu Chiba* took the Japan Swimming Federation (“JSF”)³⁹ to the CAS concerning

³⁵ Tokyo District Court judgment, 4 Jun. 1993, Decision Reports (= *Hanrei Jiho*), vol. 1436, 65.

³⁶ Tokyo District Court judgment, 6 Sep. 1988, Decision Reports (= *Hanrei Jiho*), vol. 691, 236.

³⁷ Tokyo District Court judgment, 30 Jan. 2006; Decision Times (= *Hanrei Taimuzu*), vol. 1239, 267.

³⁸ Tokyo District Court judgment, 25 Feb. 1988, Decision Times (= *Hanrei Taimuzu*), vol. 663, 243.

³⁹ The JSF website in Japanese is available *on line* at: www.swim.or.jp/.

selection for the 2000 Sydney Olympics. Despite this being a purely domestic dispute, the lack of a Japanese sports arbitration body forced *Chiba* to apply to the CAS in Switzerland. As a consequence the athlete had to bear massive costs for the arbitration, including various translation expenses. This strengthened calls in Japan for the establishment of a speedy and efficient domestic sports arbitration body which in turn enhanced support for the JSAA.

In terms of *Suzu Chiba's* application to the CAS, the JSF accepted the CAS as the forum to resolve the dispute; although in the end the athlete lost her case. However, in its judgment the CAS identified certain obscurities in the JSF's basic Olympic selection criteria and ordered the federation to pay part of the arbitration costs accordingly.⁴⁰

There are four types of disputes handled by the JSAA.

(1) *Disputes adjudicated on by an arbitration panel using sports arbitration rules*

These types of disputes involve the sports competitor filing his grievance against the relevant sports association to the JSAA in relation to a decision by the association (excluding decisions made by referees during competition/matches) concerning both parties (the competitor's application fee is 50,000 yen).

Typical cases include disputes where athletes demand the revocation of unreasonable sanctions imposed by sports associations (including suspensions from competitions) or disputes relating to allegations of procedural impropriety in tournament selection decisions administered by sports associations.

As far as these types of disputes are concerned, the JSAA does not cover all sports associations. Article 8(1) of the JSAA Rules states the JSAA is restricted to only adjudicating on sports associations that fall under the auspices of the JOC, JASA and JSAD; or those covered by regional, prefectural and city athletic associations.

This particular type of arbitration process based on sports arbitration rules is central to the JSAA's role as the integral purveyor of ADR to the Japanese sports world.

As this process concerns disputes over the decisions of sports associations, the issue arises in all cases as to whether these decisions should be revoked by the JSAA. This point was addressed in the JSAA's first arbitral award, the so-called *Weightlifting Incident*, where the panel stated: "*We recognise that the sports associations have a certain amount of autonomy; to that extent the Japan Sports Arbitration Agency panel respects the decisions of domestic sports federations*".⁴¹

⁴⁰ CAS judgment, 24 Oct. 2000, CAS 2000/A/278, available *on line* at: <http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/278.pdf>.

⁴¹ JSAA arbitration judgment, 4 Mar. 2003, case no. JSAA-AP-2003-001 (author's translation from Japanese).

The JSAA panel also stipulated the cases below, in which it would revoke sports association decisions, when the:

- rules themselves which the sports association’s decision conform to infringe the law or are highly unreasonable;
- sports association’s decision infringes the rules of that association;
- sports association’s decision is highly unreasonable even though it does not constitute an infringement of the association’s own rules; and
- process that leads to the decision is defective.

(2) *Arbitration through sports arbitration rules based on a specific arbitration agreement*

This arbitration process was introduced from 2004 for all sports disputes excluding those in (1). This arbitration is established based on the Commercial Arbitration Rules of the Japan Commercial Arbitration Association.⁴² The kinds of disputes envisaged for this process include: sports business disputes (covering conflicts between sports associations and sponsors and over tournament broadcasting rights); and disputes between famous athletes, sponsors and sports associations. In actuality, however, this arbitration process is used very little because in comparison with (1) the costs are expensive and the recognition of this process itself is not so high.

(3) *Mediation through sports mediation rules based on a specific mediation agreement*

The arbitration process (2) is hardly utilised. On the other hand, mediation was introduced in 2006 following increased consultations in relation to disputes that were not suitable for the JSAA’s arbitration processes. The principles and regulations utilised in this mediation process are not disclosed or publicised. Also mediation, as an alternative to (2) is gradually being used to a greater extent.

(4) *Arbitration through sports arbitration rules for doping disputes*

At the 33rd UNESCO General Conference meeting in Paris in October 2005, the “International Convention Against Doping in Sport” was adopted unanimously. Japan became a signatory to the convention on 27 December 2006 and implemented it on 2 February 2007.

The Japan Anti-Doping Agency (“JADA”),⁴³ a signatory to the UNESCO convention, on 1 July 2007 implemented the “Japan Anti-Doping Code (Version 1.0)” and on the same day the JSAA “Sports Arbitration Rules for Doping Disputes” came into force. The first arbitration case in 2008 concerned an administrative grievance against JADA which the complainant athlete lost.⁴⁴ These rules apply (Article 2) to appeals against decisions made by the following bodies under the Japan Anti-Doping Code:

⁴² The Japan Commercial Arbitration Association Commercial Arbitration Rules are available *on line* in English at: www.jcaa.or.jp/e/arbitration/docs/e_shouji.pdf.

⁴³ The JADA website is available *on line* in Japanese at: www.playtruejapan.org/.

⁴⁴ JSAA arbitration judgment, 10 Jun. 2009, case no. JSAA-DP-2008-001.

- (i) The Japan Anti-Doping Agency;
- (ii) The Japan Anti-Doping Disciplinary Panel;
- (iii) The Japanese Olympic Committee;
- (iv) The Japan Sports Association;
- (v) The Japan Sports Association for the Disabled;
- (vi) The Prefectural Amateur Sports Associations; and
- (vii) The National Sports Federations.⁴⁵

Please note that in relation to the above ADR processes, emergency arbitration proceedings are provided in the cases of (1), (2) and (4). In principle these proceedings are handled swiftly by a single arbitrator.⁴⁶

Arbitration is an ADR process which requires all the connected parties to agree to a solution through the proceedings. It is also possible after a dispute arises for the athlete and sports association to agree to refer the case to the JSAA. There are examples of such cases but in practice securing such agreement is very difficult. Furthermore it takes a lot of courage for athletes to bring dispute proceedings against sports association decisions. Often athletes can be reluctant to apply for arbitration itself due to the risk of it being rejected out of hand by the sports association.⁴⁷

Therefore, in order to try and compel sports associations to become party to JSAA proceedings when applied for by athletes, the JSAA has established an automatic arbitration acceptance provision in its "Sports Arbitration Rules".⁴⁸ The JSAA has carried out activities to ask sports associations to publicise this provision to athletes but these have not yielded desirable results. There are still many sports associations that resist having their decisions reviewed by external dispute resolution bodies, and which insist that disputes can only be handled through their internal grievance mechanisms.⁴⁹

According to data collated by the JSAA (up until 1 April 2013), out of the seventy five sports associations and affiliated associations in the JOC and JASA, only forty four, including both the JOC and JASA themselves (58.7% in total), have adopted the provision. Also out of the 105 sports associations and affiliated associations within the JSAD and the Prefectural Amateur Sports Associations, only eighteen have adopted the provision (17.1% in total).⁵⁰

Even when an athlete has the courage to apply for arbitration there is no end to the number of sports associations that will reject initiating such proceedings

⁴⁵ JSAA, "Sports Arbitration Rules for Doping Disputes" (Tokyo: JSAA, 2007), these rules are available *on line* in English at: www.jsaa.jp/sportsrule/index.html#02.

⁴⁶ *Ibid.*, see Article 55(4).

⁴⁷ Dougauchi & Hayakawa (eds.), *An Introduction to Sports Law*, 92.

⁴⁸ M. Dougauchi, "A Consideration and Summary of the Main Points concerning the First Three Years of the Japan Sports Arbitration Agency", in *Towards Further Development in Sports Arbitration* (Tokyo: Sophia Law School, March 2006), 7.

⁴⁹ *Ibid.*

⁵⁰ These data are available on the JSAA website in Japanese: www.jsaa.jp/doc/arbitrationclause.html (visited on 25 September 2013).

in the first place. In fact there are an abundance of examples where sports associations have refused to accept arbitration. These include the 2003 *Boxing Incident* (where a boxer applied for the revocation of de-registration sanctions (including, a one year prohibition on re-registration) imposed by the Japan Amateur Boxing Federation);⁵¹ and the 2008 *Athlete Registration Incident* (where athletes demanded registration from bodies such as the Japan Industrial Track & Field Association).⁵²

Another controversial example of this that whipped up a storm in the mass media was the 2007 *Kazuki Ganaha Incident*, where the J-League rejected *Ganaha's* (a football player) application for JSAA arbitration. In this dispute the J-League club *Kawasaki Frontale* player *Ganaha* demanded the revocation of a league imposed six match suspension for an alleged breach of doping rules. Initially *Ganaha's* desire was to have the arbitration held at the JSAA but the J-League rejected this and announced that the case must be heard at the CAS. Therefore the player had no other option but to file for CAS arbitration. In the end *Ganaha's* case was accepted by the CAS, which ruled that the J-League imposed suspension should be revoked.

Nevertheless, for the CAS arbitration *Ganaha* bore a total of 34 million yen (around 255,000 euros) in costs, which included expenses for translation, interpretation and expert witness statements. Thus, had the J-League accepted arbitration at the JSAA such massive costs would not have arose. Moreover, the J-League drew stinging criticism from the mass media for its stubborn insistence on the CAS being the forum for the arbitration. It can be said that following *Suzu Chiba's* CAS arbitration in 2000, the problem has surfaced that players have to bear massive costs for such proceedings.

4.3 *Sports organisations' internal dispute resolution bodies and "sports justice" – amateur sports*

As aforementioned, there are still many sports organisations in Japan that find it undesirable to entrust dispute resolution to an impartial and fair third party body. In fact there has been a strong tendency for such organisations to try to resolve disputes through their own internally established dispute resolution bodies.

Under the 2011 enacted BAS, Article 5(3) on dispute resolution stipulates: "*Sports associations shall endeavour to achieve swift and appropriate resolution to all disputes involving sports*".

The "sports associations" therein are defined under Article 2(2): "*Sports association means an association whose main purpose of work is for the promotion of sports*".

Although it is expected that almost all amateur sports associations have undertaken the endeavour obligations of BAS Article 5 (listed below), it is still

⁵¹ Tokyo District Court judgment, 30 Jan. 2006; Decision Times (= *Hanrei Taimuzu*), vol. 1239, 267.

⁵² A report of this incident is available *on line* in Japanese at: http://home.m07.itscom.net/jita/topics/pdf/20080125_a.pdf.

thought that the number of associations implementing these is very few (the low adoption rate of the JSAA's automatic arbitration acceptance clause illustrates this).

Endeavour obligations:

Article 5(1) – promoting sports in consideration of “safeguarding the rights and benefits of sports participants” and “retaining and increasing mental & physical health and guaranteeing safety”;

Article 5(2) – for the purpose of carrying out appropriate work, endeavouring to ensure transparency in sports organisation operations as well as establishing compliance standards; and

Article 5(3) – endeavouring to achieve swift and appropriate resolution to all disputes involving sports.

A great number of these sports associations select their own people including officials, to be members (arbitrators) of the dispute resolution chamber, thus, in almost all cases the fairness and impartiality of the proceedings is not being guaranteed for the parties in dispute.⁵³ Moreover, the appeals bodies for decisions by these types of disputes resolution bodies are on the whole staffed by the associations' own members.⁵⁴

4.4 *Sports organisations' internal dispute resolution bodies and “sports justice” – professional sports*

The BAS also applies to professional sports organisations. For example, the governing bodies of Japan's two representative professional sports leagues, the NPB and the J-League have also undertaken the endeavour obligations of the BAS (listed below).

Endeavour obligations:

Article 5(1) – promoting sports in consideration of “safeguarding the rights and benefits of sports participants” and “retaining and increasing mental & physical health and guaranteeing safety”;

Article 5(2) – for the purpose of carrying out appropriate work, endeavouring to ensure transparency in sports organisation operations as well as establishing compliance standards; and

Article 5(3) – endeavouring to achieve swift and appropriate resolution to all disputes involving sports.

In Japan, there are many professional sports organisations that suffer from a lack of transparency and whose internal dispute resolution bodies cannot be

⁵³ For example, according to the participant regulations of the Japan Weightlifting Association (“JWA”), when a weightlifter violates these regulations the weightlifter shall be sanctioned, based on the verdict of the “qualifications inspections committee”, by the board of directors (Article 12). The “qualifications inspections committee” is made up the JWA's general secretary as committee chief and 5 other members from the board of directors and academic experts (Article 3 of the “JWA Regulations of the Qualifications Inspections Committee”).

⁵⁴ Similarly, according to the participant regulations of the JWA, the “appeals committee” handles appeals (Article 14(2)), and the “appeals committee” is made up of the JWA's president and a party nominated by the president (Article 14(3)).

said to be fair and just. Thus, the undertaking of the aforesaid endeavour obligations by professional sports organisations is of massive significance to the sports world in Japan.

In the NPB, the arbitrators (“NPB Investigation Committee”) for salary arbitration hearings between the clubs and players are selected by the commissioner (Articles 25(3), 26(5) and 95 of the Nippon Professional Baseball Agreement (“NPB Agreement”);⁵⁵ and Article 5(2) of the NPB Investigation Committee Regulations⁵⁶). Thus, as these arbitrators are chosen unilaterally by the clubs, that are a party to the disputes, this illustrates the big problem concerning the impartiality with this body. (The NPB commissioner is appointed by the clubs, with the players not able to participate in the appointment process; Article 5 of the NPB Agreement.)

Similarly, the NPB commissioner also adjudicates on internal NPB disputes (including applying sanctions) after such disputes are investigated by the NPB Investigation Committee (Articles 8(2), 9(2) and 188 of the NPB Agreement). In relation to doping disputes, these are adjudicated by the NPB Anti-Doping Investigation and Arbitration Committee, whose members are also selected by the commissioner. Moreover, complaints filed about this committee’s decisions are dealt with by the NPB Anti Doping Ad-Hoc Committee, which again consists of members selected by the commissioner (Articles 3(2) & (3) of the NPB Anti-Doping Regulations). This NPB dispute resolution system is highly inequitable. It will raise a question for the future as to whether such a dispute resolution system can be called “appropriate” in terms of Article 5 of the BAS.

In the J-League, as with the situation in professional baseball, problems with the inadequate dispute resolution mechanisms have arisen. Basically, the J-League’s chairman (who is appointed by the clubs, with the players not able to participate in the appointment process; Articles 13 and 14(1) of the J-League Articles of Association) adjudicates on disputes involving contracts, transfers and sporting sanctions after such disputes are investigated by the chairman appointed arbitration body named the J-League’s Arbitration Committee (Articles 138, 139, 144 and 145 of the J-League Regulations⁵⁷).

To put it plainly, because the players cannot be involved in appointing the Arbitration Committee members, there are grave doubts over this body’s ability to guarantee impartiality in the J-League’s dispute resolution process. The chairman’s decision making powers are enshrined of Article 165 of the J-League Regulations, which reads:

“In the J-League the decisions of the Chairman are final and binding in full on all related parties, individuals and organisations that belong to the J-League. Accordingly, no objections or grievances whatsoever to the decisions of the

⁵⁵ The NPB Agreement in Japanese is available *on line* at: http://jpbpa.net/up_pdf/1326333873-651704.pdf.

⁵⁶ The NPB Investigation Committee Regulations in Japanese is available *on line* at: http://jpbpa.net/up_pdf/1284364519-389779.pdf.

⁵⁷ The J-League Regulations in Japanese are available *on line* at: www.j-league.or.jp/aboutj/document/2013kiyakukitei/02.pdf.

Chairman can be brought by third parties to a court of law or other such related institutions”.

In relation to player contractual disputes, in the FIFA Circular no.1129, from January 2008 FIFA has obliged all its constituent associations to establish fair and impartial national dispute resolution chambers (“NDRC”).⁵⁸ The members of these chambers should be composed of an equal number of player and club representatives to guarantee fair proceedings. In terms of handling player contractual disputes the J-League’s Arbitration Committee violates the provisions of this FIFA Circular. Accordingly, it will raise a question for the future as to whether such a dispute resolution system can be called “appropriate” in terms of Article 5 of the BAS.

5. Conclusion

As aforementioned, in Japan sport has historically been carried out based on strict hierarchical relationships. Therefore, in almost all cases “sports justice” is completely at the discretion of the absolutist operators of the sports organisations. However, due to factors in recent years such as players’ heightened awareness of their rights and the increased calls for good governance because of scandals in sports organisations, the principles of “sports justice” have been incorporated in the BAS. These include provisions on sports rights for athletes, fairness, impartiality, due process, maintaining the governance of sports associations and ensuring thorough compliance therein.

It is merely two years since the BAS was enacted, and there is still a strong tendency amongst all the sports organisations to try to realise “sports justice” based on their own autonomous wide-ranging discretion.

However, due to the exposure of high profile scandals in sports organisations, including the “corporal punishment scandals” at the start of 2013, these organisations are now under very strict scrutiny, particularly in terms of implementing good governance. In the future, as more emphasis is placed on the realisation of “sports justice” based on the principles of the BAS, although there will be respect for the autonomy of sports associations, the governance of these bodies will continue to be viewed severely. At the same time, there will be a focus on whether, based on such good governance, the sports organisations can provide stable management and improve the level of sporting performance. In order to bring about better results in this area, the question that must be asked is how does all this become common sense for the sports world in Japan?

⁵⁸ FIFA Circular No. 1129, ‘National Dispute Resolution Chamber (NDRC) Standard Regulations, Standard Electoral Code and Standard Cooperative Agreement’ (Zurich: FIFA, 28 Dec. 2007), this is available *on line* at: www.fifa.com/mm/document/affederation/administration/circular_1129_en_33849.pdf.

SPORT JUSTICE IN KENYA

by *Felix Majani**

SUMMARY: 1. Principles of Kenyan sports justice – 2. The relationship between ordinary justice and sports justice – 3. The Kenyan court of arbitration for sport – 4. The relevant football regulations and FKF judicial bodies – 5. Other sports judicial bodies – 6. Clubs’ and players’ rights and obligations – 7. Dispute settlements – 8. ADR and Interim Relief – Conclusion

Abstract:

An overview into the young and evolving judicial and dispute resolution mechanisms in Kenyan sports. This article lays forth the interplay between the laws enacted by the Kenyan Parliament and those enacted by the various sports federations in resolving sports disputes in Kenya. It also delves into the structures of the various judicial bodies run at federative level, comparing their compatibility with those required and/or laid forth at international level.

1. Principles of Kenyan sports justice

The duty to ensure that justice is accessed in Kenya is vested on the State. Pursuant to Article 48 of the Constitution “[t]he State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice”.

However, the power to ensure that such justice is administered in all spheres, including Kenyan sports and is vested on the Kenyan people themselves. Pursuant to article 1.1 of the Kenyan Constitution, “[a]ll sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.”

The Constitution goes on to delegate this power from the people to the judiciary and independent tribunals, as stipulated in article 1.3 of the Constitution.¹

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¹ Article 1.3 of the Constitution: “Sovereign power under this Constitution is delegated to the

The word “people” in constitutional terms refers to individuals, *i.e* a person acting in their own interest as well as:

- a) a person acting on behalf of another person who cannot act in their own name;
- b) a person acting as a member of, or in the interest of, a group or class of persons;
- c) a person acting in the public interest; or
- d) an association acting in the interest of one or more of its members.

And, in order to ensure the supremacy of the Constitution and safeguard against any unforeseen injustices at sports level, article 2.4 of the Constitution provides that *[a]ny law that (...) is inconsistent with this Constitution is void to the extent of the inconsistency, and any actor omission in contravention of this Constitution is invalid.*” Article 159.1 of the Constitution requires the judiciary and independent tribunals to exercise their judicial authority in compliance with the Constitution.

Article 159.2 of the Constitution further requires all courts and independent tribunals to apply the following principles in administering justice:

- a) That justice shall be done to all, irrespective of status;
- b) That justice shall not be delayed;
- c) That alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted;
- d) That justice shall be administered without undue regard to procedural technicalities; and
- e) That traditional dispute resolution mechanisms shall not be used in a way that:
 - contravenes the Bill of Rights;
 - is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or
 - is inconsistent with this Constitution or any written law.

The Bill of Rights applies to all law and binds all State organs and all persons. In applying a provision of the Bill of Rights, Kenyan courts and tribunals are required to:

- a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and
- b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

In interpreting the Bill of Rights, article 20.4 of the Constitution requires the court or tribunal or other authority to promote the values that underlie an open and democratic society based on human dignity, equality, equity and freedom and the spirit, purport and objects of the Bill of Rights.

following State organs, which shall perform their functions in accordance with this Constitution (...) the Judiciary and independent tribunals”.

The procedural guarantees in Kenyan sports justice

Article 22.3 of the Constitution requires court proceedings to satisfy the following criteria, that:

- a) formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation;
- b) no fee may be charged for commencing the proceedings;
- c) the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities; and
- d) an organisation or individual with particular expertise may, with the leave of the court, appear as a friend of the court.

In a nutshell, we can therefore say that the principles governing justice in Kenyan sports are that power belongs to the people, and that such power is vested and exercised by the courts and independent tribunals. The people have the right to seek justice not only within the ordinary courts but also through alternative forms of dispute resolution. In administering this justice, due regard shall be accorded to the need for fast resolution of disputes, the supremacy of the Constitution and the Bill of Rights.

2. The relationship between ordinary justice and sports justice

Sporting disputes in Kenya can either be submitted before the ordinary courts of law or to the relevant established sports judicial body, depending on their nature and classification. In general, the sports tribunals have jurisdiction to resolve technical, disciplinary, and to a large extent, employment disputes. The ordinary courts however have jurisdiction to entertain any constitutional irregularities performed by the said tribunals in resolving their disputes, and, to a substantial extent, electoral disputes concerning sports associations although most sports associations such as football² and basketball³ prohibit their members from seeking redress before the ordinary courts. However, this restriction is generally limited, as evidenced in football, which allows its members to seek redress before the

² Article 66.1 of the Football Kenya Federation Statutes: “FK, its Members, Players, Officials and match and player’s agents will not take any dispute to Ordinary Courts unless specifically provided for in these Statutes and FIFA regulations. Any disagreement shall be submitted to the jurisdiction of FIFA, CAF or FK.”

³ Article 7.1 (f) of the Kenya Basketball Federation Constitution: “The Members of the Federation shall have the following obligations (...)to adopt a statutory clause specifying that any dispute requiring arbitration involving itself or one of its members and relating to the Statutes, regulations, directives and decisions of FIBA and the Federation or the League(s) shall come solely under the jurisdiction of the appropriate Arbitration Tribunal of FIBA and the Federation, the KNSC, or the NOCK Sports and dispute arbitration committee and anti-doping agency and that any recourse to Ordinary Courts is prohibited.”

ordinary courts.⁴

The ordinary Kenyan courts enjoy a somewhat cordial and harmonious relationship with the sports tribunals of the various sports associations in Kenya.

Overall, it is the principle of the ordinary Kenyan courts “*not to interfere with the internal matters of registered societies*”.⁵ There are however exceptions to this principle, especially where the need to safeguard against any unconstitutional act is on the verge of being infringed. Ordinary courts have also intervened in the internal matters of sports associations in Kenya by issuing injunctions where an association attempts to amend its statutes and to conduct elections in contravention with the procedural regularities set out in the statutes of the said association.

The supremacy of the national courts over sports tribunals in electoral issues was emphasised in the case of *Salim Humra, Ismael Mohamed, Mohamed Omar vs Maina Kariuki, Hussein Swaleh and Mohamed Hatimy & KFF*⁶ where it was held that the national courts have jurisdiction, in accordance with section 63 c of the Civil Procedure Act chapter 21 of the laws of Kenya, where the association’s officials “*continue to defy court orders by proceeding to organize elections*”. The High Court held that it had jurisdiction to issue an injunction restraining Football Kenya Limited (then known as the Kenya Football Federation) from “*amending the FKF constitution and from fixing election dates*”.

Corroborating the supremacy of the ordinary courts over sports association tribunals is article 22.1 of the Constitution, under which “[e]very person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened”.

Of particular importance to the ordinary courts is the need to ensure that the sports tribunals apply the principles of natural justice in resolving disputes among its members. Any party or person whose right to be heard is violated by any independent sports tribunal in Kenya may seek redress before the Kenyan High Court. This is a constitutional right guaranteed under article 23.1 of the Constitution,

⁴ Article 22 of the Kenya Premier League Policy on the Status and Transfer of Players “*Without prejudice to the right of any player or club to seek redress before a civil court for employment related disputes, the KPL and KFF are competent for:*

(a) *Disputes between clubs and players in Kenya in relation to the maintenance of contractual stability (Art. 13- 18) if there has been a transfer and/or ITC request and if there is a claim from an interested party in relation to such requests regarding sporting sanctions or regarding compensation for breach of contract;*

(b) *Employment related disputes between a club and a player in Kenya;*

(c) *Employment related disputes between a club and a coach in Kenya;*

(d) *Disputes related to Training Compensation (Art. 20) and the Solidarity Mechanism (Art. 21) between clubs in Kenya”.*

⁵ See page 2 of the High Court of Kenya’s ruling in *Joe Kadenge & others v Maina Kariuki, Hussein Swaleh, Mohammed Hatimy & Kenya Football Federation*, Civil Sui No. 322 of 2003. www.kenyalaw.org/CaseSearch/case_search_one.php?pageNum_result=5274&totalRows_result=71857&casCourt=High+Court.

⁶ Civil Case No. 58 of 2004 www.kenyalaw.org/CaseSearch/case_search_one.php?pageNum_result=5274&totalRows_result=71857&casCourt=High+Court.

which grants the High Court jurisdiction “to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights”.

3. *The Kenyan court of arbitration for sport*

As earlier highlighted, the Constitution of Kenya recognises and provides for alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.

However, there is no central dispute resolution body charged with the responsibility of adjudicating all sports related matters at private level.

It is implied that each sport has its own judicial internal dispute resolution bodies. Not all the sports however have such organs. Sports such as boxing and tennis do not have internal judicial bodies.

The situation is however different with the more popular sports like football and basketball which are becoming more and more professional. This has not only been caused as a result of the financial revenues and sponsorships but also a rise in the level of the player’s knowledge in as far as their legal rights are concerned.

3.1 *The proposed national sports disputes tribunal and its composition*

The recently gazetted Sports Act 2013 however purports to revamp Kenya’s dispute resolution system at private level by providing for the establishment of a centralised sports disputes tribunal to be called the National Sports Disputes Tribunal in Article 50.1 thereof.

Pursuant to Article 56.2 of the Sports Act 2013, once established, the National Sports Disputes Tribunal shall consist of the following members appointed by Kenya’s Judicial Service Commission in consultation with the national sports organizations:

- a) a chairperson who shall be a person who is qualified to be appointed as a Judge of the High Court;
- b) at least two members who shall:
 - i. be advocates of the High Court of Kenya with at least seven years’ experience;
 - ii. have experience in legal matters relating to sports or have been involved in sport in any capacity; and
 - iii. at least two and not more than six other persons who have experience in sport, in any capacity, of at least ten years.

In consultation with the national sports organizations, the Judicial Service Commission shall then appoint a deputy chairperson from the members of the National Sports Disputes Tribunal appointed under subsection (b) above.

The chairperson and members of the National Sports Disputes Tribunal shall hold office for a term of five years and may be reappointed for one further term of five years. Once appointed, they shall serve on a part-time basis.

Although Article 60 of the Sports Act states that “[t]he Tribunal may, in determining disputes apply alternative dispute resolution methods for sports disputes and provide expertise and assistance regarding alternative dispute resolution to the parties to a dispute,” it is worth noting that the proposed Tribunal will share similar characteristics with that of an ordinary court rather than an independent arbitral body. Proving this is the fact that the judges are appointed by the Judicial Service Commission, with the associations or athletes having no say on which advocate they would prefer to sit on the bench. This is in sharp contrast with arbitration, where the parties are free to choose arbitrators of their choice and may also challenge the appointment of any arbitrator or member of the panel. It is also not known whether the parties appearing before the National Sports Disputes Tribunal will enjoy the benefits of privacy and confidentiality of proceedings.

3.2 *Jurisdiction of the national sports disputes tribunal*

Pursuant to Article 59 of the Sports Act, the national sports disputes tribunal is empowered to determine:

- a) appeals against decisions made by national sports organizations or umbrella national sports organizations, whose rules specifically allow for appeals to be made to the national sports disputes tribunal in relation to that issue including:
 - appeals against disciplinary decisions;
 - appeals against not being selected for a Kenyan team or squad;
- b) other sports-related disputes that all parties to the dispute agree to refer to the national sports disputes tribunal and that the national sports disputes tribunal agrees to hear; and
- c) appeals from decisions of the Registrar under the Sports Act.

3.3 *Rules Governing the national sports disputes tribunal*

The proposed national sports disputes tribunal is yet to have a code governing its rules and procedures. However, under Article 62 of the Sports Act, the Chief Justice of Kenya may in consultation with the chairperson of the national sports disputes tribunal, and by notice in the Gazette, make rules governing the practice and procedure of the national sports disputes tribunal having regard to the objectives of the Sports Act.

3.4 *Potential government interference through the national sports disputes tribunal*

Whereas harmonious government support and assistance in the management and administration of sports is welcome and recognised under the Olympic Charter,⁷

⁷ Article 27.5 of the Olympic Charter “In order to fulfil their mission, the NOCs may cooperate with governmental bodies, with which they shall achieve harmonious relations”.

such support must not go beyond usurping the autonomy of the National Olympic Committee of Kenya (NOCK). Unfortunately, the Sports Act contains no provisions highlighting the relationship between the Parliament, the NOCK and the sports associations.

It is worth noting that the proposed National Sports Disputes Tribunal will be more of a government formed and operated tribunal rather than a tribunal established and run by the sports federations and led by the NOCK. In particular, the funds and assets of the proposed Tribunal shall “*comprise such moneys as may be appropriated by the Kenyan Parliament for purposes of Sports Kenya*”, which is a body established under the Sports Act.⁸

Therefore, any members of the NOCK, and members of members of the NOCK who allow their internal decisions to be appealed to the proposed Tribunal risk being sanctioned by the IOC if it can be established that the decisions and operations of the proposed Tribunal interfere with the autonomy and independence of the NOCK and/or its members, in contravention with article 27.6 of the Olympic Charter, which states that “*The NOCs must preserve their autonomy and resist all pressures of any kind, including but not limited to political, legal, religious or economic pressures which may prevent them from complying with the Olympic Charter.*”

In addition, under article 27.9 of the Olympic Charter, “[t]he IOC Executive Board may take any appropriate decisions for the protection of the Olympic Movement in the country of an NOC, including suspension of or withdrawal of recognition from such NOC if the constitution, law or other regulations in force in the country concerned, or any act by any governmental or other body causes the activity of the NOC or the making or expression of its will to be hampered.”

Therefore, the extent to which this substantially financed and wholly established governmental body shall act as Kenya’s highest sports judicial body and administer sports justice without “rubbing the shoulders” of the Olympic Committee remains to be seen, although its jurisdiction is mainly limited to hearing appeals against decisions made by national sports associations if the rules of the said associations specifically allow for appeals to be made to the proposed Tribunal.

It can also be argued that as a law in force in Kenya, Article 59 (a) (i) of the Sports Act risks causing the “*activity of the NOC or the making or expression of its will to be hampered*” by allowing the National Sports Disputes Tribunal to entertain appeals filed by athletes who have been denied selection to be part of a

⁸ Pursuant to article 4 of the Sports Act, Sports Kenya is a body corporate charged with the duty to: (a) establish and manage sports training academies; (b) organize, administer and co-ordinate sports courses for technical and sports administration personnel; (c) promote research and development of talent in sports, in collaboration with institutions of higher learning, national sports organizations and other stakeholders; (d) collect, collate, store and disseminate tangible and intangible historical sports material to the public, sports organizations, researchers and institutions of learning; (e) receive and analyze data on training requirements from sports organizations; (f) link with other institutions and organizations for regular updates on the current sports trends; and (g) perform any other function that may directly or indirectly contribute to the attainment of the foregoing.

Kenyan team or squad for the Olympics.

3.5 *Agreements to arbitrate*

The Kenyan law of contract guarantees the freedom of contract, and Kenyan sportsmen have readily exercised such freedom by contractually agreeing to settle any potential disputes by way of arbitration.

Once seized with a matter which is the subject of an arbitration agreement, the ordinary Kenyan courts have proceeded to stay any such proceedings until the arbitration proceedings are closed.

Article 6.1 of the Arbitration Act states that “[a] court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration”.

Article 6.2 of the Arbitration Act adds that “[p]roceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined”.

Indeed, it is the trend of clubs, players, athletes and coaches to have clauses in their contracts automatically providing for dispute resolution in accordance with the terms of the regulations governing their respective sport. But the question however begs as to whether the dispute resolution bodies envisaged at federative level really are arbitration tribunals *stricto sensu*. This is because most of the composition of the judges of the said dispute resolution tribunals at federative level hardly complies with the arbitral requirements of permitting a party to appoint or challenge an arbitrator (or judge in this case), or the requirement of equal representation of parties. Neither do the regulations of these federations contain provisions granting the parties the freedom to agree on the procedure to be followed by the arbitral tribunal in the conduct of the proceedings as enshrined under article 20.1 of the Kenyan Arbitration Act.

3.6 *Employment related disputes*

In general, employment disputes in Kenya are settled in the ordinary courts. The regulations of most federations recognise the constitutional right of any party to seek redress before the civil courts, and have therefore formed tribunals at federative level which are competent to hear employment related disputes without prejudice to the parties’ rights to appear before the ordinary courts.

In June 2008, the Kenyan Parliament established the Industrial Court and entrusted it with exclusive powers to hear “*any matter which may arise at common law between an employer and employee in the course of employment, between an employee or employer’s organisation and a trade union or between a trade union, an employer’s organisation, a federation and a member thereof*”.

Notwithstanding the establishment of the Industrial Court, it is worth noting that a vast majority of Kenyan sportsmen do not seem keen on filing their employment grievances before this court for settlement. This is attributed to several factors, the greatest being lack of sufficient funds to sustain their cases.

As earlier highlighted, the ordinary courts are also ready to stay any proceedings filed before them in favour of arbitration agreements entered into between the parties. Kenya is a fairly small country in terms of international sports and has no jurisprudence of any employment related dispute having so far been handled by an international sports tribunal. It however appears as though employment disputes of an international nature, for example in Kenyan football may be resolved before the FIFA dispute resolution chamber⁹ given the absence of an independent and impartial national dispute resolution chamber constituted in accordance with FIFA Circular 1010 of 20 December 2005, and possibly appealed to the court of Arbitration for Sport (CAS).¹⁰

4. *The relevant football regulations and the FKF judicial bodies*

4.1 *Introduction*

The Football Kenya Federation (FKF) was established in 1960 as the Kenya Football Federation (KFF). The KFF over the years evolved and changed its name to the FKF in 2012 following endless disputes between rival factions seeking to assert their authority and power over Kenyan football. The FKF is an association limited by guarantee incorporated and registered under the Companies Act of Kenya.

In April 2013, the FKF set up various standing committees such as the legal committee, finance committee, ethics and fair play committee, players' status committee and others to facilitate the effective management and administration of Kenyan football. However, there are standing some committee members who also double up as members of other standing committees, thereby raising questions as to their independence and potential conflict of interest.

As earlier highlighted, article 66.1 of the FKF Statutes prohibits members from taking any dispute to ordinary courts unless specifically provided for in the FKF Statutes and the Fédération Internationale de Football Association (FIFA) regulations. However, Article 22 of the Kenya Premier League Policy on the Status and Transfer of Players recognises the rights of any player or club to seek redress before a civil court for employment related disputes.

⁹ Pursuant to article 66.2 of the FKF Statutes, "*FIFA shall have jurisdiction on international disputes, i.e. disputes between parties belonging to different member Associations and/or Confederations*".

¹⁰ Article 67.1 of the FKF Statutes states that "*any appeal against a final and binding FIFA decision shall be heard by the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland*".

4.2 Judicial bodies of the FKF

The judicial bodies of the FKF are the Arbitration Tribunal, the Disciplinary Committee and the Appeals Committee.

The Disciplinary Committee consists of a chairman, deputy chairman and a number of members deemed necessary, with the chairman and his deputy being qualified lawyers. The Disciplinary Committee issues disciplinary sanctions against members, officials, players, clubs and match and players' agents in accordance with the FKF Disciplinary Code.

Pursuant to article 63.5 of the FKF Statutes, the Appeals Committee is responsible for hearing appeals against decisions from the FKF Disciplinary Committee or the Independent Disciplinary and Appeals Committee (IDAC) that are not declared final by the FKF Statutes. Since article 24.3 of the KPL Policy on the Status and Transfer of Players declares the IDAC decisions to be final and binding, it is implied that the Appeals Committee, given that its functions are governed by the FKF Disciplinary Code, only has jurisdiction to hear appeals against decisions issued by the IDAC on disciplinary matters.

Article 66.1 of the FKF Statutes requires the FKF to create an Arbitration Tribunal, which shall deal with all internal national disputes between FKF, its members, and players, officials and match and players' agents. However, the said tribunal is yet to be seen active and to date, it is only the KPL which has taken up the mantle of establishing active judicial bodies, notwithstanding the provisions of article 66.4 of the FKF Statutes, which stipulate that “[a]s long as within the territory of Kenya no national sports Arbitration Tribunal has been installed and recognised by the General Meeting of FKF, any dispute of national dimension may only be referred to the arbitration tribunal established by the National Olympics Committee.”

Article 24.2 of the KPL Policy on the Status and Transfer of Players provides for the establishment of a national dispute resolution chamber to adjudicate in the presence of at least three members, including the chairman or the deputy chairman and at least one club and one player representative.

Pending the formation of the said chamber, the KPL established the Independent Disciplinary and Complaints Committee (IDCC) to specialise in resolving disciplinary matters. In order to allow appeals against decisions issued by the IDCC, the KPL, in consultation with the FKF, formed the IDAC and effectively granted it jurisdiction to act as a national dispute resolution chamber until the establishment of the real national dispute resolution chamber previewed under article 24.2 of the KPL Policy on the Status and Transfer of Players.¹¹

Although it appears to have been established for the sole purpose of adjudicating appeals against disciplinary sanctions, the IDAC has evolved into

¹¹ The footnote to article 24.2 of the KPL Policy on the Status and Transfer of Players states that “Until the Dispute Resolution Chamber is established, the matters in Article 22 shall be dealt with by the KPL Independent Disciplinary and Appeals Committee (IDAC)”.

Kenya's football's main dispute resolution tribunal, resolving disputes in accordance with the various FKF regulations, the KPL Policy on the Status and Transfer of Players, the FIFA regulations and Kenyan law.

Presumably established and governed by the principles of article 22 of the FIFA Regulations on the Status and Transfer of Players, which allows the establishment of independent arbitration tribunals at national level with the aim of guaranteeing fair proceedings and respecting the principle of equal representation of players and clubs, the constitution of the IDAC members and its structure and operations however remains unclear, particularly in relation to whether the IDAC is indeed an independent arbitral tribunal established as required by FIFA.

FIFA circular No. 1010 of 20 December 2005 insists on disputes at national level being handled by an arbitration tribunal which respects:

- a) "*the principle of parity when constituting the arbitration tribunal*", which means that "*every party shall have the right to appoint an arbitrator*"; and
- b) "*The right to an independent and impartial tribunal*".

Although article 23.2 of the KPL Policy on the Status and Transfer of Players requires the national dispute resolution chamber to "consist of equal numbers of club and player representatives", the extent to which such equity has actually been practiced is unknown, because there is no information on whether the Kenya Football Players' Association, which is relatively small and in its evolution stages, is involved in the appointment of the IDAC members.

In addition, FIFA requires all federations which claim to have national tribunals to have these regulations to enact special regulations on the composition, jurisdiction and procedural rules of this tribunal. It is however unknown as to whether the FKF the National Executive Committee has enacted such regulations, although article 66.2 of the FKF Statutes provides for such enactment.¹²

It is therefore interesting to see whether the validity or even legality of final and binding decisions rendered by the IDAC can be challenged before the CAS under Article 68.2 of the FKF Statutes, which only prevents the CAS from hearing appeals against "*decisions passed by an independent and duly constituted Arbitration Tribunal of an Association or Confederation*".

Little is reported about the cases so far handled by IDAC, but it is widely known to resolve transfer and employment related disputes between clubs and players of a national dimension at first instance to a final and binding conclusion, and appeals against disciplinary decisions issued by the IDCC in Kenyan football. Decisions issued by IDAC from appeals against IDCC decisions are not final, and may be appealed to the FKF Appeals Committee.

A case in example involved Kenyan club *Mathare Untied FC v Osborne Monday and Sofapaka FC* which was resolved in 2010. In this case, Kenyan footballer Osborne Monday unilaterally terminated his contract with Kenyan club Mathare United following the club's failure to pay his salary for three months.

¹² Article 66.2 FKF Statutes "*The National Executive Committee shall draw up special regulations regarding the composition, jurisdiction and procedural rules of this Arbitration Tribunal*".

Monday then joined Tanzanian club Azam FC before returning to Kenya to play for rivals Sofapaka FC. But the IDAC found Monday guilty of having unilaterally and without just cause terminated his contract with Mathare United, and banned him from football activity for four months.

Another case soon followed in June 2010, between *Titus Mulama v Mathare United*. In this case, Titus Mulama terminated his contract with Mathare United and approached the IDAC requesting it to officially declare his contract with Mathare United terminated due to delayed wages, bonuses and allowances accumulating to Kenya shillings 134,000 that were to be paid at the beginning of the season.¹³

In an interesting decision, the IDAC held that Mulama's reason of seeking to terminate his contract with Mathare United due to delayed wages was not one of the grounds provided under the FIFA regulations under which a player can terminate his contract. The IDAC held that Mulama's dues had been paid at the time of the decision, and therefore found that he had no just cause to terminate his contract.

The IDAC held that under article 17 of the FIFA Regulations on the Status and Transfer of Players, a party who terminates a contract without just cause shall pay compensation and shall be liable to sporting sanctions. Since Mulama's reason for contract termination was found to be unjust, he was ordered to compensate Mathare United with Kenya shillings 6,500 and further banned from playing football for a period of four months. Mathare United was ordered to give Mulama a release letter upon being paid Kenya shillings 6,500.

5. *Other sports judicial bodies*

It is assumed that the other federations have internal dispute resolution bodies.

In addition, some federations such as the Kenya Basketball Federation's regulations provide for the resolution of national disputes by the Kenya National Sports Council (KNSC) and the NOCK Sports and dispute arbitration committee.

However, little is known about the procedures, composition and mechanisms adopted by both the KNSC and the NOCK Sports and dispute arbitration committee in resolving disputes. And given the provisions of Article 36.2 of the KBF Constitution which states that the decisions issued by the KNSC and the NOCK Sports and dispute arbitration committee are final and binding, the role to be played by the soon to be established National Sports Dispute Tribunal appears minimal.

Although the World Anti-Doping Agency has listed the Kenya as having a national anti-doping organisation called the Kenya Anti-Doping Agency, it is worth mentioning that to date, the Kenya Anti-Doping Agency has remained relatively inactive in its duties as the body responsible for testing national athletes in- and out-of-competition, as well as athletes from other countries competing in Kenya and also adjudicating anti-doping rules violations and anti-doping education. This is largely attributed to insufficient funds.

¹³ The Kenyan Premier League season begins in February of each year.

Kenya is however a member of the independent Regional Anti-Doping Organization (RADO) Africa Zone V, which is headquartered in Nairobi. Pursuant to the World Anti-Doping Agency's policies, in countries where there is no established National Anti-Doping Organization, the responsibility of anti-doping activities reverts to the NOC. It is therefore assumed that the NOCK Sports and dispute arbitration committee also acts as an adjudicating body for doping matters, although little has been reported of its judicial activities.

6. *Clubs' and players' rights and obligations*

The contracts are governed and practiced in accordance with Kenyan law. The rights, duties and obligations of both clubs and players as employers and employees respectively are set out in two main regulations, the Employment Act and the Labour Relations Act. These rights and obligations are supplemented by the internal rules and codes of conduct governing the respective clubs.

In general, it is the duty of the player to render his services to the club and to abide by the club's internal regulations, while the club is obliged to pay the player's salary and to provide a conducive working environment.

There is yet to be a case filed before a civil court by a club or player in relation to breach by either party of its rights or obligations. But unlike in proceedings conducted before the sports associations' tribunals, the civil courts would seem inclined to fully apply the Employment Act and the Labour Relations Act to the exclusion of other concepts such as specificity of sport and other objective criteria when assessing compensation for breach of contract.

7. *Dispute settlements*

The Kenyan judicial system operates on a synchronised procedural structure where matters are generally handled by the subordinate courts. The high court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function.

Judgments issued by the high court and any other court or tribunal as prescribed by an Act of Parliament may be appealed to the court of appeal, and as a last resort, a court of appeal judgment may be appealed to the supreme court. In all cases, an oral hearing must be held before a judgment is issued, unless of course a party waives its right to be heard by ignoring court summons. All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court.

This also seems to be the case for disputes handled internally at federative level. In general, and until the recently proposed establishment of a National Sports Disputes Tribunal, the Kenyan sports federations' regulations provide for disputes to be resolved by their own internal tribunals at first instance and allow appeals against any decisions issued at first instance to be filed before the NOCK Sports and Dispute Arbitration Committee.

This is however not the case with football, where, notwithstanding the various standing committees established by the FKF such as the Players' Status Committee, the Disciplinary Committee, the Appeals Committee, the Arbitration Tribunal, and the existence of the IDDC, there appear to be no decisions issued by the said committees at first instance. The IDAC has assumed the role of the first instance court, with jurisdiction to hear technical, transfer and employment related disputes, and whose decisions are final, binding and un-appealable pursuant to article 24.3 of the KPL Policy on the Status and Transfer of Players, which states that the “[d]ecisions reached by the Dispute Resolution Chamber are final and binding on all members unless there is an international dimension which meets the criteria in the FIFA Regulations for an appeal to the FIFA Players Status Committee or Dispute Resolution Chamber”.

The only instance when the IDAC acts as an appellate body is when it sits to hear appeals against decisions issued by the IDDC, with the IDAC decisions being appealable to the FKF Appeals Committee.

Given the fact that the IDAC is mainly a body established by the KPL rather than the FKF, there is the potential risk of eminent “power struggles” or jurisdictional conflicts between the FKF and the KPL on which body has jurisdiction to run and resolve disputes in Kenyan football, given the relatively passive or inactive roles played by the Disciplinary Committee, the Appeals Committee and the Arbitration Tribunal, and the largely active role played by the IDAC.

However, the KPL and the FKF continue to work harmoniously and in consultation, notwithstanding the fact that FIFA vests the national federations with the exclusive jurisdiction and responsibility of forming independent arbitration tribunals at national level. Article 63.5 of the FKF Statutes is testament to this harmonious relationship, as it allows the FKF Appeals Committee to hear appeals against decisions passed by the IDAC

In general, it is worth noting that the Kenyan sports associations are still evolving in as far as their dispute resolution bodies and procedures are concerned. Unlike the Kenyan civil courts, little is reported about the sports associations' tribunals first summoning the parties for hearings before issuing their decisions, although the parties have been afforded an opportunity to file written submissions.¹⁴ It appears as though the decisions issued by the sports federation's internal bodies are usually rendered *ex officio*, with the members of the said tribunals only reported to have convened and deliberated.

¹⁴ In February 2013, Kenyan club Muhoroni Youth FC was fined Kenya shillings 500,000 by the Kenyan Premier League for alleged incomplete registration of players contrary to the KPL Status and Transfer players policy. In its ruling, the Kenyan Premier League directed Muhoroni Youth FC to lodge its complaint to the Independent Disciplinary and Appeals Committee for further directions on how to proceed with the appeal.

8. ADR and interim relief

The Kenyan Arbitration Act recognises and provides for Alternative Dispute Resolution in Kenya. As earlier mentioned, the Kenyan courts are also inclined to stay any proceedings where the parties had agreed to resolve their disputes by arbitration.

In general, it is also possible before the civil courts and the various sports association tribunals for parties to seek an amicable settlement of their dispute before a decision is rendered. It would also follow that such settlement agreements would be endorsed by the civil courts or sports association tribunals, as long as they comply with public policy.

It is also possible for parties appearing before the civil courts to seek interim relief as evidenced in the case of *Salim Humra, Ismael Mohamed, Mohamed Omar vs Maina Kariuki, Hussein Swaleh and Mohamed Hatimy & KFF*.

It is however not clear whether it is possible to seek interim relief before the various sports association's tribunals, as none of the said associations' procedural rules and regulations contain provisions to this effect.

Conclusion

It can thus be said that although there are provisions under Kenyan law which allow the ordinary courts to resolve sports disputes, this does not often happen in practice.

The Kenyan sports justice system is still growing. Tremendous strides have been made to bring it to where it is today. And as days go by, the stakeholders are slowly but surely resorting to solving their disputes outside the ordinary courts. The greatest challenge however lies in the electoral processes conducted by the federations, and on keeping checks and balances on the acts and omissions of the officials running these federations.

The transparency remains questionable and it is inevitable for electoral disputes to continue being taken to the ordinary courts. Of course, the risk of these federations being sanctioned by the international federations for government interference where it can be demonstrated that the NOCK and/or the federations have lost their autonomy and independence is ever present but as a Kenyan and a patriot at it, I would call upon the international federations to exercise care and caution when contemplating such measures in the best interest of promoting transparency in the election of officials, and to ensure that when elected, such officials serve their terms with dignity and without abusing their powers.

SPORTS JUSTICE IN THE NETHERLANDS

by *Wil van Megen**

SUMMARY: 1. Principles of sports justice – 2. Relationship between ordinary and sports justice – 3. Relevant NOC regulations – 4. Relevant football regulations – 5. The sports judicial bodies – 6. Dispute settlements – 7. ADR and interim relief – 8. Conclusions

Abstract:

The article describes the Dutch sports justice system with special attention on football. The lack of specific sports law provisions do not seem to affect the development of sports law. The regular rules of law prove to be adequate if the specificities of sport are taken into account.

1 Principles of sports justice

In the Netherlands there are no specific laws or state regulations governing the relationship between an athlete and sports organizations. There is no supervising institution or state authority present. This leaves the federations a large degree of autonomy.

The relationship between a federation and an athlete is governed by regular association law based on the freedom of association as laid down in art. 8 of the Constitution .

This principle enables associations to create rules and regulations that must be followed by their members. This includes disciplinary measures in case the rules are violated by members. Of course the rules must respect the general laws of the country. Decisions of the association must be taken according to the principle of good faith and the fair trial principle is leading in the resolution of disputes by autonomous bodies.¹

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¹ H.T. VAN STAVEREN, *Het voetbalcontract*, Deventer: Kluwer 1981.

The athlete can be a member of a federation in two ways, either direct or through his club. An athlete must adhere to the statutes, regulations and decisions from the federation and its relevant bodies. These obligations must be validly established in the statutes of the federation.

Only when it is explicitly mentioned in the statutes a federation is able to bind its members on obligations with third parties.²

There is a similar relationship between federations and the National Olympic Committee, Nederlandse Sport Federatie, NOC*NSF. This is reconfirmed in the General Principles for Qualification for the London Olympic Games 2012. Next to the statutes and other regulations in this relationship the reciprocal obligations are governed by standards of fairness and reasonability.³

Because of this structure athletes are directly bound to the regulations of the federation and indirectly to the regulations of NOC*NSF. For disputes athletes must primarily address their federation. However, there can be exceptions to this rule. This is the case when there is a dispute between the federation and NOC*NSF and the athlete is directly affected by a negative decision regarding his qualification of the NOC*NSF. In cases like that the athlete is able to challenge the Olympic Committee in court.⁴

The relationship between a professional player in a team sport is a labour agreement that is governed by labour law. In the sport the state is not involved in disciplinary matters although it has been under discussion that in football the disciplinary regulations would have a legal basis just like in the medical world or for the bar association.

2. *Relationship between ordinary and sports justice*

As there are no specific provisions in the ordinary law regarding sports there is no real difference between ordinary and sports justice. Of course the specificity of the sports industry has to be taken into account.

Disciplinary disputes are the exclusive domain of the sport unless criminal offences are at stake. Some violations that will not be accepted in daily life, like a tackle, are accepted in the sport even when it is not a correct one. A public prosecutor should stop prosecuting in a situation that sports disciplinary proceedings have led to a satisfactory solution for all parties involved and the general interest is sufficiently respected.⁵

Sports justice leads to faster decisions because of expertise. It is cheaper

² Art. 2:46 Civil Code.

³ R. SIMONS, *Sportbonden vrij spel in voordracht atleet Olympische Spelen Tijdschrift voor Sport & Recht*, 2012, 3.

⁴ (LJN: AP2217, Voorzieningenrechter Rechtbank Arnhem, 114222 / KG ZA 04-374 / LJN: BX0082, Voorzieningenrechter Rechtbank Arnhem, 230968).

⁵ Berechting van 'sportief' wangedrag: Aspecten van straf- en tuchtrecht in de sport W. BOS EN H. DE DOELDER, *Justitiële Verkenningen*, jrg. 28, nr. 3, 2002, 59.

and has more options for sanctions. Moreover it has a less stigmatizing effect.⁶

The criminal law comes into the picture when violations occur that are not part of the sport or are excessive violations resulting in physical harm. The criminal courts will take into account what the disciplinary committee has decided regarding the offense.

Sporting bodies have a possibility to organize real arbitration for internal disputes.

It is even possible to rule out regular courts for disputes that can be settled by arbitration although art. 17 of the Constitution guarantees that no one may be removed from the jurisdiction of his lawful judge. This can be done beforehand or after the dispute occurred by an arbitration clause in the statutes of the association and in the contractual relation between the athlete and his association or employer i.e. the standard player's contract.

In football arbitration is mandatory according to the statutes. There are no provisions that put exclusive jurisdiction on ordinary courts. There is no restriction for labour cases. Cases regarding liability for sports injuries can also be decided through arbitration.⁷

The possibility to have an arbitration system is not an absolute guarantee that the regular court is ruled out but it appears very hard to challenge.⁸

In football there have been no successful attempts to challenge the arbitration clause. Only when the parties do not invoke the arbitration clause the regular court will be competent to deal with a dispute. The arbitration regulations secure that the federation's ideals and values are taken into account.⁹

Recently an arbitration body for 37 other sports was introduced: the Institute for Sports Justice ISR based on the same principles as the football arbitration system.¹⁰

Both systems are according to national and international arbitration law.¹¹ In fact the system is entirely comparable with ordinary legislation. All aspects of a dispute can be taken into account so there is no difference with regular court hearings. The advantage of arbitration is that the arbitrators can operate more quickly than a regular court and have more knowledge of the relevant sports environment. The panel can take interim measures if indicated.

The rulings of the arbitration tribunal have to be registered with a nearby court. After registration the decision can be enforced like a decision from a regular court. An award has the same legal effect as if the action was brought before a regular court.

⁶ H. DE DOELDER, *Sporttucht recht*, AA 45 (1996), 485.

⁷ Arbitragecommissie KNVB 1996-1997, nr 575 : Bassa Flokstra.

⁸ Trabelsi-AFC Ajax LJN: AO8985, Rechtbank Amsterdam, KG 04/793 SR followed by arbitral award College van Arbiters KNVB 4 juni 2004, JAR 2004 / 239.

⁹ KNVB Reglementen Bondsvergadering Seizoen 2012/ 13, 31-49.

¹⁰ Aangesloten sport bonden www.isr.nl/.

¹¹ Art. 1020 v. boek 4 BW.

In principle arbitrational awards are under the scrutiny of ordinary courts but in practice it appears that recourse to regular courts is not realistic. Internal appeal is excluded and according to the system an appeal with CAS is only possible in doping cases.

According to the arbitration regulations both the arbitrators and the panel on the whole must be impartial and independent.

The procedure must be according to the principle of fair trial (Art. 6 of the European Convention on Human Rights). Also other various principles apply, such as the equality of parties, the right to be heard , the right of refusal of an arbitrator and the provision pertaining to the petition for the reversal of an arbitration award and the right to be represented by a lawyer.

The reasons legitimating a possible reversal are enumerated exhaustively in the regulations and basically apply to severe mistakes pertaining to the conclusion of the arbitration agreement, the constitution of the panel or the adherence to the public order.

Only in situations when there is no internal provision state courts are competent to rule in sporting disputes. This will be the case when there is a dispute between an athlete and the association itself.

Most case law is about the eligibility for national teams or the Olympic team.^{12 13 14 15}

From these rulings can be learnt that the federations pursue a fair and transparent qualification procedure but that these principles have insufficient guarantees in the regulations. For federations the margin of discretion in the selection process is apparently too large. State court judges are critical regarding the procedural rules but less prepared to judge the factual substantiation of the decisions of the federations within the principle of limited judicial review. Even when this marginal discretion enables another judgment the judges are extremely reluctant.¹⁶

3. *Relevant NOC regulations*

The Dutch Olympic Committee NOC*NSF was founded in 1993 as a result of a merger of the Nederlands Olympisch Comité (NOC) en the Dutch Sports Federation (NSF). Ninety national sports federations are affiliated with the NOC*NSF as well as fifteen sports related organizations . Promoting sport at the highest level possible in the Netherlands is the main mission of the organization. The NOC*NSF functions also as the National Paralympic Committee.¹⁷

The NOC*NSF is involved in the system of subsidizing federations and

¹² LJN: AP2217, Voorzieningenrechter Rechtbank Arnhem.

¹³ Wammes Rb. Zutphen (vzr.) 6 maart 2012, LJN BV7877.

¹⁴ Van Gerner Rb. Zutphen (vzr.) 23 april 2012, LJN BW3598.

¹⁵ Boonstra. Rb. Arnhem (vzr.) 26 juni 2012, LJN BX0082.

¹⁶ R. SIMONS, *Sportbonden vrij spel in voordracht atleet Olympische Spelen Tijdschrift voor Sport & Recht*, 2012, 3.

¹⁷ Ledenlijst NOCNSF www.nocnsf.nl/home.

individual athletes.

The more perspective an association has to deliver Olympic medals the better prospect there is for additional funding. Selecting the Olympic team is done in close cooperation with the national federations. The qualification schedules are approved by both organizations and in principle binding for the individual athletes.

In case of disputes the federation is the party to address unless there is a dispute between the federation and the NOC*NSF. In that case the ordinary court is competent to deal with the case.

There is no interaction between regulations of the federations and NOC*NSF.

Suspension for Olympic team does affect club competitions, European competitions and other national team matches and visa versa.

Federations organize their own disciplinary and arbitral procedures. They can do this separately or under the umbrella of the Institute of Sports Justice ISR. There is no involvement of NOC*NSF.

There are 37 out of 90 affiliated federations that have assigned their judiciary competences to the Institute of Sports Justice ISR which is a private foundation. The other organizations have their own judicial system. Since 1 January 2013 the NOC*NSF Arbitration Committee for Sport sponsoring has been brought under the jurisdiction of the ISR.

The Royal Dutch Football Association KNVB is bound by NOC*NSF regulations only as far as the Olympics are concerned. This means the U23 team the women team and the Paralympic team.

Disputes regarding the Olympic Games in principle have to be settled with the relevant federation. As there are no arbitration systems including disputes with the federation itself, a case has to be started with an ordinary court.

However if there is no dispute with the federation itself then it is possible to address the Olympic Committee directly before the ordinary court.

This is i.e. the case when the federation has the same stance as the athlete but is not prepared to use the internal dispute resolution system within the NOC.

4. *Relevant football regulations*

Association football in the Netherlands is governed by the Royal Dutch Football Association KNVB. Besides the statutes there are specific sets of regulations in place for professional and amateur football.¹⁸

The regulations apply to persons and entities registered with the KNVB such as players, coaches, referees, staff, leagues, associations of players, etcetera. They are subject to all the rules and regulations adopted by the KNVB or UEFA and FIFA.

As in most sports there is a pyramidal structure in football.

On the bottom of the structure are the players. They have to obey the rules

¹⁸ Online bibliotheek KNVB senioren www.sportlink.com/manager/dms/.

from their club their federation/league, confederation and eventually FIFA regulations.

Every stakeholder is bound to the rules and regulations of the higher level.

Professional football in the Netherlands began in 1954. The relationship between club and player was still undefined at the time. After a court case in 1967¹⁹ it became evident that the relationship between a player and a club was an employment agreement. This means that a professional player is not only a member of an association but also an employee under the labour law.

First and for all the internal club regulations apply. Then national and international regulations apply. If there are supranational regulations in place it is important to see whether these regulations directly apply on the individual level or exclusively at the international level. If the latter is not the case and the international rule is not compliant with national legislation, it has to be examined if the relevant national regulation or law has a mandatory nature or not. If the national law is not mandatory then the football rule prevails.

In the FIFA regulations the distinction between amateurs and professionals is defined in art. 2 of the FIFA Regulations on the Status and Transfer of Players. In the Netherlands there is another approach. At national level the Dutch law and regulations will be applied but in an international dispute FIFA regulations will prevail. Players in the third division (Topklasse) in the Netherlands are considered to be an amateur under the national regulations. Looking at art. 2 of the FIFA Regulations on the Status and Transfer of Players they will be considered professionals if they incur more money with their sport then their expenses.

Licensing

In the Netherlands there is a very stringent licensing system for clubs under the supervision of a Licensing Committee. Its mission is to have financially sound clubs.²⁰ Depending on their financial status the clubs are classified in one of three categories. Clubs with a poor financial status are watched closely and are sanctioned when the Committee's requirements are not met. Decisions of the Licensing Committee can be appealed with the Licensing Appeals Committee.

Player's status

For players there is no licensing but only registration. The end of a relevant labour agreement terminates the registration.

The law, the Regulations for professional football the Standard Player's contract and the Collective Bargaining Agreement determine the status of the player.²¹

¹⁹ Ktr. 's-Gravenhage 5 April 1967, NJ 1967, 418 (Laseroms/Sparta).

²⁰ Licentiereglement www.sportlink.com/manager/dms/.

²¹ Website of Vereniging voor Contractspelers www.vvcs.nl/cao-2010-2014.

In the CBA negotiations the employers' association FBO represents the clubs and not the Leagues. For the players there are two players' unions Vereniging voor Contractspelers, VVCS and Proprof. The VVCS is affiliated to the Dutch Trade Union organization FNV. For disputes regarding the interpretation of the CBA there is a joint committee.

Dispute settlement

In case of disputes an independent arbitration tribunal within the federation is competent to deal with the case. A panel consists of three arbitrators. Two arbitrators are appointed by the KNVB from a list with arbitrators nominated for a four year period either by the players' unions or the employers organization. There is no free option for the parties involved to choose an arbitrator from the list. The chairman is appointed by the KNVB. Access to regular courts is excluded. Decisions of the Arbitration Committee are final and binding can be enforced either through association law by sanctions of the federations or by the same way as regular court rulings are enforced.

For disciplinary disputes a Disciplinary Committee is competent in first instance and an Appeals Committee in second and final instance. Also here the social partners have the opportunity to nominate arbitrators for a four year period. The chairman of a panel must have a legal degree.²²

5. *The sports judicial bodies*

Out of ninety sports associations affiliated to the NOC thirtyseven have assigned the disciplinary and arbitration matters to the Institute for Sports Justice (ISR). The rest of the associations have their own systems for judicial matters.

Becoming a member of a sports association automatically means that the person involved is bound to the regulations and sanction systems of the national and international associations.

The KNVB's judicial organs are the Arbitration Committee, the Disciplinary Committee, the Appeals Committee for Disciplinary cases; the Licensing Appeals Committee and the ad hoc Committee for binding advice in case of a dispute regarding the nomination of a candidate for the Supervisory Board.

For disciplinary matters the sporting bodies are competent unless the act committed by the perpetrator are subject to criminal law. In that case the ordinary criminal court is competent to deal with the matter. An example of this is the Bouaouzan case in which a player was sentenced with 200 hours community service for willingly taking the risk that he would injure his opponent.²³

For other disputes the sporting body can offer arbitration. If no such opportunity is offered the regular court will be competent to deal with disputes

²² Arbitrage reglement www.sportlink.com/manager/dms/.

²³ LJN: AU0860, Rechtbank Rotterdam, 10/632349-05.

inside the association. For disputes between an athlete and an association or the NOC the regular courts are competent.

As sports judicial bodies are within the sports organizations they are based on association law. Although it must be kept in mind that this is within the domain of civil law a disciplinary procedure should contain fundamental criminal proceedings principles like the presumption of innocence. The disciplinary regulations offer the opportunity to attend a hearing or provide written statements.

The system of sanctions provides an exhaustive list of offences and sanctions in conformity with criminal law principles.

Each decision can be appealed either by the defendant or the prosecutor.

For disciplinary matters there is in fact a large degree of autonomy for the sports organization. Only when fundamental procedural principles are violated a regular civil court can be addressed.

The ISR offers arbitration according to Dutch arbitration law The Royal Dutch Football Association (KNVB) has a similar system. The Arbitration Committee is competent through the statutes of the federation and the standard player's contract. The chairman must have a law degree from a Dutch university .

The arbitration committee will consider the regulations of the association, the national and international laws and relevant CBA's.

Rulings can be enforced according to this law. It is also possible to have the decisions enforced by the association on the basis of association law.

The KNVB Licensing Appeal Body decides on the appeals filed against the decisions of the first instance Licensing Body.

The KNVB regulations provide the opportunity to have an ad hoc Committee for binding advice for decisions in case the Supervisory Board of the professional football department wants to nominate a new candidate for this board against the advice of other stakeholders. Before appointing this candidate the objections must be discarded by the Committee for binding advice. The composition and method of this Committee must be agreed by the Supervisory Board and the other stakeholders.

If no sports judicial body is competent regular courts can serve as sports judicial bodies as they have a general competence to decide in legal matters.

6. *Dispute settlements*

As already mentioned above, in the Netherlands there is a tendency to centralize dispute settlements by sports federations especially by a central institution for most sports: the Institute for Sports Justice (ISR).

6.1 *Technical disputes*

Technical disputes are disputes within the game itself . They are decided upon by the referee according to the rules of the game for the relevant sport. He can impose sanctions or measures which are final. They are exclusive domain of the sport

itself. Such decisions cannot be challenged through the federation nor via ordinary courts although the disciplinary body of the federation can decide to leave a yellow or red card unsanctioned.

6.2 *Disciplinary disputes*

The sports association has power to sanction anyone who is associated and acts against the rules within the association. Also third parties who made themselves subject to the disciplinary regulations can be punished.²⁴ This secures the third party effect of basic rights in private law relationships.

Disciplinary disputes are regulated in the Rules of Professional Football Disciplinary Proceedings (*Reglement Tuchtrechtspraak Betaald Voetbal*). Although disciplinary rules have a punitive character they are governed by private law and have to abide by national and international law and constitutional principles.

Disciplinary proceedings are instigated by the Disciplinary Committee of the relevant association or by a special prosecutor unless the disciplinary powers are assigned to the ISR. In the latter case the association has to make a declaration of the specific offense after which the ISR takes over the procedure.

In professional football the disciplinary bodies are the prosecutor the disciplinary committee and the appeals committee.²⁵

The prosecutor can indict an offender or shelve the case on his own authority. The prosecutor can also propose a settlement to the offender without involvement of the Disciplinary Committee. If the proposal is accepted the sanction is final and binding. The prosecutor is responsible for the enforcement of the sanction.²⁶

The Disciplinary Committee can reverse a decision of the prosecutor not to prosecute in a case. The Committee will give a decision in case the offender rejected the proposal or in the situation a case was directly brought before the Committee.

The disciplinary body will invite the parties involved to comment on the issue at stake and gives them a possibility to have an oral hearing. There is a strict time schedule for the procedure.

After the hearing the Committee decides to impose a sanction or not. The sanctions must already have been incorporated into the regulations.

The harder a possible sanction infringes players' rights to participate the more stringent the certainty of a rule must be. The decision must be in writing and substantiated. The *ne bis in idem* principle applies here as well as the principle of proportionality.

Regarding the proportionality of the sanction there is a distinction between professional and amateur players where fundamental rights are involved. Taking

²⁴ Art. 3 sub c *Reglement Tuchtrechtspraak Betaald Voetbal*.

²⁵ Art. 1 sub f *Reglement Tuchtrechtspraak Betaald Voetbal*.

²⁶ Art. 9 *Reglement Tuchtrechtspraak Betaald Voetbal*.

into account that the numbers of disciplinary cases are massive it cannot be required from the association that for every case all fundamental rights are fully applied. As the impact of a suspension for professionals on their livelihood is substantially bigger than for an amateur player the professional is entitled to have more protection from the fundamental rights principle than the amateur player. Moreover it is not possible to perform professional football outside of the national federation.²⁷

A decision of the Disciplinary Committee can be challenged before the Appeals Committee. The appeal has no suspensive effect unless the Appeals Committee decides otherwise. The decision of the Appeals Committee cannot be challenged within the sports jurisdiction.

Only when there is an absence of a sports resolution system an ordinary court can be approached. In such cases the judges have a very small margin for a decision as they cannot change the rule itself but can only give an interpretation of the rule.

6.3 *Economic disputes*

Economic disputes are disputes between members of the association with a financial nature or association law matters between members. This can be clubs versus clubs but most commonly it is the players as workers and clubs as their employer.

The associations and their members affiliated with the ISR and the Royal Football Association are offered independent arbitration in conformity with arbitration law by the statutes of the association. Both have a permanent arbitration body for all economic disputes excluding regular courts.

For each dispute a chamber is composed of 3 arbitrators. A case starts with a written submission to the Arbitration Committee with a copy to the respondent who can answer the submission.

In principle there is a public hearing. The Committee can hear witnesses and experts.

The parties have the right to have legal representation. If necessary the parties can require preliminary measures or fast track proceedings to be assessed by the chairman of the panel.

7. *ADR and interim relief*

Looking at the autonomy of sports associations there is an opportunity to introduce Alternative Dispute Resolution. Up till now there have been no initiatives to put regulations in place.

Interim relief is regulated within the regulations for arbitration. If arbitration does not offer a proper solution the regular court can be addressed.

²⁷ H. DE DOELDER, *Sporttuchrecht*, AA 45, 1996, 485; Doelder, H. de Terrein en beginselen van tuchtrecht Alphen a/d Rijn, H.D. Tjeenk Willink, 1981 (diss.).

8. *Conclusions*

The lack of specific state law for sports proves to be no obstacle for the development of extensive sports law in the country. Ordinary law can be applied by judicial bodies within the sport environment because of the direct or indirect membership of those who are involved. The fundamental principles of law are respected in arbitration as well as in disciplinary matters. Equal representation of players and clubs in the football tribunals is a pillar for the balance in the association. The fact that there have only been a very few attempts to challenge the sports judicial system via the regular courts illustrates that the quality is high.

Sporting bodies are able to decide faster, cheaper and more in line with the sport itself as specificities of sport can be taken into account. It helps that professional athletes in team sports are subject to labour law and that they can benefit from the protection the law provides. Working faster and cheaper does not affect quality nor independence.

In the future specific legislation might be necessary for match fixing and corruption but also here generic legislation may prove to be sufficient as sports is accepted as a real full grown part of society.

SPORT JUSTICE IN PORTUGAL

by José Manuel Meirim*

SUMMARY: 1. Introduction – 2. Relationship between ordinary and sports justice – 3. Relevant NOCs Regulations – 4. Football regulations – 5. Labour disputes – 6. A Portuguese Court of Arbitration for Sport? – Conclusions

Abstract:

Sports justice in Portugal falls under a sports legal framework in which the State plays a highly important role. Therefore, sports disputes are resolved, essentially, at least in the final stage, by ordinary courts of law. At the same time, it is possible to have arbitration courts deciding on civil and labor matters, and there are a few examples. Recently, a bill was drafted with a view to setting up a specialized arbitration court to deal with all sports conflicts, regardless of their nature; however, the said bill was not enacted.

1. Introduction

Understanding the Portuguese sports justice system entails bearing in mind some basal considerations.

First of all, the fact that access to the courts and an effective legal protection are fundamental rights enshrined in the Constitution.

Art. 20 of the Constitution stipulates as follows:

“Everyone is guaranteed access to the law and to the courts in order to defend his or her rights and legally protected interests and justice may not be denied to anyone due to lack of sufficient financial means.

Everyone has the right, in accordance with the law, to legal advice and information, to legal counsel and to be assisted by a lawyer before any authority”.

Furthermore, pursuant to art. 268 (4):

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“Citizens are guaranteed effective jurisdictional oversight upon their rights and interests, as long as they are protected by law, particularly the recognition of the mentioned rights and interests, the appeal against any administrative act that harms their rights and interests, regardless of its form, the issue of positive decisions requiring the practice of administrative acts, and the adoption of adequate provisional remedies.”

From the protection foreseen within this constitutional framework stems an impact on sports activity and, in particular, on the rules relating to sport disputes resolution.

In fact, the State plays an important role within the context of the national sports system.

In this perspective, art. 79 of the Constitution reads as follows:

“1. Everyone has the right to physical education and sport.

2. It falls to the State, in cooperation with schools and sportive associations and groups, to promote, stimulate, guide and support the practice and dissemination of physical education and sport, and to prevent violence in sport”.

Although the extent of the State’s involvement may vary, always in compliance with the provisions laid down in the constitutional precept, the ordinary legislator has drawn up specific regulations for sports federations and for the competitions they organize.

Nowadays, Portugal has a sports’ law¹ and a sports federations’ law by means of which a special and exclusive concept of sports public utility status² is recognized. The activities of sports federations³ and of professional leagues⁴ are public activities, despite the fact that these entities remain associations of private law.

In other words, sports federations exercise public powers entrusted to them by the State, and thus they emerge as public regulatory authorities in the field of sport.

Their actions are not those pertaining to an association of private law. They are, as a matter of fact, administrative actions which have the same nature as those undertaken by the Public Administration.

2. Relationship between ordinary and sports justice

Since 1990, Portugal has a specific regulation governing sports justice. In particular, art. 18 of the *LBAFD* (Basic Law of Physical Activity and Sport) stipulates as follows:

1 – Disputes arising from acts or omissions of the management and supervisory

¹ Act 5/2007, of 16th January 2007, Lei de Bases da Actividade Física e do Desporto - *LBAFD*.

² Order in Council 248-B/2008, of 31st December 2008 (RJFD2008).

³ A legal notion of sports federation is provided by articles 14 of *LBAFD* and 2 of *RJFD2008*.

⁴ See articles 22 of *LBAFD* and 27 of *RJFD2008*: the professional league exercises, by delegation of the respective sports federation, the powers relating to the competitions of a professional nature.

bodies of sports federations and professional leagues, within the ambit of the exercise of public powers, are subject to the rules governing administrative disputes. Sports consequences that are a valid consequence of the most recent decision of the competent instance in the sports system shall, however, not be subject to alteration.

2 – There shall be no right of appeal outside the sports dispute resolution systems against decisions and resolutions with regard to strictly sporting matters.

3 – Strictly sporting matters are those that are based on technical or disciplinary rules which arise from the application of the rules of the game, or from organizational rules and regulations regarding the organization of the corresponding competitions.

4 – For the purposes of the provisions of the preceding number, disciplinary decisions and resolutions with regard to contraventions of sports ethics, in the context of violence, doping, corruption, racism and xenophobia, shall not be deemed to be strictly sporting matters.

5 – Disputes with regard to strictly sporting matters can be resolved by recourse to arbitration, or mediation, if there is a prior arbitration agreement in writing, or in accordance with the provisions of the bylaws or regulations of the relevant sports associations.

As one can see, at first glance, these statutory provisions only deal with disputes within a public sphere and not with those within a private sphere (contracts, labor, among others).

The *LBAFD* tries to accommodate dispute resolution models, forging a terrain of limelight for both ordinary and sports justice.⁵

Despite the recognition of some specific legal solutions as being legitimate, aimed at separating sports disputes from the sphere of public justice, or at delaying access to it, we need to keep in mind that we move in a very special area of constitutional protection: that of the fundamental right to an effective legal protection.

On the other hand, aiming for the best solution, we must take into consideration that such a right is well consolidated in the Human Rights normative scenario and that any restriction must be presented as an exception to the rule and must equally be duly substantiated pursuant to constitutional rules.

Art. 18, par. 1, of the *LBAFD* establishes the fundamental rule – that of the powers of the administrative courts in relation to the exercise of public authority in disciplinary matters.

Moreover it also provides that access to ordinary courts takes place only when the internal dispute regulation procedures within the sports federations and leagues (the last decision of the competent sports judicial body) have been exhausted.

As such, appealing to the courts of law does not endanger the valid sports effects of the last decision of the competent sports judicial body which has been taken in the meantime.

⁵ Reference made to the *Lei de Bases da Actividade Física e do Desporto. Anotada e Comentada.*, Coimbra, Coimbra Editora, 2007.

This last aspect, which, thus far, has not been given any effective implementation by the courts, has long been debated amongst authors.

Let us give an example.

A club is punished with a sports sanction of relegation.

This ruling having been challenged, the court revokes it.

The club must now be allowed to participate in the competition from which he was illegally excluded. Space must be made for “reintegration” of the club in the competition. However, all other sports effects – for instance, obtaining titles by other clubs – are untouchable.

We easily realize that what is *strictly sport matters* is the key question in the relationship between ordinary (administrative) and sports justice.

Without considering at the moment the exception foreseen in paragraph 4, interpreting the provisions set forth in paragraphs 2 and 3 is of the utmost importance.

It has to do with the identification of the matters which *LBAFD* perceives as belonging to the exclusive jurisdiction of sports federations, excluding such matters from the intervention of the courts.

In fact, paragraph 2, does not allow *strictly sport matters* to be brought before courts. So far, there is nothing to object.

The problem lies in what is to be regarded as *strictly sports matters*.

In this sense, difficulties arise when reading paragraph 3: strictly sports matters are construed as being those that are based on technical or disciplinary rules which arise from the application of the rules of the game, or the organizational rules or regulations of the corresponding competitions.

Upon reading the provisions, one sees that the concept is divided into two components:

- the matter has to be based on a technical or disciplinary rule;
- must arise from the application of the rules of the game, or the organizational rules or regulations of the corresponding competitions.

Although we do not criticize the first part - technical or disciplinary rule -, we cannot avoid doing so as far as the second part is concerned.

Strictly sports matters may emerge from three situations.

The first situation regards the rules of the game, and as far as this is concerned there is nothing to argue about. They are, for sure, *strictly sports matters*

As far as the two other situations are concerned, we can only express our disagreement and our opinion that they may violate Articles 20 (1), and 268(4), of the Constitution of the Portuguese Republic.

In fact, should one extend the exclusive jurisdiction of sports federations to all matters that arise from the application of regulations (all regulations) and from the rules of competitions, one would manifestly prevent disciplinary matters, matters about access to practice of sports, questions of patrimonial nature, access to professions and activities – including economic activities, since they are also provided for in those regulations – from being settled in ordinary courts of law.

Portuguese courts have fortunately made a restrictive reading of the *strictly sport matters*.

First of all, we consider as correct and important the devaluation of the formal aspects of the norms, which continue to be “classified” regardless of the nature of the federal regulation to which they belong. Therefore, the standard of materiality prevails.

We may conclude that courts have reiterated their position through past case laws never losing sight of the importance of what is at stake when sports bodies seek to sustain that those conflicts concern a strictly sports matter.

Disputes concerning strictly sports matters can be solved by way of arbitration or mediation, depending on the existence of a prior arbitration agreement or the submission to written statutory provision or regulation of sports associations.

3. *Relevant NOCs Regulations*

The Olympic Committee of Portugal (*COP*) is defined by law as a non-profit association with legal personality, governed by its statutes and regulations, in accordance with the law and with the *International Olympic Charter*.⁶

The *COP* recognizes the Court of Arbitration for Sport (CAS) based in Lausanne (Switzerland) as an appeal jurisdiction in sporting or economic matters. Sanctions imposed by the *COP* bodies can be appealed within twenty-one days to the Court of Arbitration for Sport.

Moreover pursuant to art. 44 of its statute, the *COP* supports the establishment of a national Court of Arbitration for Sport. Despite a very recent attempt to create such a body – which will be analyzed later on this chapter – there is still no national Olympic arbitration body in Portugal.

4. *Football regulations*

All sports federations have their own bodies dealing with disciplinary matters. In this context the *Federação Portuguesa de Futebol* (Portuguese Football Federation - *FPF*) has its own Disciplinary Committee and Appeal Committee.

The first is empowered to decide, in accordance with the sports regulations, on all offenses against persons subject to the disciplinary powers of the *FPF* and *LFPF* within the specific competence of each section (article 61 of Statutes).

The Appeal Committee decides *inter alia* on second instance on decisions taken by the *LFPF* and the *FPF* Electoral Commission, the bodies of first Instance, the Executive Committee and President of the *FPF* decisions.

In terms of disciplinary regulations, the *RJFD2008* establishes a number of principles and rules to be respected by all sports federations.

⁶ Article 12 of *LBAFD*.

In particular Article 53 establishes that all sports stakeholders should act according to the values of sports ethics and transparency.

Sanctions are proportionate to the seriousness of the offence.

Moreover, the principles of equality, non-retroactivity, proportionality, and fair trial are applied (Article 53); disciplinary liability is independent from civil or criminal liability (Article 55); and where the offense has an administrative or criminal nature, the competent disciplinary body must report the incident to the competent authorities (Article 56). Finally, for disciplinary purposes, the concepts of recidivism and offences accumulation are identical to those laid down in the Criminal Code.

The Statutes of the *FPF* contain further provisions on the resolution of disputes.

According to Article 76 a Court of Arbitration is constituted within the *FPF* and in compliance with the provisions of the Arbitration Act⁷ with the purpose of resolving national-level disputes between members or sports agents or between these and the Federation, provided such disputes do not fall under the jurisdiction of other bodies.⁸

The *FPF* recognizes arbitration decisions passed by an arbitration tribunal constituted under any collective bargaining agreement for the resolution of labour disputes, as well as any decision passed by the Arbitration Committees of both the *FPF* and the *LPFP*.

On the other hand Article 78 par. 1 provides that appeals against irrevocable and binding decisions passed by FIFA's and UEFA's last instance bodies must necessarily be lodged with the Court of Arbitration for Sport, pursuant to both FIFA and UEFA Statutes.

Finally, Article 79 on *Jurisdiction* emphasizes that, unless specifically provided for by law, the *FPF* and its members and affiliates are not allowed to take any dispute over which FIFA, UEFA and *FPF* have exclusive jurisdiction to ordinary courts of law.

The *FPF* is competent to decide on national-level disputes, while FIFA and UEFA have jurisdiction over disputes at international level.

The *LPFP* Statutes provide for two judicial bodies: the Arbitration Committee and the Disciplinary Committee.

The Arbitration Committee is competent not only to decide appeals against decisions taken by the Disciplinary Committee with regard to matters strictly related

⁷ Act No.63/2011 of 14 December 2011.

⁸ Article 13 clarifies the powers of this Court:

1. The Members of the *FPF*, should:
2. insert a statutory clause stipulating that any dispute affecting the Member, or any of the members thereof, in connection with the Statutes, regulations, directives and decisions of FIFA, UEFA, *FPF* and *LPFP* shall be taken either to the Court of Arbitration for Sport in case of a cross-border dispute or litigation, under the Statutes of FIFA and UEFA, or to the Court of Arbitration of the *FPF*, in case of a national-level dispute or litigation concerning strictly sport issues, provided such dispute or litigation does not fall under the jurisdiction of another body or access thereto is prohibited due to legal requirements.

to disciplinary offenses, but also to resolve labour disputes between the League and its member clubs or between the clubs integrating the association.⁹

On the other hand, Article 58 of the *LPFP* Statutes provides that the Disciplinary Committee exercises the disciplinary powers over the clubs, takes decisions in disciplinary proceedings for offenses under Chapter V of the Statutes and imposes the relevant disciplinary measures.

In terms of disciplinary rules applicable to competitions consideration must be paid to the provisions on Disciplinary Regulations, though subject to the powers conferred on the Disciplinary Committee of the *FPF* in the professional competitions section.

Pursuant to Article 59 of the *LPFP* Statutes:

“1. It is incumbent on the Professional Area Section of the Portuguese Football Federation Disciplinary Committee, hereinafter referred to as the Disciplinary Committee, to exercise the disciplinary powers regarding the offences set forth in these Regulations, without prejudice of Article 3 par. 2.

2. The disciplinary powers are also exercised in compliance with the principles of independence, impartiality and neutrality, through the promotion and the initiative of the Professional Football Competition Inquiry Commission,¹⁰ hereinafter the Inquiry Commission, under these Regulations and in compliance with the decisions taken by the Professional Area Section of the Portuguese Football Federation Disciplinary Committee”.

Under article 82 of the *LPFP* Regulations, the recourse to national ordinary courts of law is considered to be a very serious disciplinary infringement, in respect to which the club is sanctioned with relegation to a lower category.

However, article 304 of the Disciplinary Regulations provides a very specific alternative insofar as it sets forth that all acts and final decisions taken in the scope of the sports legal system are liable of appeal before an arbitration court.

⁹Pursuant to article 54 of the *LPFP* Statutes:

The League and its associated members explicitly recognize the jurisdiction of the Arbitration Committee, excluding any other body, to resolve any dispute within the association which emerge directly or indirectly from both these Statutes and the General Regulations.

According to article 55:

Upon becoming League associated, the club is bound to comply with the provisions of the League Statutes and Regulations and to renounce to any appeal against the decisions taken by the Arbitration Committee. Recourse thereof shall be admitted only to the Plenary of the Arbitration Committee.

Finally article 56 provides as follows:

1. The decisions taken by the Arbitration Committee as referred to in Article 53 subpar.(a) shall not be appealable.

2. The decisions taken under the powers referred to in Article 53 subpar.(b) may be appealed, in such cases and under such terms as are provided the General Regulations.

¹⁰For the purposes of these Regulations, the Inquiry Committee of Professional Football Competitions is deemed to be the body entrusted with the promotion and disciplinary initiative. See also article 208 as regards the discrimination of its competences.

5. *Labour disputes*

Article 206 par. 1 of the *LPFP* regulations provides that a player's entering into his first employment contract with a club other than the one where he received training grants the latter the right to compensation.

On the other hand Article 207 par. 1 states that the aforesaid right to compensation is retained by the training club if the training contract is terminated without cause, or if termination is caused by the club based on just cause confirmed by the subsequent disciplinary proceedings

Article 216 par. 1 deals with the right to compensation in case of a contract with a player without prior notice of just cause for termination the club that enters into a contract with a player who terminates his sports employment contract by invoking just cause without the required support from a final decision taken by a court of law or by the Joint Arbitration Committee within the Collective Bargaining Agreement of Professional Footballers, shall be bound to payment of compensation to the aggrieved Club that amounts to at least forty times the value of the remuneration falling due, as provided for in the terminated contract.

Article 217 states that if the involved clubs fail to reach an agreement on the compensation amount, any of them can take legal action before the Chairman of the Arbitration Committee. In this case, the parties undertake to abide by the exclusive jurisdiction of the Arbitration Committee, which will take a final decision.¹¹

Portugal has an arbitration court specifically devoted to labour disputes.

Article 30 par. 1 of ActNo.28/98 of 26 June 1998,¹² states that the associations representing employers and players may convene, by way of collective agreement, upon the resolution of labour disputes arising from labour contracts by recourse to arbitration under the terms provided by law. For that purpose they shall recognize the exclusive jurisdiction of an institutionalised arbitration committee.

Consequently, the *Comissão Arbitral Paritária - CAP* (Joint Arbitration Committee) was constituted under the provisions of Article 54 and ff. of the Collective Bargaining Agreement (CBA) entered into by the *LPFP* and the *SJPF* (Professional Footballers' Union) with the purpose of resolving football labour disputes.

According to article 54, the sports employment contract is submitted to the *Comissão Arbitral Paritária* in case of conflict arising therefrom. The *CAP* decides in accordance with the applicable law and the relevant CBA, pursuant to the rules set out in Annex II, which is part of the CBA, without right to seek judicial review of *CAP*'s decisions.

¹¹ See also articles 219 and 220. In what concerns article 219, in case of dispute regarding the amount of compensation for promotion or training, the clubs will be prohibited to evade arbitration exercised by the *LPFP* Arbitration Committee for a two-year period, regardless of their having lost the status of associates during the relevant period. According to article 220 para. 1, the Arbitration Committee will not interfere in case the transfer occurs during the period the contract remains in force.

¹² This Act applies to both employment contracts of professional players and training contract.

Moreover, *CAP* is granted powers: a) to interpret the provisions of the relevant CBA; b) to introduce omission cases; c) to resolve disputes arising from sports employment contracts the law does not exclude from the scope of voluntary arbitration;¹³ d) to exercise all powers clearly provided for in the CBA.

6. *A Portuguese Court of Arbitration for Sport?*

Recently, on 8 March 2013, the Portuguese Parliament approved a bill for the constitution of a Court of Arbitration for Sport.¹⁴

According to article 1 pars. 1 and 2 of its bill, this arbitration court (Court of Arbitration for Sport) is a jurisdictional body independent from the sports bodies of the public administration and from entities that comprise the sports system, and it enjoys administrative and financial autonomy. It has been granted specific powers to administrate justice in case of disputes arising from the sports legal system or related to sport.

No doubt it is a specialized court for sport.

Articles 6 and 7 provide for voluntary arbitration in matters directly or indirectly related to sports activities.

However articles 4 and 5 provided for the mandatory arbitration.

Article 4 par. 1 states as follows:

It is incumbent on *CAS* to decide on disputes arising from acts and omissions of federations and other sports organizations and professional leagues as regards the exercise of the relevant regulatory powers, organization, direction and discipline.¹⁵

Article 5 provides similar provisions for doping matters.

Finally, article 8 states the definitive nature of *CAS*'s decision:

Without prejudice to the provisions of the paragraphs below, *CAS*'s decisions, given either in sole or last instance, are not appealable. Submission of the dispute to the Court implies the resignation from appeal in the case of voluntary arbitration.

The mandatory nature of arbitration in case of issues emerging from acts of a public nature implemented by sports federations has been challenged by the constitutional law.

¹³ After analysing the decisions taken by the Portuguese courts of law, João Leal Amado ("Arbitrabilidade dos litígios emergentes do contrato de trabalho desportivo"). *Questões Laborais*, Ano VI, 1999, 13, pp.109-112 summarizes the situation as follows: if the request of a player consists in the plain payment of due remuneration, nothing shall prevent *CAP*'s intervention.. However, should a decision on an unlawful dismissal be at stake, the Committee must stand aside. On the other hand, where the dismissal is promoted by the club, the competence to decide on the matter relies interely on the courts of law, although *CAP* may appreciate issues related to the contractual termination upon the player's decision.

¹⁴ Decree No. 128/XII states as follos: "It is hereby constituted the Court of Arbitration for Sport, and the relevant legislation is hereby approved".

¹⁵ Para. 3: Access to *CAS* is only admissible on appeal from decisions of jurisdictional bodies of sports federations or from final decisions of other entities referred in para. 1 above. The recourse to the internal means of challenge, appeal or enforcement of acts or omissions remains valid as referred to in par. 1, above.

Consequently, the Portuguese Constitutional Court brought the constitution of the Portuguese Court of Arbitration for Sport to an end in its Judgment No.230/2013 of 24 April 2013.

Take, for example, the disciplinary sanctions.

According to the Constitutional Court this is not acceptable that, at first glance, the State delegates its authority on a private entity, and it simultaneously waives any jurisdictional control through the state courts regarding administrative decisions taken within the legal framework of such delegation.

Only one conclusion could be reached: the Court declared the unconstitutionality of the relevant rule due to both the violation of the right of access to court enshrined in Article 20 para.1, and the violation of the principle of effective judicial protection enshrined in article 268 para. 4 of the Constitution of the Portuguese Republic, and provided for in article 8 para. 1 and Articles 4 and 5 of the Appendix to Decree No. 128/XII.

Conclusions

The idea of a Portuguese court of arbitration for sports was not totally abandoned by politicians, and a second bill could be submitted to Parliament in the future.

However, such a bill needs to reflect and take into account the administrative nature of the most important acts of sports federations and leagues.

Meanwhile the courts of law continue to play a relevant role in the Portuguese sports system.

GENERAL PRINCIPLES AND SPORTS JUSTICE IN THE STATE OF QATAR

by *Ettore Mazzilli* and *Martin Cockburn**

SUMMARY: 1. Principles of sports justice in the State of Qatar – 2. Relationship between ordinary and sports justice – 3. Relevant QOC regulations/Anti Doping regulations – 4. Relevant football regulations – 5. The sports judicial bodies – 6. Dispute settlement – 7. Conclusion

Abstract:

This chapter elaborates, in particular, on the general legal principles of sports justice in the State of Qatar as well as the relevant laws and regulations. In this context, the authors intend to provide a brief, but comprehensive, overview with regards to the legal framework, the law and decision-making powers of sport associations, the relevant proceedings, the establishment of arbitrational tribunals as well as current practices and methods of dispute settlement. Particular importance has been dedicated to the example of football which with regards to the overall circumstances must be considered as the highest developed sports in Qatar. Therefore, the Qatar Football Association (QFA), its statutes and regulations as well as other football related provisions and issues will play a significant role within the following illustration. In any case, the reader's attention shall be drawn on the fact that the writing of the present chapter has been complex due to the still young legal system in Qatar and, in particular, in the field of sports law, which, however, is under constant development at high speed.

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1. Principles of sports justice in the State of Qatar

Preliminary and prior to making a legal approach concerning the system of sports justice in the State of Qatar, it deems useful to provide some basic information on the given circumstances at stake.

Concerning the governmental system, Qatar is a hereditary monarchy under the regency of the Emir, H.H. Sheikh Hamad Bin Khalifa Al-Thani. In this respect, on 8 June 2004 the Emir ratified the Permanent Constitution of the State of Qatar (hereinafter also referred to as the “*Constitution*”) which had been overwhelmingly approved in a referendum held on 29 April 2003. Such Constitution repealed the Amended Provisional Constitution, issued on 19 April 1972. The new Constitution represents an important step concerning the democratisation and modernisation of the country. In particular, it foresees the clear separation of powers, namely legislative, executive as well as judiciary. Today’s legal system in Qatar is grounded on both ancient as well as classical sources and contains, on the one hand, elements of Islamic Law, and, on the other hand, many legal principles derive from the Napoleon Civil Code as well as from Egyptian Law, jurisprudence and procedural aspects. Moreover, the State of Qatar in 1916 signed a treaty with the United Kingdom by means of which Qatar became a British protectorate. As consequence, the British established their own court system enforcing English civil law statutes whereas alongside the local courts continued to administer a legal system partially based on the principles of Sharia law. Such practice of dual court system prevailed until 1971 when the first national court system was established in Qatar pursuant to law No. 13 of the Year 1971 (the “*Court of Justice System*”). Accordingly, the court system was divided into four deferent courts: the Criminal Court (Junior – Major), Civil Court (Junior – Major), Labour Court, and Court of Appeal. This court system remained in place until recently when, pursuant to the stipulations of the Law No. 10 of the Year 2003 (the “*Judicial Authority Law*”), a new court system in the State of Qatar was established, replacing the previous, and unifying the national judicial system.¹ Pursuant thereto litigation, generally, is divided into three stages and can take place at the Court of First Instance, the Court of Appeal as well as the so-called Cassation Court which is also foreseen to establish general guiding principles to be followed by lower courts.² In addition, in 2008 it was newly established the Supreme Constitution Court which is competent, *inter alia*, to supervise the law’s compliance with the Constitution as well as providing interpretation to vague legal texts.

On those grounds, the Constitution provides in its Article 45 the legal basis for the establishment of sports federations as well as their functioning. Freely translated into English, the aforesaid Article states as follows: “*The right of citizens*

¹ Information according to: www.qatarlaw.com

² In this respect, the Cassation Court will only consider a wrong application or interpretation of the rules of law. The Court of Appeal is competent to decide the appeals objecting to the judgements delivered by the First Instance Courts.

to establish association is guaranteed under the conditions and circumstances set forth in the law”.³ Hence and in the light of the aforesaid wording, the freedom of associations is granted provided the conditions and circumstances of sub-constitutional law are met. In any case though, freedom of association also includes the gathering of individual athletes in sports federations and/or clubs as otherwise the purpose of their establishment would be jeopardized.

Beyond the wording of the aforesaid Article 45 – merely referring to the establishment of associations – its substantial scope also grants an association the right to decide on its organization, its decision making process and its administration subject to law. The latter aspects are confirmed, in particular, by the following provisions of the Law no. (22) of the Year 2004 regarding Promulgating the Civil Code (“CC”). Insofar its Article 53, section “*Juridical Persons*”, lit. 1) states that, *inter alia*, private associations and corporations shall be considered as “*Corporate Persons*”. Such Corporate Persons then pursuant to Article 54 par. 2, lit. b) CC are equipped, among others, with “*the capacity within limits defined by its founding constitution or as provided by law*”.⁴ Hence, the right to self-legislation by (sports) federations within the legal framework of a founding constitution in the aforesaid sense, i.e. a federation’s articles of association and/or statutes, is expressly recognized. Therefore, a sports federations’ autonomy in the State of Qatar as per Article 45 of the Constitution also applies to the establishment and ratification of articles of association/statutes.

However, such articles of association/statutes of a federation not only state the legal basis of an association, but include, in particular, the fundamental principles concerning its organisation and functioning. Objectives, membership, organizational structure, organs and bodies, legal representation, judicial bodies as well as law-making are only some of the key-elements contained in the articles of association/statutes reflecting a (sports) associations’ internal self-regulation. Beyond its statutory foundation though, an association, certainly, has to be able to regulate its functioning on a day-to-day basis in order to being able to fulfil its purposes and objectives. This is regularly undertaken by means of internal law-making of an association through provisions being of lower rank than the articles of association/statutes. Regularly, they are referred to as rules, regulations, directives and/or circulars (hereinafter also individually and/or jointly referred to as “*Regulations*”). Such Regulations of sports federations will not only refer to internal administrative aspects, but will specify the means of reaching the association’s goals and objectives. Therefore, the Regulations of sports associations will include, *inter alia*, extensively competition-related matters concerning competitions organized by the federation concerned, rules of conduct, rule violations and how such violations shall be dealt with. The establishment of a code of rules dealing with sanctions for offences and the settlement of disputes within the association are of major importance.

³ Full text: <http://english.mofa.gov.qa/details.cfm?id=80>.

⁴ Full text: www.almeezan.qa/LawArticles.aspx?LawTreeSectionID=8883&lawId=2559&language=en.

In this context though, sports associations as private rule-makers, do not make their law in a legal vacuum. Rather, they form part of society and like other institutions or citizens, must take into account existing legislation. This is already indicated in the light of the wording of the aforesaid constitutional articles and laws. First of all and according to said Article 45 of the Constitution, the freedom to establish associations must take place within the conditions and circumstances of law. If, however the freedom to establish associations is limited and subject to law, then, *a fortiori*, this concept also applies to Regulations made by such association with regards to its organization, functioning, etc. In particular the aforesaid consideration is important due to the fact that the articles of association/statutes of a federation and/or its Regulations will deal to considerable extent with its relationship with its direct and/or indirect members and/or the relation between them, including, important rights and obligations.

Hence, from a formal point of view and in order for association internal Regulations to be valid, the process of law-making must comply with the procedural requirements as per the articles of association/statutes of the federation concerned. Regarding their substance, the concept of limitation and subjection to ordinary law does not necessarily mean that a federation's Regulations shall be in full uniformity with state law. Insofar the need for self-regulation in the light of specific sports related aspects is widely recognized. Notwithstanding the above, Regulations concerning their content must fulfil certain minimum criteria. In particular, such Regulations shall comply with general pillars and general legal principles of Qatari law as well as mandatory provisions. Fundamental rights of its direct and indirect members, in particular those which a natural and/or legal person cannot waive, must be safeguarded. In this context, it also shall be taken into account that there is no any sport specific law existing in the State of Qatar which would provide any particular legal framework concerning sports federations and their organization, functioning and/or internal law-making.

In the event the aforesaid formal and/or substantive requirements should not be met, the validity of Regulations may be legally challenged either in front of competent sport tribunals or Qatari state courts and/or do not even come into effect at all.

2. *Relationship between ordinary and sports justice*

Having established the law-making powers of an association, the question occurs whether sports associations in relation to the system of ordinary justice may establish their own judicial bodies concerning the regulation, settlement and/or enforcement of disputes which could be captured under the term "*sports justice*". Preliminary, emphasis shall be given that the relationship between an association and its direct/indirect members as well as the relation among themselves is of purely civil law nature.

On those grounds, the Constitution does not include any article which

would expressly prohibit the establishment and/or functioning of extraordinary, private courts/tribunals. However, according to its Article 130 (“*Chapter V: The Judicial Authority*”), “*the judicial authority shall be independent and it shall be vested in courts of different types and grades*”. Moreover and pursuant to Article 132 of the Constitution “*the law shall regulate the categories and divisions of courts and define their jurisdiction and powers*”.⁵

Within such legal framework and reconsidering the Constitution’s Article 45, the following deliberations will determine whether the freedom of associations in the above-mentioned sense also includes the right of sport-federations to create and function own decision making (arbitrational) tribunals concerning, in particular, disputes in relation to the direct and indirect members, disputes among them as well as the enforcement of their own laws and regulations. As such, it also shall be kept in mind that the creation of an adjudicatory system regularly serves the achievement of the federation’s needs, values and objectives – bearing in mind the specificity of sport.

Therefore and as form of expression of its autonomy, the goal of almost any sports federation is to judge on internal disputes by means of their panel(s) of judge(s). In any case though, this would not be possible if the general jurisdiction of courts as per Articles 130 and 132 of the Constitution would prohibit the functioning of “*private tribunals*”.

However, this is not the case. In specification of and in accordance with Article 132 of the Constitution, the “*Civil and Commercial Procedure Law*” (Law no. 13 of the Year 1990 – hereinafter also referred to as the “*CC Procedure Law*”) regulates the jurisdiction and powers of (ordinary) courts concerning civil and commercial law matters. Thereby, Articles 190 *et seq.* (Part 13 – “*Arbitration*”) of the CC Procedure Law expressly provide arbitration as a method of dispute resolution. By doing so, the state authorises private adjudication, at least within the limits of law. In this context, it is also important to keep in mind that Articles 130 and 132 of the Constitution, in particular, shall serve the purpose to guarantee the right of a party to a lawful judge and the competent court foreseen by law. However, it does not intend to deprive parties thereof to refer a dispute to a private tribunal for adjudication by means of a private agreement. In any case, such principle can only apply to disputes of private law nature as far as the parties have at their disposal the right to validly exclude ordinary state courts as decision making bodies.

Having established the general possibility for arbitration, Article 190 CC Procedure Law states that “*the Parties to a contract may agree on arbitration in a specific dispute. They may also agree on arbitration in all disputes that arise out of implementing a specific contract. No agreement for arbitration shall be valid unless evidenced in writing*”.⁶ Hence, under all circumstances the arbitration agreement must be in writing. Moreover, “*all disputes*” (i.e. all different kinds of

⁵ Full text: <http://english.mofa.gov.qa/details.cfm?id=80>.

⁶ Full text: www.almeezan.qa/LawArticles.aspx?LawTreeSectionID=8104&lawId=2492&language=en.

disputes of civil law nature) may be referred to arbitration as long as the parties concerned are entitled to dispose the disputed rights. Despite the aforesaid wording refers to the implementation of a specific contract, it is widely acknowledged that said Article 190 states the legal basis for sports federations to include arbitration clauses into their articles of associations/statutes and/or other Regulations by means of which all disputes in the aforesaid sense concerning its relationship with direct/indirect members and/or disputes between them will be referred to arbitration – provided the acceptance of all parties involved whereas the latter’s existence will be safeguarded by the sport associations.

Moreover, arbitrators must fulfil certain personal requirements in order to act as arbitrator, in particular, concerning their integrity and moral standards (Article 193 CC Procedure Law). The acceptance of an appointment must be made in writing.

From a procedural point of view, the Civil and Commercial Procedure Law stipulates various principles of arbitration which must be considered at all time. To name some, the relevant proceedings shall guarantee the parties’ right to be heard (Article 196, 200), the right of refusal of an arbitrator (Articles 194 and 195) as well as grants the right to appeal as per the relevant provisions.

In this context though and as a particularity of Qatari law, emphasis shall be given that arbitral awards cannot be considered *per se* to be final and legally binding to that extent that they may only be appealed for certain exhaustive reasons as specified in Article 207 CC Procedure Law, i.e. the arbitration agreement was invalid, the award exceeds the scope of the arbitration agreement, mistakes pertaining to the conclusion of the arbitration agreement (lit. 1), arbitrators do not fulfil certain requirements and/or the constitution of the panel was incorrect (lit. 2 and 3) and/or the existence of procedural mistakes which may be considered to affect the *ordre public* (lit. 4).

Rather and according to Article 205, sentence 1 CC Procedure Law, awards rendered in arbitration, as a general rule, “*may be appealed in accordance with the relevant rules of appeal of judgements issued by the court initially competent to consider the dispute within fifteen days from the filing of the original judgement with the Registry of the Court*”.⁷ Moreover, and pursuant to its sentence 2, the Court of Appeal is competent to deal with potential appeals of arbitration awards. Hence, arbitral awards, in general, can be appealed at the Court of Appeal as per the same rules of appeal issued by the court which would have been competent to deal with the matter concerned in first instance if the relevant parties would have not agreed to refer the matter to arbitration. However, such rule appears to conflict with the acceleration purposes of arbitration proceedings having the aim to produce at relatively low costs final and binding awards. Therefore and in order to avoid such possibility for appeal of the facts and/or law, the parties can agree in advance on the conclusive and final nature of an arbitral award which can be

⁷ Full text: www.almeezan.qa/LawArticles.aspx?LawTreeSectionID=8104&lawId=2492&language=en.

achieved by an expressed waiver of the right to appeal as per Article 205 CC Procedural Law. The right to appeal an award for the reasons as per said Article 207 CC Procedural Law remains unaffected by such waiver. Consequently, sports federations have to ensure that their articles of association/statutes and/or Regulations contain valid arbitration clauses. In addition and for safeguarding the efficiency of arbitral proceedings, federations are advised to ensure the expressed waiver of their direct/indirect members concerning the right to appeal of arbitral awards in front of ordinary courts to the widest possible extent.

In the event of appeal and pursuant to Article 209 CC Procedure Law the competent court at which the request for appeal is made may either approve the arbitral award or order its' partial or full reversal.

Regarding the enforcement and enforceability of arbitral awards, Article 204 CC Procedure Law provides that the awards in question shall not be enforceable unless by virtue of an order issued by the judge of the court with which the original copy of the award was deposited at the office of such court's registry on the demand of any of the interested parties.

In the absence of the criteria mentioned above, the deciding body in question is to be regarded as a simple 'association-tribunal' judging over its members' offences and disputes as well as over the implementation of its own rules and regulations. Here, the state courts' authority to review these rulings and decisions remains unaffected.

As consequence of the above, it can be established that the freedom of associations in Qatar includes the right of (sport) federations to create and function own (arbitral) tribunals within the framework of law. Special attention must be given thereon that the possibility to appeal arbitral awards as per Article 205 CC Procedure Law shall be expressly excluded to the biggest possible extent within a sports federation's articles of association/statutes and/or other Regulations as otherwise there is the risk of lengthy proceedings jeopardizing, in particular, the objective of speedy arbitration proceedings leading to final and binding awards.

3. *Relevant QOC regulations/Anti Doping regulations*

The Qatar Olympic Committee ("*QOC*" – formerly named the Qatar National Olympic Committee) was founded on 14 March 1979 and joined the International Olympic Committee in 1980. By means of Decree No. 37 of the Year 2002 ("*Approval of the Statutes of the Qatar National Olympic Committee*") the Statutes of the QOC (hereinafter referred to as the "*QOC Statutes*") were approved and amended by Decree no. 39 of the Year 2004. On that occasion the name of the Qatar National Olympic Committee was changed to Qatar Olympic Committee. Pursuant to Articles 1 and 2 of the QOC Statutes, the QOC is an independent sports authority with no political and/or religious objectives established for unlimited duration with headquarters in Doha/Qatar. The QOC endeavours to spread sports and physical recreation in the State of Qatar, sponsors and enhances the Olympic

movement in accordance with the Olympic Charter as well as supports and enhances sports performance within the frame of the Olympic spirit.

On the grounds of the above, the QOC as umbrella organisation concerning the sports federations in Qatar, in particular, due to the lack of necessity so far has not created an arbitral tribunal which may deal with internal disputes and/or disputes with and/or by and between its affiliated member national sport federations and/or the latter's members.

On a side note though, pursuant to Article 4 lit. 8) of the QOC Statutes, the QOC is competent to fight the use of doping or any substance prohibited by the International Olympic Committee. For this purpose, the QOC on 7 March 2005 established the Qatar Anti-Doping Commission (QADC) to carry out the anti-doping functions on behalf of the QOC which currently is undertaken on the basis of the QADC Anti-Doping Rules adopted and entered into force on 30 September 2009.

These Anti-Doping Rules will apply, in particular, to QADC, national sports federation of Qatar, and each participant in their activities by virtue of the participant's membership, accreditation, or participation in their national sports federations, or their activities or events. Moreover, these Anti-Doping Rules will apply to all doping controls over which the QADC has jurisdiction.

In case of being competent and if it appears that there may be a violation at stake, the QADC will refer the matter to the Qatar Anti-Doping Disciplinary Panel for adjudication as to whether a violation has occurred and if so what sanction should be imposed in accordance with Article 10 of the Anti-Doping Rules.

Insofar the QADC carries the burden of establishing that an anti-doping rule violation has occurred. The standard of proof will be whether the QADC has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation that is made. This standard of proof in all cases is greater than a mere balance of probability, but less than proof beyond a reasonable doubt. Where these Anti-Doping Rules place the burden of proof upon the athlete or another person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof will be by a balance of probability, except as provided in Articles 10.4 and 10.6 where the Athlete must satisfy a higher burden of proof (Articles 3.1.1 and 3.1.2 of the Anti-Doping Rules).

Decisions of the Qatar Anti-Doping Disciplinary Panel concerning cases arising from participation in an international event and/or involving international level athletes may be appealed exclusively to the Court of Arbitration for Sport (CAS) pursuant to Article 13.2.1 of the Anti-Doping Regulations. In cases involving national level athletes or other relevant national anti-doping organizations which do not have a right to appeal under said Article 13.2.1, the decision may be appealed to the Qatar Anti-Doping Appeal Panel (Art. 13.2.2).

However, also for these latter cases the World Anti Doping Agency (WADA) as well as the international federation concerned will also have the right to appeal,

to CAS with respect to the decision of the Qatar Anti-Doping Appeal Panel (Art. 13.2.3). With regards to football, attention shall also be drawn on Article 67 par. 7 of the Statutes of the Fédération Internationale de Football Association (FIFA) which contains the following wording: “*Any internally final and binding doping-related decision passed by the Confederations, Members or Leagues shall be sent immediately to FIFA and WADA by the body passing that decisions. The time allowed for FIFA or WADA to lodge an appeal begins upon receipt by FIFA or WADA, respectively, of the internally final and binding decision in an official FIFA language*”.⁸ Hence, WADA and/or FIFA, in any case, may also appeal decisions of the Qatar Anti-Doping Appeal Panel.

4. *Relevant football regulations*

The following considerations will demonstrate, in particular, the organizational structure of football on professional level in the State of Qatar, the main regulations and principles regarding football-internal sports justice and, insofar, will also outline major obligations and rights of clubs and players with regards to the system of sports justice.

The high speed development of Qatari football went hand in hand with considerable changes in the national football structure. Until 2006 national competitive football in Qatar has been exclusively organised and managed by the QFA, i.e. a non-profitable sport association in the form of a special organization of public benefit in compliance with the legislation of the State of Qatar. Then, the QFA Board of Directors, by means of Decision No. 6 of the Year 2006 dated 20 December 2006, officially decided to launch a new league format, the “*Q-League*”, which should be promoted by the “*Professional League Committee*”, an internal QFA committee. Subsequently, in 2007 such committee was established under the name “*Qatar Professional Football League Management*” which by means of QFA Decision of the Year 2008 “*Establishment and Recruitment of the Qatar Professional Football League Management*” and due to amendments on aforesaid decision out of the Year 2006 was transformed to a separate legal entity subordinate to and recognised by the QFA.

Due to the consistent “football-boom” in the State of Qatar on 24 September 2008 such entity was replaced by the “*Qatar Stars League Management*” (QSLM) founded by QFA and which was legally established in order to further achieve progress of the national football league in Qatar in compliance with FIFA’s as well as the Asian Football Confederation’s (AFC) aims, i.e. the promotion and development of football on regional and international level maintaining its independence and integrity.

On the grounds of the above and in order to provide complete background information, it shall not remain unmentioned that the 4 (four) major professional national club football competitions in Qatar pursuant to Article 71 of the QFA

⁸ www.fifa.com/mm/document/affederation/generic/01/66/54/21/fifastatutes2012e.pdf.

Statutes as well as the relevant assignments from QFA to QSLM are organized as follows:

- (i) QFA organizes and coordinates, in particular, the Second Division National League as well as the H.H. the beloved Emir's Cup (the biggest cup competition played among all professional Qatari clubs – Article 71 par. 1 of the QFA Statutes.); and
- (ii) QSLM organizes and coordinates, in particular, the Qatar Stars League (“*QSL*” – First Division National League) and the Heir Apparent's Cup (cup competition between the first four ranked clubs of each QSL season – Article 71 par. 2 of the QFA Statutes).

In the light of such organisational structure, Article 80 of the QSLM Articles of Association recognizes that the competent bodies of QFA shall deal with any football related disputes between its members, i.e. also related to the aforesaid competitions organized by QSLM. Such latter concept is also contained within Article 12 lit. 6) of the QSLM Articles of Association according to which the member clubs shall commit themselves to adopt a statutory provision specifying that any dispute involving itself and/or its members (i.e. players, coaches, etc) and relating to the statutes, regulations, directives and decisions of QFA, FIFA and AFC shall come under the sole jurisdiction of the competent judicial bodies of FIFA, AFC and the QFA. Moreover, recourse to ordinary state courts shall be prohibited unless specifically foreseen in the relevant regulations. Hence, QSLM delegates any potential competence for disputes under the umbrella of QFA judicial bodies and tribunals.

On the grounds of the above, the QFA Statutes then provide, in particular, the relevant provisions regarding the system of sports justice as follows:

Concerning disciplinary matters, Article 22 par. 5 of the QFA Statutes states that the Judicial Bodies of QFA are the Disciplinary Committee as well as the Appeal Committee. Furthermore, Article 54 of the QFA Statutes foresees on the basis of their Article 47 par. 1 lit. g), the establishment and existence of a standing committee for ethics and fair play.

According to Article 60 of the QFA Statutes, “*the QFA may create an Arbitration Tribunal, which shall deal with all internal national disputes between the QFA, its Members, Clubs, Players, Officials, Match Agents and Players' Agents that do not fall under the jurisdiction of the other judicial bodies*”. Redress to ordinary state courts is prohibited unless expressly foreseen in the relevant rules and regulations (Article 61 par. 1 of the QFA Statutes).

On the grounds of the above and for the sake of completeness, it is also important to note that the relevant QFA Competition Regulations, which regularly are issued for each football season, apply to all the aforementioned competitions organized by QFA and QSLM.

The Competition Regulations do not only contain technical aspects with regards to the aforesaid competitions as well as the status and transfer of players, but also state in their Article 43 lit. 13 that “*without prejudice to the right of*

players and clubs to seek redress before a civil court of the State of Qatar for employment related disputes” no other disputes shall be brought to ordinary state courts.

In the light of the above, it can be established that the most important national professional football club competitions are organized and co-ordinated by QSLM and/or QFA. Nevertheless, the QSLM Articles of Association refer all disputes related to such aforesaid competitions under the umbrella of the competent QFA Judicial Bodies and/or tribunals. Neither QFA, QSLM, member clubs, players or other enumerated football stakeholders shall seek redress before an ordinary court concerning disputes among them unless such possibility is expressly foreseen in the relevant rules and regulations. However, this is merely the case for employment related disputes.

5. *The sports judicial bodies*

Within the system of sports justice competencies, procedures and appealability of decisions of sport judicial bodies/tribunals vary depending on the kind of dispute which may be classified as follows. In this context, “*Technical Disputes are closely linked to the application of technical sports rules or the rules of the game, are applied regularly by referees or match judges and emerge before, during or after a match*”. [...] “*It is characteristic for Disciplinary Disputes that punitive measures, such as sanctions, penalties or fines, are taken by a sports body against an individual or members by means of which the behaviour during or outside an event is penalised. Finally, Financial Disputes are of major importance and, regularly, state disputes in which one party seeks financial compensation of another due to a contract’s breach or other violations of a party’s monetary rights*”¹.

Saying that and as indicated above, Article 56 of the QFA Statutes provides that the Disciplinary Committee and the Appeal Committee are the Judicial Bodies of QFA. The responsibilities and functions of these bodies are stipulated in the QFA Disciplinary Code (“DC”) and relate, in particular, to the adherence of the DC as well as the complaints, objections or protests concerning match results as well as matters of eligibility of players.

The Disciplinary Committee shall consist of a chairman, a deputy chairman and 3 (three) members (Article 57 par. 1 of the QFA Statutes, Article 3 lit. A) DC. At least one committee member must have legal qualifications.

Decisions of the Disciplinary Committee may be appealed at the Appeal Committee unless the imposed sanctions are (i) a call of attention, (ii) a caution, (iii) a financial fine up to maximum QR 50,000.00/- (Fifty Thousand Qatari Riyals Only) or (iv) suspension of not more than two matches (Article 28 par. 1 DC). The Appeal Committee shall consist out of a chairman, a deputy chairman and 3 (three) members (Article 58 par. 1 of the QFA Statutes, Article 15 DC). The chairman and

¹ Classification undertaken according to Michele Colucci, in International Encyclopaedia of Laws, Sports Law, Italy, edition 2009, 36 f.

the deputy chairman shall have legal qualifications.

Neither the DC nor the QFA Statutes foresee that decisions taken by the Appeal Committee may be appealed in front of a further instance and/or tribunal.

Article 59 of the QFA Statutes contains a wide range of sanctions which may be imposed by the aforesaid judicial bodies of QFA.¹⁰

Concerning disputes not falling under the competence of the latter judicial bodies of QFA, Article 60 of the QFA Statutes provides QFA with the possibility to create an arbitration tribunal which shall deal with internal national disputes as mentioned above. Pursuant to Article 61 par. 2 of the QFA Statutes internal national disputes are those between parties belonging to QFA, regardless of their nationality.

In this context, presently QFA is intending to set up an arbitration tribunal completely independent from QFA which shall be, in particular, competent to take decisions concerning disputes regarding contractual matters (i.e. disputes between clubs and players/coaches or between coaches and QFA, disputes between clubs, disputes between players' agents and clubs/players, etc.) and and/or regulatory matters (i.e. solidarity mechanism, training compensation, etc). Such tribunal will also be in conformity with the requirements of FIFA concerning the establishment of a dispute resolution chamber at national level (i.e. will adhere to minimum procedural standards and equal representation of players and clubs). In addition, such independent arbitral tribunal may also serve as final and binding appeal instance with regards to decisions rendered by the Judicial Bodies of QFA.

Moreover, Qatari clubs playing in the Qatar Stars League (and in near future also those playing in the Second Division National League) need to obtain a license allowing participation in the aforesaid competition. Therefore a licensing system has been established in Qatar with the purpose to safeguard the credibility and integrity of the Qatar Stars League and AFC club competitions, the improvement of professionalism of clubs, the promotion of sporting values in accordance with fair play as well as safe and secure match environments and the promotion of transparency in the finance, ownership and control of clubs.

In this context, the historic development of Qatari sports clubs appears interesting. Until the year 2008 Qatari professional sports clubs had been formed as non-profit organizations according to the Decree with Law no. 5/1984 ("*Governing the Regulation of Clubs*"). However, as per new AFC requirements at that time, clubs could only obtain a license from the AFC allowing participation in AFC club competitions as of the season 2009 if they would be established as commercial entities with the right to gain profits. Therefore and in order to ensure participation of Qatari clubs in AFC club competitions, the Qatari professional

¹⁰ According to Article 59 of the QFA Statutes disciplinary measures can be in general: par. 1: for natural and legal persons: a warning, a reprimand, a fine, the return of awards; par. 2: for natural persons: a caution, an expulsion, a match suspension, a ban from the dressing rooms and/or the substitutes' bench, a ban from entering a stadium, a ban of taking part in football-related activity; para. 3: for legal persons: a transfer ban, playing a match without spectators, playing a match on neutral territory, a ban on playing in a particular stadium, annulment of the result of the match, expulsion, a forfeit, deduction of points, relegation to a lower division.

football clubs needed to be transformed. However, according to the existing laws in the State of Qatar at that time it was not possible for sport clubs to exist as commercial entities as well as to aim for profits.

On such grounds, the QFA initiated proceedings to transform the status of Qatari first division clubs into commercial entities. QFA considered the legal status of One Person Companies (O.P.Co.), a form of limited liability companies, to be opportune due to the advantages that they were relatively easy to incorporate, had relatively low capital requirements as well as low supervision and reporting requirements to the governmental authorities. Such O.P.Co. should be exclusively and solely owned by the actual (multi-) sports club, a non-profit organisation. In this way it could be assured that any possible profit gained by the respective O.P.Co. could be assigned to its owner, the respective (multi-) sports club. However, such ideas could only be realized by an amendment of Qatari law allowing sports clubs to become commercial entities aiming for profits.

In the light of the above and with the kind co-operation of the Ministry of Economy and Commerce of the State of Qatar as well as, in first place, H.H. the Emir of the State of Qatar, the latter issued on 6 December 2008 the Emir Decree no. 30 of the Year 2008, amending Decree with Law no. 5/1984, stating in its Article 1 freely translated into English that: *Pursuant to this law, a club is considered to be any entity with constant organization, established by a group of natural or judicial persons for a non-profitable essential purpose, it aims to conduct sports, cultural, or social activities, or any other community-beneficial activity, while providing means and services necessary to achieve its purpose. Clubs may establish commercial companies to serve one or more of club's activities.*

Pursuant to its Article 2, the Emir Decree no. 30 of the Year 2008 entered into force with immediate effect. Accordingly, Qatari clubs could be transformed into commercial entities in the aforesaid sense and were able to obtain an AFC license allowing participation in AFC club competitions.¹¹ Moreover, the requirement of Qatari football clubs being commercial entities was also adopted in a national club licensing system in Qatar. Insofar emphasis shall also be given that the QFA was the first AFC Member Association to implement a Club Licensing System on national basis as off the season 2011/2012.

On those grounds, Article 72 (“*Club Licensing System*”) of the QFA Statutes expressly states that: *“The QFA shall be responsible for the operation of a club licensing system in accordance with the relevant club licensing regulations of AFC and FIFA. The QFA Executive Committee may delegate the operation of the club licensing system to the QSLM”.*

With the respective approval of the AFC dated 29 July 2011, the QFA delegated the operation of the national club licensing system to the QSLM.

Such system basically draws up certain requirements on Qatari professional

¹¹ From a regulatory perspective it is also interesting to note that by means of Law no. 11 of the Year 2011 governing Sports Clubs in Qatar it was expressly stipulated that Qatari sports clubs could be established as commercial entities.

football clubs (*O.P.Co.*) to be met in the criteria sectors sports, infrastructure, personal and administrative, legal and finance. If the minimum criteria are fulfilled the club will be granted a license allowing entrance in the QSL as well as AFC club competitions, if qualified, (Provision 1.1 lit. c) of the QSL Club Licensing Regulations).

According to the provision 2 (“*Procedure*”) of the QSL Club Licensing Regulations, lit. 2.2.2 there are three different criteria grades. “*A*” Criteria are mandatory. If the license applicant does not fulfil any of them then it shall not be granted a license. Also “*B*” Criteria are mandatory. However, if the license applicant does not fulfil any of them, it shall be sanctioned. “*C*” Criteria refer to best practice elements and are only recommendations. Non-fulfilment of any “*C*” Criteria does not lead to any sanction or to the refusal of the license. According to the provision 2.5.1 of the Qatar Stars League Club Licensing Regulations the QSLM shall establish a catalogue of sanctions to be applied against the license applicant and/or licensees in the event of non-fulfilment of any “*B*” Criteria.

In the light of the above, the QSLM then established decision making bodies, i.e. a first instance body (the Club Licensing Committee (“*CLC*”) and a second instance body (the Club Licensing Appeal Committee (“*CLAC*”)), with regards to the licensing process. The CLC will decide within the relevant deadlines thereon whether a license should be granted to the applicant commercial entity or whether a license should be withdrawn on the basis of the documents at its disposal and in accordance with the provisions of the relevant Qatar Stars League Club Licensing Regulations. QSLM insofar nominates administrative staff of QFA and QSLM as members of the CLC.

The CLAC decides on appeals submitted in writing against decisions of the CLC and makes a final and binding decision on whether a license should be granted. Members of the CLAC shall not include administrative staff of the QFA or QSLM and may not be member of any other statutory body or committee of QSLM.

In any case though, it is important to note that neither the CLC nor the CLAC will decide on any sanctions to be imposed on any applicant for a license for any violation of the QSL Club Licensing Regulations. Rather any such violations shall be referred to the Judicial Bodies of QFA for adjudication according to the QFA Disciplinary Code as well as the QSLM sanction catalogue, if applicable.

6. *Dispute settlement*

As demonstrated above, disputes may have a wide variety of causes and may be of different nature. Therefore, also their settlement may take place in application of different proceedings and regulations taken into account the specifics of each kind of dispute.

6.1 *Technical disputes*

As mentioned above, Technical Disputes are closely linked to the application of

technical sports rules or the rules of the game, are applied regularly by referees or match judges and emerge before, during or after a match.

There does not exist any provision in the QFA Regulations, according to which it would be expressly contained that decisions regarding facts taken by a referee during a match are final, and, hence, not subject to objection and/or appeal.

Notwithstanding the above, Article 4 (“*Legislation*”) lit. c) of the QFA Statutes expressly states that the legislation applicable to the QFA is, among others, the FIFA Laws of the Game issued by the International Football Association Board (IFAB – hereinafter also referred to as the “*Laws of the Game*”). Moreover, pursuant to Article 8 of the QFA Statutes members of the QFA will play football in accordance with the Laws of the Game. Furthermore and in accordance with Article 63 of the Competition Regulations all the aforesaid competitions in Qatar organized by the QFA and the QSLM are played in accordance with the laws of FIFA. Consequently, the Laws of the Game as well as the included principles apply in Qatar.

On those grounds, the Laws of the Game within their Law 5 (“*The Referee*” – “*Decisions of the referee*”) expressly provides that “*decisions of the referee regarding facts connected with play, including whether or not a goal is scored and the result of the match, are final. The referee may only change a decision realizing that it is incorrect or, at his discretion, on the advice of an assistant referee or the fourth official, provided that he has not restarted play or terminated the match*”.¹²

In the light of the aforesaid wording as well as the purpose of such aforesaid Law 5 which, eventually, shall also safeguard the integrity of a competition, it becomes clear that factual decisions of the referee – upon continuation of the match respectively its termination – are final and, hence cannot be successfully attacked in front of any tribunal. As such the legal stability concerning match results, even if produced wrongly, is a sports-typical principle which must be accepted. In this context, the expressed wording of Law 5 referring, explicitly, even to the facts whether a goal is scored and an incorrect match result suggests its wide scope of application.

QFA internally there is no any available jurisprudence on potential exceptions to such aforesaid principles, which in any case, may only be applied in extreme cases. In some countries the competent judicial bodies in such scenarios draw a distinction between factual decisions taken by the referee (or his assistants) – which are unchallengeable – and decisions which shall be considered as a rule violation. The latter may be subject to appeal.

However, any such exceptions to the principle of incontestable referee decisions during a match are not even indicated in any QFA or QSLM Regulations. Hence, any judicial body of QFA and/or any other tribunal/committee established by QFA may only apply any exception to the aforesaid rule of unchallengeable referee decisions very restrictively. In this context and for the sake of completeness only, it also shall not remain unmentioned that factual decisions of referees are not

¹² www.fifa.com/mm/document/footballdevelopment/refereeing/81/42/36/laws_of_the_game_2012_e.pdf.

subject to be overruled by ordinary state courts in Qatar.

6.2 *Disciplinary disputes*

Within *Disciplinary Disputes* characteristically punitive measures, such as sanctions, penalties or fines, are imposed by a sports body against an individual or members by means of which the behaviour during or outside an event is penalised. For the sake of clarification though, any such punitive measures are of civil law nature and, therefore, of paramount difference than sanctions imposed in penal law procedures prosecuted by the state. The latter, in particular, shall serve deterrence, betterment as well as retaliation in return for a culpable act of the perpetrator weighing up the state interests and the personal freedom of an individual. In contrast, disciplinary measures in sports shall serve, in particular, compliance with the “*law and order*” of the game, the integrity and fairness of sport competitions and, eventually, are the outflow of the freedom of associations. However, such freedom understandably cannot be without limits. In any case, penal law principles must be applied by analogy insofar as otherwise fundamental values within the State of Qatar would need to be considered to be violated – always though taking into account the specificity of sport.

In this context and concerning disciplinary proceedings carried out by the QFA Judicial Bodies, i.e. the Disciplinary Committee in first instance as well as the Appeal Committee, it is remarkable that the DC already contains fundamental procedural and substantial standards to be observed. Hence, it eventually can remain open whether or not they must be considered to state fundamental values in the aforesaid sense.

In particular, the DC expressly provides for the observance of the principles as follows: (i) minimum quorum of committees (Art. 5 lit. A), (ii) confidentiality of information (Art. 5 lit. B), (iii) safeguarding the right to be heard (Art. 8) and (iv) the right to appeal unless expressly excluded (Art. 28).

Moreover and in the light of the constant and well established jurisprudence of the QFA Judicial Bodies, also the following procedural and substantial aspects are observed:

- (i) “*nulla poena sine lege*”, i.e. with regards to the principle of certainty of sanctions no sanction shall be imposed if at the time of the alleged violation no any such sanction was foreseen in the DC;
- (ii) pursuant to the principle of “*tempus regit actum*” new regulations do not apply with retroactive effect to facts that occurred prior to their entry into force. In this context and in the absence of any rulings by the QFA Judicial Bodies, it remains open whether or not the principle of “*lex mitior*” may be applied according to which a new/amended law applies as soon as it comes into force if it is more favourable to the perpetrator;
- (iii) moreover, penal as well as civil law in Qatar is based on the principle of culpability of the perpetrator. No sanction shall be imposed if the perpetrator

has not acted with any default. However, in this context it must be awaited whether, in case it should become pertinent, the QFA Judicial Bodies may apply the principle of strict liability;

- (iv) it is prohibited to impose a double-sanctioning for the same rule violation; and
- (v) the principle of proportionality of sanctions will be considered to that extent that the concrete sanction fits the violation under consideration of all relevant circumstances of the particular case.

In this context, it also shall not remain unmentioned that pursuant to Article 25 DC – which in any case is in line with Article 2 lit. 1 as well as Article 4 of the QFA Statutes – the QFA Judicial Bodies shall not be competent to deal with any doping violations which as mentioned above fall under the competence of the QOC.

6.3 *Economic disputes*

Economic or Financial Disputes, regularly, state disputes in which one party seeks financial compensation of another due to a contract's breach or other violations of a party's monetary rights. Whereas this sort of disputes often will be employment related (i.e. will take place in the relation between clubs and/or associations on the one side as well as players and/or coaches on the other side), there are many types of disputes outside the scope of an employer – employee relation. Prominent examples of strictly sports-related matters are disputes between two clubs concerning the (non-)payment of a transfer fee, a participation in a future transfer fee or the non-payment of commissions to players agents arising out of contracts. Furthermore, requests related to the training and education of young players (i.e. solidarity contribution, training compensation) based upon regulatory provisions form a major source for disputes.

In this context and unlike in several other jurisdictions, Qatari labour law does not prohibit related to employment related matters redress to arbitration tribunals. Hence, the parties concerned may seek resolution of such disputes in front of the sport arbitration tribunals.

Nevertheless and as demonstrated above, so far there is not yet any such arbitration tribunal in place in Qatar. However, this does not mean that the QFA would not be actively involved in the resolution of economic disputes between parties being directly and/or indirectly affiliated to the QFA. In this context and in accordance with a system which could be described to have been established upon customary practice, the QFA in a sort of mediation process has been able to legally solve numerous issues at a stage prior to which the parties would lodge claims in front of ordinary courts and/or arbitration tribunals/judicial bodies established by the competent (international) sports federations. This solution from a time, cost and psychological perspective has turned out to be very satisfying.

Whereas there are no any “mediation rules” in place, the procedures in the process to reach solutions in the aforesaid sense will regularly take place in the

following sequence. Upon receipt of a “complaint” by a party, QFA may forward it to the counter-party asking to receive a response within a specified time-limit. Thereupon the parties concerned may be summoned in meetings to discuss the possibility to reach settlements. Such meetings regularly are led by representatives of QFA. However, QFA representatives at all stages will only mediate the proceedings between the parties, but will never take a decision. If the parties then are able to agree on a mutual settlement, the QFA may assist them in drafting the relevant settlement agreements which then will be executed by and between the parties. Such informal mediation according to the aforesaid principles has turned out to be very successful in recent years and it could be avoided a large number of disputes. In any case, the aforesaid process which regularly can be processed in a relatively short period of time does not prevent the parties from seeking redress at judicial courts/tribunals should the mediation not lead to any settlement among them.

For the sake of completeness, it shall note remain unmentioned that also the QSL Club Licensing System may serve as another tool for enhancing the settlement of disputes with regards to the financial matters. As such the QSL Club Licensing Regulations contain, in particular, within the provision 10 (“*Financial Criteria*”) important A-Criteria which may encourage clubs to settle any outstanding amounts as otherwise they shoulder the risk of not becoming granted the license to participate in QSL and/or AFC club competitions. In particular, the provisions F.03 “*No payables overdue towards football clubs arising from Transfer Activities*” as well as the provision F.04 “*No payables overdue towards employees and Social/Tax Authorities*” as per the QSL Club Licensing Regulations shall safeguard a club’s compliance with its financial obligations.

7. Conclusion

The sector of sports law in the State of Qatar has undergone an enormous development during the last decade and, in particular, the last years. However, such progress still is located among a steadily process which will lead to further changes and amendments in the field of sports law as well as the system of sports justice within a considerably short period of time. On the grounds of the above as well as in the light of freedom of associations in Qatar, sports federations are free to create and function own (arbitrational) tribunals within the framework of law. However, arbitrational awards rendered by such federations may be appealed at the Court of Appeal with regards to the facts and/or the law as per Article 205 CC Procedure Law if such right is not expressly waived by the parties concerned. Whereas in this context so far no arbitration tribunal in the aforesaid sense exists in Qatar, the establishment will be likely to appear soon.

In this respect, the QFA is intending to set up an arbitration tribunal completely independent of QFA which shall be, in particular, competent to take decisions concerning disputes regarding contractual matters and/or regulatory matters. Such tribunal will also be in conformity with the requirements of FIFA

concerning the establishment of a dispute resolution chamber at national level. In addition, such independent arbitral tribunal may also serve as final and binding appeal instance with regards to decisions rendered by the Judicial Bodies of QFA, in particular, with regards to disciplinary disputes.

The establishment of such a tribunal is also likely to form valuable new sources of sports law in Qatar, in particular, regarding the fact that the awards to be rendered will be penned by highly specialised arbitrators. In the absence of such arbitration tribunal, in any case, during the last years the method of mediation by QFA has turned out to be a successful tool of dispute resolution in Qatari football.

Furthermore, it is expected that state legislation will be designed increasingly concerning special needs and requirements for the sport environment in the State of Qatar. However, and albeit the considerable amount of work which still needs to be invested with regards of the field of sports law in the State of Qatar and the Sports Justice System in particular, it can be expected that in near future Qatar may even set examples with regards to a sports judicial system setting new bars at high level.

SPORTS JUSTICE IN ROMANIA

by *Geanina Tatu**

SUMMARY: 1. Principles of sports justice – 2. Relationship between ordinary and sports justice – 3. Relevant NOC's regulations – 4. Relevant football regulations – 5. Clubs and players' rights and obligations – 6. The sports judicial bodies – 7. The procedure – 8. Dispute settlements – 9. The CAS recent jurisprudence involving Romanian parties – 10. Implementation of decisions and awards – Conclusion

Abstract:

This article presents the main features of sports justice system in Romania. Having as a starting point the normative provisions and principles that govern sport activity at national level and presenting briefly the main aspects of Romanian Sports Olympic Committee, this article continues with a in-depth analyses of the statutes, regulations and judicial bodies in football. Emphasis is given to the rights and obligations of players and clubs, but also to the procedure applied by the football judicial bodies in settling technical, disciplinary or economic disputes, exemplified with decisions delivered at national level. In the last chapters, recent decisions ruled by CAS in disputes regarding Romanian parties were presented together with the implementation procedure of decisions and awards.

1. Principles of sports justice

The main normative deed with regard to organizing and functioning of the national sport system in Romania is Law No. 69/2000 of physical training and sport, based on which “the sports federations organized on different sport branches are empowered to issue their own statuses and regulations”.¹

The organizing and functioning of sport structures is governed by Decree no. 26/2000 regarding associations and foundations, considering that the national law stipulates “The State acknowledges and grants to any natural person and legal

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¹ Cf. art.2 para. 6 of the Law No. 69/2000 of physical training and sport.

entity the right to freely associate in view of constituting sport structures” yet, it is still possible for sport clubs to set up as commercial companies on shares, governed by Law 31/1990 regarding commercial companies.

A series of normative deeds like: Law no. 4/2000 with regard to preventing and fighting violence in sport competitions and performances, Law no. 104/2008 with regard to preventing and fighting manufacturing and illicitly trafficking high degree risk doping substances, Law no. 504/2002 on broadcasting acts secondarily, in sports.

From all the above mentioned normative provisions, as well as from the content of statutes and regulations, it follows that the principle of right to free association lies at the base of organizing and functioning of sport structures.

As we have already showed, in Romania, a self-contained juridical branch has at its base the provisions of Law No. 69/2000 which institutes an essential obligation for the national sport federations, namely that of affiliating with the specific international federations, in view of participating in international tournaments and thus of representing Romania, in different sport branches. This obligation assumes that the national federation meets all the criteria to affiliate to the international federation, which implies drawing-up regulations compatible with the international sport activity, as well as accepting a sport jurisdiction. The Romanian law itself gives the national federations the peculiarity of setting up regulations and statutes which may allow them to achieve their object of activity. These regulations and statutes, after having been approved by the competitive ministry, have a compulsory juridical drive for their addressees, representing the normative base of the juridical sport branch.

In opposition to sport practised entirely as recreative activity or to keep fit,² the professional sport activity is defined by the above mentioned law as being specific to “an organized system of selection, training and competition, having as purpose improvement of sport results, attainment of records and achievement of victory”.³ Moreover, professional sport activity has a supplementary objective - that of gaining profit. In view of attaining these objectives, the national law grants to sport federations the prerogative of self-regulating the juridical connections which arise, modify and cease in the field. This prerogative of regulating these connections is limited only by the imperative of the domestic juridical order, and in this respect all normative deeds (regulations and statutes) issued by the national federations are referred to the concerned ministry. Thus, once passed, these regulations govern exclusively all juridical connections afferent to the specific sport division. Sport law also confers to national federations the possibility of regulating the athlete’s status under all its aspects, and along with it, sets him/her under the exclusive jurisdiction of the judicial commissions set up by these entities. As argued by the international juridical literature, the idea of delegating the jurisdiction to TAS states

² CATALIN CIUBOTA, “*Sport, game and competition in business law*”, *The Romanian Journal of Business Law* No. 10/2012.

³ Cf. art. 1 para. 2 of Law No. 69/2000 of physical training and sport.

that also nationally, there is such a juridical delegation conferred by the state to the national federations by means of the regulations stipulated in the Sport Law.

Based on the disciplinary authority acknowledged by law to sport structures, the national federations and sport associations exercise investigation and sanctioning of persons and institutions to be found in want, based on a system of gradual sanctions, depending on the seriousness of the actions. Each national federation drafts its own disciplinary norms by observing the rightful principles, in respect of national juridical order and the status and regulation of international sport federations.

The judicial commissions act in respect to a system of coherent sanctions, of gradual differentiation of actions, applying sanctions excluding the possibility of double sanctioning for the same action (*non bis in idem*), of retroactivity in applying sanctions, the interdiction of ruling sanctions for actions committed prior to the action at hand, the assessment of reasons which exempt, attenuate or worsen the liability of the doer etc., everything by observing the right to defence, the right to use the means of appealing against stipulated by normative deeds.

As a consequence of insuring the second court, in the first court of law as well as in the appeal, the judicial commissions within sport structures must ensure the parties under the sanction of nullity proceedings, of observing the right to defence, the principle of contradiction, equality in treatment. One of the principles specific to disciplinary proceedings is observing the obligation of confidentiality justified by the specificity of the disciplinary procedure, whose finality is ensuring the credibility, the image of the parties, conferring rights to the parties as well as to the commission members.

2. *Relationship between ordinary and sports justice*

The relationship between the two law systems is best synthetized in art. 46 (Title V Disciplinary Authority) of Law No. 69/2000 according to which, sport structures:

“(1) Disciplinary authority in sports is fully and legally exercised according to:

a) the competences conferred by the law in view of exercising the right to supervise and control sport structures by the sport concerned central public administrative body;

b) the statutes and regulations of sport national federations, county associations and those belonging to Bucharest Municipality, divided by branches, professional leagues and the Romanian Olympic Committee.

(2) The disciplinary authority confers to legitimate right-holders, mentioned above at par. 1 (b) the ability to investigate and as case may be, to sanction the persons or institutions found wanting”.

These provisions are reproduced also in the statutes and regulations of the national federations, imposing that litigation occurred in connection with sport activity be resolved exclusively by the concerned federation’s juridical commission, at the same time, requesting its affiliated members not to remit such litigations to

law courts unless the applicable legislation specifically institutes the imposition of settlement of litigation before competent courts.

The acknowledgment by law of an exclusive competence to the assignment of the sport judicial bodies on disciplinary matters is a transposition at national level of the international federations' principles, an acknowledgement of the specificity of sport activity.

As far as labour contracts or civil conventions concluded in conformity with common law provisions are concerned, it is stipulated in the Regulations on Football Players' Status and Transfer (RFPST) that the players have right to appeal to a common law court, if in a validly concluded contract the parties have specifically stated the possibility to appeal to common law courts.

With regard to the relationship between common right internal juridical order and sports justice, a short reference to the mechanism of CAS jurisdiction may highlight the essence of this relationship. Thus, in relation to the effects of the CAS decisions within internal sports juridical order, we must make a distinction between the decisions ruled on disciplinary matters and the decisions ruled on patrimonial matters. In the first case, the decisions ruled by the internal juridical commissions which become final and irrevocable either after expiry of CAS intimation period, or after settlement of the file by the CAS, are directly set into practice, by applying disciplinary specific sanctions by the concerned departments within the federation. With regard to decisions determining rights and patrimonial obligations, they are basically willingly executed, and in case of opposition, the national federations may apply sanctions which can go as far as to excluding the debtor from tournaments. On the other hand, these awards ruled by CAS are acknowledged as juridical deeds within the internal system by virtue of the New York Convention of 1958, meant for acknowledgment and execution of foreign awards.⁴ By signing this convention, the states delegated juridical authority⁵ to any Panel which fulfils the conditions imposed by the Convention.

Yet, common law courts have reticence applying these international provisions, and strictly appeal to the internal juridical system, assimilating the effect of mandatory rules and dispositive norms, and considering that such internal juridical norms prevail over the arbitration clauses included in the sport federations' status, as well as in the contracts concluded directly between sport structures and athletes.

This happens to be the case of a court of law in Romania,⁶ which having to solution an action against a deed produced by a ruling organ of a national sport federation, withheld among others the following aspects:

⁴ Romania ratified the above mentioned Convention by Decree No. 186 of July 24th 1961, regarding Popular Republic of Romania's adhesion to the Convention meant for acknowledgement and execution of foreign awards, adopted in New-York, June 10th 1958 published in the Gazette No. 19 of July 24th 1961.

⁵ For details regarding the idea of delegating juridical authority by virtue of the Convention, see ABBAS RAVJANI – *“The Court of Arbitration for Sport: a subtle form of international delegation”* in CAS Bulletin No. 1/2010, 13 and following.

⁶ Court of Appeal Bucharest – Judgement in civil matters No. 29/2012.

- „the defendant,..... Federation is a public authority, being a private law entity, pronounced of public utility by the Law of physical training and sports (notice the contradiction within the very same phrase private law entitys – public authority)
- “The Executive Committee of Federation exerts prerogatives of public power”
- “the litigations deriving from individual labour contracts are not up to commissions within the Federation...”
- the arbitration clause, included in the contract concluded between the parties stipulating that litigations are up to the Federation is null and inofficious” (this is the clause by means of which it acknowledges the competence of solutioning litigations in favour of juridical commissions and of the Court of Arbitration for Sport in Lausanne)
- „labour conflicts in Romania are only up to the courts of law appointed by law, the possibility of their solutioning being excluded to any other entities, such as commissions with juridical attributes within RFF. The latter ones do not pertain to the law court system, which comprises of courts, tribunals, the Court of Appeal and the High Court of Cassation and Justice and they cannot substitute them.”

Obviously, the solutions above mentioned cannot be maintained as principles of unfolding sport activity. The national federations organize juridical commissions which meet all specific criteria of a permanent, independent and impartial court, as they are specified in the national and international legislation. These commissions work based a set of precise procedural rules provided for in sport regulations and which offer, under contradictory-like conditions, sufficient guarantees regarding the right to defense. As proof in this respect stands the practise of the Court of Arbitration for Sport in Lausanne, which adjudicated litigations coming from the Romanian sport law system and which did not announce the lack of any guarantees regarding solutioning differences by means of award”.⁷

3. Relevant NOC's regulations

The Romanian Sports Olympic Committee (COSR) organized as an association of national interest, functions in compliance with its own status drawn up in conformity with the Olympic Charter and Law no 69/2000, and which in achieving its mission works together with governmental and non-governmental institutions, with associations and public and private law organizations. Without having any disciplinary regulations or commissions as in the case of national sport federations, RSOC exerts a disciplinary authority in sanctioning injurious actions in sport and which do not have contraventional or penal incidence.

Investigating such actions is up to the Judicial Commission relatively newly set up within COSR, constituted as a lucrative group having an advisory

⁷ Court of Appeal Bucharest - Judgement in civil matters No. 29/2012.

role, without power of decision. The Commission's report is submitted to the Ethics Committee, made up of well-known people from the sport world and of consultants, and its decisions may be appealed before the National Commission of Sport Discipline.

In practice, there are few cases when COSR rules sanctioning measures for such actions, in the latest case, the Ethics Commission ordering suspension for undetermined period from the national batch of three players of Hungarian origin of the national hockey batch "Under 16", on the ground of aggressing a Romanian colleague, and permanent monitoring of Romania's representative batch FOTE 2013.

4. *Relevant football regulations*

Within the football playing activity in Romania, the central role falls onto RFF credited to draft its own status and regulations in conformity with the provisions of Law no. 69/2000 and FIFA's status.

The sport structures to be found in the Romanian football playing are organized by the pyramidal pattern, having RFF at its top "to promote, control and coordinate the football activity in Romania and which, as an affiliated FIFA and UEFA member, is acknowledged as the only football association authority to represent Romania".⁸

At the same time, according to RFF's status, the affiliate-membership quality spreads also to the County Football Associations (CFA) and the sport clubs which function as "sport structures with legal personality, legally constituted and officially acknowledged".⁹

At the base of the organizational pyramid stay the amateur and professional football players identified within football clubs constituted as associations or shareholding commercial companies.

There are professional clubs to have made possible the coming into being of the Professional Football League (PFL) subordinated to RFF, and which unfolds its activity based on its own statuses and regulations approved by RFF.

There are at the same time, entities which perform activities in football in the form of sport associations without legal personality, having the character of a civil society being able to affiliate to CFA and to take part only in local official tournaments.

All these sport structures function based on their own statuses and regulations, at the same time having the obligation to respect the statuses, regulations, instructions and decisions of FIFA, UEFA and RFF.

Ones of the main football regulations in the Romanian sport justice are:

- *The Regulations regarding the Football Player's Status and Transfer (RFPST)*

⁸ Cf. art. 1 para. 3 of the RFF Statutes.

⁹ Cf. art.45 para. 1 of the RFF Statutes.

- *The Disciplinary Regulations (DR)*
- *The Football Activity Organizational Regulations (FAOR)*

The Disciplinary Regulations (DR) presents a strong technical character aiming at the course of the tournament whereas the *Regulations regarding the Football Player's Status and Transfer (RFPST)* presents specific sport activity provisions in the sense of nationally identifying the players' right to play and transfer as well common law and labour law principles. RFPST contains a set of rules adopted by RFF based on Law 69/2000 and respecting FIFA and UEFA instructions.

The Football Activity Organizational Regulations (FAOR) contains dispositions regarding the conditions of a club's affiliation to RFF, modalities of organizing tournaments, dispositions on exclusion of clubs from the championship, modalities of settlement of contestations on match results etc.

Yet, as any law norm, sport regulations imply difficulties in having them interpreted and applied, such that even juridical bodies elaborate a jurisprudence of their own with regard to the disciplinary side as well as with regard to drafting, modifying and ceasing sport specific contracts. This jurisprudence is mostly often confirmed by TAS, which leads to building up of reference points in interpreting and applying these norms.

5. *Clubs and players' rights and obligations*

As I have specified in the previous chapter, the main normative provisions in Romanian football are to be found in RFPST, DR and RFOA.

On the other hand, the relationships between clubs and players, respectively their rights and obligations are governed by the concluded contracts, club's internal regulations as well as RFF/FPL/CFA regulations.

In the head note of RFPST can be read "*The present Regulations establishes the norms regarding the status, identification, players' right to play and transfer nationally from one club to another, as well as making the players available to national teams*".¹⁰

Keeping track of the differences which have to be made between the professional football player and the amateur football player, the professional football player's rights and obligations are stipulated in RFPST, in the Internal System Regulations (ISR) of the club where he is identified and not least, in his labour contract or temporary work contract concluded with the club where he performs work.

Only as an example, among the main rights stipulated by RFPST for the professional football player, as part in a labour contract or civil convention: the right to remuneration and other pecuniary rights, corporeal rights agreed by contract, the right to benefit of contractual stability, to be ensured by the club of all appropriate corporeal and technical conditions for training and tournaments, the benefit of other rights stipulated by the RFF regulations.

¹⁰ Para.1 of the RFF "Regulations regarding the Football Player's Status and Transfer" Preamble.

Among the rights of which the professional football player benefits, there is also the right to appeal to common law courts in case of litigation which focuses on the execution of the labour contract clauses validly concluded with the employing club.

The player's obligations have in sight: observing the club's scheduled program, taking part in official and friendly matches, observing the contractual clauses concluded with the club, observing the regulations of FIFA/UEFA, RFF, etc.

According to the same regulations, within the contractual relations with the player, the club has the following obligations: insuring corporeal, technical, organizational conditions, medical assistance necessary for the player's activity, performing knowingly the contractual obligations assumed before the professional football players, as well as other obligations deriving from the club's internal regulations.

On the other hand, DR stipulates a series of obligations to be followed by the legal entities and natural persons susceptible to observe these regulations, respectively by the clubs managers and employees, players, coaches, etc.

Still, having a predominantly technical character, DR establishes prevalently the obligations regarding matches and competitions organized by RFF/FPL/CFA/FABM.

The players' and clubs' rights and obligations must be analyzed in terms of statuses and regulations nationally and internationally in force, of the clubs' internal system regulations, of the contracts concluded with the clubs, an operation which gives rise to many inconsistent decisions (in case of litigation) due to different understandings of the set of norms.

6. *The sports judicial bodies*

The disciplinary authority is exerted at central level by the national sport federations, professional leagues and at regional level by county associations per sport branch, according to legal provisions, statutes and regulations adopted by each sport structure.

Observing the principle of double level of jurisdiction, most national federations exert disciplinary action in the first trial court by means of Disciplinary Commissions, the rulings of which can only be appealed in the Appeal Committee constituted as the second and last internal sport trial court.

According to the Regulations of Application of the RFF's Status the disciplinary authority within football activities is fully and legally exerted in compliance with the competences given by the law to the structures within football activity, by the Ministry of Youth and Sports. County football associations, professional football leagues may exert the disciplinary peculiar within the limits of the competence delegated by the RFF statuses and regulations and their jurisdiction.

In football, the settlement of disputes, in which affiliated clubs and their officials, RFF/PLF/CFA/FABM officials, players, players' agents or match bookers

are involved, is exclusively up to judicial commissions for litigations arising from sport activity, while common law trial courts rule on litigations arising from interpreting and executing validly concluded contracts between professional players/coaches and clubs and which may be individual labour contracts or temporary work contracts subject to common law.

The main sport judicial bodies in football:

- The Disciplinary Commission (DC) within the LPF/RFF,
- The Commission Dispute Resolution (CDR) within LPF;
- The National Dispute Resolution Chamber (NDRC) within FRR;
- The Appeal Committee (AC) within RFF/FPL

In the first court, the competence of ruling disciplinary issues is up to the Disciplinary Commission, while contractual litigations are up to CNSL. The appeal against the decisions ruled by the Disciplinary Commissions as well as those of the CNSL is settled by the Appeal Committee, from where unlike the first court, there is a clear difference between the competence of the Disciplinary Commissions and CNS, while in the second Appeal Committee it has a common competence for all litigations.

In compliance with RFPST provisions, the disputes settlement in the first trial court is up to the CDR within RFF/LPF. The decisions ruled in the first trial court may be subject to action before the RFF/LPF Appeal Court.

Law no. 551/2004 regarding the organization and functioning of the National Commission for Sport Discipline (NCSD) stipulates that definitive decisions ruled by commissions with disciplinary attributed within national sport federations, professional leagues, county associations, Romanian Sport Olympic Committee (COSR) may be appealed by the interested party at NCSD. The law stipulates freedom of choice of the parties since “in the case where there is no option for a procedure of settlement of the redress mechanisms by the Commission, the interested parties may refer to the law-court, according to common law norms...”.¹¹

In practice it is proved that in most of the football cases, the decisions of the Appeal Committee are appealed directly at TAS.

Keeping aside for the next chapter the aspects of trial procedures, we would like to point out that, the disciplinary authority in sport with its two attributes of investigating and sanctioning respectively, is conferred by the sport branch central public administration organs and must be exerted in compliance with the law, and its own statuses and regulations.

Except for the bodies conferred with disciplinary attributions, constituted at each sport branch level, there is a series of disciplinary authorities to act nationally.

The National Commission for Sport Discipline (NCSD) set up by Law no. 551/2004 functions within the National Authority for Sports and Youth and holds the competence to judge “the appeal drawn up against definitive decisions, by exhaustion of redress mechanisms, by the internal discipline commissions, which

¹¹ Cf. art. 2 para. 6 of the Law No. 551/2004 regarding the organization and functioning of the National Commission for Sport Discipline.

are organized and function within national sport federations, county associations and those of the Municipality of Bucharest, by sport branches, of the professional leagues and the Romanian Olympic Committee, as well as of the redress mechanisms drawn up against the decisions ruled by the National Commission for Action against Violence in Sport".¹² With regard to the decisions ruled by NCDS, they can be appealed within 15 days at the Bucharest – Administrative Law Department. Should the decisions become definitive by unappealing, Law no 551 stipulates the obligation, on the one hand, of the party against which it was ruled, to willingly fulfill the contrivance of the decision and the obligation, on the other hand, of the Commission to communicate the decision to the national sport federations, professional leagues, COSR, CNAVS which fulfill them in compliance with the stipulations in the contrivance of the decision. From the moment this commission came into being, the majority of the cases brought up to settlement, pertained to football, but it was noticed that there was mostly a throwing-back of litigations, which came into conflict with the principle of celerity in the sport branch.

In view of performing sport activity in compliance with fair-play principles and in view of preventing and fighting the doping phenomenon, the National Anti-doping Agency (NAA) functions based on Law 552/2004. Applying the National Anti-doping Program, NAA exerts, based on the law, the disciplinary prerogatives of hearing and sanctioning athletes in want of breaching the regulations in the field.

The National Action Commission against Violence in Sport (NACVS) supervises and controls the modality in which the binding norms are observed and applied by the show and tournament organizers and by the stadium or other sport base administrators, where these performances take place and ascertains and applies sanctions, others than those to be found in the respective structures' statuses and regulations; ascertaining sanctions shall be done by consultation with the national sport federations according to the Law 4/2008 on preventing and combating violence at sporting competitions and games.

Law no 4/2008 stipulates that the provisions' violation attracts civil, disciplinary, trespass (misdemeanor) or penal responsibility and the ascertainment of trespass (misdemeanor) and the application of sanctions is performed by the police and gendarmerie. Yet, if the national sport federations apply in their turn sanctions as a result of requests coming from CNVS and if for the same action a breach on the classical principle of *non bis in idem* is noticed at some sanctions applied by the organs of regulations.

7. *The procedure*

Taking into consideration the nature of the bodies dealing with football disciplinary matters and the complex jurisprudence, it is important to examine the relevant procedure.

¹² Cf. art. 2 para. 1 of the Law No. 551/2004 regarding the organization and functioning of the National Commission for Sport Discipline.

Depending on the issue under litigation, the trial procedure takes place in compliance with RFPST norms or the RFF Disciplinary Regulations which contains provisions regarding organizing and functioning of responsible bodies on ruling decisions in football.

The litigations arising from contracts concluded between players and clubs (termination, interpretation, execution, maintaining contractual stability, players' legitimation and transfer etc) or contracts concluded between clubs and coaches or those concluded between affiliated clubs to RFF/LPF/CFA are to be settled in compliance with procedural provisions enforced by RFPST.

In this case, the trial procedure is conditioned by "fulfilment by the parties of the preliminary binding procedure of amicable settlement of the dispute, and should the parties not reach any agreement, they may bring the litigation before the competent commission".¹³ At the same time we must point out that the intimation of the commission may take place only after the due date of the unfulfilled obligation.

In the first trial court, the intimation of CDR is done by writ of summons, in written form, in Romanian and should be accompanied by all documents used in augmenting the demands. RFPST stipulates that ex officio notification by the CDR of RFF/LPF or those which may be notified by the RFF/LPF General Secretary.

The procedure takes course in written form, and there is at the same time the possibility of the commission to summon the parties, should it need supplementary explanations with regard to the entries in the file.

After submission of all diligences stipulated for in the regulations and attainment of the in-fact situation, CDR intimates to the parties the ruled decision, except for the case when the parties also request the intimation of the reasons adduced, or should it come to sanctions of sport character, the reasons adduced are also to be intimated.

CDR's decisions may be appealed within 5 days from having been ruled; otherwise they become final and irrevocable.

The appeal request, in written form, empowers the Appeal Committee with expediency solutioning of the litigation. At the longest 7 days from the registration of the request, the Secretary Office of the Committee sets the appeal term, which cannot be any sooner than 3 days from citation of the parties.

The appeal takes course within the procedural frame existent at the moment of decision ruling of the first trial court, and the appeal commission is to solution the request "in compliance with the conventions and agreements concluded between the parties as well as with the RFF/LPF/CFA/FIFA/UEFA status, regulations and norms." (art. 36 RFPST)

The Appeal Committee solutions the request, and by the decision adopted with the majority of members, may rule keeping or changing entirely or partly the decision ruled in the first trial court. The decisions ruled in appeal may be re-appealed within 21 days at TAS, if not they become final and irrevocable.

¹³ Cf. art.25 of the RFF "Regulations regarding the Football Player's Status and Transfer".

In case of any deviations from the RFF status and regulations, the trial procedure is submitted to DR provisions which apply to any match or tournament organized by the football institutional structures and which ascertain applicable sanctions, organizing and functioning of the bodies responsible with ruling decisions.

In the first trial court, the RFF Disciplinary Commission is up to adjudge the disciplinary causes afferent to football litigations, except for the First League, for which the adjudging is up to the DC within LPF. The decisions' ruled by the Disciplinary Commission may be appealed by the Appeal Commission of RFF/ FPL.

The decisions ruled in appeal may be appealed at CAS as the last jurisdiction on disciplinary matters, if not these become final and irrevocable.

After exhausting all means of appeal existent at the level of bodies having disciplinary attributions in the field, the parties may refer to CAS jurisdiction based on the arbitration clause introduced in RFF statuses and regulations, as a consequence of international affiliation and of the sport activity specific character.

8. *Dispute settlements*

The modalities of dispute settlements in football shall be presented depending on their character, firstly with regard to applicable normative deeds, the breach of conduct and applicable sanctions, concluding with examples from sport justice bodies.

8.1 *Technical dispute*

The main normative deeds which regulate the offenses having a technical character, the procedure and applicable sanctions are the Disciplinary Regulations and the Football Activities Organizational Regulations (FAOR) of the RFF.

A primary distinction must be made between the sanctions applied by a referee regarding the course of a match on the field and the offenses committed by clubs through their representatives or other persons with regard to the course of the match.

According to DR, the decisions taken on the field by "the referees are final and irrevocable and exceptionally they may be the object of a revision when proved that the sanctioned person was wrongly identified".¹⁴

As far as the course of a match is concerned, the arbitration report must mention any complaint made by any of the participating clubs against one another, in case it is stipulated that the latter one is guilty of breaching on one of the regulatory provisions.

Complaint may be lodged at the beginning of the match when their object is the right to play of one or more players, when the non-conformity of the field is contested etc, as well as at half time or after the match is over when

¹⁴ Cf. art. 64 paras 1 and 2 of the RFF "Football Activities Organizational Regulations".

contesting with regard to the right of play of a reserve, the identity of one or more players recorded in the referee's report.

An essential condition in solving such complaints by the relevant commissions is that they be recorded in the referee's report. Should bad-faith be noticed in the drafting of a contestation, should unaccountability occur or should non-payment of stamp duty be remarked then the culpable club is sanctioned.

In recent law cases of the LPF's Disciplinary Commission we can find decisions ruled in litigations which have as object organizational deficiencies and in which the sanction ruled were – warnings for the responsible club.

In another case, the complaints lodged by both clubs participating in the match, due to lack of stamp duty were sanctioned with sport penalties for both teams.

8.2 *Disciplinary disputes*

RFF imposes to football sport structures to foresee modalities of exerting disciplinary authority in their own statuses and regulations in relation with the competences delegated by RFF statuses and regulations.

Commanding the disciplinary prerogative, the football associative structures, according to their own statuses and regulations, apply disciplinary sanctions whenever their members commit disciplinary offenses, respectively breach on the internal regulations norms, on the labour contract, on the decrees or legal provisions imposed by hierarchical leaders, on the RFF statuses and regulations. One of the criticisms brought before disciplinary bodies at different levels is the lack of uniformity in applying sanctions given that the same action is differently sanctioned, making similar situations right by applying different sanctions and in some cases by applying a sanction not corresponding to the action committed.

At club level, the internal regulations contain precepts and disciplinary sanctions according to RFF frame-work regulations applicable in view of sanctioning players' offenses. With regard to the sanctions ruled by the commissions having disciplinary attributions with the clubs, for the offenses committed by the players, it is stipulated with the RFF regulations that should there be a sanction of ban on taking part in certain matches or of other sport penalties, these sanctions must be ratified by the Disciplinary Commission.

At national level the provisions of the RFF Disciplinary Regulations are applied, stating that: *“it stipulates the infringement from RFF status and regulations, ascertains applicable sanctions, governs the organization and functioning of the liable bodies in ruling decisions and the procedure of solutioning disciplinary matters. Upon its drawing-up, the provisions of FIFA Disciplinary Regulations and UEFA Disciplinary Regulations have been taken into consideration”*.¹⁵ Containing an elaborated system of sanctions, disciplinary offenses and applicable sanctions with regard to natural persons, when it comes to players and clubs, the

¹⁵ Cf. art. 1 of RFF “Disciplinary Regulations”.

applicable procedures as well as the Disciplinary Regulations are on a whole in conformity with observing the principle of proportionality, culpability, legal equality as well as in conformity with the benefit of doubt.

With regard to the judicial practice of the LPF Disciplinary Commission, in one recent concrete case which had as object the denial of the measure taken by the referee of suspending two players as a result of the kicks applied, it has been ruled that one of the players be sanctioned with suspension for two matches and sport penalties and the other player be suspended for one match and sport penalties.¹⁶

As a result of committing the crime of “throwing objects” (stipulated at art. 82, paragraph 3, let. a), “to other members of the public or to/in the court” (Disciplinary Regulations art 83.2 let. d) by groups of supporters of the host club as well as of the visitor club, the Disciplinary Commission has sanctioned with sport penalties both clubs for “unruly behaviour of their own supporter groups”.

In a case from 2011, the LPF Disciplinary Commission ruled the demotion of FC Arges into the Second League. The club’s main shareholders, as well as two other officials were declared *personae non-grata* as a result of committing the crime of on-going bribery. Moreover, the club was sanctioned with sport penalties as well as with suspension of court for two laps, given the poor organization of the match versus Dinamo club.

In another case from 2011, FC Vaslui submitted a contestation with the First League Disciplinary Commission demanding the demotion of FC Rapid and disciplinary sanctioning of its executive chairman, by restricting him from any football connected activity and restricting his access to the stadium for two years as well as sport penalties having in mind that the respective person tried to influence the result of the match between the two clubs.

By contacting 3 players of FC Vaslui before the course of the match, the executive manager was accused of committing an extremely serious crime incompatible with the basic principle of organizing sport activities, as well as the principle of fair-play and that of integrity and which constitutes a breach on FIFA, UEFA and FRF regulations.

8.3 *Economic disputes*

FRAO stipulates a series of offenses with economic character susceptible of being committed by football clubs constituted as commercial companies on shares by means of which they might influence the results of the match.

The obligations imposed to the clubs aim at protecting the sport integrity of sport tournaments organized by RFF which, in this regard, has the competence of sanctioning any natural person or legal entity who is found wanting of influencing the management, administration of more federation affiliated clubs.

¹⁶ FC Steaua v. CS Gaz Metan Medias from 5 March 2013.

By dealing with litigations regarding a club's possession of shares or equity interests of another club, the quality of being another club's member, of being anyhow involved or to hold any management or administrative position and/or sport performance of another club, the competent disciplinary commission in the first trial court may rule the sanctioning of the natural person with restriction to any legal football connected activity for unlimited time as long as the action does not cease, a sanction which is fortified with sport penalties and which may be doubled in case of relapse.

9. *The CAS recent jurisprudence involving Romanian parties:*

CAS 2011/A/2642 FC Bacau v. Steaua Bucharest

In *FC Bacau v FC Steaua Bucharest*, the CAS had to rule on the validity and the consequences of an Addendum signed by the parties representing an integral part of the Transfer agreement of the player Bacau and to order the Respondent to pay the amount of 800,000 Euro (according to art. 5 of the Addendum) having as object the remainder of the payment related to the transfer of the football player to the Respondent club.

In a recent case opposing two football clubs which concluded a transfer agreement and an addendum to this transfer, CAS upheld the appeal against the decision of the RFF bodies which rejected the Appellant's claim for the payment of the 800.000 Euros, transfer fee, stipulated by article 5 of the Addendum.

The rejection was reasoned on the fact that "At least from the formal and regulatory points of view, the drafting of a separate addendum contradicting the contents of the Transfer Agreement should not be validated by the ruling commission" and that the commission couldn't admit a claim based on approximations or incomplete interpretation of doubtful contract provisions and they applied the interpretation rule according to which "Any reasonable doubt shall be interpreted in favour of the defendant".

Applying the RFF regulations and FIFA/UEFA regulations as well, the panel held that the parties concluded a valid transfer contract made up of the transfer agreement and the addendum to the transfer agreement and with the extension of the contractual relationship between the Player and the Respondent, the two documents were extended according to the period of the new contract between the Player and the Respondent until 30 June 2011, based on the clear wording of the addendum articles.

The Panel determined that contrary to the resonnement of the appeal commission of RFF, the wording of article 5 of the addendum was clear and the Addendum was also valid until June 30th 2011, and obliged the Respondent to pay the Appellant an amount of 800.000 Euros plus VAT.

CAS 2011/A/2461 Ivan Laurentiu Marian v. C.S. Otopeni

In this case regarding the breach of contract due to unpaid salaries, the Sole arbitrator examined not the existence and the content of the Contract signed by the parties but whether or not the Club and the Player entered into a subsequent agreement the Amendment that modified the Contract by reducing the financial rights to which the Player was entitled.

After signing a Civil Convention, the Player performing for CS Otopeni was asked to sign together with the another club's player a Nominal Table in order to acknowledge receipt of the bank cards.

Due to belated wage payments, the Player initiated the proceedings before the National Dispute Resolution Chamber (NDRC) of the RFF invoking the contract and the payment of the instalments due. The NDRC rejected the Player's request "based on the agreement signed by the Player accepting to waive his entitlement to the payment in relation to the 2009-2010 season and had agreed on a reduction by 50% in relation to the payment for the 2010-2011 season."

In adjudicating this appeal, the Sole arbitrator found that the Amendment that modified the Contract had a number of characteristics that tented to establish its valid formal existence, there were some elements that rose questions on the fact that there was only one alleged version of the Amendment for 25 parties and, more significant the fact that the first page of the Amendment was signed only by the club.

The fact that the Nominated Table which existed as a stand-alone document to which the Club subsequently added another page in order to form the Amendment together with other factual evidence, the Sole arbitrator admitted the Player's appeal and ordered the Club to pay to the Player the outstanding contractual salaries.

CAS 2012/A/2690 S.C. Dinamo 1948 S.A. v. Romanian Professional Football League & Sporting Club S.A. Vaslui

The arbitral award issued by the CAS on 16 October 2012 in the case FC Dinamo v RPFL & FC Vaslui gave the answer to a series of question regarding the registration of a player outside the registration period by FC Vaslui banned from registering players and in consequence violating FIFA regulations and fielding this player that was not eligible to play in the match with FC Dinamo.

Nevertheless, this award also rised another matter respectively which period was covered by the DRC decision based on the article 17 (4) of FIFA regulations that, "the club shall be banned from registering any new players, either nationally or internationally, for two registration periods".

In October 2011, Dinamo (the Appellant) lodged a complaint with the Disciplinary Committee of RPFL alleging that serious disciplinary infringements had been committed by Vaslui (the Respondant). Dinamo claimed that by registering

a player and fielding him in the match of September 11th 2011, Vaslui seriously infringed on both FIFA and RFF regulations because the club was still banned from registering any new players. Dinamo asked the Disciplinary Committee to sanction Vaslui (deduction of 15 points and losing by forfeit the game played on September 11th 2011). In its complain, Dinamo mentioned the FIFA position sent to RFF maintaining that Vaslui would only be in position to register new players as from the opening of the new registration period (being the third registration period of the 2011/2012 season).

The Disciplinary Committee of RPFL dismissed the petition as inadmissible while the Appeal Commission of the RPFL rejected the recourse as not grounded.

The Appellant filed its statement of appeal before CAS which delivered its decision after analyzing firstly the period covered by the DRC decision to ban FC Vaslui from registering any new players for two registering periods starting with December 26th 2010. The Panel considered that the ban expired on September 5th 2011 according to FIFA provisions stating that a ban shall last “for two (full and consecutive) registration periods” and based on its wording there is hardly any doubt that the ban expires at the end of the second period and it does not last “until the beginning of the third registration period”.

Therefore the Respondent (Vaslui) was in principle free to register a player free of contract whose previous contract expired before the closing of the second transfer period contained in the sanction.

The Panel was of opinion that the date of registration of the Player was in accordance with FIFA and RFF regulations because the employment contract had been concluded on August 31st 2011 and the Player was registered on the September 8th after the ban expiration (September 5th 2011) and in this case operates FIFA exception according to which a professional whose contract had expired at the end of a registration period may be registered outside that registration period.

Even though some media articles questioning the goodfaith of the registration of the player by the Respondant (Vaslui) and the fact that the exception must be interpreted in a restrictive manner and without any doubts concerning the parties' intentions, in absence of sufficient evidence, the Panel did not have sufficient reason to change the decisions taken by the Romanian football bodies and rejected the appeal.

CAS 2010/A/2112 FC Rapid Bucuresti v. FC Timisoara, RPFL, RFF

In 2010 winter transfer window, FC Rapid signed two transfer agreements but failed to make the necessary applications to register the players. On 5 March 2010 FC Rapid and FC Timisoara were scheduled to compete one against another.

On 4 March 2010 FC Rapid requested the AMFB (Bucharest Municipal Football Association) to approve the registration of the 3rd team of the club in the 4th league competition organised by AMFB who issued the annual visas for the two players allowing this way to FC Rapid to play in 2010 AMBF competition.

On the visas issued by AMFB, the LPF granted on 4 March 2010 the annual visas for the two players allowing them to play for FC Rapid in the competition organized by LPF.

On 4 March 2010 AMFB informed Rapid that its request to register the 3rd team in the 4th League city championship has been denied and the transfers of the two players were null and void.

On 5 March 2010, the LPF informed Rapid that the annual visas for the two players were annulled.

On 5 March 2010, Rapid submitted a new request to AMFB which revoked the decision rendered the day before and confirmed the registration of the 3rd team of Rapid for the 4th League.

On the same day FC Rapid played against FC Timisoara, before the beginning of the match, FC Timisoara contested the two players' eligibility arguing that « The transfer of both players was irregularly made and the provisions of ROAF and the RSTJF were not observed.

Disciplinary Committee of the LPF declined its competence to decide on the issues regarding the validity of the acquiring of the rights to play and on the validity of the exercising of the rights to play for FC Rapid by the two players in favour of the Commission for Disputes Resolution of the LPF who also declined its own competence on the validity to acquiring the right to play in the favour of National Chamber of Dispute Settlement of the FRF.

On 19 March 2010 FC Timisoara filed before NCDS a renouncement on the claim regarding the validity to acquiring the right to play which was recorded by NCDS on 25 March 2010.

On the 30 March 2010 the CDR of LPF decided that the right to play in the game FC Rapid FC Timisoara. FC Rapid filed an appeal against this decision which was rejected and later filed an appeal before CAS.

From the evidence that were presented to the panel, the Panel concluded that it was correctly considered by the DSC in terms of decision of 30 March 2010 that once the annual visa was concluded by the issuing body only the competition body of LPF may issue a new one.

After considering all the submissions and evidences, the Panel is of the opinion that the revocation by the AMFB could not possibly have any legal effect on the acts of LPF since there is no relationship of correspondance and submission between the two institutions. The decision rendered on the 5 March 2010 by AMFB did not affect the decision of LPF annulling the visas for the two players and so the two players were not eligible to play in the match held on 5 March 2010.

Since the LPF and AMFB are two independent bodies, the AMFB decision from 5 March 2010 could not produce per se any effects on the LPF decision from 5 March 2010 cancelling the two players annual visas.

In its decision the Panel considers that the decision of LPF on 4 March 2010 is valid and enforceable, the cancellation of the visas of the two players remains effective and the Appeal against the decision of the Appeal Committee of LPF is rejected.

10. Implementation of decisions and awards

Goodwill execution constitutes the prominent form of executing final and irrevocable decisions ruled by the judicial bodies of the football institutional structures. The compulsory force of these decisions derives from the judicial character of the agreement between the contracting parties to appeal to football judicial bodies and implicitly admit the compulsoriness of executing the decisions ruled.

If despite the contract, statutes and accepted regulations the compelled Party does not goodwillingly execute the final and irrevocable decision ruled by the sport judicial bodies, then there is a series of sanctions stipulated against it.

According to the Disciplinary Regulations, in case of refusal or omission of executing a final and irrevocable decision, a natural person risks financial penalties or banning from any football activity for a determined period of time, and a club may be sanctioned with demotion or banning from transfers for one period of transfer.

The enforcement of decisions ruled by FIFA/UEFA or TAS is accomplished by the the Executive Committee or the Emergency Committee according to RFF status drafted in conformity with FIFA regulations.

Yet, in the light of the RFF regulations provisions with regard to applying the decisions ruled by CAS, we must also take into account the prior reference to the decision of the Court of Appeal Bucharest (mentioned before at Chapter 2) which stipulates among others “*the arbitration clause in the contract concluded between the parties which states that litigations are up to Federation, is null and inoperative*”.¹⁷

Conclusion

Currently, sport in Romania is suffering from a weak legal framework and the economic crisis.

Despite the interference Namely in this respect, even though there are certain shortages, the football organizational system is one of the best structured, benefiting of a complex disciplinary normative and procedural frame at federation, league, association and club level. With regard to certain decisions ruled by disciplinary bodies, we can notice discordant application and interpretation of rules, thus the lack of constant jurisprudence on the matter, as well as a shortage on the side of sport associations in opening investigations with regard to breaching on norms by certain clubs or football managers. Eventually such a situation leads to a decreasing level of trust in the impartiality of disciplinary commissions.

Yet, as a consequence of affiliation with FIFA and UEFA and application of international federations' provisions as well as of the CAS awards with regard to the Romanian parties, contractual stability is granted, tournaments take place in fair-play conditions, and an efficient system of detecting and sanctioning match fixing and fraud in football is *de facto* in place.

¹⁷ Court of Appeal Bucharest - Judgement in civil matters n° 29/2012.

SPORTS JUSTICE IN RUSSIA

by *Olga Rymkevich**

SUMMARY: 1. Principles of sports law – 2. Relationship between ordinary and sports justice – 3. Olympic Committee of the Russian Federation (OCRF) – 4. Russian football regulations: clubs, players, rights and obligations – 5. Sanctions on clubs and players – 6. Judicial bodies in sport – 7. Disputes – 8. Conclusion

Abstract:

In recent years Russia has been progressively integrating into the international sports law system, taking measures to bring sports law into line with international standards. In this article the main characteristics of the sports law and dispute resolution system in Russia will be analysed, with particular attention to the provisions regulating football.

Since the collapse of the Soviet Union the regulation of sport has considerably evolved. In the Soviet period it was highly ideological and served to a large extent to reinforce the prestige of the Soviet State in the international arena. Private property and other institutions typical of the market economy such as advertising, sponsorship, image rights and mass media rights did not exist, and as a result they were not regulated by legislation. However, the privatization of sport, the amounts of capital involved in sport, and the increasing number of disputes, often going beyond the national borders, have given rise to the need for appropriate sports law and dispute resolution mechanisms.

1. Principles of sport law

Although a number of proposals have been put forward, there is no single legislative act in Russia consolidating the legal norms regulating sport (*lex sportiva*). Some of them are laid down in the Russian Constitution, federal laws, acts issued by bodies

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of the Russian Federation (RF)¹ and the provisions adopted by sport federations and associations.

In Russia as in other countries sports law is a complex interdisciplinary phenomenon consisting of regulation by administrative, civil, tax, labour, and criminal law. In some cases the norms adopted by these different branches of the law contradict each other. In general, the legal regulation of sport lags behind the development of relations in sport, and as a result sports legislation still presents significant gap. Although among legal scholars there is no consensus about whether to consider sports law as a separate branch of law, it evidently requires specific regulation. The Russian Constitution refers to sport in relation to human rights, in connection with the promotion of a healthy lifestyle and special state-supported programmes in favour of those practising sport (Art. 41), and in relation to matters of joint competence of the federation and federal government bodies (Art. 72). As for specific legislation, one of the main legislative sources in the field of sport is the Federal Law of the RF of 4 December 2007, 329-FS “on Sport in the Russian Federation” repealing the law of 29 April 1999, 80-FS on Physical Culture and Sport in the Russian Federation. In the 2007 law the legislator underlines the fact that sport is to a large extent a commercial activity in the entertainment sector. The regulation of sport in Russia is based on a mixed model with a significant role still played by the state, together with self-regulation by professional sports bodies (federations). The law “on Sport in the RF” is to a great extent devoted to administrative matters such as the division of competences between the federal state and the federal government bodies, leaving significant gaps in terms of other matters that are regulated by other legislative acts, corporate norms or individual/collective contracts. However, the lack of specific norms gives rise to significant practical problems for the courts that do not have the provisions required to adopt proper decisions. Employment issues are regulated by special norms of the Labour Code (2001) applying specific norms to professional sportsmen and women² and coaches as a special category of workers. There is a separate section on the working conditions of professional sportsmen and women and coaches.³

As in other countries, many issues in sport are regulated by the norms of sports federations that are intended to comply with the norms of the international federations and fill the gaps left by federal laws. Sport federations have their own

¹ At present there are 83 federal government bodies in the Russian Federation (Federal States). According to Art. 5 of the Russian Constitution they have equal rights in their relations with the federal government.

² The Russian Legislator does not provide a definition of the term “sportsmen” but implicitly it should be considered to refer to professional sportsmen and women, i.e. those who practise sport as their main activity and as their main source of income. This omission is linked to the fact that up to 1988 it was forbidden by the International Olympic Committee for professional sportsmen and women to take part in the Olympics. Even if the International Olympic Committee now allows the participation of professional sportsmen in the Olympic Games, in the Olympic Charter the notion of professional sportsmen is still lacking.

³ Labour Code, Chapter 54.1, Art. 348.1- 348.12.

regulations, and disputes relating to sport are often settled within the federations through their specific dispute resolution bodies instead of recurring to the judicial procedure.

The principles of sport law should ensure the unity and systematic nature of the legal norms and play a significant role in the further codification and evolution of sport law. Legal scholars⁴ identify general and special principles in the regulation of sport. The general principles include:

- the principles of legality,
- the principle of respect for human rights,
- the principle of freedom of economic activity,
- the principle of state (financial, economic) regulation of market relations.

Special principles

The main principles are based on the law On Sport in the RF (Art. 3):

- the right of all individuals to have free access to practice sport;
- the unity of the legal basis of sports legislation throughout the territory of the RF;
- a mixture of state regulation and self-regulation by the stakeholders in sport;
- the prohibition of discrimination and violence in sport;
- health and safety safeguards for all the stakeholders in sport;
- compliance with international treaties concluded by the RF in the field of sport;⁵
- the promotion of the practice of sport of vulnerable groups such people with disabilities, orphans and so on;
- interaction of the federal executive body implementing state policy with the federal government bodies and sports federations;
- the permanent and ongoing nature of sports education of people of different age groups;
- the promotion of the development of all kinds of sport with due consideration for its social and educational functions and voluntary participation of people in sport activities.

The main principles of arbitration are as follows:

1. *independence and impartiality of the arbitrator*: arbitrators cannot represent the interests of one of the parties involved or be directly or indirectly interested in the decision on the case. They must inform the arbitration court immediately if they become aware of one of the abovementioned problems;
2. *equality of the parties*: each party must have equal opportunities to present and defend their interests;

⁴ N. ALEXEEV, *Sports Law in Russia*, Law & Legislation, Moscow: (Unity Dana) 3rd ed. 2012, 151 (in Russian).

⁵ Art 15, (4) of the Russian Constitution (1993) establishes the precedence of international agreements concluded by RF over internal law.

3. *competitiveness of the parties*: each party must demonstrate the circumstances that it cites in order to justify its claims;
 4. *promotion by the arbitration court of an amicable agreement* without violation of the rights and interests of the parties protected by law;
 5. *confidentiality of the arbitration procedure*: arbitrators and their staff cannot divulge the facts they become aware of during the arbitration without the prior agreement of the interested parties. The arbitrator cannot be interrogated about these facts.
2. *Relationship between ordinary and sports justice*

Art. 45 (2) of the Russian Constitution confers on all citizens the right to defend their personal rights and freedoms having recourse to all possible means not prohibited by law. Art. 46. (1) of the Constitution guarantees the right to judicial protection as an inalienable personal right, and this applies also to relations in sport. All those involved in sport or third parties have the right to apply both to the bodies of general competence (regular courts) pursuant to the federal Constitutional Law of 31 December 1996 N. 1-FKZ On the Judicial System of the Russian Federation and special courts (arbitration courts) or use alternative procedures (such as mediation). The Labour Code of the RF also grants all citizens the right to defend their working rights and freedoms including the right to judicial protection (Art. 2 of the Labour Code).

In line with international practice, Russia has established arbitration courts. The advantages of arbitration are widely recognised. The procedure is reasonably quick, which is important considering the relatively short careers of professional sportsmen and women. The parties can count on one or more arbitrators with specific competence in the field of sport (normally lacking in the ordinary courts) and they are free to choose them themselves. Arbitration decisions are considered to be final and not subject to appeal at a higher level. In addition this procedure more economical than proceedings in the regular courts, and the details of the cases are kept confidential.

Moreover, increasing recognition of alternative forms of dispute resolution resulted in the adoption of a special law of 27 July 2010: on Alternative Dispute Settlement Procedures with the Participation of Mediators. Pursuant to this law, the procedure of mediation is a voluntary one, to which the parties have recourse with the aim of reaching an agreement. The mediator must be independent. The mediation agreement may be concluded before a dispute arises or subsequently. It can be carried out on a professional or non-professional basis. A non-professional mediator is required to be at least 18 years old, to have legal capacity to act and not to have a criminal record. Professional mediators are required to be at least 25 years old, to have a specialised degree and attend special professional courses in arbitration. There is no impediment to mediation even when a case is under examination in a regular or arbitration court.

Disputes relating to administrative or labour relations come under the jurisdiction of the regular courts, while disputes relating to business relations in the sphere of sport subject to civil law may be dealt with by arbitration courts. Russian practice differs in this sense from the practice of the international Court of Arbitration for Sport (Lausanne) that has more extensive powers. Proposals to extend these competences to the arbitration courts of Russia failed to gain support. The regular courts can overrule decisions of arbitration courts. Even if decisions of arbitration courts are deemed to be final and in principle cannot be contested, a limited number of factors may result in annulment.⁶

Pursuant to Art. 421 of the Civil Code of Practice, the rulings of arbitration courts can be annulled in the following cases:

- the arbitration agreement was not valid according to federal laws;
- one of the parties was not duly notified about the nomination of the arbitrators or the arbitration hearing (the time and place of the hearing);
- the arbitration decision was issued on a matter beyond the jurisdiction of the arbitration court or beyond its competence. Regular courts can partially annul an arbitration court decision regarding questions beyond its competence;
- the composition of the arbitration panel or the procedures were contrary to the arbitration agreement or federal laws;
- the arbitration court decision violated the basic principles of Russian legislation.

Depending on the nature and parties involved, the dispute may be subject to the jurisdiction of the regular court or arbitration court, pursuant to the Civil Code of Practice of the Russian Federation, and the execution of such decisions is mandatory. According to Art 24(1) of the law N. 102-FS, On Courts of Arbitration in the RF, if a ruling of the arbitration court is not executed voluntarily and in a timely manner, it can be enforced by means of compulsory execution. In order to obtain this outcome, the party in whose favour the ruling has been handed down needs to appeal to the competent court within three years of the decision. The court must deal with this application within one month. In the case of failure to comply with the three-year time limit, the appeal will be rejected by the Court.

There is an important difference between team and individual sports in Russia. Sportsmen and women practising individual sports normally have the status of individual entrepreneurs and are subject to civil law norms. As a result, disputes are referred to arbitration courts. In the case of team sports, an employment contract is generally concluded, labour law norms are applicable and disputes are referred to the regular courts.⁷

Arbitration Courts in the Russian Federation

There are two specialised courts of arbitration for sport in the Russian Federation:

⁶ Section 46 of the Civil Code of Practice of the RF and para 1 section 30 of the Arbitration Code of Practice of the RF.

⁷ E.V. POGOSYAN, *Forms of Resolution of Sports Disputes*, Kluwer, 2011, 59 (in Russian).

the court of arbitration for sport at the Russian Sports Chamber⁸ and the court of arbitration for sport at the Russian Chamber of Commerce,⁹ both located in Moscow.

The court of arbitration for sport at the Russian Sports Chamber was set up as an autonomous non-commercial body on 10 June 2003 to deal with disputes about property rights including the status and transfer of players, disputes with agents, disputes regarding the decisions of sports organisations, and disputes relating to doping. Before applying to the arbitration court the claimant must exhaust all other means of defence provided by his/her federation or organisation. An arbitration agreement must be concluded in order to refer the matter to the arbitration court. The court must hear the dispute within 60 days, or within 45 days in case of appeals against the decisions of sport organisations.

The court of arbitration for sport at the Russian Chamber of Commerce is an independent and permanent body regulated by federal law No. 102 of 24 July 2002, on Courts of Arbitration in the Russian Federation, and federal law No. 5338-1 of the Russian Federation of 7 July 1993, on International Commercial Arbitration. The activity and organisation of the court of arbitration for sport at the Russian Chamber of Commerce is regulated by the provisions on sports arbitration of 24 October 2003, federal law No. 114. The Russian Chamber of Commerce validates the list of arbitrators and arbitration fees.

The court of arbitration for sport deals with disputes about property rights and the interests of sport stakeholders, including those deriving from the statutes, regulations and other documents establishing rules for championships and other competitions on the territory of the Russian Federation, as well as disputes relating to the transfer of players and coaches, agents, sponsorships, and media rights. Disputes can be settled at the arbitration court only with the consent of the parties in the form of an arbitration agreement in which the parties agree to refer the dispute to the court of arbitration for sport. Such an agreement may concern a certain dispute or category of disputes or all possible disputes in relation to a certain juridical situation. Unlike the Swedish law on arbitration, the law on Courts of Arbitration in the Russian Federation does not contain special provisions with additional safeguards for the weaker party so professional sportsmen and women do not have a priority status compared to federations or other sport organisations and cannot appeal against the legitimacy of the arbitration agreement.¹⁰

The right to file a complaint with the court of arbitration for sport pertains to all persons carrying out their main activity in sport, either legal or natural, with or without the status of an individual entrepreneur. The arbitrators are natural persons having the necessary skills in the world of sport. An arbitrator sitting alone

⁸ The regulation of this court was approved by the autonomous non-commercial Sports Arbitration Chamber on 10 June 2003 (with amendments of 27 March 2012). The regulation is available *on line* at <http://law.infosport.ru/xml/t/default.xml?mid=6&pid=5>.

⁹ The website of the Chamber of Commerce is www.tpprf-arb.ru/ru/sa/.

¹⁰ A. BRILLIANTOVA, *Sports arbitration as a means of dispute resolution in sport (comparative legal aspects)*, in *Theory and Practice of Physical Culture*, N. 6, 2004 (in Russian).

is required to have a law degree. In the case of a joint panel, only the president is required to have a law degree. The arbitration panel consists of arbitrators appointed by the Chamber of Commerce of Russia as approved by the governing body for sports for a three-year period.

The main distinctive feature of the court of arbitration for sport at the Russian Chamber of Commerce is that it has competence to deal with international disputes in the sphere of sport. According to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958), the decisions of arbitration courts must be recognised and enforced in the territory of foreign states.

According to international commercial arbitration law, sports arbitration deals with cases based on the law specified by the parties in the agreement and, in the absence of such a provision, on the basis of the law defined by sports arbitration according to the dispute rules considered appropriate. In all cases the court of arbitration for sport considers the terms of the agreement, and commercial practice is applied to the specific case.

The limitation of the jurisdiction of the court of arbitration for sport to the law On Courts of Arbitration in the Russian Federation means that many sports-related disputes do not come under its jurisdiction. At the same time the conferral on the court of arbitration for sport of the status of an international commercial arbitration court gives rise to doubts about its competence in labour disputes between foreign players and Russian clubs, as this is not contemplated by the law On International Commercial Arbitration. As a result, foreign players in Russia are obliged to refer any disputes to the Court of Arbitration for Sport in Lausanne, and Swiss law is normally applied if the parties cannot demonstrate the necessity of dealing with the case on the basis of their national laws. This could encourage to the development of alternative forms of dispute resolution.¹¹

The international Court of Arbitration for Sport in Lausanne deals with financial and disciplinary matters, disputes relating to the decisions of sport associations, and allegations of doping. In the case of Russia, recourses against sport organisations are problematic as according to Art. 1 part 2 of the law on Courts of Arbitration in the Russian Federation only civil cases can be heard in courts of arbitration. As a result, these courts cannot hear disputes concerning administrative or other relations unless specified by law. They also have no competence in employment-related disputes. Any provision for an arbitration agreement laid down in an employment contract with sportsmen or women is therefore invalid.

In cases concerning the legitimacy of decisions of sport associations (doping, disqualification, violation of the rules of the game) the court of arbitration for sport is not a court of second instance but of first instance. In addition, the procedure is of exceptional nature. Sportsmen and women can refer a dispute to the court if the regulation of the federation to which they belong contemplates such a possibility, if

¹¹ See A. SMOLIN, http://rapsinews.ru/sports_publication/20120427/262974778.html#ixzz2PZgfnRvG.

the parties have foreseen this option in the arbitration agreement, or if all other means of dispute resolution have been exhausted. Cases can be heard either by an arbitrator sitting alone or by a panel of arbitrators. This is a distinctive feature of sports arbitration as the traditional arbitration procedure contemplates a panel when the decisions of lower courts are concerned.

3. *Olympic Committee of the Russian Federation (OCRF)*

The Olympic Committee of the Russian Federation¹² was set up on 1 December 1989 and is an all-Russia federation of public associations, voluntary, non-governmental, non-commercial organisations, recognised by the International Olympic Committee. Its activity is regulated by the laws of the Russian Federation and the Olympic Charter (last updated 8 July 2011) of the International Olympic Committee. It governs the Olympic movement in Russia, elaborates and conducts general policy for high-level competitive sports in collaboration with the federal executive body reflecting the interests of federations and sportsmen and women.

According to the statute the OCRF was set up for the following purposes:

- to develop and defend the Olympic movement in Russia according to the Olympic Charter;
- to promote Olympic, physical and spiritual education in Russia;
- to enhance the prestige of Russian sport in the international arena;
- to promote participation in sport and high-level competitive sports in all Russian regions .

The tasks of the OCRF are:

- to raise awareness among Russians of the main Olympic principles;
- to disseminate knowledge on the Olympic spirit, Olympic movement and Olympic games in educational institutions;
- to assist educational establishments whose activity is linked to the Olympic movement;
- to support Olympic academies, museums, and cultural programmes linked to the Olympic movement;
- to defend the interests of sportsmen and women and coaches, sports referees, and sports veterans;
- to set up funds and charitable organisations promoting mass sport;
- to organise scientific conferences in the field of sport;
- to take action against doping

Art. 11 of the law On Sport in the RF (No. 329-FS, 2007) is devoted to the Olympic movement and the Olympic Committee. According to Art 11(1), the Olympic movement in Russia is part of the international Olympic movement whose aim is to uphold and implement the principles of the Olympic movement, to promote physical culture, to reinforce international sports collaboration and participation in

¹² The website of the Olympic Committee of the Russian Federation is www.olympic.ru.

the Olympic games and other sport events under the patronage of the International Olympic Committee.

Moreover, the Olympic Committee defends the rights of the International Olympic Committee with regard to the use of the Olympic symbols, motto, hymn and flags with exclusive rights in this respect. It fulfils these tasks from its own funding sources, voluntary contributions and the federal budget.¹³

4. *Russian football regulations: clubs, players, rights and obligations*

The Russian Football Union (RFU) is the main football organisation in the Russian Federation. The first All-Russia football union was founded on 19 January 1912. On 8 February 1992 after the collapse of the Soviet Union it assumed the role of leading football organisation of Russia and was granted membership of FIFA and UEFA. The main aims of the RFU are the development and promotion of football in the Russian Federation, the organisation of football events, and the formation of national football teams. It consists of the following governing bodies:

- Governing and Disciplinary Committee,
- Ethics Committee,
- Committee on the Status of Players,
- Dispute Resolution Chamber,
- Agents' Committee,
- Appeals Committee.

In the context of the present study it seems appropriate to mention the RFU regulation on the status and transfer of players (2011),¹⁴ as it contains specific norms regulating working conditions of professional football players that are lacking in federal laws. Particular attention is paid to the problem of the transfer of players as it is not mentioned in other laws (neither in the law On Sport in RF, nor in the special chapter of the Labour Code). The Russian Football Union (RFU) regulations include norms concerning the transfer of football players, and defines transfers as relations regulated by FIFA. As a result transfers are regulated by sports regulations and relate to the registration of players with a particular club in order to take part in competitions.

According to Art. 2, the Regulations cover relations in the following spheres:

- the status of football players registered with clubs (and sports academies) participating in competitions under the aegis of the RFU;
- the registration of football players for clubs (and sports academies) participating in competitions under the aegis of the RFU;
- the transfer of football players from clubs (and sports academies) taking part in competitions under the aegis of the RFU to other clubs (and sports academies) participating in competitions under the aegis of the RFU;

¹³ N. ALEXEEV, o. c., 451-2.

¹⁴ The RFU regulations are available at: <http://sportslaw.ru/data/files/regstatus2011.pdf> (in Russian) (accessed 25 April 2013).

- reimbursement of the players training costs to the clubs (and sports academies) participating in competitions under the aegis of the RFU;
- dispute resolution among football stakeholders including clubs and sports academies participating in competitions under the aegis of the RFU; players registered with the clubs participating in competitions under the aegis of the RFU; coaches registered with the clubs participating in the competitions under the aegis of the RFU; football agents licensed by the RFU.
- the application of sanctions for the violation of the Regulations.

Contractual terms according to the Labour Code

As mentioned above, the Labour Code of the RF includes a section regulating the working conditions of sportsmen and women and coaches. Pursuant to Art. 348.2 LC RF, athletes and coaches can conclude both open-ended and fixed-term contracts up to five years, in the same way as any other category of workers. Fixed-term contracts can be concluded without consideration of the nature of work and terms of its performance. If there is no specific agreement on a fixed term, the contracts will be considered to be open-ended. There is no minimum term. In the Labour code, respect to the Art. 57 LC RF, establishing general terms for the conclusion of fixed-term contracts, the legislator laid down additional requisites to be included in employment contracts with professional sportsmen and women. Employers are required:

- to provide training for sportsmen and women and promote their participation in competitions under the guidance of coaches;
- to make sure that sportsmen and women comply with sports regimes and prepare for competitions;
- to ensure that sportsmen and women take part in competitions at the employer's request;
- to ensure that sportsmen and women do not use doping or prohibited substances and that they undergo doping tests;
- to take out life, health and medical insurance for their players.

Additional provisions may be included concerning:

- the consent of the sportsmen, women and coaches for their personal data and a copy of the employment contract to be sent to the All Russia Sports Federation for the particular sport;
- the obligation to use outfits provided by the employer while taking part in training and sporting events;
- the obligation to comply with sports competition regulations;
- the amount of any indemnity to be paid to the employer by sportsmen or women in the case of termination of the employment contract pursuant to Art. 348.12 LC RF.

Moreover, employers are obliged at the time of hiring and for the entire duration of the employment contract to inform the sportsmen and women about

the norms adopted by the all-Russia sports federations, regulations on sport competitions, contractual terms between the employer and sponsors, and the organisation of sporting events, to the extent that they concern the sportsmen and women in their employment.

Contractual terms according to regulations on the status and transfer of players

Obligations of clubs

Clubs are under an obligation:

- to pay monthly salaries in full and in a timely manner, and make other payments according to the employment contract and local normative acts regulating bonus payments;
- to provide players with the appropriate working conditions according to the labour legislation of RF, collective agreements and individual employment contracts, and the regulations of FIFA, UEFA and RFU;
- to ensure players take part in training events and competitions under the guidance of a coach;
- to provide the obligatory social insurance of players according to the labour legislation or other normative acts of the RF;
- to cover the cost of health and safety insurance as well as medical insurance in order to enable players to receive medical services in addition to those required by law and to specify their terms;
- to organise at their own expense obligatory preliminary and annual periodical medical check-ups of the player, extra medical check-ups at the request of players, and medical advice;
- to ensure training events and the participation of players in competitions under the guidance of a coach;
- to provide players with necessary sports gear and other technical equipment necessary for their activity and to carry out any necessary maintenance;
- to make available financial assistance in the case of a temporary inability to work due to sport-related injury under the employment contract, in order to bring the temporary disability benefit into line with the average monthly salary of players if such a benefit is lower and no integration is provided by supplementary insurance schemes.

Obligations of players

Players are under an obligation:

- to comply with the sports regime defined by the club and take part in training for competitions;
- to take part in competitions only upon the indication of the football clubs to which they belong;

- to take part in training or other events (including commercial events, meetings and press conferences);
- to travel with the football team within the RF and abroad, following the itinerary and using the means of transport made available by the employer;
- to use the equipment made available by the employer for use during working hours;
- to comply with the regulatory documents of FIFA, UEFA and RFU regarding working conditions;
- to comply with internal working rules or local regulations of the employer regarding working activity;
- to abstain from the use of doping, and to consent to doping tests;
- to abstain from any dangerous kind of sport or other activity without the written authorisation of the employer;
- to uphold the reputation of the employer during any public meetings and contact with the press;
- to behave in compliance with moral norms in their personal and public life;
- to maintain confidentiality with regard to confidential commercial or other information including information on the terms of employment and transfer contracts, internal documents of the employer or sponsorship contracts;
- to abstain from gambling activities or any kind of match-fixing;
- to take part in medical check-ups and respect medical advice;
- to give their consent for the transmission of their personal data, including a copy of the employment contract to the RF or other football league; in case of the inclusion of the player in the national team of the RF, to transmit the employment contract to the federal body responsible for state policy in the field of sport.

Football players normally have unregulated working time,¹⁵ but they have a right to holidays for a total of 28 days. Moreover, they have the right to at least four additional calendar days for sportsmen, women and coaches¹⁶ and three calendar days for the unregulated working regime.¹⁷ Longer holidays may be agreed on in collective or individual employment contracts. Players receive a fixed monthly salary plus bonuses based on their sporting achievements in addition to other incentives.

5. *Sanctions on clubs and players*

The following sanctions are provided in section 3 of the Disciplinary Regulations of the Russian Football Union:

Natural and legal persons

- a. reprimand

¹⁵ Art. 101 of the Labour Code of the RF.

¹⁶ Art. 348.10 of the Labour Code of the RF.

¹⁷ Art. 119 of the Labour Code of the RF.

- b. fine
- c. withdrawal of titles and awards

Natural persons

- a. reprimand
- b. expulsion from a competition
- c. disqualification
- d. prohibition of any football related activity
- e. prohibition of access the stadium

Legal persons

- a. obligation to play a match (or matches) behind closed doors
- b. obligation to play a match (or matches) in a neutral venue
- c. annulment of a match result
- d. assignment of a defeat
- e. deduction of points
- f. expulsion from competitions
- g. relegation to a lower division.

In particular Annex 3 of the Regulation on the Status and Transfer of Players provides a list of offences and corresponding sanctions (our translation):

N.	Offences under the RFU Regulation on the Status and Transfer of Players	Sanction
1	Conclusion by the player of two or more professional employment contracts for the same period (excluding the "leasing" of players to another club).	Disqualification for four to six months
2	Conclusion by the player of an employment contract with the club to which they were transferred for any period exceeding the leasing contract	Ban on the registration of new players for the new football club for a maximum of two registration periods
3	Conclusion by the player and club to which they were transferred in the basis of a leasing contract of the actions aimed to transfer the player to a third club	Fine for the new club of up to 500,000 roubles
4	Termination of the employment contract before the established term at the players initiative during the protected period, or shortcomings on the part of the player during the protected period resulting in the termination of the contract by the club	
5	Failure of the player to comply with the term of notice of the club or contractual termination before the established term due to sport reasons or reinstatement of the player's amateur status	Disqualification of the player from one to three months
6	Failure on the part of the club to comply with the terms of the transfer contract or transfer leasing contract including transfer fees	Fine for the club of up to 250,000 roubles
7	Termination before the permitted term of the employment contract during the protected period and non-payment by the club of the salary or coach for a period exceeding two months	Ban on the registration of new players for a club for a maximum of two registration periods
8	Violation by the club of the terms of compensation fee payment or non-payment	Deduction of points from the club
9	Violation by the club of the terms of solidarity fee payment or non-payment	
10	Violation by the player of the terms of compensation fee for the termination of contract before the permitted term	Fine of up to 250.000 roubles
10 ¹	Failure of the club to comply with the terms of registration laid down in the employment contract with the player	Fine of up to 100,000 roubles

N.	Offences under the RFU Regulation on the Status and Transfer of Players	Sanction
11	Failure to execute or failure to execute in a timely manner the decisions of the RFU Committee on the Status of Players or of the Dispute Resolution Chamber	Fine of up to 300,000 roubles Deduction of points Disqualification of the player from four to six months
12	Failure to provide the player with a copy of the employment contract on the day of stipulation	Fine for the club up to 100,000 roubles
13	Failure to provide the player with a copy of the employment contract with all amendments or annexes	Fine for the club up to 100,000 roubles
14	Violation of the rules on the transfer of players (Art. 17 of the regulation)	Disqualification of the player from four to six months Ban on the registration of new players with the new club for a maximum of two registration periods Fine for the new club of up to 500,000 roubles
15	Failure to comply with the rules on extrajudicial regulation of disputes relating to the regulations on the status and transfer of players	Ban on the registration of new players for a club for a maximum of two registration periods Disqualification of the player or coach from three to six months
16	Failure on the part of the club to comply with the duty to send players to the national team of the RF	Fine for the club up to 500,000 roubles Assignment of a defeat on the club for all the matches in which the player participated (annulment of all points gained in such matches or award of victory to the opponent club in case of cup games)
17	Violation by the player of the terms of temporary transfer from the football club to the national team	Fine for a player of up to 250,000 roubles
18	Failure to comply with the registration procedures by an official of the organisation required to register players	Fine for such officials from 1,000 to 15,000 roubles

The application of the sanctions for disciplinary offences is performed by the RFU Disciplinary Committee and the RFU Appeal Committee.¹⁸ The Disciplinary Committee of the RFU acts as a court of first instance in the case of disciplinary offences and deals also with claims concerning decisions of the judicial bodies of the federations. The Appeals Committee deals with claims concerning the decisions of the Disciplinary Committee of the RFU. An appeal against decisions by the Disciplinary Committee can be made to the Appeals Committee except when they are deemed to be final under the regulations or other norms of the RFU. Decisions of these bodies can be contested at the Court of Arbitration for Sport in Lausanne, and decisions of this court must be recognised by the parties involved. The Court of Arbitration for Sport or other arbitration courts whose competence is recognised by the RFU Executive Committee act as courts of last instance with regard to the decisions of the Appeals Committee of RFU, decisions of judicial bodies of the interregional confederations of regional football federations or the Disciplinary Committee.

¹⁸ The judicial bodies in football (section III, chapter 6 of the disciplinary regulation of RFU).

The Court of Arbitration for Sport or other arbitration court recognised by the Executive Committee cannot deal with¹⁹ claims relating to the violation of the rules of the game, the term of sanction applied is less than five matches or three months, cases under consideration or already regulated by another court of arbitration in the RF.

6. *Judicial bodies in sport*

The international football federation (FIFA) and the Russian Football Union (RFU) promote extrajudicial dispute resolution in the RF through the dispute resolution chamber and the committee on the status of players

These two bodies are regulated by the Constitution of the RF, constitutional federal laws, federal laws, normative acts of the RF president and federal government, normative acts of the subjects of RF, international treaties, the RFU Statute, norms of FIFA, UEFA and RFU, customs and other norms in conformity with the RF legislation. In cases in which relations are not directly governed by the RFU regulations, the FIFA statute and regulations are applied by analogy.

6.1 *Dispute resolution chamber*

The dispute resolution chamber is a judicial body of the RFU created pursuant to the Regulation on the Status and Transfer of Players. It is responsible for pre-trial dispute resolution among football clubs, football players, coaches, agents and other parties. It applies disciplinary sanctions for the violation of the Regulation on the Status and Transfer of Players and other regulations as specified. The right to refer a dispute to the Chamber pertains to clubs, football players, coaches, agents or other parties in football according to the Regulation on the Status and Transfer of Players. Applicants are not entitled to refer a dispute to the Chamber if they have already referred the matter to the regular court, court of arbitration, dispute resolution chamber or committee on the status of players at FIFA or the Court of Arbitration for Sport in Lausanne.

The Chamber bases its procedures on principles of legality, confidentiality, independence, impartiality, competitiveness and equality of the parties.

The Chamber consists of a president and vice-president, and five representatives of professional football players recommended by the players' trade union according to clause 8 of the Regulation on Dispute Resolution

The composition of the Chamber is approved by the Executive Committee of RFU for a period of four years. Members of the Chamber cannot at the same time be members of the Executive Committee, or of the committee on the status of players, or directors of one of the leagues. The president is required to have a law degree.

With regard to the competence of the Chamber, it can deal with the following

¹⁹ Art 40 (2) of the disciplinary regulation of RFU.

categories of disputes:

- violation of the terms of registration of players, if not referred to the committee on the status of players;
- violation of the norms governing employment contacts between clubs and players;
- violation of an employment contract during the temporary leasing of a player, or violation of supplementary contractual terms or terms on termination of employment contract or violation of collective agreements or other normative acts;
- violation of the terms of employment contract with coaches admitted to competitions;
- violation of the training compensation fees.

The official language of the proceedings is Russian. If one of the parties concerned is not proficient in Russian, an interpreter must be made available. The Chamber is required to keep all information confidential. Between April 2010 and March 2011 the Chamber dealt with 223 disputes referred by football players, clubs and agents, of which 179 referred by players and coaches, 38 referred by clubs, and six by agents. It is evident that the majority of disputes are referred to the Chamber by players. The Committee on the Status of Players overruled only five decisions, whereas two decisions were changed into monetary payments. An appeal against one of the decisions was filed with the Court of Arbitration in Sport (Lausanne), which rejected the appeal.²⁰

The case was *Ural Football Club vs the RFU*. On 3 June 2010 the Dispute Resolution Chamber ruled that Ural had to pay bonuses to the professional players Povorov, Katulsky and Shishelov for the amount paid to the other members of the football team for the 2009 season for the same number of matches. Ural considered the ruling to be a violation of its legitimate rights and interests. In light of the difficult economic situation, the club argued that it had the right to pay bonuses at its complete discretion. The RFU held that such behaviour was contrary to the legal norms and business practice in sport. Both the dispute resolution chamber and the committee on the status of players ruled that discrimination between players could not be accepted and the above-mentioned players should be entitled to the same bonuses as the other members of the team. The CAS dealt with the case on the basis of the materials submitted by the parties, and according to the Russian legal norms prohibiting discrimination.²¹

The main aim of the Chamber is to reconcile the parties and settle disputes in the pre-trial phase while seeking a mutually acceptable compromise. The percentage of appeals to other courts against its rulings is fairly low.²²

²⁰ CAS 2010/A/2204, Russian football club Ural v. Russian football Union.

²¹ Labour Code RF, art. 2, 3, 21, 22, 29.

²² K. N. GUSOV, *Activity on the dispute resolution chamber of the Russian Football Union*, materials of the 5th international conference “*Sport law: prospects for development*”, Moscow, 2011 (in Russian).

6.2 Committee on the Status of Players

This committee consists of a president, vice president and ordinary members. The total number of members cannot exceed nine. The composition is approved by the Executive Committee of the RFU, for a period of four years. The president is required to have a law degree. Members cannot at the same time be members of the Executive Committee, the Chamber, or directors of one of the leagues.

The committee is a judicial body of second instance dealing with claims concerning the rulings of the Chamber on matters within its competence. It deals with matters concerning the definition of the transfer of player, or registration out of transfer windows, or the transfer of minor players.

7. Disputes

In the Russian legal literature there is no single definition of sports disputes and no single classification of them. Federal law on sport does not provide for such a definition and does not mention arbitration courts. Alexeev provides the following definition: “different non-regulated controversies of the parties in the sphere of sport relations with regard to rights and obligations, presented to the legal (juridical) body or settled by means of the alternative dispute resolution procedure”.²³ He also divides sports disputes into sport disputes in the general sense and sports disputes in a narrow sense. Sports disputes in the general sense include disputes relating to the division of competences between state and regions, tax-related disputes, sponsorship and mass media rights. Sport disputes in the narrow sense cover sports disputes among the actors directly involved, such as professional sportsmen and women, coaches and referees. They normally concern rights and obligations deriving from the regulations and statutes of sport federations (for example, disputes regarding violations of the rules of the game, disqualification, use of doping, participation in competitions).

The most exhaustive classification is proposed by Pogosyan²⁴ who identifies the following kinds of sport disputes:

- general disputes involving sportsmen and women concerning family law, consumer law and other areas of law are within the competence of regular courts
- special disputes in which sportsmen and women act as parties of the sport relations linked to training and participation in sporting events.

In general disputes, the parties should refer the matter to the regular courts. In the case of special disputes when participation in sporting events is concerned, the parties should have recourse to special courts like arbitration courts, judicial bodies within the federation or alternative procedures. Furthermore, Pogosyan divides special disputes into the following categories:

²³ ALEXEEV, op. cit, 967.

²⁴ E.V. POGOSYAN, *Forms of Resolution of Sports Disputes*, Kluwer, 2011, 32.

- 1) disputes concerning property rights and interests of the sport stakeholders such as the transfer of players, sport agents, compensation for sports injuries;
- 2) disputes linked to claims against sport organizations;
- 3) employment-related issues;
- 4) issues arising from the use of doping;
- 5) disputes regarding citizenship (whether a player can play for a foreign country);
- 6) disputes on improper refereeing;
- 7) disputes linked to discrimination in sport;
- 8) disputes concerning intellectual property.

The absence of a single classification of disputes gives rise to significant practical problems concerning the definition of the proper jurisdiction of a particular dispute. As a result, it would be useful to establish a single classification of disputes and rules of dispute resolution also for the internal bodies of justice of sport federations and leagues.²⁵

8. *Conclusion*

The legal framework of sports law in Russia is still in a formative phase and in spite of some undoubted progress in this regard, there are some normative gaps and contradictions both with regard to international norms and among the internal norms of different branches of law. As mentioned above, there is no legally accepted definition and classification of sports-related disputes and in practice this gives rise to problems in defining the proper jurisdiction of a dispute and slows down the dispute resolution process, resulting in damage for the parties involved. The creation of courts of arbitration and alternative procedures such as mediation represents a great step forward in improving the decision - making mechanisms of sports law. However, arbitration courts can deal only with civil disputes and as a result other disputes, notably in the sphere of employment relations, are beyond their competence. The ordinary judicial process is still slow while dispute resolution procedures inside the sport federations and meditation do not guarantee enforcement of the decisions and these bodies are not always independent. This often obliges the parties to refer disputes to the international sports bodies, resulting in a longer timeframe and additional expense. In many cases the arbitrators lack the necessary legal norms for taking a decision. Considerable efforts are still required to further improve arbitration and alternative dispute resolution procedures and achieve greater uniformity among the norms of various levels, international, national, internal legal norms in the different branches of the law and norms at different hierarchical levels.

²⁵ N. ALEXEEV, *op. cit.*, 975.

SPORTS JUSTICE IN THE SLOVAK REPUBLIC

by Tomáš Gábriš*

SUMMARY: Introduction – 1. Principles of sports justice – 2. Relationship between ordinary justice and sports justice – 3. Relevant NOCs regulations – 4. Relevant football regulations – 5. Clubs' and players' rights and obligations – 6. Sports offences – 7. Sanctions on clubs and players – 8. The sports judicial bodies – 9. The procedure – 10. Dispute settlements – 11. Implementation of decisions and awards – Conclusions

Abstract:

Besides torts and offences based on Civil Code, Criminal Code and Offences Act, the Slovakian Act on sports no. 300/2008 Coll. contains special regulation on sports offences within a game and sports offences outside a particular game. These are ruled upon by autonomous national or international sports authorities, under their rules of sports competitions and their own statutes. Moreover, property disputes may be decided by national or international arbitration courts or regular courts.

Introduction

In the Slovak Republic, Act no. 300/2008 Coll. of 2 July 2008 on the organization and promotion of sports and amending certain acts (hereinafter referred to as “Act on sports”) further develops the provisions of the Act on physical culture no. 288/1997 Coll., which is a *lex generalis* (and indeed very general in its contents) in relation to the Act on sports. The Act on sports specifically regulates:

- (a) state support of sports, care for sporting talents and sporting of children, pupils and students,
- (b) training of athletes representing the Slovak Republic,

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- (c) measures in the fight against doping in sport and the position of the Slovak Anti-Doping Agency,
- (d) establishment and management of public administration information system for sport,
- (e) and last but not least – dispute resolution in sport.

Thus, besides general system of courts there is a special regulation on dispute resolution in sports, which sets a basic framework for autonomous regulation of dispute resolution within the sports movement in Slovakia.

1. Principles of sports justice

The right to a fair trial is a fundamental constitutional principle (laid down in Article 46 sec. 1 of the Constitution of Slovak Republic), but also international legal principle enshrined in all conventions on human rights and fundamental freedoms.¹

The Slovak Constitution specifically provides for:

- (a) right to resort to independent and impartial courts (Article 46 sec. 1),
- (b) right to resort to court to have a decision of a public authority reviewed (Article 46 sec. 2),
- (c) right to public hearing without undue delay (Article 48 sec. 2), and
- (d) presumption of innocence (Article 50 sec. 2).²

In terms of sports, the question arises whether the right to a fair trial applies also to autonomous dispute resolution within the sports organizations, since these have their internal matters usually decided by bodies lacking the nature of courts, and lacking the nature of public authorities or public administration in general, as well as lacking the publicity of hearing (especially in disciplinary matters).

In fact, no general guarantee of fair trial is laid down in case of autonomous sports organizations in the Act on sports. Only the Act on association of citizens no. 83/1990 Coll. in its § 15 specifically guarantees each member of a private association the right to resort to a court in case internal rules of the association should be breached. Nevertheless, always when a sports organization by its decision (or act or omission) interferes with the rights and freedoms of an athlete, the athlete should have the right to have this decision (act, omission) reviewed by a court. Any interference with the rights and freedoms should namely be reviewable by courts, notwithstanding the nature of the organization being a private association or not. Therefore, it should be considered important to have the guarantees of fair trial introduced also to internal autonomous proceedings within the sports movement.

So far, review process by courts is governed by the Slovak Civil Procedure Code no. 99/1963 Coll.,³ specifying standards for protection and enforcement of the substantive law and rights guaranteed at all three levels of the judicial proceedings

¹ M. ŠTEVČEK, 'Right to a fair trial in relation to judiciary system of the Slovak Republic', in *Prawa człowieka*, Katowice, Oficyna Wydawnicza Waclaw Walasek, 2008, 128–137.

² Cf. D. KROŠLÁK, *Introduction to the Slovak Constitutional System*, Lodz, Ksiezy Mlyn, 2013.

³ M. ŠTEVČEK ET AL., *Občiansky súdny poriadok : Komentár*, Prague, C.H.Beck, 2009.

in Slovakia – district, regional and Supreme Court. In particular, the Code of Civil Procedure also recognizes the so-called administrative judiciary, i.e. solving disputes arising from exercising the public administration, which is however almost inapplicable for the majority of disputes in sports, since sports organizations, being private associations mostly, do not fall under the headline of public administration.

Exceptional decision-making relating to basic rights and fundamental freedoms by the Constitutional Court is governed by Act no. 38/1993 Coll.

In addition to the system of regular courts, the right to a fair trial should also include the protection of interests of parties in an arbitration, which is, however, not always the case, e.g. in case when arbitration proceeding is lacking the publicity or public hearing.⁴ Thus it seems the arbitration proceedings could also be restructured in order to reflect the fair trial principles, just like it is in case of autonomous sporting bodies' proceedings.

Currently, alternative dispute resolution in Slovakia is governed by a special Act no. 244/2002 Coll. (Arbitration Act) which governs:

- (a) deciding property disputes arising from domestic and international commercial and civil relations (but not e.g. labour disputes), if the place of arbitration is in the Slovak Republic, and
- (b) recognition and enforcement of domestic and foreign arbitration awards in the Slovak Republic.

According to the Arbitration Act, within arbitration procedure, only those disputes may be decided, which the parties can conclude by settlement before the court. It is expressly prohibited to decide disputes:

- (a) concerning the establishment, modification or termination of ownership rights and other rights to immovable property,
- (b) concerning personal status,
- (c) associated with enforcement of a decision,
- (d) incurred during the bankruptcy and restructuring proceedings.

The same limits apply to use of the arbitration method in sports. The use of arbitration services in sport should therefore be allowed only when dealing with certain, mostly economic, issues. Should an athlete be in an employment relationship with a sports organization, the settlement of labour disputes would be excluded from the scope of any arbitration.

At present, there is a sole sports arbitration court in Slovakia – *Arbitration Court of the Slovak Football Association*. All other “arbitration” (by name only) bodies of sports associations in Slovakia do not possess an official character of an arbitration court based on the Arbitration Act.

⁴ M. ŠTEVČEK, 'Základné teoretické problémy a východiská rozhodcovského konania v Slovenskej republike', in *Aktuálne problémy vo vývoji práva SR a ČR*, Bratislava, VO PraF UK, 2008, 114–121.

2. *Relationship between ordinary and sports justice*

Internal norms of sporting organizations usually require that the members submit their disputes to internal dispute resolution procedures, performed mostly by internal dispute resolution committees or chambers without the nature of an arbitration court.

As already noted, the Act on association of citizens no. 83/1990 Coll. in its § 15 specifically guarantees each member of a private association the right to resort to a court in case internal rules of an association should be breached and there is no other option of internal review.

This condition for admissibility of resort to court is not applicable in case of sporting organizations of other legal forms than private association, though. Here no previous review by an internal body is required prior to filing a petition with the regular court.

A different situation is with arbitration before an official Court of Arbitration established under the Arbitration Act. A petition to an arbitration court has the same legal effect as if the action was brought before a regular court. After the initiation of arbitration, no longer can the same matter be presented to a court or before any other arbitration court, only should the both parties agree.⁵

On the other hand, a type of cooperation between the arbitration and regular courts takes form of the enforcement of an interim measure issued by an arbitration court, which may be executed by the ordinary court, upon request. Similarly, if the arbitration tribunal cannot ensure the production of evidence on its own, it may ask the regular court for intervention.

According to § 35 of the Arbitration Act, an arbitration award, which cannot be examined by any other arbitrator on the basis of prior agreement between the parties, has the same effect as a final court decision. After the decision, annulment of the arbitration award may be requested by an action filed with the competent court within thirty days from receipt of the award, or within thirty days from when the party became aware of a reason for possible re-trial, but only if:

- (a) the arbitration award was issued in a case which cannot be subject to arbitration;
- (b) arbitration award was issued in a case which had already been finally decided by a regular court or in another arbitration;
- (c) one of the parties to arbitration challenges the validity of the arbitration agreement;
- (d) a matter was decided, to which the arbitration agreement did not apply, and the party argued this beforehand;
- (e) the party to the arbitration, which must be represented by a legal representative, was not represented, or an unauthorized person was acting on behalf of the party, and its operations were not approved subsequently;
- (f) the arbitration award was issued by a panel comprising an arbitrator, who was disqualified for bias;

⁵ S. FICOVÁ – M. ŠTEVČEK ET AL., *Občianske súdne konanie*, Prague, C.H.Beck, 2010, 75.

- (g) the principle of equality of parties to the arbitration was breached;
- (h) there are reasons for a re-trial based on the Code of Civil Procedure;
- (i) the arbitration award has been affected by crime of the arbitrator, of the parties or an expert, of which they were convicted; or
- (j) by the decision, consumer rights were violated.

Even after filing an action with the court, challenging an arbitration award, the award remains valid. The regular court ruling on an appeal may, upon application, postpone the enforceability of the arbitration award.

Arbitral decision may be enforced in the same manner as a regular court decision. Even foreign arbitral decision may be recognized by the Slovak regular court by taking it into account as if it were a domestic arbitration award. Recognition and enforcement of a foreign arbitration award may be denied by the court upon proposal from a party, only if that party can show to the court that there were procedural errors in the process of awarding the arbitral decision. The Court refuses recognition and enforcement of foreign arbitration award even without a motion by a party if it finds that under the law of the Slovak Republic the matter cannot be resolved in arbitration or if the recognition and enforcement would be contrary to public order: e.g., should sporting activity be considered dependent work under Labour Code (which is not the case in Slovakia), this provision would make it impossible to have disputes related to employment relationship decided by the Arbitration Court of the Slovak Football Association, or to have a CAS (in Lausanne) award recognized and enforced in Slovakia.

Another kind of competence conflict may arise between national arbitration court such as the SFA Arbitration Court, and the international sporting dispute resolution bodies, such as the FIFA Dispute Resolution Chamber or the Court of Arbitration for Sport in Lausanne. Here the express arbitration clause should take precedence.

However, should the FIFA not recognize the SFA Arbitration Court or its decision as fair and issued in accordance with the FIFA Regulations, or should the CAS establish its competence on the basis of simple statement of its competence in the SFA Statutes, a conflict might arise between the SFA Arbitration Court decision (which is enforceable via regular enforcement officials in Slovakia or via SFA disciplinary measures) on the one hand, and the FIFA DRC decision (enforceable via the FIFA disciplinary measures) on the other hand. Finally, a CAS decision could also be enforced via Slovak official enforcement agents. A conflict could thus potentially become immense!

A solution could only take the form of objecting against a later arbitration award claiming that the earlier takes precedence, or objecting to the CAS arbitration should the competence of CAS not be based on an express arbitration clause but only upon the SFA statutes that the parties have accepted. Slovakian courts namely require explicit arbitration contract or arbitration clause concluded between the parties to the dispute. But this would only solve the competence conflict between the CAS and the SFA Arbitration Court. The concurrence between the SFA award enforced by an official enforcement agent and the FIFA DRC award enforceable

through FIFA and SFA disciplinary measures could on the other hand be insurmountable.

3. *Relevant NOCs regulations*

According to Act no. 226/1994 Coll. of 18 August 1994 on the use and protection of Olympic symbols and the Slovak Olympic Committee, the Slovak Olympic Committee is a private association. Its mission is to manage the Olympic movement in Slovakia, whereby it has the status and powers of the national Olympic Committee under the Olympic Charter. The Slovak Olympic Committee and the Slovak Paralympic Committee perform mainly tasks associated with ensuring the participation of Slovak sports representation at the Olympic Games and Paralympic Games.

The Act also specifically protects Olympic symbols. Protected Olympic symbols of the International Olympic Committee comprise the Olympic symbol, the Olympic flag, Olympic motto, Olympic Flame, Olympic Torch, Olympic anthem, Olympic emblem and the words “Olympic” and “Olympics”. Special Olympic symbols of the Slovak Olympic Committee comprise the emblem (badge), flag and other symbols of the Slovak Olympic Committee approved by the International Olympic Committee.

Disputes in matters concerning the protection of Olympic symbols are decided by the courts, and the breach of obligations established by this Act is an offence or criminal act in the area of infringement of copyright, trademark rights, trade names and protected designations of origin.

No specific body or rules of proceedings for deciding any other disputes related to sports is regulated either in this Act, or in any internal Slovak Olympic Committee norm.

4. *Relevant football regulations*

The legal status, legal form, rights and obligations of the national sports associations are governed by the Act on sports (no. 300/2008 Coll.).

From among the large number of associations, the most popular sports associations in Slovakia take the legal form of private associations or of an “association of private associations”.

The Slovak Football Association (SFA), founded in 1938, is the largest sports organization in Slovakia, claiming to have 427,102 members. It has a status of private association, too. SFA is a member of the International Federation of Football Associations (FIFA) and Union of European Football Associations (UEFA).

In accordance with the SFA Statutes, the SFA members undertake in the event of a dispute within the football movement, related to organizing or carrying out sporting activities affecting the competition, or related to participants in competitions, players, officials and administration officials of the SFA, to respect the authority to resolve such disputes primarily by the competent SFA authorities

and to respect the jurisdiction of the Court of Arbitration established by the SFA under penalty of disciplinary measures enshrined in the SFA Disciplinary Code.

SFA members, upon filling out their membership application, have to expressly and in writing recognize both the competence and jurisdiction of FIFA dispute resolution bodies and of the Court of Arbitration for Sport in Lausanne as the top independent and unbiased authority to resolve disputes in sport. The SFA members should also ensure compliance with the final decision of these bodies by entities that the decisions of these bodies relate to, and that are subject to the members' jurisdiction.

At the same time, however, they agree to conclude arbitration contracts or use arbitration clauses in order to submit their disputes to the competence of the SFA Arbitration court. The mutual relationship between the SFA Arbitration court and the FIFA and CAS is that of priority of contractual arbitration clause in favour of the Slovak Arbitration Court, and in case of lack of this clause, the FIFA bodies are competent in case of disputes with international dimension where no specific arbitration clause is signed. The CAS competence may be given by specific arbitration clause in a contract, or, lately, based on the CAS case law, also without any explicit contractual clause, just by a simple invocation of the CAS competence in the Statutes of the sporting organization that the disputing parties belong to.

5. *Clubs' and players' rights and obligations*

Various categories of statutory rights and duties can be discerned. The individual fundamental rights and freedoms, guaranteed by Constitution and international treaties, usually have their counterpart in obligations of other entities in relation towards the rights holders. Since these rights are absolute (meaning an obligation for all persons to respect these rights), the respective obligation is an absolute obligation to respect rights and freedoms of others.

The second category of obligations is the obligations arising from generally binding legal regulations, mostly Acts of Parliament, other than the obligation to respect fundamental rights and freedoms. These are e.g. the obligations related to social security, tax obligations, obligation to keep accounting and similar. Mostly, these are public law obligations imposed by the State, which do not necessarily have a direct counterpart in any right of a private entity.

Another, third category encompasses the relative obligations as a counterpart to relative rights – within a relationship between specific subjects. There is no general clause on such duties and rights in the Act on sports. Since the athletes are mostly not considered employees, the obligations generally set by the Labour Code do not apply.

Questions of liability for unlawful conduct in sport, and any relevant rights arising therefrom, are primarily governed by civil (or commercial) and criminal law. A classic example is the civil liability of players (athletes), which may arise as a result of an accident. This issue is not specifically regulated in Slovakia. The general rule of civil law, i.e. a general preventive obligation enshrined in § 415 of

the Civil Code applies: “*Everyone is obliged to behave so as to avoid damage to health, property, nature and the environment* (trans. T. G.)”.

According to the Article 33 of the SFA Statutes, obligations of the SFA members comprise, inter alia:

- a. to comply with the SFA Statutes, other regulations and decisions of the bodies of SFA, FIFA and UEFA, especially of the Arbitration Court and the Court of Arbitration for Sport in Lausanne (CAS) and to ensure that these will be adhered to by their members and persons subject to their jurisdiction,
- b. to accept a commitment that any dispute relating to the SFA Statutes, rules, regulations and decisions of the SFA, FIFA and UEFA, will be addressed by the competent SFA authorities, and in the case of a dispute which allows for arbitration, the member shall be subject to the jurisdiction of the SFA Arbitration Court. Member is also required to submit to the jurisdiction of arbitral bodies of FIFA and of the Court of Arbitration for Sport (CAS),
- c. to notify in writing to the Central Register of the SFA all relevant legal changes on the day following the date of the event or date when the member learnt of the event, particularly with regard to:
 - i. change in the statutes of a member,
 - ii. change in identification data of a member,
 - iii. change in the list of officials,
 - iv. change in the representation of an SFA member, especially the change of the executive, the delegate for the Conference, statutory representative or other representative of a member,
 - v. filing for bankruptcy or entering into liquidation, or
 - vi. other serious legally relevant facts affecting their membership in the SFA,
- d. in accordance with the decision of FIFA, UEFA and the SFA, not to maintain any sporting relations:
 - i. with entities, if decided so by FIFA, UEFA,
 - ii. with entities whose SFA membership has been suspended or who were excluded from the SFA,
- e. to pay the membership fees in the amount determined for the different types and categories of membership, as set by a decision of the Conference,
- f. to pay other fees at the rate provided for by SFA regulations or a competent SFA authority,
- g. to observe the principles of loyalty, integrity and sportsmanship, fair play, fight against doping,
- h. to protect and promote by their actions and behaviour a good reputation of the SFA and of Slovak football.

Violation of the above obligations by a member may result in disciplinary measures under the SFA Statutes and the Disciplinary Code.

Finally, specific category of rights and obligations is based on contracts. The sports movement mostly uses atypical contracts, the content of which depends

solely on the agreement of the parties, with respect of the generally binding legal regulations. For the majority of athletes in Slovakia who do not have an employee status, their rights and obligations are enshrined in players' contracts based on § 51 Civil Code or § 269 sec. 2 of the Commercial Code.

Based on the Directive for registration of professional and non-amateur contracts of the SFA, professional contract must include the rights and obligations of each player and the club, the provisions on penalties for infringement or breach of agreed terms, the reasons for termination by the player and the club, and the conditions for terminating the contract.

Club commitments in contractual practice in Slovakia include in particular the following obligations:⁶

- (a) to provide remuneration,
- (b) to create conditions for training, daily regime, rehabilitation and recovery, to provide medical care,
- (c) to provide catering and accommodation during journeys and matches,
- (d) to lend sports equipment and maintain and exchange it,
- (e) on the basis of consultation with the coach to grant the player a time-off in a calendar week, possibly cumulative, if it is not possible to grant leave regularly. Time-off is usually given in the middle or end of the competition period,
- (f) to provide continuous holidays for a specific period without reduction in pay,
- (g) to compensate the player for damages suffered by a breach of legal obligations by the club,
- (h) to provide the player with a leave for managing private matters, upon written request, without cuts in monthly remuneration.

On the other hand, obligations of players usually include:

- (a) to participate in training and perform the duties imposed by a coach in connection with participation in training,
- (b) to attend meetings and training camps, and perform the duties imposed in connection with these meetings and training camps,
- (c) within the performance of sporting activities, to make every effort to achieve the objectives of the sports team according to their capacity and abilities, to compete fairly in the matches,
- (d) to submit to the timing and organizational arrangements resulting from participation in competitions and in preparation for competitions and training process,
- (e) to actively assist in maintaining discipline in the team, speak in public in a spirit of moral principles, to strengthen the reputation of the sports club,
- (f) to ensure their health and physical conditions, observe the principles of professional athlete's daily routine, proper nutrition and diet, hygiene, recovery and rehabilitation, to undergo a medical check and avoid the use of doping in any form, prevent injuries and follow doctor's instructions,

⁶ T. SLUKA, *Profesionální sportovec (právní a ekonomické aspekty)*, Prague, Havlíček Brain Team, 2007, 126.

- (g) to protect the assets of the club, to care for the property of the club, and compensate the club, if they cause damage in violation of their legal obligations,
- (h) to participate in community events and speak in public, especially in mass media, while wearing clothing, footwear and other visible parts of clothing, in the way prescribed by the club, in connection with the activities under the contract,
- (i) to maintain confidentiality on the facts related to activities of the club, as well as on all matters relating to club activities, disclosing of which the club would not wish,
- (j) to recognize and respect the statutes of the club, to act in accordance with them, and to submit to the authority of the club,
- (k) to submit to the provisions of the applicable disciplinary rules of the club, whereby the player agrees with sanctions contained in the disciplinary rules of the club,
- (l) not to participate personally or through others, in betting, games and contests related to the results of the matches of their teams,
- (m) not to perform any other gainful activity without the consent of the club.⁷

6. *Sports offences*

Duty to respect sporting rules (including rules of the game) essentially arises from the rules of the organization, of which the athlete becomes a member, respectively in which he is registered, or rules to which the athlete submitted contractually. This commitment may namely be expressly stated in the contract with the club.

An example of an offence is e. g. liability for injury caused by athletes to another athlete in the course of the game, in breach of the rules of the game. Athlete may also be responsible for damage caused to a spectator, either in connection with violation of sporting rules or not. Often, however, the responsibility is taken over by the organizer or organizing service, which should ensure the safety of spectators. Still, one cannot exclude a shared responsibility of the athlete and the organizer/organizing service.

Responsibility between the spectators and organizing service has also the opposite form – the form of liability of spectators for the damage they cause in the stadium, or civil liability of the spectator for a fine imposed on a club by sports association or international federation due to the behaviour of the spectators.

Liability of the athletes to organizers and organizing service and vice-versa arises from specific contractual relations between them, and from the fundamental principles of civil liability (breach of duty, damage, causal link and the fault).

Another possible form of accountability is the liability of coach towards the athletes, often minors, or, responsibility for damage caused by a minor athlete.

⁷ Ibid., 124.

All of these are civil law liabilities, arising from breach of general civil law duty of care. Finally, according to J. Čorba, in sport there exists also a possibility of commercial law liability. The club may e.g. claim compensation for an injured player from another club whose player caused the injury.⁸

Besides civil liability and civil offences, the liability may also take form of criminal responsibility under the Criminal Code no. 300/2005 Coll. The criminal responsibility in sport is connected not only to causing injuries, respectively bodily harm,¹⁰ but may also meet elements of other criminal acts. These include, for example, an offence of killing pursuant to § 147 of the Criminal Code, the criminal act of manslaughter (§ 149), or corruption and bribery (regulated in § 332 of the Criminal Code). Particular criminal deed pursuant to § 336 sec. 2 of the Criminal Code is the offence of indirect corruption.

Essence of the criminal law approach to sports injuries differs from other criminal offences due to some specificities of sports, and can be summarized in Slovakia in a sense that the athletes are criminally responsible only if they exceeded the frontiers of natural risk arising out of the game. In such cases, the situation is to be considered on a case-by-case basis. This approach could be summarized in a way that the criminal liability arises under the following conditions:

- (a) serious breach of the rules of sport,
- (b) causing an outcome meeting the elements of a criminal deed,
- (c) causal link,
- (d) lack of proportionate penalty imposed by sports organization, and
- (e) fault of the defendant having regard to all circumstances of the case.⁹

In case of a milder form of illegal conduct, the offenders may be punished for an offence under the Offence Act no. 372/1990 Coll. (in the field of protection against alcoholism and other addictions (§ 30), offences against public order under § 47 of the Offences Act, an offence against civic cohabitation under § 49 of the Act, and finally, when intentionally causing damage to foreign property – e.g. stadium facilities, this may be an offence against property under § 50.)

The previous list was a list of offences based on Civil Code, Criminal Code and Offences Act. Additionally, the Act on sports no. 300/2008 Coll. contains special arrangements for sporting offences. In addition to sporting offences within the game, the Act governs also sporting offences outside a particular game. These are decided by autonomous sports authorities, under the rules of sports competition and their own statutes. In terms of types of disputes, one may discern offences and disputes between:

- (a) organizers of sporting events and sports clubs participating in the sporting competition, or an individual athlete, if acting alone in his own name,
- (b) sports clubs which are members of national sports associations, unless the dispute concerns commercial law relationship or their property,
- (c) sports club which is a member of a national sports association, and athletes or

⁸ J. ČORBA, *Obchodnoprávne vzťahy v oblasti športu* (PhD. dissertation), Košice, UPJŠ, 2008, 157.

⁹ T. GÁBRIŠ, *Sports Law in Slovakia*, Alphen aan den Rijn, Wolters Kluwer, 2012, 96.

sports professionals who are members or contractual partners of the sports club, unless related to claims within the employment relationship or civil claims, which are to be decided by regular courts.

The Act on sports no. 300/2008 Coll. discerns also specific disciplinary offences, based on the disciplinary rules of sporting bodies. As an example of disciplinary offences, in football, under the SFA Statutes, these are connected to misconduct of individuals and teams, committed:

- (a) by violation of rules, orders, directives, regulations of the SFA and other competent authorities,
- (b) with respect to participation in competitions organized by the SFA and other territorial authorities,
- (c) by other act in detriment of the reputation of Slovak football, including misconduct in the national team within international relations,
- (d) conduct and speech in detriment of reputation and status of officials, regular or associate members, and the principles of *fair play*.

Moreover, the Competition Rules of the SFA specifically regulate offences against the Competition Rules, which do not have the nature of disciplinary offences. Examples of wrongdoings are contained in Art. 53 of the Competition Rules, for example voluntary rescheduling of the meeting to another date, not appearing to a match, players playing in the game with an invalid or other player's registration card, the physical harassment of referees and other officials or spectators by the players – either before the meeting, during the meeting or immediately after the meeting.

7. *Sanctions on clubs and players*

The Act on sports no. 300/2008 Coll. discerns various disciplinary measures that may be imposed upon athletes and sport officials:

- (a) oral or written reprimand,
- (b) fine,
- (c) a ban on participation in sporting competition,
- (d) exclusion from the sports representation.

According to the SFA Statutes, similarly, violation of the SFA Statutes and other regulations by a member of the SFA or any other person subject to the disciplinary powers of the SFA, may be punished by disciplinary measures.

Disciplinary measures, which may affect a natural person and legal person in the SFA disciplinary proceedings, are the following:

- a. caution;
- b. reprimand;
- c. fine;
- d. withdrawal of the award.

Disciplinary measures which may only affect an individual in the SFA disciplinary proceedings, are:

- a. exclusion:
 - i. from the SFA;
 - ii. from national team;
- b. suspension:
 - i. from function;
 - ii. from sporting activities; or
 - iii. from other than sporting activities;
- c. ban from the dressing rooms, the technical area, including substitutes' bench, spaces of the extra seating or other areas of the stadium;
- d. ban from entering a stadium;
- e. ban on participation in any activities related to football;
- f. community football service order for the benefit of football movement, SFA or of its member.

Disciplinary measures, which can only affect a legal person in the SFA disciplinary proceedings are the following:

- a. subsidy reduction or refund of expenses or costs covered from the subsidy granted to the SFA by state government, self-government, FIFA or UEFA;
- b. prohibition to apply for grants from the subsidy granted to the SFA by state government, self-government, FIFA or UEFA;
- c. transfer ban;
- d. playing a match without spectators;
- e. playing a match on neutral ground;
- f. ban on playing a match in a particular stadium;
- g. annulment of result of a match;
- h. exclusion from the competition;
- i. forfeit;
- j. deduction of points;
- k. relegation to lower competition.

In addition to disciplinary measures, in order to achieve the purpose of disciplinary proceedings, other proportionate restrictions and obligations may be imposed by the SFA, based on the SFA Statutes:

In the interest of individual and general prevention, as well as in the interest of educating the youth and other members of the football movement, it may be decided to publish disciplinary decisions in their entirety on the website of the SFA. Otherwise, only the imposed disciplinary measure is being published in a usual manner.

The suspension of membership of a regular or associate SFA member or exclusion of a regular or associate SFA member, or a temporary suspension from office in harmony with the Statutes may be imposed by the competent SFA authorities on the initiative of the SFA Disciplinary Committee or other SFA body or SFA member, or even without any proposal.

The Competition Rules of the SFA which specifically regulate offences against the Competition Rules that do not have the nature of disciplinary transgressions, recognize as a sanction the so-called gaming effects, e.g. a

declaration of default outcome for serious violation of standards and guidelines, or for acting contrary to regularity of the competition.

A number of other associations regulate specific offences and sanctions without precisely specifying the nature of these as disciplinary offences and sanctions. The practice thus varies to a great extent.

8. *The sports judicial bodies*

According to Reeb,¹⁰ there are three possible ways of settling sporting disputes, namely through:

- (a) national sports organizations,
- (b) regular court, or
- (c) arbitration (both at national and international level).

In addition, mediation can be used (e.g. under the rules of the International Ice Hockey Federation).¹¹

In Slovakia, sporting dispute settlement can similarly take place either before the autonomous sporting bodies, before regular courts, or in the process of alternative dispute resolution through arbitration in accordance with Act no. 244/2002 Coll. on arbitration.

Not taking into regard regular courts, we will analyze to a greater detail only the “true sports judicial bodies”, i.e. autonomous bodies and the sports arbitration.

The autonomous SFA bodies for the administration of justice according to the SFA Statutes are the following:

- a) Disciplinary Committee - the first instance authority administering justice within the SFA, ruling on breach of the obligations arising from the normative system of the SFA, from decisions of the SFA bodies and of its members, and imposing disciplinary measures for the breach,
- b) the Appeal Committee - decides in the second level on appeals against decisions of the Electoral Committee, the Disciplinary Committee, against the decisions of expert Committees and other SFA bodies issued in the first instance, against which the appeal is admissible, and
- c) The SFA Club Licensing Appeal Body - decides solely on the appeals filed against the decisions of the first instance Licensing Body.

An arbitration court represents the SFA Arbitration Court as an independent body for resolution of sport disputes and property claims by independent arbitrators under the rules of arbitration in force in the territory of the Slovak Republic, regardless of the sports industry in which they incurred. The SFA Arbitration Court decides particularly disputes that arise from the implementation of contracts between legal

¹⁰ M. REEB, ‘*The role of the Court of Arbitration for Sports*’, in *International Law and The Hague’s 750th anniversary*, Wybo P. Heere (ed.), Den Haag, T.M.C. Asser Press, 1999, 233.

¹¹ I. S. BLACKSHAW, *Mediating Sports Disputes: National and International Perspectives*, The Hague, T.M.C. Asser Press, 2002, 170.

entities and individuals in areas related to performance of sports activities. The arbitral tribunal is also empowered to decide on appeals against final decisions of SFA bodies, regional and provincial associations, the Union of League Clubs, and football clubs, where those decisions relate to property issues.

The Statutes of the SFA go even beyond the limits set by the Arbitration Act. Statutes namely provide for competence of the Arbitration Court to decide even such matters which the Act does not consider arbitrable and thus also not enforceable. Nevertheless, the SFA provides for enforceability of such decisions by its own disciplinary bodies and competence. Thus, the SFA Arbitration Court has a much broader competence than an arbitration court is allowed by the Arbitration Act.

The Arbitration Court consists of the executive bodies of the Court, the arbitrators and the Registrar. The executive bodies are:

- (a) Presidency of the Court of Arbitration,
- (b) President of the Court of Arbitration,
- (c) Vice-President of the Court of Arbitration.

The arbitrators have to meet specific conditions under the Act on Arbitration as well as under Statutes of the SFA Arbitration Court. E.g., the SFA Arbitration Court arbitrators are required to possess a completed law degree from a law faculty of a university in graduate level, which is a requirement exceeding the dispositive rules of the Arbitration Act, since the Act does not require a legal qualification of the arbitrators.

9. *The procedure*

The Act on sports as well as the Arbitration Act do not regulate guarantees of a fair trial neither within the autonomous (disciplinary or other) proceeding, nor within arbitration proceeding, with the exception of a possibility to have a decision of an arbitration court nullified by a regular court in case any procedural errors would be present, as specified in the Arbitration Act.

However, the SFA Statutes go into greater detail explicitly requiring that the SFA disciplinary procedure shall respect the principles of due process and material justice and the imposed disciplinary measures must be justified and proportionate to the nature and seriousness of the breach of rules or regulations.

The SFA regulation of arbitration procedure does not specify any similar general rules, though. Nevertheless, these should be observed by analogy. Similarly with any other proceedings under the SFA authority – since due process is considered a basic principle within the SFA rules.

The SFA arbitration takes generally place only in a single level. It is not public, and it is predominantly written in form. Proceedings begin on the date of filing the application with the Arbitration Court. After bringing an action, if the applicant has not designated an arbitrator in the application, the President of the Court shall invite the parties to choose from a list of arbitrators of the Arbitration Court within a specified period (minimum of fifteen days). The applicant and

respondent shall each appoint one arbitrator. Parties to arbitration may agree on another person as an arbitrator, even if unregistered in the List of Arbitrators of the Court. Such a person must meet the general conditions for entry into the List of Arbitrators of the Court. If the disputing parties do not choose the arbitrators within a specified period, the Court of Arbitration shall decide without delay on the arbitrators. The arbitral tribunal, in cooperation with the parties, shall secure all documents, papers and other evidence to fully determine the facts. The Arbitration Court, however, carries out only evidence proposed and presented by the parties. If a party fails to submit documents or other evidence within a set period, the Arbitration Court shall continue the proceedings and issue a decision on the basis of available evidence only. The procedure is therefore governed by a principle of formal truth, and represents mostly adversarial type of proceeding.

10. Dispute settlements

10.1 Technical disputes

According to § 24 sec. 1 of the Act on sports no. 300/2008 Coll., the rules of sports competitions laid down by the national sports associations should contain also a way of deciding a dispute on a particular breach of the rules within a collective or individual sport performance. These disputes are decided by referees determined by the national sports association for the specific sporting event. Disputes are decided by a referee by imposition of sanctions or corrective measures under the rules of the sports competition. The referee's decisions during the game are final. Only in exceptional cases where equality in competition has been undermined, the national sports association may proclaim the outcome null and void and initiate disciplinary action against the referee, athlete or a sports clubs.

According to the SFA Statutes, the Appeal Committee is a body of administration of justice within the SFA with appellate and examination powers, deciding also in cases with sporting technical implications. Appeal Committee is authorized to investigate upon a complaint even those decisions that are not final and effective yet, as well as practices of the SFA members' bodies of the first instance. Proceedings before the Appeal Committee and the Appeal Committee decisions do not affect the current or subsequent decision of the Court of Arbitration in matter of claim for damages or any other related claim. Motion for the proceedings before the Court of Arbitration does not have suspense effect in relation to the decision of the Appeal Committee.

Details on the activities of the Appeal Committee, its composition, jurisdiction, powers, procedure, fees and types of decisions is regulated by the Charter of the Appeal Committee and other SFA regulations.

10.2 Disciplinary disputes

Disciplinary offences may be tried and prosecuted under the Act on sports within

one month from the date when the violation was identified, and no later than six months from the date when the violation occurred. This is however, often not reflected in the internal disciplinary rules of the sporting organizations in Slovakia.

The SFA disciplinary proceedings is instigated by the Disciplinary Commission (DC) which shall proceed as quickly as possible, in order to clarify the case. To properly clarify the circumstances of the misconduct, DC is entitled to invite the parties, which may provide important information, ask for written documents and reports or other evidence, as well as to ask an expert panel for opinion. Reimbursement for witnesses is paid by the football association or by the club, of which the offender is a member. After clarifying all the circumstances of the misconduct, DC decides to impose a penalty in the event that the misconduct occurred, or DC stays the disciplinary proceedings in the event that the misconduct did not occur. Given the nature of the misconduct and the person of the offender, DC may waive the sanction.

If DC decides simultaneously on various disciplinary offences, it imposes a penalty for the most serious offence and takes into account the other offences as aggravating circumstances. A number of other specific mitigating and aggravating circumstances is recognized.

Ne bis in idem principle applies only to disciplinary proceedings, not to any subsequent criminal or civil law proceedings. Criminal sanction for the same misconduct is thus permitted.

After serving half of the sentence, DC may decide at the request of the punished that the sentence is conditionally suspended for a probation period of two to twelve months.

10.3 Economic disputes

To remind the reader, Act on sports no. 300/2008 Coll. contains special arrangements on sporting offences. It does not recognize disputes between sports clubs as members of national sports associations to be sporting disputes, should the dispute concern commercial law relationship or property of the clubs. These “economic” disputes can namely not be a subject of autonomous dispute resolution. On the other hand, however, Act no. 244/2002 Coll. (Arbitration Act) allows for deciding such property disputes arising from domestic and international commercial and civil relations by arbitration courts. The “economic” disputes can thus be decided by the SFA Arbitration Court. The most widely spread economic type of disputes is however the disputes arising from the players’ unpaid monthly remuneration based on the players’ contracts. These are also mostly collectible through the decisions of the SFA Arbitration Court. The Arbitration Court would, however, not be competent, should the relationship between the club and the player be considered employment relationship, since the Slovak Act on Arbitration does not allow for labour disputes to be decided by arbitration courts. Besides labour disputes, it is also expressly prohibited to the arbitration courts to decide disputes concerning the establishment, modification or termination of ownership rights and other rights to immovable

property. These disputes, besides labour disputes, can only be decided by regular courts.

11. Implementation of decisions and awards

Besides official enforcement of regular court and arbitral decisions by entrusted law enforcement officials, decisions of sporting bodies are also enforceable by autonomous bodies, usually in the form of disciplinary measures for not respecting the internal norms and decisions of the autonomous sporting bodies.

The strongest sanctions in this respect are mainly the suspension of membership and termination of membership.

Within the SFA, the Executive Committee may decide to suspend the membership in the SFA immediately, particularly in cases where the SFA member is reasonably suspected of:

- a. influencing the results of a match contrary to the principle of fair play,
- b. offense of corruption (passive bribery, bribery, indirect corruption) or
- c. other serious crime (felony).

On the basis of serious or repeated breach of duty, which is fundamentally contrary to the SFA regulations or decisions and seriously threatens sports ethics and reputation of the SFA, the Executive Committee may decide to suspend the membership with immediate effect.

Suspension of membership lasts until the decision on the matter of membership at the next SFA Conference, unless the Executive Committee revokes its decision to suspend the membership. Should the Conference not confirm the suspension of membership, suspension of membership is cancelled.

An SFA member may also be expelled from the SFA:

- a. in case of gross violation of the Statutes and / or other SFA regulations, while such a gross violation is considered in particular:
 - i. influencing the outcome of the match contrary to the principle of fair play,
 - ii. ingestion of doping substances or conscious participation in the abuse of doping substances,
 - iii. active participation in violence and misbehaviour by spectators in connection with a public sporting event,
 - iv. corruption (receiving a bribe, bribery, indirect corruption), committed by a member, statutory body or other official of a member, or other person for the benefit of an SFA member or
 - v. another criminal activity of a serious nature (crime) committed by a member, statutory body or other official of a member or by any other person for the benefit of a member of the SFA,
 - vi. severe, long-lasting or repeated breach of duties of the SFA member set by the SFA regulations or by a decision of the competent SFA authority, which threatens or may seriously endanger the principles

and relations within the SFA or the authority of the normative system and decision-making activities of the SFA,

- b. if a member has ceased to meet the conditions of membership (e.g., loss of integrity, outstanding membership fee) despite repeated written warning,
- c. because of not registering any team of the club in a competition organized by the SFA or its members in two consecutive competition years.

Exclusion from the SFA does not relieve the members of their obligation to settle their financial or other obligations towards the SFA or other SFA members.

Conclusions

Currently, in the Slovak Republic, sports justice is administered either via regular courts, autonomous sporting bodies, or a sole arbitration court specialized in sports – the SFA Arbitration Court.

The Act on sports as well as the Arbitration Act place certain restrictions on the competence of relevant bodies to decide in sporting matters – especially with respect to reserving decisions in property matters to arbitration courts and regular courts rather than to autonomous bodies. Moreover, property matters relating to immovable property and labour matters are completely reserved solely to regular courts.

Still, even in matters that are in the competence of autonomous bodies and arbitration courts, the principles of fair trial are not reflected properly. Current recodification trends in the Slovak Republic, stretching also to the area of sports legislation, should thus be considered a good opportunity to reconsider both the competence of sports justice bodies as well as the fair trial principles reflection in the act of parliament on sports.

SPORTS JUSTICE IN SPAIN

by *Juan de Dios Crespo Pérez**

SUMMARY: 1. Principles of sports justice – 2. The relationship between ordinary justice and sports justice – 3. The Olympic Spanish Committee (COE) – 4. Athletes' special labour relationship – 5. The Spanish Football Federation (RFEF) – 6. Sport events and audiovisual rights – 7. Sports trademarks – 8. Conclusion

Abstract:

We will deal with the legal Spanish framework in Sport with a special mention of the football side. It should be remembered that Spain was one of the leaders in this field, having approved a "Sports Law" as early as in 1980 and a "Professional Sportsmen Law" in 1985, as well as other legal instruments for TV sports rights. One of the main characteristics of Spain is the public treatment of sports with very little room for a private system which leads to the administrative control of much of the sport, including the disciplinary system, which is a matter of discussion within sports lawyers.

1. Principles of sports justice

The importance of sport was contained in a set of guiding principles of social and economic policy that are included in the Third Chapter of Title I of the Constitution, wherein article 43.3 states: "Public authorities will promote health education, physical education and sport. It will likewise facilitate the proper utilization of leisure".¹

We also must point out that Spain is constituted of 17 different "Autonomous Regions" which also have their say on sport, with local laws controlling the regional level of the sporting activity.

The response to the constitutional duty to promote sport came, firstly, by

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¹ Spanish Constitution of 6th of December 1978. Art. 43.3.

means of the 13/1980 Act.²

But nowadays, the law in force is the Sports Act 10/1990 of 15 October. Its fundamental goal is to regulate the legal framework in which it is necessary to carry on the playing of sport under the auspices of the State, which gives you the clear understanding that sport must be a State-control issue.

It is also clear that sporting activities constitute an evident cultural manifestation, about which the State must not and cannot demonstrate itself to be separate from the particular Constitution, even though this is only in order to facilitate the necessary communication between the different autonomous spheres. Moreover, this is without knowing which of the responsibilities for education, research, health or commercial legislation guarantee State action on the subject, in their supra-autonomous facet. This is with full observance of the competences assumed by the Autonomous Communities in their Statutes of Autonomy which, in certain territories, have led to the promulgation of sports legislation particular to this sphere. On the basis of this reality, the corresponding articles are declared to be supplementary.

We may abstract the Spanish sport organization in the following points:

1.1 The Higher Sports Council [Consejo Superior de Deportes]

The activity of the State Administration in the sports sector corresponds to and will be directly exercised by the Higher Sports Council, other than in the cases of delegation set out in this Act.³

The Higher Sports Council is an autonomous body of an administrative nature associated with the Ministry of Education and Science. In regulatory terms, the Government will be able to modify this association.

The President of the Higher Sports Council, with the rank of Secretary of State, is appointed and dismissed by the Council of Ministers. He holds the form of representation and the senior management of the Council, administers its capital, executes the particular contracts of its activity and issues administrative documents on its behalf.

1.2 Clubs and Sports Public Limited Companies

Without doubt, one significant Title of the Act is that which relates to sports associations' involvement.⁴

At the first level, the Act proposes a new model of sports associations' involvement which seeks, on the one hand, to benefit grass roots sports associations' involvement, and on the other, to establish a model of legal and financial responsibility for the Club that carries on activities of a professional nature. The aim is to achieve the former by means of the creation of elementary sports clubs, with a simplified

² The first law of sport in Spain, of 31 March 1980, known as "of Physical Culture and Sport".

³ Sports Act 10/1990 of 15 October.

⁴ Title III of the Sports Act 10/1990, articles 12 to 45.

constitution. The second one is by means of converting professional clubs into Sports Public Limited Companies, or the creation of such Companies for the professional teams of the relevant sports modality. This is a new legal form which, being inspired by the general system of Public Limited Companies, incorporates certain specific features in order to adapt itself to the world of sport.

These are the legal definitions:⁵

Sports clubs

Sports clubs are considered to be those private associations, made up of private individuals or legal person whose object is the promotion of one or several sports modalities, the playing of the same by their members, as well as participation in sports competitions and activities.

All Clubs, whatever may be their specific objective and the legal form they adopt, will be inscribed in the relevant Register of Sports Associations.

Classification of Sports clubs

Sports clubs are classified into:

- a) Elementary sports clubs. For the incorporation of these clubs it will be sufficient that their promoters or founders sign a private document, whenever they are private individuals.
- b) Basic sports clubs. For the incorporation of a basic sports club, its founders will register the founding deed in the corresponding Register as set out in Article 15. The deed will be executed before a notary with at least five founders and contain the intention of the latter to incorporate a club with an exclusive sports object.
- c) Sports Public Limited Companies. The Clubs, or their professional teams, that take part in official sports activities of a professional nature or State scope, will adopt the form of a Sports Public Limited Company. Said Sports Public Limited Companies will be subject to the general regime of Public Limited Companies, with the particular features that are contained in the Sports Act and its rules of implementation. The corporate object of the Sports Public Limited Companies will be participation in sporting competitions of a professional nature and, as appropriate, the promotion and development of sporting activities, together with other activities relating to or deriving from said practice.⁶

Sports Public Limited Companies and the clubs that participate in professional competitions of a State scope will not be allowed to directly or indirectly participate in the capital of another Sports Public Limited Company that takes part in the same professional competition or, in a different case, pertains to the same sporting modality.

⁵ As per Sports Act 10/1990 – Title III, Chapters II to V.

⁶ Article 14 of the Sports Act 10/1990.

No private individual or legal person that directly or indirectly holds a stake in the voting rights of a Sports Public Limited Company that is equal to or greater than five per cent in another Sports Public Limited Company will be able to directly or indirectly hold a stake equal to or greater than five per cent in another Sports Public Limited Company that participates in the same professional competition or, in a different case, pertains to the same sporting modality.⁷

1.3 Spanish sports federations and professional leagues

Spanish sports federations

Likewise, the Act pays special attention to Spanish sports federations and the professional leagues as second level associative forms. For the first time, the legislation recognises the private-legal nature of the Federations, at the same time as allocating public functions of an administrative nature to them. It is in this latter dimension in which the different rules of guidance and control that the State Administration can exercise over the Federations are maintained. Furthermore, the Act, on an interim basis, has established, with full and perfect observance, respect for the principles of self-organisation that are compatible with the monitoring and protection of the public interest of those attending.⁸

Spanish sports federations are defined as private entities, with their own legal personality, whose sphere of activity extends to the whole of the State territory, in the undertaking of the competences that are particular thereto, being made up of sports federations of an autonomous nature, sports clubs, sportsmen and women, technical staff, umpires and referees, professional leagues, should there be any, and other interested groups that promote, practice or contribute towards the undertaking of the sport.

Spanish sports federations, in addition to their particular attributes, exercise public functions by delegation of an administrative nature, in this case acting as partnership agents of the public authority.

A corollary to the recognition of the private nature of sports federations and their role as bodies which assist the State is a direct and generic declaration of public utility that the Act sets out. The official seal which, by virtue of State authorisation, is held by the Spanish sports federations finds its most visible manifestation here and, at the same time, justifies the guidance and control of the State over the same.

Professional Leagues

Leagues will be established in the Spanish sports federations where there is an official competition of a professional nature and State scope, which are exclusively

⁷ Article 22 of the Sports Act 10/1990.

⁸ Interim disposition of the Sports Act 10/1990.

comprised of all of the clubs that participate in said competition on an obligatory basis.

With respect to the imposing of a special corporate-legal form in the undertaking of professionalized sport, the obligatory nature of the constitution establishes, within the federative structures, the leagues that are exclusively and by law made up of all of the Clubs that participate in official competitions of a competitive nature.

The Act does not authorize a break-up of the federative core, because therein lies the true catalyzing element of the work of promoting sport. However, it does recognize the legal personality, and organizational and functional autonomy of the professional leagues to the standard and with the intensity that is recommended for this form of playing sport. It follows from this that the leagues are allowed to organize their own competitions in coordination with the respective Spanish sports federation, and in accordance with the criteria which, in exclusive guarantee of international commitments, may be guaranteed by the State Administration, as applicable.

1.4 Other aspects ruled in Sports Act 10/90

The Act also contemplates other aspects which, it is necessary to list in a brief form:

- the definition of sports competitions;
- the regulation of the instructions that are nowadays the basis of numerous professional situations;
- the incorporation of the fundamental criteria of the sports disciplinary procedure into the Act;
- the opening of the process of extra-judicial conciliation in sport in accordance with the new Arbitration Act;
- the creation of the General Sports Assembly, with the Spanish Olympic Committee being likewise constituted as a private association whose object consists of the development of the Olympic movement and the publicizing of its ideals, declaring this to be of public utility for the purposes of the objectives that are particular to it.

2. The relationship between ordinary justice and sports justice

The ordinary justice in sports is absolutely linked to the sports justice as all the sanctions that are taken by any of the disciplinary committees of all the Spanish Federations are subject to an appeal before the Comité Español de Disciplina Deportiva (CEDD) or “Spanish Disciplinary Committee on Sport”,⁹ which shall take the final decision within the Sports’ world (article 67 of the Royal Decree).

⁹ Royal Decree 1581/1992 of 23 December on Disciplinary proceedings.

The appeals can be brought within 15 working days from the date of the notification of such decision (art. 52.2 of the Royal Decree). As well, the decisions on disciplinary issues made by the professional leagues have the possibility to be appealed before the CEDD and within the same deadline.

Then, and this is the link between the ordinary justice and the sports justice, the decisions taken by the CEDD, which are considered as administrative ones, being the CEDD a part of the Higher Sports Council (which pertains to the Ministry of Sports, which by the way has changed its name several times, nonetheless we will refer to it that way for ease of understanding), are subject, as are all administrative ones in Spain, to a possible appeal before the Contencious-Administrative Courts.

Those Courts take care of the judicial relationship between the citizens and the State, in all its various faces (local, regional, national).

So, we might have a case which can last for years (as for the doping case of the Athletic de Bilbao footballer Mr. Gurpegui¹⁾) once you decide to bring your case into those administrative Courts.

This, of course, is a particular issue and not very well accepted internationally as sports needs urgent decision and not a long lasting proceeding on the ordinary justice.

The Supreme Court of Spain already decided on the 20th of January 1989, regarding the previous Law on Disciplinary Proceedings,¹¹ but that applies to the present and current one, that there is a need to control by the ordinary Justice the disciplinary proceedings of the Spanish Federations in order to have *legal safety* and a *Constitutional control*.

The protection of the citizens/sportsmen is then the aim of such legal frame which could be understood as really not the best for the sport itself but that definitively protects the individual rights (of persons or of sports associations/companies) which is an issue that is always present at the international level (see WADA code and procedure for instance or CAS jurisdiction itself that has been challenged in Belgium).¹²

¹⁰ The player was controlled on the 1st of September 2002, in a match of the Spanish First Division Championship and he had a positive doping test of norandrosterone. On February 2006 the First Committee of the Spanish Football Association (RFEF) suspended his licence and gave him a two years sanction, a decision confirmed by the Appeal Committee where Gurpegui and his club went. But the CEDD gave him a stay of the decision of the RFEF Committees and Gurpegui re-started to play, until he got a final decision by the CEDD which confirmed the two years sanction. Then, both the club and the player went to the Contencious-Administrative Section of the "Audiencia Nacional" in Madrid and he got another stay from that High Court. Finally, the "Audiencia Nacional" gave him the 2 years sanction on the 31st of July 2006, so he was quite four years playing before he got the final sanction. He served it and resumed to play for the season 2008-2009.

¹¹ Royal Decree 642/1984.

¹² The tennis players, Malisse and Wickmayer were sanctioned by the Flemish Doping Court (FDC) and its regulations provide an appeal before the Court of Arbitration for Sport, but the athletes decided not to follow that path but to go to a Belgian Civil Court which provide for an injunction in their favour.

On another side, the employment issues are not possible to be decided outside of the ordinary justice (Labour Law Courts – Magistraturas de Trabajo) and it is thus mandatory to litigate.

3. *The Olympic Spanish Committee (COE)*

The COE is under the legal frame of its Statutes dated 14 June 1994, in which it is said¹³ that it is a body with no lucrative purposes, with full capacity of acting with its own resources and patrimony and with an indefinite duration.

It means that the COE is independent from the State, even though it has different links as it has to supervise, control and coordinate the participation of the Spanish athletes at the Olympic Games and thus it is indirectly the responsibility of the Spanish Federations.

As well, the COE receives from the State¹⁴ some subsidies but it could also be given by any other public body (local, regional, etc...).

Thus, the COE is an independent body but it is linked to the public administration by means of the Spanish Federations as well as by the subsidies that it receives.

One interesting point of the COE has been the creation of the Court of Arbitration for Sport of the Spanish Olympic Committee (CASSOC) which is an independent body but within the scope of the COE as the CASSOC is under the administration of the Committee for Sports Arbitration. This Committee is composed of two members of the Executive Committee of the COE but also by two members of the Superior Council for Sports which depends, as it has been said, on the Ministry of Sports. This could be seen as a not too independent body as it would control the CASSOC.

It does not deal with any appeal but only with ordinary proceedings and it has not been too active.

4. *Athletes' special labour relationship*

The relationship between sportspeople and their clubs has for a long time been separated from employment legislation in Spain. It is of course applicable to professional footballers.

It was eventually included in the Workers' Statute in article 2.1.d) as a special working relationship, and the Government legislated on the special working relationship of professional sportspeople through Royal Decree 1006/1985 dated 26th July.

¹³ Article 1 of the Statutes.

¹⁴ Article 35 of the Statutes.

4.1 *Scope of application*¹⁵

Such Royal Decree 1006/85 includes: a professional sportsperson is anyone who, by virtue of a regular employment relationship, voluntarily dedicates themselves to the practice of sport on behalf and under the direction of a club or sports organization in exchange for remuneration.

There is a discrepancy as to whether coaches are included in this special employment relationship. Despite contradictory rulings on the matter, in all cases this special relationship is considered as an employment relationship. For example, football selectors/coaches are occasionally considered as holding senior management positions.

The definition also includes relations between professional sportspeople and organizations whose objective is the organization of sports shows, companies or commercial firms for the undertaking of sporting activities.

Exclusions from Royal Decree 1006/85:

- Sportspeople who receives compensation only for expenses derived from sports practice.
- Intermittent sports practice (e.g. professional tennis players or golfers).
- Relationships between professional sportspeople and national federations when the sportspeople are members of teams, representations or selections organized by national federations.
- The professional sportsperson's status differs from that of high-level athletes as defined in the Sports Act 10/1990, as implemented by Royal Decree 971/2007 dated 13th July. High-level athletes are considered to be of interest to the state in the promotion of sport at grassroots level. These sportspeople are entitled to be included in the Self-Employment Special Regime.

4.2 *Recruitment*¹⁶

4.2.1 *Formalization of the agreement*

The agreement should be made in writing and in triplicate. It must be registered at the appropriate Federation. Registration is necessary in order that the sportsperson may participate in official competitions.

4.2.2 *Duration and probation period*

A probation period may be agreed on, which should not exceed more than three months, although this period may be reduced in the different Collective Bargaining Agreements.¹⁷

¹⁵ Article 1 of the RD 1006/1985.

¹⁶ Article 3 of the RD 1006/85.

¹⁷ Collective Bargaining Agreements are the legal frame for the labour relationship between the clubs

The agreement should always be for a fixed term, with the possibility of extending the agreement for fixed periods.

4.3 *Content of the relationship*¹⁸

4.3.1 *General rights and obligations*

The sportsperson's rights and obligations:

- a) The sportsperson is obliged to carry out the sports activity in accordance with the instructions from the representatives of the club or sports organization.
- b) He is entitled to freely express his opinions about topics relating to his profession, in accordance with the law and contractual obligations, and without prejudice to the limitations that may be established in the collective agreement, provided that they are justified on sports grounds.
- c) He is entitled to effective employment and may not be excluded from training or any other preparatory activities to practice the sport, except in the case of disciplinary action or injury.
- d) He is entitled to have a share in the profits derived from the commercial use of his image, except in the case of direct recruitment by a commercial firm.
- e) The rights and basic duties set out in the Workers' Statute apply.

4.3.2 *Remuneration*

The remuneration is that set out in the collective agreement or in the individual agreement. Any income that the sportsperson receives, including the bonus for being signed up by a club or sports organization, is considered as remuneration.

4.3.3 *Working Day*

The sportsperson's working day includes his actual performance before the public and the time in which he is under the direct orders of the club or sports organization for the purpose of training or physical and technical preparation.

The maximum working day does neither take into account pre-match preparation prior to sporting events, nor the time that has been spent travelling.

4.3.4 *Rest and holidays*

The sportsperson is entitled to a day and a half of rest per week. If due to sport related reasons the rest period cannot be completed without interruption, the part that has not been enjoyed may be moved to a different day. When the sportsperson is required to participate in immediate sports events, the weekly rest may amount

(football, basketball) and the sportsmen.

¹⁸ Articles 4 to 10 of the RD 1006/85.

to 36 hours.

When, due to sport related reasons, public holidays cannot be enjoyed, the day of rest shall be moved to another day of the week.

The sportsperson is entitled to 30 days paid holidays per year. It is possible to spread them out over the year, and the time of the year in which the holiday must be taken is set by the Collective Agreement or the individual contract. Some Collective Agreements provide for longer holiday periods.

4.4 *Temporary loans*¹⁹

During the term of the agreement, the clubs and sports organizations may temporarily loan the player to another club or organization with his express consent.

The club is obliged to consent to a temporary loan when the services of the sportsperson have not been used to participate in official public competitions for over a season.

The term of the loan will be stated explicitly in the loan agreement. It may not exceed the remaining term of the employment contract.

The assignee will be subrogated in the rights and obligations of the assignor, with both parties being jointly and severally liable for the performance of employment and Social Security.

If the player is loaned in return for a consideration, the sportsperson shall be entitled to receive the amount agreed, which may not be less than 15 per cent gross of the stipulated amount. In the event of reciprocal loan of sportspeople, each will be entitled to receive from their initial club at least one monthly payment of their salary plus one twelfth of the quality and quantity money paid during the year.

4.5 *Termination of the agreement*²⁰

The employment relationship will be terminated for the following reasons:

- a) By mutual agreement.²¹
- b) Expiry of the agreed term. In the case that after the termination of the agreement upon expiry, the sportsperson enters into a new agreement with another club or sports organization, the parties may, on the basis of the collective agreement, agree upon the payment of consideration for the sportsperson's preparation or training, to be paid by the new club to the original club.²²
- c) Full performance of contract.²³

¹⁹ Article 11 of the RD 1006/85.

²⁰ Articles 13 to 16 of the RD 1006/85.

²¹ Art. 13 of the RD 1006/85.

²² Art. 13 and 14 of the RD. 1006/85.

²³ Art. 13 of the RD 1006/85.

- d) Death or injury leading to permanent total or absolute disability, or major disability. In such cases, the sportsperson or his beneficiaries shall be entitled to receive compensation equal to at least six monthly installments if the death or injury arose from the practice of the sport, without prejudice to the Social Security benefits to which he may be entitled.²⁴
- e) Dissolution or liquidation of the club by resolution of a General Meeting of Members. The collective redundancy procedure set out in article 51 of the Statute applies.²⁵
- f) Economic crisis that justifies a restructuring of staff; article 51 of the Workers' Statute relative to collective redundancy for economic reasons is also applicable.²⁶
- e) Causes validly laid down in the agreement, except in the case that they constitute a misuse of law by the club.²⁷
- f) Dismissal of the sportsperson, which may be:
- Fair dismissal: When the dismissal is due to a breach of contract on the part of the sportsperson, and the dismissal is held to be fair, there is no right to compensation. In the absence of an agreement between the parties, the judge may order the sportsperson to pay compensation to the club based on the loss caused.²⁸
 - Unfair dismissal: If the sportsperson is not reinstated, he shall be entitled to receive compensation, which is set by the court in the absence of an agreement, equal to at least two monthly installments of his salary, plus the proportion of the quality and quantity money paid during the year. The amount of compensation will be calculated taking into account current circumstances, especially the shortfall in earnings resulting from the termination of the contract. The sportsperson is not entitled to any back pay and may not be reinstated (except where agreed otherwise by the parties).²⁹
 - Null and void: When the dismissal is based upon any of the categories of discrimination prohibited by the Constitution or by law, or where dismissal occurs in breach of fundamental rights and civil liberties, the employee must be reinstated immediately and receive any unpaid salaries.
- g) Termination by the sportsperson:
- Based on a breach of contract by the employer for any of the reasons stated in article 50 of the Workers' Statute and with the same effects as unfair dismissal without reinstatement.³⁰
 - Without causes attributable to the club: the club shall be entitled to

²⁴ Art. 13 of the RD 1006/85.

²⁵ Art. 13 of the RD 1006/85.

²⁶ Art. 13 of the RD 1006/85.

²⁷ Art. 13 of the RD 1006/85.

²⁸ Art. 13 of the RD 1006/85.

²⁹ Art. 13 and 15.1 of the RD 1006/85.

³⁰ Art. 13 and 15.2 of the RD 1006/85.

compensation, which is set by an employment tribunal in the absence of an agreement between the parties, based on the sporting circumstances, the loss caused to the organization, the grounds for termination and any other elements considered by the court. If the sportsperson is signed by another club within a year, said club shall have subsidiary responsibility for the payment of the above-mentioned compensation.³¹

5. The Spanish Football Federation (RFEF)

5.1 First of all, it has to be said that the Spanish Federations have a legal frame with the Royal Decree 1835/1991 of 20th of December, which it is a regulation coming from the Sports Law Act of 1990.

The intention of the State was to regulate the legal frame of the Federations under the control of the State Administration, which drive us again into the more administratively controlled sport in Spain.

The Spanish Sporting Federations are defined nevertheless as “private associations” with no profit aim and with an independent legal personality and own patrimony as well as independence from its associates (clubs, sportsmen, etc...).³²

But what is interesting is that, despite being “private associations” they exercise, by means of the State delegation, “public functions of administrative character, behaving then as *collaborators of the Public Administration*”.

This double cap is somehow difficult to understand, as if the Administration would not want to leave Sport alone and to have a control over it.

It is also said³³ that the Sporting Federations are entities of “public utility” which gives us more about the “public” aura of sport.

One interesting point that need, at least, to be mentioned is the international representation of the Federations, due to the fact that some Autonomous Regions (like Catalonia or Basque Country) are seeking to have an “international” representation through sport and have been struggling at national and international level in the recent years.

The Royal Decree states³⁴ that the Spanish Sporting Federations (and not the Regional) are the only ones that represent Spain, but the question raised is if they do not want to represent Spain but their own region, is there any problem?

Right now, the question is solved by one objective criteria, which is if there is no Spanish Federation of a sport, there could not be an international federation so, if a Regional sporting federation exists, it has the right to represent the region itself. This occurs for example with korfball (a mixed sport that has similarities with basketball and was within the Spanish basketball federation before being independent from it), which has no Spanish federation and thus the Catalan one is

³¹ Art. 13 and 16 of the RD 1006/85.

³² Art. 1.1 of the Royal Decree.

³³ Art. 1.4 of the Royal Decree.

³⁴ Art. 5.1 of the Royal Decree.

representing in international events not Spain.

But, other Regional federations, like the “Federació of Pilota Valenciana”, which has no national association, is competing within the flag of Spain, despite the non-existence of a State federation. So it is a matter of choice, but it only occurs, as it has been said, when there is no national federation.

As for the RFEF, it has nothing particular in its legal concept which is the same as for any other Federation (article 1 of its Statutes). It is a member of UEFA and FIFA as well as of the CEO (article 4 of the Statutes) and recognizes the jurisdiction of the Court of Arbitration for Sport (TAS-CAS) in Lausanne, but such recognition does not mean that its decisions are appealable to TAS-CAS, which is not the case, so it is really merely wording with no legal function, so CAS is not going to take any decision on matters related to the RFEF unless it is an ordinary proceeding.³⁵

The RFEF is not over the Spanish Professional Football League (LFP) but only coordinating the two pro divisions with the LFP (article 16 of the Statutes) through an agreement that is changed normally each season, so we can say that RFEF is the controlling body of football in Spain but for the two professional divisions.

5.2 As for the legal issue and the sporting justice, the professional football is strangely under the umbrella of the RFEF and not dealt by the LFP. The RFEF has two different ways of deciding:

- The first one is on disciplinary issues that are under a Disciplinary Code. The decisions are initially taken, after a match, by a first instance committee which will have until 48 hours to decide, and then an appeal can be brought to the appeal committee which will decide in another 48 hours (i.e.: a match that takes place in a week end will have a first decision on the following Tuesday and the appeal dealt by Thursday). Then, as it has been previously said, that final decision on the RFEF level can be brought before the CEDD within 15 working days, but normally, if someone wants to request a stay of the decision, the appeal to the CEDD is brought on Friday morning in order to get the stay (or not) on the very same afternoon. Both bodies are composed of three members, one of them nominated by the RFEF and another by the LFP and the President by consensus of the two others. The members are chosen according to the Agreement signed between the RFEF and the LFP.
- The second one is not in the Disciplinary Code but on the General Regulations,³⁶ concretely in its Book VI in which the so-called “Comité Jurisdiccional y de Conciliación” or CJC (Conciliatory and Jurisdictional Committee) will deal with any case that is not related to the competition or the disciplinary issues.

³⁵ See the case “Granada 74” . CAS 2007/O/1361 RFEF vs LFP.

³⁶ Reglamento General de la RFEF.

This is a kind of arbitration tribunal but that lacks the independence as it is an internal body of the RFEF, and its members are the very same for each case with no chance to nominate the Panel for a particular proceeding. So the arbitration side is unclear, despite the fact that you can appeal before a superior Court which can annul the “award”, as it has been the case in labour issues which, even though submitted to the CJC, have a legal prohibition to be sent to any arbitration tribunal.

The most normal use of the CJC is between the players and agents or agents and clubs but if there is not a clear clause in the contract, the parties would not agree on its jurisdiction.

Both the legal prohibition of the labour proceedings and the lack of jurisdiction when no clear clause of submission to the CJC exists, have driven this Committee to a *no man's land* in which very few cases are now dealt comparing to previous years.

As for the football under the two “professional” divisions, instead of three members, the first instance is a Single Judge but the Appeal Committee is composed of three members like the professional one.

6. *Sport events and audiovisual rights*

In Spain, football teams bargain individually with broadcasters for the right to show matches, unlike, for example, in the UK where the Premier League collectively negotiates on behalf of teams.

The legal frame may be extracted from the Law in force: Law 7/2010, of 31 March, General on Audiovisual Communication.

Two articles of this Law are essential for sport event retransmissions.

1. *Article 20. Power to exclude encrypted broadcast of events of general interest to society*

1. The Audiovisual Media State Council should set by reasoned decision a biennial catalog which includes events of general interest for society to be issued for free TV and state coverage.

Doing so will also determine whether these events should be total or partial broadcasted live, or, where necessary for reasons of public interest, whole or partial pre-recorded.

The events of general interest to society that can be included in that list will be chosen from the following list:

- a. The Winter and Summer Olympics.
- b. The official match of the Spanish football and basketball national team.
- c. The semifinals and finals of the European Football Championship and the World Cup.
- d. The finals of the football Champions League and the football King's Cup.

- e. A match of every match week of the Professional Football League First Division designated by the League itself with a minimum of 10 days in advance.
- f. Motor-racing Grand Prix to be held in Spain.
- g. Motorcycling Grand Prix to be held in Spain.
- h. Participation of the Spanish national team in the handball European and World Championships.
- i. “La Vuelta” of Spain.
- j. The World Cycling Championship.
- k. Spanish participation in the Davis Cup.
- l. Participation of Spanish players in the semifinals and the final of Roland Garros.
- m. Spanish participation in the Athletics and swimming World and European Championships.
- n. Great prizes and national and international competitions held in Spain which have state or regional public subsidy.

Exceptionally, by two-thirds majority, the Audiovisual Media State Council may include in the catalog other events considered of general interest for society.

2. When one of these events is contracted to broadcast exclusively by an audiovisual communication server that broadcasts all coded programming, it may choose to broadcast live and open the event or sell it to another provider for broadcast openly and with a price set by auction among interested providers. If it do not receive an offer, the server entitled to the exclusive broadcast rights is obliged to broadcast the event open, either live or recorded.

3. When one of these events is contracted for exclusive broadcast by a communications service provider of open audiovisual broadcasting but with a coverage area smaller than State scope, it will retain the exclusive right to broadcast within its coverage scope. However, it shall sell at a state-wide provider or set of providers that cover the entire territory, open and direct broadcast to the rest of the state, at a price set by auction among stakeholders. If there are no bids it will retain its exclusive right to broadcast in its coverage.

4. When one of these events is not contracted for television audiovisual communication, the audiovisual right holder shall sell the allowances in open and live with a state coverage at a price set by auction among stakeholders.

2. *Article 21: Sale of exclusive regular Spanish football competitions*

1. The establishment of the system for acquisition and exploitation of media rights of regular Spanish football competitions shall be governed by the principle of free enterprise within the framework of the evaluation system established by the European and Spanish competition legislation.

Acquisition contracts of the rights of football competitions may not exceed four years. Current contracts since the entry into force of this Act, shall remain

valid until completion.

2. The sale to providers of audiovisual media service of the rights mentioned in the preceding paragraph shall be made under conditions of transparency, objectivity, non-discrimination and respect for the rules of competition, in the terms established by the various pronouncements that, in each time, may pass the Spanish and European competition authorities.

7. *Sports trademarks*

The sports trademarks have no special regulation in Spain. Therefore, their registration formalities and legal protection are the same rules for all the trademarks in Spain.

The Trademark Law No. 17/2001 of December 7, 2001 establishes a new legal regime to govern distinctive signs in Spain, incorporating the provisions of community and international law by which the Spanish State is bound, and contains substantive and procedural provisions that practice has shown to be advisable.

Spanish law, aside from trademarks, specifies another type of distinctive signs, namely: 'commercial names' and 'shop tags'. These three types of distinctive signs, despite being different, are protected under the Spanish Trade Marks Act 17/2001.

'Commercial names' can be found in art 87 Spanish Trade Marks Act, where they are defined as every sign susceptible of being graphically represented that will identify one company in the mark, being able to distinguish it from any other company. We note however that while the function of trademarks is to distinguish the marketplace from products or services, the aim of the commercial names is to distinguish the company itself.

The usefulness of the commercial name has decreased since the approval of the Spanish Trade Marks Law in 2001, in which 'service marks' are included in the main term of trademark. It is not easy to differentiate between service marks and commercial names as one company can hold both of them to publish itself in the market, the practical effects being exactly the same. It is for this reason that many companies are opting to register service trademarks to designate themselves (without prejudice of registering other trademarks to designate their services, or even to use the same trademark as a service and goods trade mark) and include them in their mark portfolio.

8. *Conclusion*

We clearly do not have enough space to deal with all the sporting issues in the Spanish Sports Justice system but what has to be said is that Spain has an evident *administrative* or public law policy towards Sports. The control by the ordinary courts of any decision by the national federations is something that should be, in

my opinion, changed in the future as sports needs a quicker way of dealing with its issues. As well a specific body should be the one which, as a Court of Arbitration, deals with sporting matters, with specialists that have the internal knowledge that sometimes does not appear to be in the ordinary courts.

On the other side, the doctrine which supports that *administrative* point of view says that the rights of the athletes, clubs and other members of the sports family is much more protected as it is now than if a “judicial sporting body” takes the lead in that field.

One way or the other, what is clear is that Spain must change and the new Spanish anti-Doping law³⁷ that has been “forced” by WADA-AMA is an example of what Sport is, a special entity which needs to follow legal principles but that must have a sort of specificity that allows quicker distinguishing from other fields of the law. This is a difficult task, mostly in doping cases, but we need to try to discover that, may I say, “third way”, which is neither a full administrative frame as we have in Spain nor the all “sporting exception” that some doctrine seems to follow, but rather some equidistance point between the two of them.

One interesting point of the new anti-doping law which could lead a revolution in the Spanish sports legal system is the creation of the Court of Arbitration. The Court will deal with doping cases, at a national level only and with no possible appeal before the TAS-CAS.

This national Court of Arbitration, which will be a part of the CEDD is, hopefully, the first step to a future and different system in Spain.

³⁷ Approved in March 2013 and which should enter in force in June 2013.

SPORTS JUSTICE IN SWITZERLAND

by *Lucien W. Valloni** and *Thilo Pachmann***

SUMMARY: 1. Introduction – 2. Sports justice in general – 3. Judicial review of decisions of national sports federations – 4. Relevant NOC regulations – 5. Relevant football regulations – 6. Sports justice in doping cases – 7. The sports judicial bodies – 8. Conclusions

Abstract:

This article describes the system of sports justice in Switzerland with its main principles and its most important legal institutions. These main legal principles are of paramount importance for worldwide sports justice as they are constantly applied by the Court of Arbitration for Sport, which reviews the decisions not only of the national but also of international sports federations. The decisions of the Court of Arbitration for Sport are subject to appeal to the Swiss Federal Supreme Court, which makes the Swiss Federal Supreme Court the highest authority in worldwide sports justice. Due to the Swiss legal system, its jurisprudence has, unfortunately, not such a big effect for the implementation of basic legal principles in sports as it could and should have.

1. Introduction

Organized sport and therewith sports justice is of paramount importance in Switzerland. Many important bodies organize worldwide sports from Switzerland. Among others FIFA, IOC, UEFA, FEI, FIBA, FIVB and IIHF are all incorporated in Switzerland, which makes Swiss association law applicable for the relationship between the international sports federations and their foreign members.¹

Furthermore, the World Anti-Doping Agency (WADA) and the Court of

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¹ Art. 1 and art. 155 lit. f Swiss Private International Law Act (PILA).

Arbitration for Sport (CAS) are domiciled in Switzerland.

For sports justice, the Court of Arbitration for Sport (CAS) has a worldwide importance as almost all international sports federations have an arbitration clause in their articles of association according to which their disputes are decided by CAS. CAS is an arbitral tribunal having its seat in Switzerland and consequently applying Swiss law. The arbitral awards of CAS are subject to judicial review by the Swiss Federal Supreme Court. Swiss sports justice is therefore very important for sports justice all over the world. As CAS is the subject of another chapter of this book, this chapter concentrates primarily (i) on the system of Swiss sports justice in general (see below para. 2 and 3) as well as (ii) the sports justice of the national sports federations (see below para. 4 to 6) and (iii) on the sports justice of the Swiss Federal Supreme Court (see below para. 7).

2. *Sports justice in general*

2.1 *Autonomy and limits of sports justice*

All sports federations in Switzerland are associations pursuant to art. 60 et seq. Swiss Civil Code (CC). They are autonomous legal entities. The form of association gives sports organizations the freedom for their internal organization.² Each association is free within the framework of Swiss law to legislate for itself and its members, to apply and to enforce such rules. This right also contains the right to sanction its members and to decide disputes between its members. Sports organizations make use of their autonomy when establishing, applying and enforcing their articles and regulations, as well as to uniformly regulate their respective sport.

However, the principle of autonomy of associations is particularly limited when it comes to judicial review because each member of an association has a compulsory right to appeal against decisions of the association at an independent court or an independent arbitral tribunal.³ This appeal is a means to check all decisions of associations as to whether they comply with the law and the articles of association (see below para. 3.1). Furthermore, decisions of associations can be declared as null and void if they violate basic legal principles (see below para. 3.2). For this reason it needs to be differentiated between the *internal* sports justice of the sports federations and the *external* sports justice by independent courts or arbitral tribunals such as CAS.

2.2 *Legal review of sporting rules*

Together with the statutory rules, the articles of association form the corporate

² The autonomy of associations is an emanation of the human right to self-determination and is firmly anchored in Swiss law, giving the right to determine the articles of association as well as the right to self-manage. There is also a constitutional right to found associations, to become a member, to be a member and to participate in its activities.

³ Art. 75 Swiss Civil Code.

constitution of the sports organization. They form the starting point for the regulations and decisions of the bodies of the association. The articles of association are complemented by the association's internal continuing practice. The articles, regulations and decisions are binding due to the collective consent when the association is founded or a member is joining the association.

According to the Swiss Federal Supreme Court, rules of private organizations do not have the same quality as rules of state law. They are not 'law' pursuant to art. 116 para. 1 and art. 187 Swiss Private International Law Act (PILA) and cannot be recognized as "lex sportiva transnationalis", as some authors argue.⁴ Sports associations have to comply with the hierarchy of laws as well. In case of contradictory rules, mandatory statutory law prevails, followed by the articles of association and continuing practices (art. 36 paragraph 2 Swiss Civil Code), followed by non-mandatory statutory law (art. 63 paragraph 1 Swiss Civil Code). It is not clear whether autonomous rules of an association at a lower level, such as regulations, can prevail over non-mandatory statutory rules. This is in any case only possible if the articles of associations contain the foundation for such regulation.⁵ Regulations and other rules of the association are therefore in principle at the bottom of the hierarchy.⁶

The possibility of *internal* judicial review of such sporting rules and their application depends on the extent to which the sports organization has used its autonomy and the extent to which it grants internal rights of appeal. It also depends on the rights granted in the articles of association and the statutory rights of the people who are affected by rules of the game. However, the sporting rules and their application can never exceed the given frame of the mandatory law. There is always the last resort of an *external* legal review by independent courts. By this means, the decision as well as the proceedings leading to the decision can be reviewed. Before the decision can be appealed against in courts outside the organization, it is mandatory to exhaust the possibilities within the organization.

2.3 Principles of sports justice

2.3.1 Principles of sports justice in general

Despite the law on associations being mostly capable of amendment of waiver, there are some important mandatory rules that have an impact on the autonomy of sports organizations.⁷ These mandatory rules include the principles of equal treatment, legality and proportionality, which all follow from the principle that rights must not

⁴ Cf. BGE 132 III 285, according to which the rules of international sports associations are only applicable as an agreement between two private parties, that is subordinated to state law.

⁵ Cf. for example HEINI/PORTMANN/SEEMANN, *Grundriss des Vereinsrechts*, N 58; RIEMER, *Berner Kommentar*, art. 63 N 52.

⁶ Cf. for example HEINI/PORTMANN/SEEMANN, *Grundriss des Vereinsrechts*, N 58.

⁷ Art. 63 para. 2 Swiss Civil Code.

be abused.⁸

According to the principle of *equality*, a sports organization has to treat its members equally, both in an absolute and in a relative sense when issuing rules and using discretion.⁹ Pursuant to the principle of *legality*, all duties that sports organizations impose on their members must be based on a provision in the articles of association.¹⁰ According to the articles of association, the person imposing such duties must at least be competent to define members' duties within a given framework. The principle of *proportionality* is one of the most important principles of Swiss company law.¹¹ Sports organizations have to act in a way which least infringes the rights of their members. Any infringement has to be appropriate and necessary and the reason and the result have to be balanced.

Further compulsory rules follow from *private law in general*,¹² *public policy* and *bona mores*.¹³ Sports organizations may in particular be restricted to act with regard to sportspersons by art. 21 Swiss Code of Obligations, which protects against *exploitation*.¹⁴ Amongst the most important limits are *privacy rights* according to Art. 27 ss. Swiss Civil Code and *competition law* according to the Swiss Cartel Act.¹⁵ Many important limits to the autonomy of organizations are based on unwritten laws.¹⁶

2.3.2 Principles of sports justice in disciplinary cases

All disciplinary cases need to be handled according to the basic principle of *fair trial*.¹⁷ In particular all members of an association have to be granted the *right to be heard*.¹⁸ The right to be heard is the most important procedural principle in Swiss sports justice and it needs to be granted in any case even if the articles of association would allow an exclusion of the member without any reasons.

Further important principles in disciplinary cases include the following:

- the principle *nulla poena sine lege* does not allow the punishment of any

⁸ Art. 67 para. 1 Swiss Civil Code; for more details see FUCHS, *Rechtsfragen der Vereinsstrafe*, 110 et seq.; PACHMANN, *Corporate Governance in Sportverbänden*, 277 et seq.

⁹ PACHMANN, *Corporate Governance in Sportverbänden*, 279.

¹⁰ PACHMANN, *Corporate Governance in Sportverbänden*, 277 et seq.

¹¹ PACHMANN, *Corporate Governance in Sportverbänden*, 279 et seq.

¹² Cf. thereto *inter alia* BGE 132 III 285, in which the shortening of the enforceability in accordance with the relevant FIFA regulations was considered to be a breach of the mandatory limitation period of (elected) Swiss substantive law (see art. 127 and art. 129 Swiss Code of Obligations). Consequently, the relevant provision was not applicable in the case at hand.

¹³ Art. 19 para. 2 Swiss Code of Obligations.

¹⁴ The sports organization shall only require services of an athlete that are in proportion to the contribution. Thus, when concluding an athlete's agreement this balance must be assured, provided there is an obligation to contract.

¹⁵ PACHMANN, *Corporate Governance in Sportverbänden*, 268 et seq.

¹⁶ RIEMER, *Berner Kommentar*, N 39 et seq., and N 41 to art. 63 Swiss Civil Code, N 42 and N 52 to art. 72 Swiss Civil Code.

¹⁷ Art. 29 ss. Swiss Constitution and art. 6 European Human Rights Convention.

¹⁸ Art. 29 para. 2 Swiss Constitution.

person without any sufficient legal basis in the articles of association of a sports federation;

- according to *ne bis in idem* it is not allowed to punish a member twice for the same action;
- the *prohibition of excessive formality* states that the sports federation is not allowed to enforce formal rules if they are materially not justified and to apply formal rules with excessive rigidity. It is a special form of denial of justice.

However, there are also other legal principles that do not fully apply in sporting cases. The presumption of innocence for example is, according to the jurisprudence of the Swiss Federal Supreme Court not applicable in doping matters, even though there are quite a few authors that are criticising this jurisprudence.¹⁹ Because of the very close relationship between athletes and sports federations, rather a presumption of guilt applies once a forbidden substance is found in the body of an athlete. In such a case the athlete has of course the possibility to show that it was not his fault that the substance came into his body. Therewith, the principle of *fault based liability* – which is another important basic principle in Swiss sports justice – is sufficiently upheld.

3. Judicial review of decisions of national sports federations

3.1 Appeal

The most important corporate remedy to safeguard the rights of members is the right to appeal pursuant to art. 75 Swiss Civil Code. However, before a legal action can be taken, the internal legal means within the association have to be exhausted. Not only can members fight against breaches of law, but this right also guarantees that corporate life in general complies with the law and that the association is managed in accordance with statutory law and the articles of association.²⁰

According to art. 75 of the Swiss Civil Code, decisions²¹ that breach statutory law²² or the articles of association can be challenged before a court by each member who has not given his or her consent within one month from when the member has become aware of the decision. However, CAS has reduced this mandatory statutory time limit to twenty-one days (R49 CAS Code). The appeal

¹⁹ Decisions of the Swiss Federal Supreme Court 5P.83/1999 of 31 March 1999 C. 3d and 4P.105/2006 of 4 August 2006 C. 8. For more details see VALLONI/PACHMANN, *Sports Law in Switzerland*, N 335 ss.

²⁰ BGE 108 II 18.

²¹ Although the law only mentions the resolutions of the general meeting of an association, other resolutions by organs of an association may also be challenged through the courts if they cannot be challenged within the association and if they concern rights of members of an association; BGE 108 II 18 et seq.; BGE 118 II 17 et seq.

²² Cf. hereto *inter alia* decision of the District Court of VIII Bern-Laupen of 13 June 2008. *In casu* the court held that the ‘foreigner provision’ (restriction on the number of foreign players allowed to participate in the competition) of Swiss Athletics contravenes the Agreement with the EU on the Free Movement of Persons.

can refer to any breach of statutory law or the articles of association that in fact have an impact on the decision. This includes all explicit and implied rules of law, as well as all internal rules, including rules of the association and rules of the game.²³ In particular decisions referring to the right of the members or privacy rights under art. 27 and 28 Swiss Civil Code are included.²⁴ However, mere declarations by a director or employee of the organization cannot be the subject of an appeal.²⁵

Contrary to the wording of art. 75 Swiss Civil Code, not only direct members of an association but also indirect members, i.e. the sports-men that are members of a club which is a member of a sports federation, have a right to appeal. The reason given for this by the courts is the special relationship between indirect members and the organization²⁶ on which they depend.

If an appeal is granted, the court will cancel the decision without replacing it.²⁷ The association is bound by the judgment; however, it can still exercise its autonomy within the limits of the decision. However, CAS proceedings include the so-called *de novo rule*. Under R57 CAS Code, CAS may replace the decision.²⁸

3.2 Nullity of decisions

A decision by an association that is, formally or with regard to its content, gravely tainted is void. This is the case if the decision breaches mandatory rules of law, public policy, *bona mores* or privacy rights or if it is 'impossible'. In these cases, the claimant may at any time request that the court declares the decision void. However, the decision is only partially void insofar as the violated rule requires it to be void. There is no time limitation for this claim, but the claimant has to prove a sufficient interest.

3.3 Provisional measures

Provisional measures are very important in sports law. A recent decision²⁹ has clarified some open issues. According to the court, the state courts are mandatorily competent to issue provisional measures even if there is a clause for arbitration.

²³ PORTMANN, *Schweizer Vereinsrecht*, N 279.

²⁴ BGE 120 II 369 et seq. cf. SCHERRER, *Aktuelle Rechtsfragen bei Sportvereinen*, 46 et seq.

²⁵ The appealability of a decision is in particular questionable, if an individual or a subsidiary organ of the association simply states the intention of the association. Only if it is clear from the statement of the individual that the intention of the association is being stated, can a final decision of the association be assumed. In all other cases the letters are only considered as informal non-appealable statements. See Decision of the 1st Division of the District Court of Zurich CG030235 of 7 February 2005 and Decision of the Swiss Federal Supreme Court 4A_62/2009 of 23 June 2009.

²⁶ BGE 119 II 271 et seq.

²⁷ In principle, according to art. 75 Swiss Civil Code the judge has no authority to intervene in the order of jurisdiction of the association.

²⁸ This basically infringes the right to autonomy of the organization. Due to the limited grounds for appeals to the Swiss Federal Supreme Court, this violation could so far not be challenged successfully.

²⁹ Decision of the District Court of the Canton of Lucerne of 25 January 2010.

This is necessary due to the fact that the state has the monopoly of power. Therefore, provisional measures are the only way to break out of the appeal system which was built by the sports federations. This legal situation has not changed with the new CPC (see art. 374), even though it is basically possible that provisional measures are also granted by arbitral tribunals (as long as the requirements of art. 6 ECHR are fulfilled). At least the state courts are in parallel charge. Furthermore, it was confirmed that all internal rights of appeal have to be exhausted first (this is also the case for claims under art. 75 Swiss Civil Code), except if the provisional measures shall protect privacy rights. Such claims may be brought before a state court as soon as privacy rights have been infringed or even if such infringements are merely imminent.³⁰

4. Relevant NOC regulations

Swiss Olympic is the national umbrella organization for sport as well as the National Olympic Committee for Switzerland at the same time. As an umbrella organization, Swiss Olympic combines 82 national sport associations with more than 22'600 clubs and around 2.8 million members.³¹ Swiss Olympic's bodies include the sports parliament, the executive council, the foundation board of anti-doping, the disciplinary chamber for doping cases and the auditors.³²

The member organizations are obliged to comply with the articles and regulations as well as the decisions of the sports parliament and the executive council of Swiss Olympic.³³ It follows that the power of Swiss Olympic, as the national Olympic committee and umbrella organization of the eighty-two national sports organizations is vast. However, the members (the national sports organizations) remain autonomous for their respective sports.³⁴

For sports justice Swiss Olympic only plays a role with its *antidoping regulations* and its internal *disciplinary chamber for doping cases* (see below para. 6). Apart from the disciplinary chamber for doping cases there is no other internal organ that is taking care of Swiss Olympic's disputes. This means that all disputes between Swiss Olympic and its members as well as disputes between two or more members are, according to art. 10 of the articles of association of Swiss Olympic, directly subject to the *jurisprudence of CAS*.

³⁰ *In casu*, a basketball player was prohibited from wearing a headscarf during the official games. The player then announced she would file an action for personal injury against her basketball organization, but requested preliminary measures in order to continue to take part in the official games. The court affirmed its competence in this case (despite the existence of an arbitration agreement), but it dismissed the request for preliminary measures, since the interests of the sports organization to conduct the official games according to the international rules takes precedence and the player also accepted the corresponding rules of the organization; decision of the District Court of the Canton of Lucerne of 25 January 2010.

³¹ See www.swissolympic.ch.

³² Art. 3.1 of the articles of association of Swiss Olympic.

³³ Art. 2.2.2 para. 2 of the articles of association of Swiss Olympic.

³⁴ Art. 2.2.2 para. 1 of the articles of association of Swiss Olympic.

5. *Relevant football regulations*

The Swiss Football Association (SFA) takes care of professional and amateur football in Switzerland.³⁵ SFA's bodies are the assembly of delegates, the council, the central board, the legal bodies – the Control and Disciplinary Commission and the Appellate Court – and the finance commission as well as the auditors. The assembly of delegates, the supreme body of SFA, consists of the three divisions, the professional Swiss Football League, the first league and the amateur league. Each delegate has one vote, resulting in the amateur associations dominating. The central board represents SFV vis-a-vis third parties and supervises all of SFV's activities. It has power to do everything that is not delegated to a different body by law or in the articles of association. The council is in charge of making special strategic decisions as well as the interpretation of the articles of association.

The Control and Disciplinary Commission (Kontroll- und Disziplinarkommission)³⁶ comprises one president and twelve members. The members are elected by the Assembly of Delegates. For the rest the commission constitutes itself (among other things the election of a president and two vice presidents). The different tasks of the commission are regulated in art. 35 para. 2 of the articles of association. That includes in particular the responsibility for all disciplinary cases, as long as they are not assigned to another institution or to the authority of the SFA. Furthermore, the Control and Disciplinary Commission supervises the transfers and qualification of players, controls the compliance with the amateur status and conciliates disputes from contracts with coaches. Finally, the Control and Disciplinary Commission decides protests and disciplinary cases regarding the Swiss Cup.

The Appellate Court (Rekursgericht)³⁷ comprises the president, three vice presidents, 21 judges and six to nine clerks. The members of the appellate court are elected by the assembly of delegates upon nomination by the central board. The Appellate Court is responsible for the treatment of appeals against decisions of the Control and Disciplinary Commission, the Technical Department and the Referees Committee, as far as it is not a final decision. The procedural details of the Control and Disciplinary Commission and the Appellate Court are regulated in the regulations on the administration of justice (Rechtspflegeordnung).³⁸

As the members of the Control and Disciplinary Commission and the Appellate Court are elected by the members of the SFA, they are not considered to be independent tribunals. The decisions of the Appellate Court and all other final decisions of organs of the SFA can therefore be appealed to CAS according to art. 4 para. 1 articles of association of the Swiss Football Association in connection with art. 67 of the articles of association of FIFA.

³⁵ See www.football.ch.

³⁶ Art. 35 of the articles of association of the Swiss Football Association.

³⁷ Art. 36 of the articles of association of the Swiss Football Association.

³⁸ Art. 35 para. 3 and art. 36 para. 5 of the articles of association of the Swiss Football Association.

In case of disputes between a player and a club SFA's Regulations on the Status of Non-Amateurs apply.³⁹ The SFA provides for a conciliation authority for all labour disputes between clubs and their non-amateurs (art. 6 para. 1). Subsequently, the state courts have jurisdiction over labour disputes. Employment-related cases of an international dimension can be brought before FIFA's Dispute Resolution Chamber. For disputes between clubs and players in relation to the maintenance of contractual stability the Control and Disciplinary Commission is competent (art. 7 para. 1). The Commission has the right to decide on compensation and to apply disciplinary measures. Claims need to be lodged within a time limit of 30 days commencing on the date of termination of the contract (art. 8 para. 1).

6. *Sports justice in doping cases*

The Anti-doping Foundation Switzerland⁴⁰ is responsible for the private fight against doping. Since 1 July 2008, it has been the independent competence centre of the fight against doping in Switzerland. The mission of Anti-doping Foundation Switzerland is the conduct of doping controls, information and prevention, applied research and development, national and international cooperation with other doping organizations and taking all other measures that target clean and fair sport.

Once the Anti-doping Foundation Switzerland has established a violation of the anti-doping regulations, the case is taken to the disciplinary chamber of Swiss Olympic. All Swiss sports federations acknowledged in their articles of association the competence of the internal disciplinary chamber of Swiss Olympic to punish athletes for violations of the anti-doping regulations.

The decision of the internal disciplinary chamber of Swiss Olympic can be appealed to CAS. Thereafter, the arbitral awards of CAS can only be appealed at the Swiss Federal Supreme Court pursuant to art. 389 et seq. CPC. As CAS is usually working as a domestic arbitral tribunal in such cases, the competence of the Swiss Federal Supreme Court is a little bit wider than in international cases. Pursuant to art. 393 cf. e CPC it is also possible to claim that the decision is arbitrary, based on an obviously wrong determination of the facts, or an obvious violation of the law or equity.

7. *The sports judicial bodies*

7.1 *Internal Tribunals of the Federations*

Many national sports federations have internal judicial bodies, like the Swiss Football

³⁹ See www.football.ch.

⁴⁰ Anti-doping Foundation Switzerland is funded one half each by the federal government and Swiss Olympic. The appointment of services is made through performance-related mandates purchased by Anti-Doping Switzerland and Swiss Olympic, or the Federal Office of Sports. They form the basis for financing and determine the goals of the Anti-doping Foundation of Switzerland. The Foundation has no commercial purposes and does not aim for profit.

Association,⁴¹ that review the decisions or the executive organs of the federations internally. However, these judicial bodies are neither independent courts nor independent arbitral tribunals, as their members are usually elected by the members of the federation. For this reason their decisions are always subject to an appeal or a declaration of nullity at an independent court or an independent arbitral tribunal (see above para. 3). The question whether their decision can be appealed at CAS or at an ordinary state court is answered based on the articles of association of the respective sport federation.

7.2 *Sports justice of ordinary state courts*

Only if the sports federation does not have an arbitration clause in their articles of association for the dispute at hand can the decision of the federation be judicially reviewed by ordinary state courts. Competent is usually the district court at the domicile of the sports federation is competent. The decision of the district court can be appealed at the upper court of the Canton and thereafter at the Swiss Federal Supreme Court. The past has shown that the ordinary state courts are often more willing to decide cases against the sports federations. This is one of the reasons why most sports federations have in the meanwhile introduced CAS as their independent arbitral tribunal in their articles of association.

7.3 *Court of arbitration for sport*

In the famous Gundel case, the Swiss Federal Supreme Court recognised CAS as a true court of arbitration (and not an organ of the International Equestrian Federation).⁴² Still, the Swiss Federal Supreme Court in an *obiter dictum* drew the attention of CAS to the close links of CAS to the International Olympic Committee (IOC). In the aftermath of this decision, CAS was reorganised and its independence from the sports organizations strengthened. Subsequent to this, the Swiss Federal Supreme Court has always upheld CAS' position as an independent arbitral tribunal, even in cases against the IOC.⁴³ Its decisions are, therefore, internationally enforceable arbitral awards according to the New York Convention.

Surprisingly, during the entire time of its existence, there has not been one single case from CAS that was set aside by the Swiss Federal Supreme Court due to the lack of impartiality of one of the arbitrators, even though there were in fact a lot of cases in which the independence of the arbitrators was at least questionable. The Swiss Federal Supreme Court considered it in particular as unproblematic that an arbitrator and a counsel of one of the parties sit together on another CAS Panel,⁴⁴ or that two out of the three arbitrators as well as the legal counsel of the

⁴¹ Control and Disciplinary Commission and the Appellate Court; see above para. 5.

⁴² BGE 119 II 271.

⁴³ Decision of the Swiss Federal Supreme Court 4P.267/2002 of 27 May 2003.

⁴⁴ Decision of the Swiss Federal Supreme Court 4P.105/2006 of 4 August 2006, cons. 4.

opposing party were members of the same federation.⁴⁵ Furthermore, it was not found problematic that the legal counsel of one of the parties had worked closely together – in the CAS ad hoc division or as CAS clerk – with a member of the arbitral tribunal.⁴⁶

In its jurisprudence, the Swiss Federal Supreme Court has, thus, always backed up CAS as an independent institution for the resolution of sporting disputes. For this reason in Switzerland it is not possible to turn to the ordinary courts if the articles of association of the sports federations contain an arbitration clause regarding CAS. As a result, CAS is the most important instance for Swiss sports justice.

7.4 Swiss Federal Supreme Court

7.4.1 The sporting jurisprudence of the Swiss Federal Supreme Court in general

In general it must be pointed out that the appeals to the Swiss Federal Supreme Court in sports cases were very unsuccessful in the last few decades.

In *arbitration cases*, almost all appeals against CAS were dismissed.⁴⁷ The extremely restricted cognition of the Swiss Federal Supreme Court under art. 190 para. 2 PILA in international arbitral cases but also in domestic arbitral cases under art. 393 Swiss Civil Procedure Code (CPC) almost always proved to be insurmountable. Only in matters of jurisdiction, where the Federal Supreme Court is less restricted in its cognition, a larger number of decisions were rescinded. CAS has, thus, a very wide discretion due to the conception of international arbitration in Switzerland. The decisions of CAS are very difficult to challenge by means of an appeal to the Swiss Federal Supreme Court. Even substantively false decisions that clearly suffer from an inner conflict and are arbitrary will not be annulled in an international arbitration case by the Swiss Federal Supreme Court.⁴⁸

The jurisprudence of the Swiss Federal Supreme Court is only more effective in *ordinary appeals* against sporting decisions of ordinary Courts. In these cases the cognition of the Swiss Federal Supreme Court is much wider pursuant to art. 95 ss. CFSC. In the famous wrestler case the basis was laid for the famous “trust-liability” jurisprudence of the Swiss Federal Supreme Court.⁴⁹ In the recent Eddy Barea case for example, a football player was suspended from the first team because

⁴⁵ Decision of the Swiss Federal Supreme Court 4A_506/2007 of 20 March 2008 cons. 3.3.2.2.

⁴⁶ BGE 129 III 445, 467; decision of the Swiss Federal Supreme Court 4A_176/2008 of 23 September 2008, cons. 3.3.

⁴⁷ In international arbitration cases against CAS awards the appeals were only successful in the Cañas decision (BGE 133 III 235) and the decisions of the Swiss Federal Supreme Court 4A_400/2008 of 9 February, 4A_358/2009 of 6 November 2009, 4A_490/2009 of 13 April 2010, 4A_456/2009 of 3 May 2010, 4A_600/2010 of 17 March 2011, and 4A_558/2011 of 27 March 2012.

⁴⁸ See for example decision of the Swiss Federal Supreme Court 4A_612/2009 of 10 February 2010 as well as the limited appeal grounds outlined above.

⁴⁹ BGE 121 III 350 et seq. in which the Swiss Federal Supreme Court allowed an athlete to appeal against the selection decision of a federation despite the fact that the wrestler was not a direct member of the federation.

he did not follow the coach's instructions. Thereupon, Barea terminated the employment contract without previous notice. The Swiss Federal Supreme Court upheld Barea's behaviour. The club's reaction was considered as disproportional and violated the legitimate interests of Barea, as Barea's market value would have been substantially influenced without regular games and training. Therefore, Barea was able to terminate his contract without previous notice and ask for a compensation for personal suffering based on art. 49 in connection with art. 328 para.1 of the Swiss Code of Obligations.⁵⁰

7.4.2 *The sporting jurisprudence of the Swiss Federal Supreme Court in arbitral cases*

The grounds for an appeal to the Swiss Federal Supreme Court are extremely limited in both domestic and international arbitration cases.⁵¹ The legislator wanted to limit the possibilities to challenge arbitration awards in commercial arbitration. Unfortunately, the last few years have demonstrated that these restrictive statutory provisions are inappropriate for sports arbitration, as the sportspersons – contrary to business partners – do not voluntarily submit their disputes to CAS.⁵² As a result, there is no way to fully review the CAS decision.⁵³ According to art. 190 para. 2 PILA only the following appeal grounds exist in international arbitration cases:⁵⁴

- a) *Wrongful Appointment of the Arbitral Tribunal*:⁵⁵ this provision guarantees the right for an independent judge according to art. 30 para. 1 of the Swiss Constitution and art. 6 para. 1 European Convention on Human Rights. The condition for invoking this appeal ground is that the respective breach of the regulation (lack of independence or impartiality) could not have been addressed earlier in the proceedings. The parties have to challenge an arbitrator as soon as they take notice thereof.
- b) *Lack of Jurisdiction of the Arbitral Tribunal*:⁵⁶ with this objection, the arbitrability pursuant to art. 177 PILA and the formal and/or substantive validity of the arbitration agreement pursuant to art. 186 para. 2 PILA may be contested. However, the Swiss Federal Supreme Court stated recently

⁵⁰ Decision of the Swiss Federal Supreme Court 4_A 53/2011 of 28 April 2011.

⁵¹ This is basically true for domestic and international arbitration cases even though in domestic arbitration cases there are, according to art. 393 lit. e CPC, additional reasons to appeal; see below.

⁵² If the sportsperson refuses to submit to sports arbitration, the sportsperson cannot perform his or her occupation. The equality between the parties, which is a characteristic of commercial arbitration, does not apply in sports.

⁵³ CAS fully reviews the decision of the sports federation and decides *de novo* (R57 CAS Code). Therewith, a completely new decision of the sports federation comes into place, which is not subject to a full legal review.

⁵⁴ For more details see VALLONI/PACHMANN, *Sports Law in Switzerland*, Kluwer Law International, 2011, 123 ss.; as well as VALLONI/PACHMANN, *The Role of the Swiss Federal Supreme Court in Sporting Disputes*, 7 ss.

⁵⁵ Art. 190 para. 2 lit. a PILA.

⁵⁶ Art. 190 para. 2 lit. b PILA.

that the arbitration agreement between two parties in sports disputes is considered in its jurisprudence with a “certain goodwill” in favor of the arbitration agreement’s validity.⁵⁷ The generosity of the Swiss Federal Supreme Court is in particular given in cases of arbitration clauses by reference.⁵⁸ Nevertheless, the Swiss Federal Supreme Court has considered CAS as not competent in a few cases.⁵⁹ Moreover, within art. 190 para. 2 lit. b PILA, the violation of the *litis pendens* provision stated in art. 9 PILA may be censured.⁶⁰ All objections to jurisdiction of CAS have to be addressed already during the CAS proceedings. An appeal against jurisdiction pursuant to art. 190 para. 2 lit. b PILA must be taken against the first correctly inaugurated, challengeable decision, otherwise it will be forfeited. An appeal is not only possible against partial arbitral decisions and final arbitral decisions but also against preliminary and intermediate decisions.⁶¹

- c) *Decisions Disregarding the Petita*:⁶² this objection ground – the arbitral tribunal awards more than the parties have requested (*ultra petita*), or the arbitral tribunal awards something different to what the parties have requested (*extra petita*), or the arbitral tribunal does not decide on one of the parties’ requests – represents a particular aspect of the parties’ right to be heard and prohibits the arbitral tribunal from including claims in its arbitral award on which the parties could not take a position either in fact or in law.⁶³
- d) *Breach of the principle of equal treatment of the parties or the right to be heard*:⁶⁴ the Swiss Federal Supreme Court considers the right to be heard protected under art. 190 para. 2 lit. d PILA to correspond to the right protected under art. 29 para. 2 of the Swiss Constitution.⁶⁵ The parties are to be

⁵⁷ Decision of the Swiss Federal Supreme Court A_640/2010 of 18 April 2011.

⁵⁸ See for example the decision of the Swiss Federal Supreme Court 4A_460/2008 of 9 January 2009, where the Swiss Federal Supreme Court affirmed the opinion of CAS, that a professional football player is bound to the articles of association of the FIFA by accepting the articles of association of his national association. He therewith accepts CAS as arbitral tribunal.

⁵⁹ In the *Gert Thys* case (decision of the Swiss Federal Supreme Court 4A_456/2009 of 3 May 2010), CAS simply based its competence on a fax from the anti-doping administrator to the legal representative of the athlete, wherein it assumed the competence of CAS. In the eyes of CAS, this fax was an offer for the conclusion of an arbitration agreement, which the athlete accepted implicitly. Fortunately, the Swiss Federal Supreme Court held that CAS was not allowed to assume such an implicit arbitration agreement. The fax just expressed the wrong opinion of CAS regarding its jurisdiction. In the case of the ice hockey player *Florian Busch* (decision of the Swiss Federal Supreme Court 4A_358/2009 of 6 November 2009.), CAS based its competence on an application form that was signed by every player for the Ice Hockey World Championships, which the participants had to sign every year. However, the Swiss Federal Supreme Court held that the arbitration clause is only valid for disputes in connection with the respective World Championship; the arbitration clause could not be considered as a general arbitration agreement.

⁶⁰ BGE 127 III 279 C. 2a.

⁶¹ Art. 190 para. 3 PILA; BGE 120 II 155.C. 3b bb.

⁶² Art. 190 para. 2 lit. c PILA.

⁶³ BGE 120 II 172 C. 3a; BGE 116 II 80 C. 3a.

⁶⁴ Art. 190 para. 2 lit. d PILA.

⁶⁵ BGE 127 III 576; BGE 119 II 388; BGE 117 II 347; BGE 116 II 85.

granted equal chances to present their arguments in the sense of art. 182 para. 3 PILA. The arbitral tribunal shall ensure the equality of arms and non-discrimination.⁶⁶ Each party has the right to comment on the facts and the legal arguments, to file motions to take evidence, to participate in the evidence taking or at least to comment on the result of the taking of evidence and to participate in hearings.⁶⁷ However, this appeal ground is very restrictively applied.⁶⁸ According to the Swiss Federal Supreme Court, the right to be heard does not contain a right for a materially correct decision (prohibition of the '*révision au fond*').⁶⁹ In any case, it is crucial that the objection is already raised in the arbitration proceedings, since otherwise, if brought forward for the first time to the Swiss Federal Supreme Court, the assertion will be forfeited.⁷⁰

- e) *Breach of 'ordre public'*:⁷¹ a decision is incompatible with the *ordre public*, i.e. public policy, if it misconceives the essential and largely accepted values that prevail in Switzerland and that are part of the foundations of every judicial ruling.⁷² There are two possible categories of violations of public policy: Violations of substantive public policy and violations of procedural public policy. Examples for substantive public policy violations are the principles of *pacta sunt servanda*, prohibition of abuse of rights, the principle of trust and good faith and the prohibition of discrimination. The Swiss Federal Supreme Court is very restrictive in the application of this appeal ground. Even the incorrect application of mandatory laws or the violation of human rights do not *per se* constitute a breach of public policy; the breach of public policy has to affect the decision itself.⁷³ Examples for procedural public policy are the right to an impartial and unbiased expert appointed by

⁶⁶ BGE 129 III 445 C. 5.1.

⁶⁷ In the Decision 4A_400/2008 of 9 February 2009, the Swiss Federal Supreme Court had to judge a case in which a player's agent pleaded a violation of the right to be heard because the CAS based its decision on a legal argument that was unforeseeable for the parties. According to the considerations of the Swiss Federal Supreme Court, the parties have to be heard regarding all legal questions and legal provisions on which the arbitral tribunal intends to base its decision if their determinative effect was not foreseeable for the parties in any other way. See also BGE 116 II 639 C. 4c.; BGE 117 II 346 C. 1a; BGE 130 III 35 C. 5; BGE 133 III 235.

⁶⁸ There is no right to be heard on the Panel's legal qualification of a case; BGE 4A_42/2007. And there is also no right to make oral representations to the arbitral tribunal; BGE 117 II 346 C. 1b aa. It does not include the right to receive a reasoned international arbitration decision; BGE 134 III 186 C. 6.1, 187. The blatantly contradictory fact finding or the non-consideration of evidence does *not per se* constitute a breach of the right to be heard; if, however, the fact finding or the consideration of evidence constitutes a formal denial of justice, the right to be heard is breached; decision of the Swiss Federal Supreme Court 4A_18/2008.

⁶⁹ BGE 127 III 576 C. 2b.

⁷⁰ BGE 126 III 254; BGE 119 II 388; BGE 116 II 644 and Decision of the Swiss Federal Supreme Court 4P.103/1989 of 23 October 1989 C. 2c.

⁷¹ Art. 190 para. 2 lit. e PILA.

⁷² BGE 132 III 389 C. 2.2.3.; BGE 120 II 155.

⁷³ BGE 116 II 634 C. 4.

the arbitral tribunal and the *res judicata* effect.⁷⁴ However, the lack of a justification of the decision does not constitute a breach of public policy and there is no autonomous right to rescind the arbitral award because of blatantly wrong establishment of the facts.⁷⁵

In domestic arbitration cases there exist according to art. 393 lit. e CPC – in addition to the appeal grounds of international arbitral awards – further reasons to appeal a decision. It is possible to challenge domestic arbitral awards also because of (i) an arbitrary result, (ii) an apparently wrong determination of the facts, or (iii) an apparently wrong application of the law or equity. However, due to very good internal dispute resolution mechanisms of the sports federations and the jurisprudence of CAS there are not a lot of domestic cases which were appealed all the way up to the Swiss Federal Supreme Court.

In addition to these limited appeal grounds, the Swiss Federal Supreme Court's authority to reassess arbitral awards is also very limited under Swiss law. The Swiss Federal Supreme Court does not have the authorization to correct or complete the facts of the case *ex officio*, and the Swiss Federal Supreme Court is bound by the facts as established by CAS.⁷⁶ Further, the Swiss Federal Supreme Court does not apply the law *ex officio*;⁷⁷ the parties have to argue which law applies and how the law should be applied. Finally, the Swiss Federal Supreme Court is basically not authorized to decide the case instead of CAS.⁷⁸ It has only a function as a court of cassation. The Swiss Federal Supreme Court can only annul the CAS decision. Also, with respect to sports arbitration, which in contrast to ordinary arbitration is affected by a serious imbalance between the parties, the Swiss Federal Supreme Court still follows, almost⁷⁹ without exception, the statutory requirements.

8. Conclusions

The system of sports justice in Switzerland basically provides a legal protection for all parties involved. Usually, the federations already have internal legal institutions that are able to settle most disputes. If these internal judicial organs are not able to settle the disputes there is always the possibility to review the decisions of federations by an independent tribunal. Depending on the articles of association of the federation this is either an ordinary court or an independent arbitral tribunal such as CAS. The decisions of the independent tribunals can thereafter be appealed at the Swiss Federal Supreme Court. As the cognition of the Swiss Federal Supreme Court is

⁷⁴ BGE 128 III 191 C. 4^a; decision of the Swiss Federal Supreme Court 4A_490/2009 of 13 April 2010.

⁷⁵ BGE 120 II 155 C. 6a; BGE 119 II 380 C. 3c.

⁷⁶ Art. 77 para. 2 and art 105 para. 2 CFSC.

⁷⁷ So called "Rügeprinzip" according to art. 77 para. 2 and art. 106 para. 1 CFSC.

⁷⁸ Art. 77 para. 2 and art. 107 para. 2 CFSC. Only in cases regarding the jurisdiction of CAS is the Swiss Federal Supreme Court allowed to render a reformatory decision.

⁷⁹ See above footnote 6.

very limited in appeals against decisions of arbitral tribunals, the main principles of sports justice are not as effectively upheld as they should be. The Swiss Federal Supreme Court is only able to carry out its role as highest guardian of the main principles of sports justice in appeals against decisions of ordinary courts. This is, however, not very often the case as most federations have introduced CAS as independent arbitral tribunal in their articles of association.

SPORTS JUSTICE IN TURKEY

by *Anil Gürsoy Artan* and *Murat Artan**

SUMMARY: 1. Principles of Turkish sports justice – 2. Relevant National Olympic Committee regulations – 3. Relevant football regulations – 4. Sanctions on clubs and players – 5. The sports judicial bodies – 6. Dispute settlement – 7. Implementation of decisions and awards – 8. Sports offences – Conclusion

Abstract:

This chapter aims to analyse the sports justice and sports law system in Turkey. Football is the sole sport qualified as professional while all others have an amateur status. Such a difference is reflected in the sports systems of the Federations. Since football is the most developed sport we'll be focusing on football but also give information about the other branches, as well as the general organisation.

1. Principles of Turkish sports justice

1.1 The sources of law

As having a continental law system, the Constitution of the Turkish Republic is at the top of the *hierarchy of laws*. Sport is the responsibility of the government as a result of being a social state. This means that the State shall take measures to ensure the training and development of the youth. At the same time it shall also take all necessary measures to protect the youth from addiction to alcohol, drug addiction, crime, gambling, and similar vices and ignorance.¹ At the same time, the State shall also take measures to develop the physical and mental health of Turkish citizens of all ages and encourage the spread of sports among people. The State shall protect successful athletes.²

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¹ Articles 58, Constitution of the Turkish Republic.

² Articles 59, Constitution of the Turkish Republic.

Following an important judgement delivered by the Constitutional Court of the Turkish Republic,³ the Turkish Constitution provides that the decisions of the sports federations regarding the administration of the sports or its disciplinary proceedings shall only be appealed to mandatory arbitration. The decisions of this mandatory appeals committee are final and binding, and cannot be appealed to any other courts of law.⁴

In order to fulfil the obligation being given by the Constitution, a General Directorate for Physical Education was established by law on 29 June 1938.⁵

Today, with Decree Law (Executive Order) No. 638⁶ the Ministry of Youth and Sports has been established and all sporting organizations and events are under its authority.⁷

1.2 Sports Federations

There are sixty-one sports federations⁸ operating in Turkey. There are three types of federations in the Turkish sport organization system:

- i. Sports federations under the authority of the General Directorate for Sports;
- ii. Autonomous sports federations;
- iii. Turkish Football Federation.

The majority of federations have their own autonomy but they cannot be defined as “independent” because of the influence of the Ministry both to their administrative and financial structure.

In this scenario, the Turkish Football Federation is one of the rare examples among other members of FIFA because it is established by law⁹ which guarantees its autonomous structure. The Turkish Football Federation is the only sports federation which is not being supported financially by the Government.

All sports federations are subject to civil law and have legal personalities. The supreme body of each federation is the Congress while mandatory bodies are the Executive Board and the Auditing Committee which are elected by the congress. The remaining bodies are general secretariat, referee committee, disciplinary

³ E 2006/118, K 2009/107, Decision of Constitutional Court delivered on 2 July 2009.

⁴ Articles 59, last paragraph, Constitution of the Turkish Republic.

⁵ Law No. 3530, Law Regarding Establishment of General Directorate for Physical Education.

⁶ Published in the Official Bulletin of 8 June 2011.

⁷ From 8 June 2011 on the General Directorate for Physical Education serves under the name of General Directorate of Sports.

⁸ The sports federations in Turkey; athletics, aquatics, water polo, archery, badminton, basketball, boxing, canoe, cycling, equestrian, football, fencing, gymnastics, handball, hockey, judo, modern pentathlon, rowing, sailing, shooting and hunting, table tennis, taekwondo, tennis, triathlon, volleyball, weight lifting, wrestling, golf, baseball softball rugby, ski, ice skating, ice hockey, billiard, bocce bawling dart, bridge, chess, dance, golf, karate, underwater sports, motorcycling, mountaineering, orienteering, wushu, motor sports, body building fitness arm wrestling, physically disabled, blind, deaf, intellectually disabled, sports for all, school sports, university sports, traditional sports, folkdance, developing sports, scouting, kickbox, digital games, aeronautics, muay thai.

⁹ Law No 3813, Law Regarding Establishment and Duties of Turkish Football Federation.

committee, etc., varies from federation to federation.

Sport Federations have the authority to adopt their own regulations regarding their own organization.

A typical sports federation has two types of regulations: a) administrative ones such as statutes, regulations on working principles of administrative bodies, etc, and b) sports ones like those on licensing, transfer, laws of the game, tournament rules etc.

2. *Relevant National Olympic Committee regulations*

The Turkish National Olympic Committee (NOC) is an association established in accordance with the Civil Code. It was founded in the Ottoman era however the International Olympic Committee (IOC) recognized the Turkish Olympic Committee (OC) in the year 1962. In the year 1970, the Cabinet of Ministers gave permission to use the word “Turkish” in its name, authority to work with international organizations and declared the association as “working for the furtherance of public welfare” which has granted several immunities in the taxation and other obligations.

Besides Olympic bids, the NOC’s most important role is to determine the athletes who are going to participate in the Olympic Games, spreading the Olympic movement, funding amateur sports etc.¹⁰

The Turkish Anti- Doping Agency is established under the NOC in the year 2011. All the anti-doping legislation is prepared by the NOC and approved by World Anti-Doping Agency (WADA).¹¹

Except the anti-doping legislation, the Turkish Olympic Committee has no regulation regarding sports. The statute of the Turkish NOC has been prepared in accordance with the Olympic Charter.

3. *Relevant football regulations*

The Turkish Football Federation (TFF) was founded in 1923 and at the same year became a member of FIFA.

The TFF earned autonomy in 1992. The Law Regarding Establishment and Objectives of Turkish Football Federation No. 3813, adopted on 17 June 1992, and granted autonomy to TFF.¹² Unfortunately despite several amendments of such a legislation players, coaches and clubs were never equally represented at the Congress.

¹⁰ Article 1 and Article 5 of the Statute of Turkish National Olympic Committee.

¹¹ WADA Executive Board decision taken on 23 September 2011.

¹² Pursuant to Article 1 of the Law 3813 enacted on 3 July 1992 the Turkish Football Federation was established as an autonomous organization and as being subject to private law for the purposes of conducting and organizing football activities in line with national and international rules and representing Turkey in and outside Turkey in the field of football.

The TFF has forty-eight regulations: rules of the game, administrative, disciplinary and anti-doping regulations governing the organization of the football activity and some of them cover administrative aspects while others govern the football activity *stricto sensu*.

The most important ones are TFF's Regulations on Status and Transfer of Players (RSTP) which have been adopted in compliance with the FIFA Regulations on Status and Transfer of Players.

The employment contract is a uniform contract prepared by the TFF. It contains *essentialia negotii*: the validity period, the parties, their communication information, remuneration or other means of payment. The ending date of the contract must be 31st of May of the relevant year. Parties are also free to submit special provisions as an annex to the uniform contract.

The obligations of the clubs are listed as:

- a. Safeguard its players' health and take all measures necessary for matches, training activities, camps and travels in accordance with the provisions regarding health and injuries;
- b. To maintain all the necessary sporting kit for the players;
- c. Clubs shall send their internal disciplinary regulations to TFF, one week before the beginning of the relevant football season. Also shall give the inner disciplinary regulations of the clubs to the player in hand or send it via notary public.

Unfortunately, the Clubs have the tendency to give fines to the players as a way to reduce their debts to the players. By forcing the clubs to prepare their regulations and notify the players about this inner disciplinary regulation prior to the season, TFF aims to prevent arbitrary fines to be imposed on the players.

- a. In cases where it imposes a fine on any of its players, provide such player and the Federation with a notarized copy of its decision within 15 days of the date of such decision.

By forcing the clubs to notify the decisions of fine, TFF ensures the player will be notified and subject to these decisions:

- a. If the Club's Executive Committee decides to exclude a player from the squad then the club has to appoint at least a coach and a training facility for him in a way which should not constitute abuse of its rights.

Since training is an essential part of a football player's routine, the aim of including this provision to the Regulation is to guarantee a player's career.

- b. To buy insurance policy for its professional players from private insurers, which are determined by the Federation, against risks of permanent and partial injury, accident and death that may be incurred during matches, training activities to be performed, whether in Turkey or abroad, and during travels to and from the venues of such matches.

Players must follow up, complete and ensure the necessary documents and other transactions are in order to participate in the matches. They should also follow courses, lessons or seminars organised by the Club or by the TFF.

In case of illness or injury, players are requested to transmit his health and injury reports to his club and the Federation within ten days (any player failing to do so shall not be entitled to claim any rights arising from such illness or injury).

Finally clubs can only terminate a contract for just cause for one of the following reasons:

- a. Any kind of illness or injury of the player which exceeds six months,
- b. If the player is banned for at least six months by the Disciplinary Committees;
- c. Serious breach of the contractual duties.

If the player is in default of his contractual liabilities, and if the club is willing to terminate the contract, then the club should send a warning letter to the player and give him a certain period of time to act in accordance with the contract. Despite receiving the letter if the player does not fulfill his obligations then the club has the right to terminate the contract in seven days following the end of given time period.

On the other side, players can only terminate their contract for just cause by one of the following reasons:

- a. If the club is in default of paying fee or other remuneration and the player is willing to terminate the contract, then the player should send a warning to the club and give them thirty days of time to pay the outstanding amount. Despite receiving the letter if the club does not fulfill its obligations then the player has the right to terminate the contract in seven days following the end of given time period.
- b. If the Club is in default of its other contractual liabilities and the player is willing to terminate the contract, then the player should send a notarized warning to the club and give a reasonable time to act appropriate with the contract. Despite receiving the letter if the club does not fulfill his obligations then the player has the right to terminate the contract in seven days following the end of given time period.
- c. After receiving the notification set out in paragraph (a) and (b), TFF, shall notify the Club at latest in 7 days via facsimile or any type of communication. The time limits set out in the paragraph (a) and (b) shall begin from whichever comes first either TFF's notification or Notary Public's notification. Moreover, TFF shall send the document evidencing the notification date to the player or his attorney.
- d. Any player older than 23 years old who has, in the course of the season, appeared in fewer than ten percent of the official matches in which his club has been involved may terminate his contract prematurely on the ground of sporting just cause. Due consideration shall be given to the player's circumstances in the appraisal of such cases. A player may only terminate his contract on this basis in the fifteen days following the last official match of the club with which he is registered.

The right to terminate an employment contract on the basis of sporting just cause has only been given to the players older than 23 years.

4. *Sanctions on clubs and players*

As a member of the TFF, suspension or expulsion sanctions are applicable to the Clubs. According to TFF's Statute art. 14 and 15¹³ these two sanctions are given by the Congress for violating the aforementioned articles.

There are also sanctions listed in the Statutes and Disciplinary Regulations of the TFF as follows:

- For individuals and legal persons: a warning, a reprimand, a fine, the return of awards sanctions can be given.
- For individuals persons: a warning, an expulsion, a match suspension, a ban from the dressing rooms and/or the substitutes' bench, a ban from entering a stadium, a ban on taking part in any football-related activity, suspension of license sanctions can be given.
- For legal persons: a transfer ban, playing a match without spectators, playing a match on neutral territory, a ban on playing in a particular stadium, a ban on accepting spectators to a particular stand or a portion thereof, annulment of the result of the match, expulsion, a defeat by forfeit, deduction of points, relegation to a lower league sanctions can be given.

5. *The sports judicial bodies*

5.1 *General Directorate of Sports Appeals Committee*

All the sports federations, except Football Federation, are under the jurisdiction of General Directorate of Sports' Appeal Committee. The Appeals Committee is regulated under the Law Regarding Establishment and Organization of General

¹³ Article 14 Suspension

1. The Congress is responsible for suspending a Member. The Executive Committee may, however, suspend a Member that seriously and repeatedly violates its obligations as a Member with immediate effect. The suspension shall last until the next Congress, unless the Executive Committee has lifted it in the meantime.

2. A suspension must be confirmed at the Congress. If it is not confirmed, the suspension is automatically lifted.

3. A suspended Member shall lose its membership rights (including the right to vote). Other Members cannot entertain any sporting relation with a suspended Member. The Disciplinary Committee may impose further sanctions.

4. Members which do not participate in the sports activities or events organized by TFF for three (3) consecutive years shall be suspended from voting at the Congress until they have fulfilled their obligations in this respect and may not be candidate for any function with TFF.

Article 15 Expulsion

1. The Congress may expel a Member:

- a) if it fails to fulfil its financial obligations towards TFF; or
- b) if it seriously violates the Statutes, regulations, directives and decisions of FIFA, UEFA or TFF and has been sanctioned therefore.

2. For an expulsion to be valid, such expulsion must be approved by the Congress. The member in question shall have the right to speak in its own defense before the polling.

Directorate of Sports No. 3289.

The Appeals Committee has seven members and seven substitute members. The five of the members shall be lawyers and the remaining two members shall be appointed among scholars or athletes who have experience in sports. The members are nominated by the General Director and appointed by the Minister of Sports and Youth.

Appeals Committee has jurisdiction over the disputes between federations and clubs; federations and referees, federations and coaches, clubs and coaches, clubs and players, clubs and clubs. Also the Committee has jurisdiction over the appeals regarding the decisions of a federation's board decision or disciplinary committee.

5.2 *Turkish Football Federation's Judicial Bodies*

According to Statutes of the TFF, the judicial bodies of the federation are the following :

the Dispute Resolution Chamber, the Disciplinary Committee, the Club Licensing Committee, the Ethics Committee, and the Appeals Committee.

The Dispute Resolution Chamber has the jurisdiction over economic disputes between the clubs and players and clubs and clubs. Every four years a list of arbitrators are fixed by the TFF's Board, among the lawyers who have minimum five years of professional experience and nominated from the proposals of Union of Super League, all the Clubs competing at 1st, 2nd and 3rd League, Association of Professional Football Players, Bar Associations, and Law Faculties. The Chamber will be explained in detail in the following paragraphs .

All disciplinary infringements committed by clubs and individuals during football matches and organizations are subject to disciplinary inspections. There are three disciplinary committees established in TFF. One for provincial one for amateur football the other one is for professional football. All decide according to the Disciplinary Code. The Appeals Committee has seven members and seven substitute members. The President of the Committee and the members are appointed by the nomination of the President of the Federation and appointed by the Board. Three of the members shall be appointed among lawyers; the remaining members shall hold a bachelor degree.

The Professional Football Disciplinary Committee has always been the body whose decisions are followed by the public authorities. Besides giving regular sanctions over violation of laws of the game, the most recent and discussed decision of the Committee on match fixing.¹⁴ In July 2011, after a long term investigation the police arrested 46 people and during the operation a total of 93 people underwent a criminal trial including presidents of clubs, players, licensed and unlicensed player agents, etc. In July 2012 the Criminal Court decided that 48 people violated the law

¹⁴ Decision of the Professional Football Disciplinary Committee taken on 6 May 2012.

and fixed the match results.¹⁵ This decision of the Court has been appealed to Supreme Court of Appeals. The decision is still waiting for Supreme Court's decision. Apart from the criminal investigation Turkish Football Federation also submitted the case to its Ethics Committee. The Ethics Committee prepared a report and submitted it to TFF's Executive Board. TFF's Executive Board decided to open a disciplinary procedure against all the involved clubs and individuals. At the end of the Professional Disciplinary Committee's proceedings, the Committee decided that 3 members of a football club and several players and agents found guilty of manipulating match results, however stated that although these people manipulated the match results, this offence did not reflect to the game. Therefore sanctioned these people but did not decide to neither relegate the involved Club nor deduct points.

- i) The Club Licensing Committee decides whether a licence should be granted to an applicant club on the basis of the documents provided and in accordance with the TFF Club Licensing Regulations. The decisions of this committee can also be appealed to the Appeals Committee. The Club Licensing Committee has a Chairman, a Vice-Chairman and three members and four substitute members who are appointed by the Executive Committee upon the proposal of the President of the TFF. Among the Chairmen, vice chairman or other members, two members of those three shall hold a University degree in business administration or finance and in law and have at least five years of professional experience.
- ii) The Ethics Committee is responsible for preserving the ethical values and the brand value of Turkish football and carrying out all necessary legal inspections to prevent any damage to football's good reputation in society. The Committee consists of a chairman and four members and four substitute members who are elected by the Executive Committee on the proposal of the President of TFF. Each member of the Committee must hold a bachelor's degree in law and have a minimum of 5 years of professional experience in the field of law.
- iii) The Appeals Committee has seven members and seven substitute members. The president of the Committee and the members are appointed by the nomination of the President of the Federation and appointed by the Board among lawyers who have a minimum five years of professional experience.

The Appeals Committee has the jurisdiction over the Board's decision; both Amateur and Professional Disciplinary Committee's decisions; decisions of Dispute Resolution Chamber.

6. *Dispute settlements*

6.1 *Technical disputes*

The details of the procedures regarding the technical disputes are regulated under

¹⁵ Judgement of the 16th Criminal Court of Istanbul delivered on 4 May 2012 no 2011/63.

each federation's regulations.

With particular regard to football the technical disputes concerning the rules of the game are regulated under the Competition Regulation.¹⁶

If any of the team has certain reason to object the other teams list of players (an unregistered player in the name list, if ineligible foreign players or ineligible other players fielded, the referee committed an error at the game against Laws of the Game, etc.), that team has the right to object to the game and shall file a complaint to TFF in five days following the game.

The board of directors has the authority to decide over the complaint. The decisions of the board shall be appealed in seven days to the TFF's Appeal Committee.

6.2 *Disciplinary disputes*

The federations which have their own Disciplinary Committees, renders their decision over the infringements of the Disciplinary Codes. For the federations which have no inner disciplinary regulations, then they are subject to General Directorate's Disciplinary Committee. All the federations Disciplinary Committees' decisions can be appealed to the General Directorate of Sports Appeals Committee. The decisions of the Appeals Committee are final and binding.

Since TFF has its own Disciplinary Committees and Appeals Committee, football is distinct from the other sports. After each game played in the professional leagues, all the reports of the officials are submitted to the disciplinary inspectors. The disciplinary inspectors read the reports and if there is an infringement, they forward the case to Disciplinary Committee. The related player or the club is notified about the procedure and given 48 hours to prepare their defence statements. After this time period elapses, the Professional Disciplinary Committee renders its decisions. The decisions of the Committees shall be appealed to the Appeals Committee. The decisions of the Appeals Committee are final and binding.

6.2.1 *Doping*

The National Anti-Doping Agency (NADA) is established in the year 2011 under the Turkish Olympic Committee. The Agency prepared the whole Regulations over anti-doping in accordance with the WADA regulations.

In the event of an anti-doping rule violation, the related athlete is reported to the athletes' federation and the NADA requests from the federation to begin with the proceedings. When the Disciplinary Committee of the relevant federation renders a decision, the NADA has the authority to appeal the decision to General Directorate of Sports Appeals Committee.

Also the Court of Arbitration for Sports jurisdiction is recognized for doping cases.

¹⁶ Articles 29 and 30 of Football Competition Regulation.

Turkish Football Federation and Turkish Basketball Federation are exempt from this system and they are continuing their own anti-doping programme.

6.3 *Economic Disputes*

6.3.1 *Ordinary Courts of Law*

According to Article 4/g of the Labour Code, athletes are excluded from the scope of this code.

The employment contracts of the athletes are subject to Code of Obligations and the Employment Contracts are defined as follows under the Article 393; *“By means of an individual employment contract, the employee undertakes to work in the service of the employer for a limited or unlimited period and the employer undertakes to pay him a salary based on the amount of time he works (time wage) or the tasks he performs (piece work).”*

Most of the Federations i.e. football, basketball, volleyball prepared a uniform contract to be signed between the athletes and clubs.

In principle the contractual disputes between clubs and athletes are under the jurisdiction of ordinary courts of law. Since the athletes are not in the scope of the Labour Code, the cases regarding the contractual disputes are held by the First Instance Civil Courts not by the Labour Courts.

6.3.2 *TFF Dispute Resolution Chamber*

The Dispute Resolution Chamber functioned as a mandatory dispute resolution body until the end of season 2010 – 2011. In the Congress which was held on 29 June 2011, the whole system has changed in the detriment of players. After the amendment, the Dispute Resolution Chamber’s legal character has changed from mandatory to voluntary arbitration. In other words, before the amendment, any dispute that arose between the Clubs and players, clubs and clubs, clubs and coaches was under the jurisdiction of this Chamber and the parties could receive a decision from this Chamber within an average of six to eight months’ time. Today the Chamber can resolve a dispute only if the opposing party also accepts the procedure. If the opposing party does not accept the jurisdiction of the Chamber, the claimant party’s only option is to submit its case to ordinary courts of law, where a decision can be received with an average of one to two years from the first instance and two to three years from the Court of Appeals.

7. *Implementation of decisions and awards*

7.1 *Decisions of Federation’s Boards*

Each Federation’s Board has the authority to manage the sports related to that

Federation. The Boards are taking both administrative and sporting decisions.

Any legal or physical person who is affected by a decision of a Federation's Board has the right to appeal this decision. According to Law No. 3289, the Appeals Committee of General Directorate of Sports has the jurisdiction over the appeals regarding Board decisions.

The parties have ten days to appeal the decision beginning from the date of notification.

If the appeal is about an administrative or a disciplinary decision of a Federation's Board, the decision of the Appeals Committee is final and binding.

7.2 *Decisions of Ordinary Courts of Law*

Decisions regarding the economic disputes between the parties are subject to ordinary courts of law. The decision of the first instance courts can be appealed before the Court of Appeals. Except very limited conditions, the decisions of the Court of Appeals are final and binding.¹⁷

A final decision can be executed via execution procedure. The final decisions can be executed by distressing the debtor party's property.

7.3 *Decisions of TFF Judicial Bodies*

Pursuant to article 12 of the TFF Regulations on Status and Transfer of Players:

- “(1) The Clubs shall produce written evidence that they have no debts to the Federation, clubs, players, coaches, medical stuff, player agents and match agents, born from a final and binding decision either taken by TFF's Board or other judicial bodies or ordinary courts of law or shall provide a document evidencing the creditor party gives consent to the registration of the player to the Club. Otherwise the players shall not be registered to the Club.*
- (2) The players shall also prove that they have paid their debts to TFF, clubs or players' agent, born from a final and binding decision or shall provide a document evidencing the creditor party gives consent to the registration of the player.*
- (3) The creditors shall request in written from the TFF to impose a transfer ban to the debtor party”.*

After a decision of TFF's Board or Dispute Resolution Chamber or Disciplinary Committee or other judicial bodies or ordinary courts of law decisions becomes final, the creditor party of the relevant decision requests from TFF to impose a transfer ban until the debtor pays its debts.

This article is introduced to the system to guarantee the receivables of the football family from each other.

¹⁷ Article 59 of the Constitution of Turkish Republic.

8. *Sports offences*

8.1 *Law Regarding the Prevention of Violence and Disorderliness in Sports Law No 6222 regulates the sports offences in particular*

According to art. 11, manipulating match results and fixing a match is classified as a crime and the offenders are punished with one to three years of imprisonment. If the offender is an officer at the TFF or anyone did it to manipulate betting, etc. these offences would aggregate the period of imprisonment. By enacting this Law in the year 2011, manipulating match results and match fixing acts classified as a crime for the first time.

There are also other offences listed from swearing, throwing substances to the pitch, having alcohol or narcotics at the game or bringing guns and other forbidden cutter substances to games is also punished from a list of sanctions. These sanctions range from stadium ban to imprisonment.

8.2 *Criminal Code*

The criminal code is also applicable to the offences between the players or referee. Besides being prosecuted by the TFF, also a criminal case can be filed. In June 2012, during a football match between the two teams one of the player insulted another one by saying “F* s* negro”. The victim lodged a complaint with the public prosecutor and a public investigation was opened against the offender player. After the investigation the Public Prosecutor decided to file a case against this player. The criminal case is still pending.

Conclusion

Sport Justice in Turkey is still developing and needs to be supported by well written and thoughtful laws, then finding solutions for the moment.

When it comes to sports, the State should be in a position to encourage the independence and autonomy of the sports federations, however the State still dominates and controls the federations.

Athletes do not have any labour union to protect their rights. Therefore the weakest party in the system are the ones who are actually doing sports. Not having a specialized Sports Justice system harms the athletes and sport itself. We are of the opinion that a specialized Sports Justice system must be established immediately.

Amateur sports need more funds so that it can spread through the whole country however football is the dominating sport and much of the civil funds (i.e. sponsorship) are still flowing thereto.

So far, the Law against violation and establishment of Turkish NADO are good steps to an ideal Sports Justice System, however, Turkey still needs to walk a long road to that happy end.

SPORTS LAW IN THE UNITED ARAB EMIRATES

by *Saleh Alobeidli**

SUMMARY: 1. The UAE Legal System – 2. Sports Associations in the UAE – 3. The Resolution of Sports Disputes in the UAE – 4. Football – 5. The National Olympic Committee (NOC) & Anti-Doping Regulations – 6. Relevant Football Regulations – 7. Conclusion

Abstract:

Sports law is a young branch of law in the United Arab Emirates ('UAE'). This chapter aims to provide an overview of sports justice in the United Arab Emirates as well as the UAE legal system. The chapter identifies the various sports bodies in the UAE, their function and the applicable regulations. The adoption and application of international regulations will also be discussed. Special focus on legislation specifically relating to the UAE Football Association and the National Olympic Committee is also provided.

1. The UAE Legal System

Before UAE sports law is discussed in detail, it is necessary to provide an overview of the UAE legal system.

The UAE is a federation of seven Emirates (Abu Dhabi, Dubai, Sharjah, Ajman, Umm Al Quwain, Ras Al Khaimah and Fujairah). The UAE Constitution was signed by six of the Emirates on 2 December 1971. The seventh Emirate, Ras Al Khaimah, joined the federation shortly afterwards in February 1972. The UAE's legislative coverage is fairly comprehensive in most basic areas of law. The legal system in the UAE is primarily a civil law system, and Islamic Shari'a is also an important source of law. In practice, the role of the Shari'a is a secondary one,

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providing a source of guidance for the courts to interpret legislation and to reach judgments. Although there is no formal system of judicial precedent in the UAE, lower courts respect the precedents of higher courts.

Article 4 of the UAE Constitution establishes the governing institutions of the Federation. The highest of these is the Supreme Council, consisting of the rulers of each of the Emirates, who are responsible for formation of general policy; sanctioning laws and decrees; ratifying treaties and international agreements; and approving various appointments.

A Council of Ministers, consisting of the Prime Minister, his deputy and various other ministers with specific portfolios, is responsible for initiating drafts of Federal laws, decrees, regulations and decisions, as well as supervising the execution of all these. Its decisions are made by simple majority vote, with the vote of the Prime Minister prevailing in the case of a tied vote. Draft laws initiated by the Council of Ministers are submitted to the Federal National Council, and, if considered suitable, for consideration by the Supreme Council.

2. *Sports Associations in the UAE*

The UAE Constitution is the highest form of law in the UAE legal system.¹ As a result, in the event Emirati legislation is inconsistent with the UAE Constitution, the Federal Supreme Court will declare it null and void. Article 33 of the UAE Constitution provides the legal basis for the establishment of sports associations (“*freedom of assembly and establishing associations shall be guaranteed within the limits of law*”). In addition to this article, Federal Law No. 12 of 1972 relates to the organising of clubs and societies operating in the field of youth care in the UAE. This law sets out the conditions for the establishment of any club or society to operate in the field of youth care and sport. The General Authority for Youth and Sport Welfare, established pursuant to Federal Law 25 of 1999, is the highest authority concerned with all youth care and sport affairs. One of the most established sports associations in the UAE is the UAE Football Association. The UAE Football Association was established pursuant to Ministerial Resolution No. 17 of 1972. This Resolution lists the founding 15 members of the Association, including the Chairman, his Deputy and the General Secretary. The legal authority of the Ministry of Youth and Sport is derived from two statutes: Law No. 1 of 1972 concerning the ministries’ authorities and Law No. 12 of 1972 regulating the clubs and associations working in the field of youth care. The members of the UAE Football Association have also issued the Statute of the UAE Football Association. This Statute is considered to be the main legislation regulating football in the UAE.²

In summary, the relevant legislation applicable to the regulation of UAE Football is as follows:

1. The UAE Constitution as amended.

¹ The UAE Constitution dated 18 July 1971 (as amended) is available at www.westlawgulf.com.

² The Statute of the UAE Football Association is available at www.uefa.ae/en/.

2. Law No. 12 of 1972 regulating the clubs and associations working in the field of youth care.
3. Law No. 1 of 1972 concerning the ministries' competences, minister's powers and laws.
4. Federal Law No. 25 of 1999 establishing the General Authority of Youth and Sports Welfare.
5. Ministerial Resolution No. 17 of 1972 issued by the Ministry of Youth and Sport, establishing the UAE Football Association.
6. Ministerial Decree No. 85 of 1988 issued by the Supreme Council for Youth and Sport dated 05/29/1988 on the common statute of sports associations.
7. The Statute of the UAE Football Association.

The UAE National Olympic Committee was established pursuant to Ministerial Resolution No. 200 of 1979 issued by the Ministry of Youth and Sport.

The relevant legislation applicable to the Olympic Committee in the UAE is as follows:

1. The UAE Constitution as amended;
2. Law No. 12 of 1972 regulating clubs and associations working in the field of youth care;
3. Law No. 1 of 1972 concerning the ministries' competencies, minister's powers and laws;
4. Federal Law No. 25 of 1999 establishing the General Authority of Youth and Sports Welfare;
5. Ministerial Resolution No. 200 of 1979 issued by the Ministry of Youth and Sport establishing the UAE National Olympic Committee.
6. The UAE Olympic Code dated 31st March 2013 issued by the General Assembly of the UAE National Olympic Committee.

3. *The Resolution of Sports Disputes in the UAE*

3.1 *The general rules which establish the ordinary court system*

In 1971, a federal judicial structure was established to deal with civil and criminal matters within the UAE. Four Emirates, namely Abu Dhabi, Sharjah, Ajman and Fujairah, opted to incorporate their judicial systems into the Federal system. The Emirate of Umm Al Quwain initially opted to retain its independent system, but, in 1991, opted to join the Federal judicial system. Abu Dhabi opted out of the Federal Judicial system in 2007. As a result, Abu Dhabi, Dubai and Ras Al Khaimah maintain their own independent judicial systems. The Federal system comprises a court of first instance and a two tier appeal system in each Emirate. Each Emirate has its own Court of First Instance and Court of Appeal, but there is only one Federal Supreme Court. This is in Abu Dhabi and accepts appeals coming from different Emirates. However, the Emirates of Dubai, Ras Al Khaimah and Abu Dhabi have their own Court of Cassation.

The UAE's judicial system consists of the Court of First Instance, which hears all civil claims; the Criminal Court, which hears claims originating from police complaints; and the Sharia Court. The Civil Courts have exclusive jurisdiction over civil, commercial, banking, insurance, property, labor and maritime matters. The Sharia Courts have exclusive jurisdiction in connection with all family law matters and those relating to personal status. The Court of First Instance, sitting with a single judge, hears claims with a value not exceeding AED100,000. Claims of over AED 100,000 (including claims for an undetermined amount) are heard by a panel of three judges. Judgments can be appealed unless the amount in dispute is less than AED 20,000.

The Court of Appeal is the second stage in the judicial process and hears appeals on matters of fact and law from the Court of First Instance. Matters can be challenged before the Court of Appeal against all types of court rulings, including penal, civil and personal status. The Court of Appeal sits as a panel of three judges irrespective of the amount of the claim.

The Federal Supreme Court and the Court of Cassation in each of the three Emirates is the final court of appeal and only hears disputes on matters of law. An appeal can be filed before the higher courts from the Court of Appeal if the value of the claim is in excess of AED 200,000 or is undetermined at the time of filing the appeal. The Court of Cassation has a panel of five judges and judgments are given by majority decisions.

In addition to the court system, there are a number of specialist tribunals within each court such as the Labour Court; the Personal Affairs Court of First Instance; the Real Estate Court of First Instance.

3.2 *Arbitration in the UAE*

The UAE recognizes the importance of arbitration as an alternative to litigation and has demonstrated to the international community that it is supportive of arbitration.³ The UAE's accession to the New York Convention of 1958 in 2006 was a significant step in showing the UAE's commitment to foreign investors and the international community. The New York Convention lays down conditions for the recognition and enforcement of foreign arbitration Awards in the territories of its member states. Thus an arbitration award issued in the United Arab Emirates will become directly enforceable in the territory of another member state and an award from any other member state will be directly enforceable in the UAE after ratifying it before the UAE court for it to be equivalent to a court judgment and thereby enforceable against the losing party's assets.

³ For a detailed overview of the arbitration system in the UAE see Essam Al Tamimi, *Practical Guide to Litigation and Arbitration in the United Arab Emirates* (1st Edition, Kluwer Law International, 2003).

3.2.1 *Arbitral Institutions*

The prominent arbitration institutions in the UAE include the Dubai International Arbitration Centre (DIAC); the Dubai International Financial Centre – London Court of International Arbitration (DIFC-LCIA); and the Abu Dhabi Commercial Conciliation and Arbitration Centre (ADCCAC).

The DIAC administers arbitrations under the DIAC Arbitration Rules 2007, or alternatively serves as an appointment or challenging authority in *ad hoc* arbitral proceedings. The DIFC-LCIA administers arbitrations under the DIFC-LCIA International Rules of Arbitration 2008 (which are modeled on the Rules of Arbitration of the LCIA) in association with the London based LCIA, or alternatively serves as an appointment or challenging authority in *ad hoc* arbitral proceedings. The ADCCAC administers arbitrations under the ADCCAC Procedural Regulations.

3.2.2 *Arbitration Procedures*

Arbitration proceedings in the UAE are governed by Articles 203 to 218 of the Federal Civil Procedural Law. The arbitration agreement must be evidenced in writing. Arbitration proceedings are generally commenced by filing a request for arbitration with the competent arbitration institution or in *ad hoc* proceedings by serving a notice of arbitration upon the prospective respondent. The parties have to be notified of a date and place of the first preliminary hearing within 30 days of the tribunal accepting its appointment (article 208(1) of Procedural Law). Further hearings will be held as agreed between the parties or directed by the tribunal. Arbitral proceedings are flexible and arbitrators are not required to strictly apply the rules that would be applied in Court, subject to any institutional rules that the parties may adopt.

The award has to be rendered within six months from the date of the first hearing (subject to extension by the parties' consent or order of the court) (article 210 of the Procedural Law). Under some arbitration rules, the deadline for rendering the award is six months from the date of the tribunal's receipt of the arbitration file; this deadline can be extended by the tribunal of its own motion by another six months, which, in turn, may be further extended as appropriate by the institution (for example, article 36 of the DIAC Rules). Under UAE law the award must be written in Arabic (unless otherwise agreed by the parties) be rendered and signed by a majority of arbitrators, setting out the reasoning of the award and also the place and date it was issued. The arbitrator may render preliminary as well as final awards. Under the DIAC Rules, the tribunal may make 'preliminary, interim, interlocutory, partial or final awards' (article 37(1) of the DIAC Rules). The arbitrator may also make awards by consent of the parties, namely, following the parties' settlement (article 39 of the DIAC Rules). Under UAE law, arbitrators are empowered to grant all kinds of relief, including damages and interim measures.

3.2.3 Enforcement of the Arbitral Award:

Generally speaking, under UAE law, arbitration awards are final and binding and cannot be appealed. However, an award may be challenged on grounds of procedural irregularity. In order to challenge an award, the award debtor has to commence ordinary court proceedings before a competent UAE court of first instance, whose judgment on the challenge may subsequently be appealed to the Court of Appeal and Court of Cassation.

To ensure recognition and enforcement, domestic awards have to undergo a validation (ratification) process before the UAE courts. This process is based on an ordinary court action, resulting in an order of recognition and enforcement by the competent court of first instance, which, in turn, is subject to the ordinary channels of appeal before the UAE courts.

Before the UAE's accession to the New York Convention, if there was no bilateral treaty signed between UAE and the country where the award was issued, article 235 of the Procedural Law was applicable. Since the UAE ratified the New York Convention in 2006 the provisions of the New York Convention apply and supersede the provisions of the Procedural Law in relation to the ratification and enforcement of foreign arbitral awards.

Judicial review of foreign arbitral awards is therefore limited to ensuring its conformity with articles 4 & 5 of the New York Convention. According to Article 4 of the Convention, the party applying for recognition and enforcement shall, at the time of submitting the application, provide (a) a duly authenticated original award or duly certified copy of it; (b) the original agreement or a duly certified copy; (c) if not in Arabic, a certified official translation of the award.

4. Football

In addition to the above discussion of the general rules of the ordinary justice (the national ordinary court) and its exclusive jurisdiction within the UAE territory and the right for parties to arbitrate, we will consider the UAE Football Association, its regulations and dispute resolution processes. The most significant and relevant piece of legislation regulating UAE football is the Statute of the UAE Football Association issued by the General Assembly of the UAE Football Association. Some of the key articles of this Statute are set out below:

Article 95 states that the Chairman of the UAE Football Association is the legal representative of the association.

Article 103(7) states that the legal committee of the UAE Football Association develops and maintains a set of legal principles upon which football can be regulated. Part of the Legal Committee's role is to review and evaluate current and draft football legislation and to provide recommendations and amendments. These recommendations and amendments are discussed and adopted at the General Assembly level.

The Statute refers to the relevant sports judicial bodies:

- (i) The Judicial Tribunal, the sport judicial authority in the UAE Football Association in relation to all disputes.
- (ii) The national courts which decide over any public or private dispute.
- (iii) Arbitral Tribunals: the sports arbitral tribunal and it includes the dispute resolution chamber and the arbitral tribunal.
- (iv) CAS: the court of arbitration for sport located in Lausanne, Switzerland.

With the exception of CAS, there is no literature on the national judicial bodies. Currently, there is no public record of any cases being determined before the national judicial sports bodies. However the UAE has taken a positive step in developing sports law in the UAE by opening a CAS Alternate Hearing Centre in Abu Dhabi by the Abu Dhabi Judicial Department (ADJD). This is the only CAS office in the Middle East. Cases with an international element from the region are expected to be referred to this Centre.

Article 11 of the Statute states that the UAE Football Association should comply with the Asian Football Confederation (AFC) and the Federation Internationale de Football Association (FIFA) rules and regulations.

Article 34 states that the General Assembly is the highest legislative body in the UAE Football Association. Therefore, it has the right to accept, reject or amend any of the recommendations proposed by any of the UAE Football Association Committees.

Article 35 categorizes the judicial sports bodies as follows:

Judicial Tribunals which comprise the disciplinary committee and the appeal committee. The two committees have jurisdiction to hear disputes related to disciplinary issues. The disciplinary committee is the first instance and the appeal committee is the appeal level.

Arbitral Tribunals which includes the dispute resolution chamber and the arbitral committee. These two bodies have jurisdiction over contractual related issues occurring in football disputes, that is, a dispute between a player and a football club arising from the contract.

Articles 114 – 122 of the Statute provide a general explanation of the four judicial bodies mentioned above; the Disciplinary Committee; the Appeal Committee; Dispute Resolution Chamber; and the Arbitral Tribunal as set out in the Statute. Each of these judicial sports bodies will be discussed in more detail in paragraphs 7.3 to 7.6 below.

The prohibition in relation to bringing claims before the ordinary courts:

Article 13 sets out the obligations of the members of the UAE Football Association, one of which is that the members are prohibited from lodging a complaint before the ordinary courts.

Article 123 states that the ordinary court has no jurisdiction over football related disputes while the following article sets out the conditions when the national sports judicial bodies have jurisdiction and when the AFC or FIFA have jurisdiction.

The Statute references the FIFA Dispute Resolution Chamber and the Court

of Arbitration for Sport. In particular, Articles 125 and 126 of the UAE Football Association recognize the CAS jurisdiction to settle sports related disputes.

5. *The National Olympic Committee (NOC) & Anti-Doping Regulations*

5.1 *The NOC*

As mentioned earlier, the UAE National Olympic Committee was established by Ministerial Resolution No. 200 of 1979 issued by the Ministry of Youth and Sports. The aim of the Committee is to improve the standard of performance among UAE athletes in order to compete at an international level.

Several statutes and regulations have been enacted to enhance the role of the NOC. The key development was the enactment of the National Olympic Code in 2013 issued by the General Assembly of the NOC. The objective of this is to provide a strong legal infrastructure in accordance with international standards.

The above-mentioned Code has granted important powers to the NOC in order to achieve its objective. In particular, the NOC can rely on and apply international conventions that regulate the sports sector.

The NOC adheres to the laws and regulations relating to sport activities that are issued by the General Authority of Youth & Sports Welfare, subject to the International Olympic Charter.

The NOC should also comply with International Olympic Committee's Medical Regulations and the International Agreement on Anti-Doping.

The NOC supports the need for the establishment of an arbitration centre in the UAE to resolve sports related disputes.

In addition, the NOC has the power to carry out accurate medical tests for all athletes participating in sports activities prior to their participation in such events. Furthermore, any sports bodies, national federations and athletes must comply with the UAE National Anti-Doping Code and carry out all procedures and tests required by the National Anti-Doping Committee at any time whether during the event or otherwise.

All sports federations have included an arbitration provision in their constitutions. As a result, all sport entities, authorities, members and individuals will be required to refer their disputes to the UAE Sports Arbitration Centre.

5.2 *The Ratification of the International Anti-Doping Treaty*

The UAE ratified the International Agreement on Anti-Doping issued by UNESCO in 2005. After the UAE signed the International Agreement on Anti-Doping, a National Anti-doping Committee was set up to deal with all matters related to doping at the local, regional and international levels. The Committee supervises the implementation of the National Anti-Doping Code in the UAE.

The National Anti-Doping Committee is a consultative, regulatory and

executive body affiliated with the General Authority of Youth and Sports. It is consulted in all matters related to national drug issues. The committee works within the framework of the general policy of the General Authority of Youth and Sports Welfare and the National Olympic Committee.

The main objective of the National Anti-Doping Committee is to eradicate doping in the UAE. This Committee also cooperates with the authorities of Arab, regional and international championships hosted by the UAE.

The committee has the power to impose sanctions on national sports associations, players and athletes in the event of a violation of the Anti-Doping rules.

6. *Relevant Football Regulations*

6.1 *The UAE Football Association & the Pro League Committee*

As mentioned above, the UAE Football Association was established in 1972 by a Ministerial Resolution issued by the Ministry of Youth and Sports. The first national competition was organized in 1973 and a few clubs participated. The number of football clubs has increased significantly since 1973.

The UAE Football Association established the Pro League Committee on the 18 February 2007 in order to develop UAE football and enhance it to professional standards. The Pro League Committee must also comply with FIFA and AFC regulations. The Pro League Committee is a separate body from the UAE Football Association with financial and administrative independence. The Board of the UAE Football Association established the Pro-League Committee comprising a Chairman, Vice Chairman and twelve members from professional clubs.

In addition, the committee has the right to market, sell and invest in all kinds of sponsorship and commercial deals; TV broadcasting; media and print; coverage; electronic broadcasting; information technology rights; and all commercial and intellectual rights of the Pro League. Importantly, the Committee shall impose the regulations and instructions that regulate the Pro League in accordance with the regulations of the UAE Football Association, football game rules and the regulations of both the AFC and FIFA.

The Pro League Committee organized its first competitions in 2008. The committee is currently organizing four professional leagues: the Arabian Gulf League; the Second Division League; the Super Cup League; and the Professional Cup League.

6.2 *UAE Football Regulations*

There is a body of rules and regulations governing all aspects of football in the UAE. All rules and regulations are passed by the General Assembly of the UAE Football Association. Some of these regulations are technical, concerning the

technical aspects of the game (the so-called ‘rules of the game’). Others concern the structure and regulation of several bodies or group within the UAE Football Association. Importantly, there are four regulations relating to dispute resolution. The following is an overview of all the UAE Football regulations.

(a) The technical regulations

There are four technical regulations that apply to four professional competitions. These are: the Arabian Gulf League Regulation; the Super Cup Tournament Regulation; the Professional Cup Tournament Regulation; and the Second Division Tournament Regulation. In general, they regulate the technical issues of each tournament, such as the rules of the game, doping control and security and safety of stadiums.

(b) The dispute resolution regulations

There are four dispute resolution regulations that cover all types of sports related disputes. These are the Dispute Resolution Chamber Regulation issued on the 17/8/2009; the Arbitral Tribunal Regulation issued on the 30/7/2011; the Disciplinary Regulation issued on the 17/8/2009; and the Appeal Regulation issued on the 17/8/2009. Each of these Regulations sets out the scope of their jurisdiction. The Dispute Resolution Regulations will be discussed in more detail below.

(c) Other Regulations

Other Regulations govern referees, the status and transfer of players; and the election of members of the UAE Football Association.

6.3 *The Judicial Sports Bodies that form part of the UAE Football Association*

As previously mentioned, pursuant to the Statute of the UAE Football Association four judicial sports bodies were established. Each has a different role. An outline of the objectives of the four judicial sports bodies is set out below:

6.4 *The Disciplinary Committee*

The Disciplinary Committee has jurisdiction to hear any dispute in relation to disciplinary issues, such as the ‘rules of the game’ and breaches of UAE Football Association regulations. The Disciplinary Committee decides the penalties to be imposed (with reference to the penalties set out in the Disciplinary Regulation) in relation to such violations.

The Disciplinary Committee consists of a panel of five independent members. The chairman and his deputy must be qualified lawyers, whilst the other three members should have experience in football. The committee makes a decision based on the UAE Football Association Regulations, AFC Regulations, FIFA Regulations; customs and the principle of justice. Sanctions vary depending on the seriousness of the violation.

6.5 *The Appeal Committee*

The Appeal Committee is a semi-judicial body which is part of the UAE federal judicial authority with a panel of both judges and football experts. It has jurisdiction to hear any appeal of a decision issued by the Disciplinary Committee, the Status and Transfer of Players Committee, the Dispute Resolution Chamber and the Referees' Committee. The chairman of the Appeal Committee and his deputy must be qualified lawyers, whilst the other three members should have experience in football. The Appeal Committee follows the same rules and principles as the Disciplinary Committee. A judgment given by the Appeal Committee will be considered final and enforceable, except if the case has an international element, in which case the unsuccessful party has the right to appeal its decision before the CAS.

6.6 *The Dispute Resolution Chamber*

The Dispute Resolution Chamber was established to exclusively hear contractual issues between football related parties, such as disputes between players and their clubs. The Dispute Resolution Chamber comprises eight independent members. The chairman and his deputy should all be qualified lawyers. The other six members are selected by the clubs' representative and the players' association. Theoretically, any judgment issued by the Dispute Resolution Chamber can be appealed before the Arbitration Tribunal. The name is a bit of a misnomer as it is not an arbitration tribunal in the conventional sense but is equivalent to a Court of Appeal. However, the Arbitration Tribunal has still not been established. As a result, any judgment rendered by the Dispute Resolution Chamber can be appealed before the Appeal Committee which is mentioned above.

6.7 *The Arbitration Tribunal*

The Arbitration Tribunal is equivalent to the Court of Appeal for decisions issued by the Dispute Resolution Chamber. A judgment issued by the Arbitration Tribunal will be considered final and enforceable.

7. *Conclusion*

The UAE is a young jurisdiction but is maturing fast in the field of sports law and dispute resolution. Significant developments have occurred, such as the establishment of CAS's Alternate Hearing Centre in Abu Dhabi. The new CAS Centre and the establishment of other sports dispute resolution bodies is significant because of the prevalence of arbitration clauses in the rules and regulations of sports governing bodies. We expect to see a body of literature from these bodies in the near future.

The UAE boasts an impressive list of sports events and international sporting

competitions. Abu Dhabi, the capital of the UAE, annually hosts the Formula One Grand Prix. Dubai hosts the most expensive horse race in the world (the Dubai World Cup) and is bidding to host the 2020 Olympic Games. The UAE Football Association (the governing body of football in the UAE) is very active and now hosts a number of competitions.

In view of these developments, the law relating to sport in the UAE will no doubt continue to grow and improve as the UAE continues to attract international sporting competitions in the future.

SPORTS JUSTICE IN THE UNITED STATES

by *Katherine Porter**

SUMMARY: 1. Principles of sports justice – 2. Sports justice in the United States Olympic Committee – 3. Sports justice in U.S. professional sports leagues – 4. Sports justice in Major League Soccer – 5. Case study: the New Orleans Saints “Bounty” case

Abstract:

This chapter discusses the concept of sports justice as found in the United States both in the Olympic movement sports and the professional sports leagues, with a specific discussion of sports justice in Major League Soccer. In the Olympic movement sports, the United States Congress has enacted legislation that creates several procedural mechanisms to ensure that athletes cannot be unfairly denied the right to participate in sport. However, these federal protections do not apply to the professional sports leagues and therefore the leagues have developed unique dispute resolution mechanisms through the collective bargaining process that address the types of disputes that arise in U.S. sports leagues.

1. Principles of sports justice

In the United States, the term “sports justice” is used to describe the result of grievance and dispute resolution available to athletes, coaches, sports officials, clubs, and leagues. In this regard, “sports justice” is “the product of the authoritative procedures used in the business of sports to resolve disputes and controversies,”¹ which “establishes a system of rights and responsibilities that are defined and ascertainable.”²

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¹ ROGER I. ABRAMS, *Sports Justice: The Law & Business of Sports*, 14 (2010).

² ROGER I. ABRAMS, *Sports Arbitration and Enforcing Promises: Brian Shaw and Labor Arbitration*, 20 Marq. Sports L. Rev. 223, 232 (2009).

In general, the dispute resolution mechanisms and grievance procedures employed in U.S. sports ensure that athletes are provided with a timely resolution of a dispute or grievance by an adjudicator with sports-related expertise. Unlike litigation before the courts, the dispute resolution mechanisms employed in sports generally provide several benefits, including speed, efficiency and lower cost. As described in more detail below, sports justice in the United States encompasses at a minimum: the right to be heard, the right to be represented, the right to fair notice, and the right to prompt resolution of disputes.

1.1 *Right to be heard*

One of the most important characteristics of sports justice in the United States is the right of the athlete to be heard. Federal legislation provides Olympic movement athletes³ with the opportunity to submit any dispute related to his or her opportunity to compete to binding arbitration before the American Arbitration Association (“AAA”).⁴ Not only does an athlete that has been excluded from a team or competition have the right to arbitrate before the AAA, athletes that may be “adversely affected” by a dispute may also have the option to participate in the arbitration process as a party.⁵

Athletes participating in professional sports leagues – the National Football League (“NFL”), National Basketball Association (“NBA”), National Hockey League (“NHL”), Major League Baseball (“MLB”) or Major League Soccer (“MLS”) – also have the right to be heard, as set forth in the leagues’ respective collective bargaining agreement. As described in more detail in Section 3 *infra*, these collective bargaining agreements contain several different types of dispute resolution mechanisms to address the particular types of disputes that arise in U.S. sports.

1.2 *Right to representation*

Second, athletes in the United States have the right to be represented in sports-related disputes by an attorney, union representative or other advisor. Indeed, Olympic movement athletes may be represented by an attorney in any hearing or grievance related to his or her opportunity to compete.⁶ On the other hand,

³ According to the International Olympic Committee (“IOC”), “[t]he Olympic Movement is the concerted, organised, universal and permanent action, carried out under the supreme authority of the IOC, all individuals and entities who are inspired by the values of Olympism. [. . .] Belonging to the Olympic Movement requires compliance with the Olympic Charter and recognition by the IOC”. Olympic Charter, “Fundamental Principles”, para. 3, 7. As discussed in more detail in *infra* section 3, the U.S. professional sports leagues do not fall within the “Olympic Movement.”

⁴ 36 U.S.C. § 220522(a)(4)(B).

⁵ See *Lindland v. USA Wrestling Ass’n*, 230 F.3d 1036 (7th Cir. 2000) (discussing inclusion of “affected athletes” in arbitrations arising from a decision of a National Governing Body).

⁶ See e.g., *Bylaws of the United States Soccer Federation, Inc.*, Bylaw 701(1)(a)(5), available *on line* at www.ussoccer.com/governance/bylaws.aspx; *United States Soccer Federation, Inc. Policy Manual*, Policy 701-1(A), available *on line* at www.ussoccer.com; Frequently Asked Questions for

professional athletes have the right to representation by an attorney or the players' union for their league in grievances, disciplinary procedures or in the course of a league investigation.⁷

1.3 Right to fair notice

Third, athletes in the United States are guaranteed the right to fair notice of any decision to exclude an athlete from competition or any disciplinary action. Pursuant to federal legislation, Olympic movement athletes must be provided with "fair notice and opportunity for a hearing . . . before declaring the individual ineligible to participate."⁸ A similar right to fair notice exists in the professional sports leagues. Indeed, the collective bargaining agreements in each of the professional sports leagues require that a player and the players' union be provided with written notice of any discipline to be levied against an athlete as promptly as possible.⁹

1.4 Prompt resolution of disputes

Finally, athletes in the United States generally have the right to a prompt resolution of their disputes. In many instances, prompt resolution of a dispute is imperative to ensure that an athlete's rights are protected, especially where the dispute involves the disqualification, suspension or exclusion of that athlete from competition. Indeed, the expeditious resolution of sports-related disputes was one of the primary purposes of the Federal Amateur Sports Act and its progeny, the Ted Stevens Amateur and Olympic Sports Act ("Ted Stevens Act").¹⁰ Similarly, the collective bargaining agreements found in professional sports leagues set forth special procedures to ensure the prompt resolution of disputes. For example, where a dispute between an NFL player and his club involves a suspension of that player, the NFL collective bargaining agreement provides that a hearing shall be held within seven days from the date on which the grievance was filed.¹¹

Olympic Movement Disputes Administered by the American Arbitration Association (AAA), available *on line* at www.adr.org/aaa/ShowPDF?doc=ADRSTG_010805

⁷ See e.g., NFL CBA, art. 43, § 10 (2011) (relating to Non-Injury Grievances); *id.* at art. 46, § 2(b) (players have the right to "be accompanied by counsel of his choice" at a hearing arising from a disciplinary appeal); MLS CBA, § 20.6 (2004) (players' union has the right to be present at any "investigative interview . . . or hearing" involving a MLS player).

⁸ 36 U.S.C. § 220522(8).

⁹ See e.g. NFL CBA, art. 46, § 1(a)-(b); MLS CBA, art. 20.2(iii); MLB CBA, art. XII(C) (2012).

¹⁰ *Dolan v. U.S. Equestrian Team, Inc.*, 608 A.2d 434, 436 (N.J. Super. 1992). Indeed, Congress explicitly stated that one of the purposes of this act was to "provide for the swift resolution of conflicts and disputes involving amateur athletes . . . to participate in amateur athletic competition." *Id.* (quoting 36 U.S.C. § 374(8)).

¹¹ See NFL CBA, art. 43, § 4 (2011).

2. *Sports justice in the United States Olympic Committee*

Although sports – especially those related to the Olympic Games – have always been an integral part of American culture, it was not until the late 1970s that federal protections were enacted to ensure that U.S. Olympic movement athletes' rights to compete were protected. On 19 June 1975 President Gerald Ford created the President's Commission on Olympic Sport (the "Commission") to investigate the "best methods of addressing the problems facing international amateur athletics."¹² A report issued by the Commission two years later concluded that many sporting bodies failed to protect the rights of their athletes, noting that "[f]ar too often . . . athletes have been denied the essence of being an athlete – the right to compete."¹³ In the absence of federal legislation to guarantee an athlete's right to compete, the national governing bodies, by virtue of their status as private associations, could deny athletes the right to compete without legal consequence, so long as that denial complied with their respective statutes and regulations.¹⁴

Following the Commission's findings, President Jimmy Carter signed the Federal Amateur Sports Act ("FASA") in 1978 to explicitly establish a regime of "sports justice" for amateur athletes, coaches, and officials.¹⁵ The FASA established protections to ensure that Olympic movement athletes could not be unfairly denied the opportunity to compete. However, in the mid- to-late 1990s, faced with the increased participation of professional athletes in the Olympic games and other problems confronting the United States Olympic Committee ("USOC") and its athletes, Senator Ted Stevens pushed to revise the FASA to reflect the realities of sports entering the 21st century. The revised act was renamed the Ted Stevens Act in Senator Stevens' honour.¹⁶

The Ted Stevens Act establishes guidelines for the USOC and its National Governing Bodies in order to, among other things, coordinate, develop and promote amateur athletics¹⁷ in the United States and to provide expeditious and fair dispute resolution mechanisms for athletes and entities governed by the Olympic movement.¹⁸ In this regard, Congress granted the USOC the authority to "facilitate,

¹² Exec. Order No. 11,868, 3 C.F.R. (1971-1975).

¹³ *Final Report of the President's Commission on Olympic Sport*, Jan. 1977, Vol. I, at 59.

¹⁴ *Id.* at 62.

¹⁵ Jimmy Carter, *Amateur Sports Act of 1978 Statement on Signing S. 2727 Into Law*, Nov. 8, 1978, available *on line* at www.presidency.ucsb.edu/ws/?pid=30133. ("This legislation, based on the recommendations of the President's Commission on Olympic Sports, establishes procedures and guidelines to resolve disputes without placing the Federal Government in control of amateur sports. The act . . . gives the Olympic Committee a mandate to resolve disputes through arbitration.")

¹⁶ 36 U.S.C. § 220501, *et seq.*

¹⁷ The definition of "amateur" was revised to include professional athletes participating in the Olympic games. 36 U.S.C. § 220501(b)(1) (defining "amateur athlete" as any athlete that "meets the eligibility standards established by the national governing body or paralympic sports organization for the sport in which the athlete competes.")

¹⁸ See 36 U.S.C. § 220503 (8) (purpose of USOC is to, among other things, "provide swift resolution of conflicts and disputes involving amateur athletes, national governing bodies, and amateur sports

through orderly and effective administrative procedures, the resolution of conflicts that involve any of its members and any amateur athlete, coach, trainer” or other representative.¹⁹

The Ted Stevens Act also codified certain mechanisms to ensure that the athletes were given a more active role in the governance of their sports. For example, for the first time, Congress mandated that the USOC create an Athletes’ Advisory Council (“AAC”), comprised of athletes from each national governing body (“NGB”),²⁰ to ensure that the concerns of athletes are adequately represented before the USOC Board.²¹ The Ted Stevens Act also requires the USOC to employ an Ombudsman to “provide independent advice to athletes at no cost” regarding the applicable rules and regulations of the USOC, international sports federations and the NGBs.²² The Ombudsman also acts as an intermediary between the athlete and the sports body in order to “assist in mediating certain disputes involving the opportunity of amateur athletes to compete.”²³

2.1 Resolution of disputes involving Olympic Movement athletes

One of the most important protections afforded by the Ted Stevens Act is the requirement that the USOC and its NGBs establish procedural mechanisms “for the swift and equitable resolution of disputes” relating to the opportunity of an athlete to compete.²⁴ In this regard, each of the NGBs “must agree to submit to binding arbitration with respect to opportunities-to-compete issues at the request of the affected athlete under the Commercial Rules of the AAA.”²⁵

The AAA is competent to hear three categories of Olympic-related disputes: (1) issues of athlete eligibility to participate in international and domestic competitions, (2) determinations of the “the appropriate National Governing Body (NGB) for a particular amateur sport,” and (3) disputes involving a positive out-of-competition doping test.²⁶

With respect to athlete eligibility to compete, Section 9 of the USOC Bylaws prohibits USOC members from denying or “threaten[ing] to deny any amateur athlete the opportunity to participate” in the Olympic Games, Pan American Games, Paralympic Games, World Championship competitions or other “protected

organizations, and protect the opportunity of any amateur athlete, coach, trainer, manager, administrator, or official to participate in amateur athletic competition”.

¹⁹ 36 U.S.C. § 220505 (c)(5) (detailing the authority of the USOC as related “to amateur athletics and the Olympic Games”).

²⁰ *Bylaws of the United States Olympic Committee*, § 14.1 (Sept. 25, 2010).

²¹ Athletes’ Advisory Council, <http://usathlete.org/>.

²² 36 U.S.C. § 220509(b)(1)(A).

²³ 36 U.S.C. § 220509(b)(1)(B); 144 Cong. Rec. S27449 (1998) (statement of Sen. Stevens).

²⁴ 36 U.S.C. § 220509.

²⁵ 144 Cong. Rec. S27449 (1998) (statement of Sen. Stevens).

²⁶ *Olympic Athlete Eligibility, NGB Determination, and Doping Disputes: An Overview, the American Arbitration Association*, available on line at www.adr.org/aaa/ShowPDF?doc=ADRSTG_008054.

competition[s].”²⁷ As the very nature of these disputes involving the opportunity to participate in a competition usually requires immediate resolution, the USOC Bylaws have established an expedited hearing process which requires a hearing to be held within forty-eight hours of filing the claim.²⁸

The standards applied by AAA arbitrators in Section 9 claims vary from claim to claim. Some arbitrators have found that an athlete must show that the NGB has acted “arbitrarily or capriciously” in the enforcement of its qualification guidelines.²⁹ Other arbitrators have placed the burden on an NGB to establish that it has “used all reasonable means at its disposal to protect the athletes’ opportunity to participate.”³⁰

As stated above, the AAA also has competence to hear other Olympic Movement related disputes, including those involving doping allegations. In light of the specific nature of doping-related disputes, the AAA has adopted the “Supplementary Procedures for the Arbitration of Olympic Sport Doping Disputes,”³¹ which requires that these disputes be heard only by “arbitrators who serve on both the American Arbitration Association roster and the Court of Arbitration for Sport, [and] who are U.S. citizens.”³²

²⁷ *USOC Bylaws*, § 9.1 (2010) (“Opportunity to Participate”). “Protected competitions” are defined as either (a) competition between an athlete or athletes designated by the appropriate NGB (or Paralympic Sports Organization) as representing the U.S., and an athlete or athletes representing a foreign country, or (b) a domestic competition organized by an NGB to assist the NGB in its selection process for future international competitions, such as the U.S. Olympic Team Trials for track and field. *Id.* § 1.3(v).

²⁸ *Id.* § 9.9 (“Expedited Procedures”).

²⁹ See, *Saltzstein v. USA Swimming* (AAA Case No. 77 190 E 00318 10 JENF (July 23, 2010)).

³⁰ See Final Award *DeRosier v. USA Track & Field* (AAA Case No. 77 190 E 00189 12 JENF (22 June 2012)). *DeRosier* involved a successful Section 9 challenge brought by two athletes against USA Track & Field’s (“USATF”) decision to exclude the athletes’ qualifying times for the Olympic Trials. On 16 June 2012 DeRosier and Kimbers participated in the New Jersey International Invitational in Holmdel, New Jersey (USA). During this meet, both DeRosier and Kimbers set personal records in their respective heats of the 100 meters, with times sufficient to qualify them for the Olympic Trials to take place on 22-23 June 2012. However, since USA Track & Field determined that the marks set by the athletes were significantly better than their previous times, it launched an investigation and ultimately determined that faulty timing equipment had led to the qualifying times.

The arbitrator held that the standard applied to Section 9 cases is “not whether the USATF acted arbitrarily or capriciously,” *id.* at 2, but rather “whether the USATF used all reasonable means at its disposal to protect the athletes’ opportunity to participate.” *Id.* at 4. The arbitrator ultimately held that the applicable Competition Rules were contradictory and unclear and therefore the USATF had not “used all reasonable means at its disposal to protect the athletes’ opportunity to participate.” DeRosier and Kimbers were thus permitted to participate in the Olympic Trials. Neither athlete qualified for the 2012 Olympic Games in London.

³¹ See *American Arbitration Association Supplementary Procedures for the Arbitration of Olympic Sport Doping Disputes*, May 1, 2009, available on line at www.adr.org (then search “AAA’s Supplementary Procedures”).

³² *Id.* at R-3 (“National Pool of Arbitrators”).

3. Sports justice in U.S. professional sports leagues

Although the Ted Stevens Act establishes dispute resolution mechanisms in the Olympic movement sports, this legislation does not apply to the professional sports leagues in the United States. Indeed, the professional sports leagues in the United States are private associations, and generally operate independently of the NGB for that sport.³³

In the absence of explicit federal legislation to protect the rights of professional athletes, the professional athletes in the U.S. have, through the collective bargaining process, negotiated and incorporated procedural mechanisms into each league's collective bargaining agreement to ensure that the athletes' rights are protected.³⁴ Indeed, because the athletes in each of the professional sports leagues are represented by unions, the federal labour law plays a very important role in the relationship between the leagues and their players. Pursuant to the National Labor Relations Act, the leagues (on behalf of their member teams) are required to negotiate in good faith with the players' unions³⁵ "with respect to wages, hours, and other terms and conditions of employment."³⁶ The result of mandatory negotiation is a collective bargaining agreement between the players' unions and the leagues which, at a minimum, addresses: (a) the form of the standard player contract, (b) the salary cap, (c) minimum salaries, (d) assignments (trades), (e) disciplinary policy and (f) grievance procedures, among other topics.

The ability of the players to bargain with the league has ensured that the athletes have negotiated, and incorporated, adequate dispute and grievance resolution mechanisms into the collective bargaining agreements to resolve disputes arising between and among players, clubs and the league. In general, the dispute resolution mechanisms and disciplinary provisions in each of the major U.S. professional sports leagues,³⁷ do not differ substantially among the leagues. This section will address the various dispute resolution mechanisms employed in the professional sports leagues.

³³ The exception to this rule is Major League Soccer ("MLS"), which began play in 1996 as a condition for FIFA designating the United States as the host of the 1994 FIFA World Cup. As discussed in Section 4.1 *infra*, the MLS is the only Division I football league in the United States and is sanctioned by the USSF. As such, the MLS must ensure that its league rules comply with both FIFA regulations and U.S. labour and antitrust law.

³⁴ For decades, players in each of the major professional sports leagues in the United States, the National Football League ("NFL"), National Basketball Association ("NBA"), Major League Baseball ("MLB") and National Hockey League ("NHL"), have been represented by unions. The relationship between the players' unions and the leagues has often been both complicated and contentious.

³⁵ For the purposes of this chapter, the relevant players' unions are: National Basketball Players' Association (NBA), National Football League Players' Association (NFL), Major League Baseball Players' Association (MLB), National Hockey League Players' Association (NHL), and Major League Soccer Players' Union (MLS).

³⁶ National Labor Relations Act, 29 U.S.C. § 158(d).

³⁷ National Football League (American Football) ("NFL"), National Basketball Association ("NBA"), Major League Baseball ("MLB"), National Hockey League ("NHL"), and Major League Soccer ("MLS").

3.1 *The powers of the Commissioner*

Pursuant to the collective bargaining agreements (“CBAs”) of the professional sports leagues, certain disputes are resolved, in some instances exclusively, by the league’s Commissioner. Each league has a single Commissioner who is appointed by the member teams of the league and who oversees the daily operations of the league. The Commissioner is, in essence, the Chief Executive Officer of a league.

One of the Commissioners’ principle responsibilities is to oversee and, in some cases, administer league-imposed discipline on players. As discussed in more detail below, there are two categories of conduct for which a player may be disciplined: conduct that occurs on the field (or court) of play, and conduct that occurs off the field (or court) of play. In general, the CBAs have granted the Commissioner the authority to discipline players for both on-the-field and off-the-field conduct. Such discipline may include: suspension, fines or termination of the player’s Standard Player Contract.³⁸

However, the power of the Commissioners of the sports leagues to discipline players is not absolute. Indeed, while in certain circumstances the Commissioner has the exclusive and final authority over such discipline, in other circumstances the decision of the Commissioner may be reviewed by a Grievance Arbitrator or other independent authority. For example, where discipline imposed by the commissioner involves conduct off the field or court of play, a player may have the right to appeal the sanction to the grievance arbitrator, as detailed below.³⁹

3.1.1 *On-the-field/Court Conduct*

Sports offences that occur on the field or court are generally easy to define. When a player violates the rules of the game, whether through violent conduct, unsportsmanlike behaviour or other violations of these rules, the player may be subject to disciplinary action. In the professional sports leagues, the Commissioner of the league generally has the exclusive authority to discipline players for conduct that occurs on the playing field or court. For example, pursuant to Article 35 of the NBA Constitution, from which much of the NBA Commissioner’s authority is derived,⁴⁰ the NBA Commissioner has the following disciplinary authority:

- (c) *If in the opinion of the Commissioner any other act or conduct of a Player at or during an Exhibition, Regular Season, or Playoff game has been prejudicial to or against the best interests of the Association or the game of basketball,*

³⁸ See e.g., MLB CBA, Art. XII § E; MLS CBA, Art. 20.2(ii)(b).

³⁹ In some leagues such as the NFL, the Commissioner maintains absolute authority over conduct where a player is found to have engaged in conduct that is “detrimental to the integrity of, or public confidence in, the game of professional football”. See NFL CBA, art. 46, § 1(a).

⁴⁰ Each NBA player, as part of the NBA Uniform Player Contract, agrees to abide by the NBA Constitution. The Uniform Player Contract is also negotiated between the union and the team owners, and is considered to be an integral part of the League’s CBA.

the Commissioner shall impose upon such Player a fine not exceeding \$50,000, or may order for a time the suspension of any such Player from any connection or duties with Exhibition, Regular Season, or Playoff games, or he may order both such fine and suspension.

- (d) *Except for a penalty imposed under Paragraph (f) of this Article 35 [relating to betting on games]: . . . any challenge by a Player to the decisions or acts of the Commissioner pursuant to Article 35 shall be governed by the provisions of Article XXXI of the NBA/NBPA Collective Bargaining Agreement then in effect.*

Although the exact procedure varies from league to league, should a Commissioner determine that a player is to be disciplined for conduct on the playing field or court, the player will receive written notice of the decision of the Commissioner or his designee of the disciplinary action taken against him.⁴¹ In general, the player may then appeal the decision, in writing, to the Commissioner for reconsideration of the sanction based on the arguments of the player and/or the players' union.⁴² However, in some leagues if the discipline levied against a player is above a certain threshold level,⁴³ the sanction may be appealed to a Grievance Arbitrator or other independent arbitrator as designated in the league's CBA.

A notable example of the Commissioner's exclusive authority over on the field (or court) conduct occurred during an NBA playoff game in 1997.⁴⁴ Under the NBA rules, if a fight breaks out on the basketball court, any player who is not currently in the game and leaves the bench area will automatically be suspended for the following game. During a playoff game between the New York Knicks and the Miami Heat, a fight broke out between the Knicks and Heat Players. Several Knicks players left the bench to join the fight, while all of the Heat players remained in the bench area. Following the game, the NBA Commissioner suspended all of the Knicks players that had left the team beach area for the next game. Although the players' union petitioned a court to overturn the suspensions, the court denied this request and held that the NBA Commissioner had the exclusive authority to suspend players for on-the-court conduct pursuant to the terms of the CBA. Without the suspended players, the Knicks lost the next game and were eliminated from the playoffs.

⁴¹ See e.g., *id.*

⁴² See e.g., *id.*, art. 46, § 2. The Commissioner may, in certain cases, appoint a designee to hear the appeal of the disciplined player or players.

⁴³ The league's CBA will detail what types of discipline may be appealed to the Grievance Arbitrator. For example, in the NBA, a dispute involving a fine of more than \$50,000 or a suspension of more than twelve (12) games may be appealed to the Grievance Arbitrator. See NBA CBA, art. XXXI, § 8 (2005).

⁴⁴ See MIKE WISE, *5 Knicks Barred for Melee; 3 to Miss Game 6*, New York Times, May 16, 1997, available on line at www.nytimes.com/1997/05/16/sports/5-knicks-barred-for-melee-3-to-miss-game-6.html.

3.1.2 *Off-the-field/Court Conduct*

Each league also retains the authority to discipline players for “conduct detrimental to the integrity of, or public confidence in, the game. . .”.⁴⁵ This conduct includes, but is not limited to, criminal activity, violent or threatening behaviour among employees, possession of weapons inside team facilities,⁴⁶ conduct that imposes a threat to the safety of another and other conduct that may undermine the reputation of the league or its member teams.⁴⁷ In general, when a league learns of a potential violation of the league’s Player Conduct Policy, the league has the right to initiate an investigation of the conduct in question, and, upon conclusion of this investigation, the Commissioner has the authority to impose discipline on the player.⁴⁸

However, the leagues have adopted different approaches as to who has the final authority to hear disciplinary appeals arising out of “conduct detrimental” to the league. For example, in the NFL, the decision of the NFL Commissioner with respect to player discipline for “conduct detrimental” may be appealed only to NFL Commissioner or his designee.⁴⁹ Similarly, the MLB also provides that the Commissioner has final authority with respect to disciplinary actions “involving the preservation of the integrity of, or the maintenance of public confidence in, the game of baseball.”⁵⁰ In the NBA, however, where the discipline levied by the Commissioner has a financial impact on a player of more than \$50,000, the discipline may be appealed to the Grievance Arbitrator, as discussed below.⁵¹ On appeal, the Grievance Arbitrator shall apply an “arbitrary and capricious” standard of review.⁵²

3.1.3 *Limits on player discipline*

Each CBA also establishes limits on the discipline that may be imposed against a player. For example, both the leagues and their individual member clubs are required to periodically publish a schedule of maximum fines that may be imposed for

⁴⁵ NFL CBA, art. 46, § 1; see also MLB CBA, art. XII(B) (2012); NBA CBA, art. XXXI(8); NHL CBA, art. 18.

⁴⁶ In January 2010 the NBA suspended Washington Wizards guard Gilbert Arenas for the remainder of the NBA season for admittedly possessing handguns in the Wizards locker room. Arenas later pleaded guilty to violations of the District of Columbia’s gun laws.

⁴⁷ *Personal Conduct Policy, 2012 League Policies for Players*, National Football League, available on line at www.nfl.com/wordpress/wp-content/uploads/2012/08/FO-11-12-League-Policies-for-Players.pdf.

⁴⁸ *Id.*

⁴⁹ NFL CBA, art. 46, § 2(a). The NFL CBA provides:

(a) Hearing Officers. For appeals under Section 1(a) above, the Commissioner shall, after consultation with the Executive Director of the NFLPA, appoint one or more designees to serve as hearing officers. . . . Notwithstanding the foregoing, the Commissioner may serve as hearing officer in any appeal under Section 1(a) of this Article at his discretion.

Id.

⁵⁰ MLB CBA, art. XI(A)(1)(b).

⁵¹ NBA CBA, art. XXI, § 8(b).

⁵² *Id.*

certain conduct.⁵³ Where a player has been disciplined by both his club and the league for the same conduct, the discipline imposed by the league normally takes precedent.⁵⁴

3.2 *Grievance arbitration*

Another important dispute resolution mechanism employed by the professional sports leagues is what is known as grievance arbitration. In general, the leagues have defined a “grievance” as any dispute arising out of or involving the interpretation of the league’s CBA, or the Standard Player Contract.⁵⁵ The CBA provides for the arbitration of grievances before an impartial arbitrator or panel of arbitrators as appointed by the players’ union and the league.⁵⁶

A player, players’ union, club or league wishing to file a grievance must do so in writing.⁵⁷ However, some leagues, such as the NBA, require that the parties to the dispute meet in attempts to resolve the matter prior to the commencement of a grievance. Once the grievance has been filed, the opposing party or parties has the opportunity to respond in writing.

The dispute will then proceed to a hearing either before a single arbitrator or an arbitration panel, as provided for in the CBA. In certain instances, such as when the grievance concerns the suspension of a player, the hearing may be held on an expedited basis. Following the hearing, the arbitrator(s) will issue a written decision, which shall constitute the final disposition of the dispute.

3.3 *Economic disputes*

In addition to general grievances as addressed above, each CBA also provides for the resolution of certain economic disputes. For example, the professional sports leagues have established mechanisms to address disputes concerning the operation of the league’s salary cap, and two leagues – MLB and the NHL – have adopted a mechanism that allows certain players and their clubs to conclusively determine a player’s salary for the upcoming season via binding arbitration.

3.3.1 *System arbitration*

Economic disputes between a club and the league is generally resolved via what is known as “system arbitration.” System arbitration is unique to the professional sports leagues, and is almost never found in non-sports collective bargaining

⁵³ See *id.*, art. 42, § 1 (Exhibit A).

⁵⁴ See e.g., MLS CBA, § 20.1(iii); NFL CBA, art. 46, § 4.

⁵⁵ See *id.*, art. 43, § 1; NBA CBA, Art. XXXI(1)(a)(i); MLB CBA, art. XI(A)(1)(a); NHL CBA, § 17.1.

⁵⁶ See generally, NFL CBA, art. 43, § 6; NHL CBA, art. 17; NBA CBA, art. XXXI; MLB CBA, art. XI.

⁵⁷ See NFL CBA, art. 43, § 3.

agreements. In the NFL and the NBA, system arbitration is used to resolve any disputes that arise under the economic system incorporated in the CBA that allocates league revenues between teams and players, including disputes arising in connection with the leagues' salary caps.⁵⁸

Procedurally, system arbitration differs from grievance arbitration in two important ways: (a) the System Arbitrator is empowered to order much broader discovery than in that which is available in grievance arbitration, and (b) a party has the opportunity to appeal the decision of the System Arbitrator to an Appeals Panel. With respect to discovery, the System Arbitrator may authorize expedited discovery, including the production of documents and pre-hearing depositions.⁵⁹ With respect to an appeal, although there is no appeal from the decisions of the grievance arbitrator, the decisions of the System Arbitrator are always subject to review by a three-member appeals panel composed of distinguished jurists (former judges or leading academics).⁶⁰ Because both the players and the league recognize the importance of the salary cap and the league's overall economic system, these additional procedural safeguards were adopted to minimize the chance of an erroneous ruling, even if these safeguards come at the sacrifice of speed, efficiency and lower costs.

3.3.2 *Salary arbitration*

Another form of dispute resolution found in professional sports is salary arbitration, also known as high/low arbitration. Salary arbitration is found in both the MLB and the NHL,⁶¹ and allows a player, who has a certain number of years of league experience (between three and six years in the MLB and, generally, after four years in the NHL),⁶² to submit the issue of his salary for the upcoming season to final and binding arbitration. When a dispute between a player and his club proceeds to salary arbitration, the player and the club each submit, in writing, an amount they believe the player should be paid.⁶³ At the hearing, an arbitration panel will hear the arguments of both the player and the club as to the correct salary for the

⁵⁸ See Article 15 (System Arbitrator), NFL Collective Bargaining Agreement; NBA CBA art. XXXI. With the exception of the MLB, each of the professional sports leagues in the United States has adopted a salary cap system. The salary cap prohibits a team from spending more than a pre-defined percentage of the league's total revenues on its players' salaries. To implement the salary cap, the revenues generated by the league is pooled together and shared equally among all the teams in the league.

⁵⁹ See NBA CBA, art. XXXII § 3(c); NFL CBA, art. 15 § 3.

⁶⁰ See NBA CBA, art. XXXII § 7; NFL CBA, art. 15 § 7.

⁶¹ MLB CBA, art. VI(E) ("Salaries / Salary Arbitration"); NHL CBA, Art. 12 ("Salary Arbitration").

⁶² NHL CBA, art. 12.1 provides that a player is eligible for salary arbitration once he has obtained: (a) four years of professional experience if he signed his first NHL contract between the ages of 18 and 20, (b) three years of professional experience if he signed his first NHL contract at age 21, (c) two years of professional experience if he signed his first NHL contract between the ages of 22 and 23, and (d) one year of professional experience if he signed his first NHL contract at age 24 or older.

⁶³ MLB CBA at VI(E)(4).

player for the upcoming season based on his level of talent and achievements. At the conclusion of the hearing, the arbitrators pick one number – either the figure proposed by the player or that proposed by the club – as the player’s salary for the upcoming season.⁶⁴

Since the panel will only pick one number, and does not have the authority to assign the player a salary somewhere in between the two figures, both the player and the club are incentivized to pick the most reasonable number possible. If the club picks a number that is too low, the arbitration panel will be more inclined to choose the player’s higher proposed salary figure. Similarly, if the player’s figure is too high, the panel will be more inclined to side with the club.

4. *Sports justice in Major League Soccer*

In 1988 FIFA awarded the U.S. the rights to host the 1994 FIFA World Cup.⁶⁵ In exchange for designating the U.S. as the host of this tournament, the U.S. Soccer Federation (“USSF”) – the NGB for football in the U.S. – promised that it would organize a professional football league as soon as possible. In 1993 three different league proposals were presented to the USSF for consideration; in 1995, the USSF selected what is now known as the MLS as the USSF-sanctioned Division I football league in the United States. The MLS began play in 1996.

In 1997 several MLS players brought suit against the MLS alleging that certain league practices violated federal antitrust law. The players were ultimately unsuccessful, and thus in April 2003, the MLS players formed the MLS Players’ Union in hopes of expanding the scope of the players’ rights through the collective bargaining process.⁶⁶ In 2004, the MLS Players’ Union and the MLS entered the league’s first ever CBA, which ran through the end of the 2009 season. A new CBA was agreed to in March 2010.

As with the other professional sports leagues, the MLS CBA embodies a comprehensive agreement between the players and the league regarding the “wages, hours, and other terms and conditions of employment.”⁶⁷ In particular, the CBA outlines the procedures for resolving grievances between the MLS and the MLSPA or a player, establishes limits on roster size, details the mechanism for player allocation (the MLS Draft and expansion draft) and specifies minimum salaries and bonuses.

4.1 *Player discipline*

The MLS CBA also sets forth specific procedures regarding player discipline.

⁶⁴ *Id.* at VI(E)(13); NHL CBA § 12.9(d).

⁶⁵ *Fraser v. Major League Soccer*, 284 F.3d 47, 52-3 (1st Cir. 2002) (discussing history of Major League Soccer).

⁶⁶ *About the MLS Players Union*, www.mlspu.org/about_mlspu.html; also *Fraser*, 284 F.3d at 52-3 (discussing history of Major League Soccer)

⁶⁷ National Labor Relations Act, 29 U.S.C. § 158(d).

Discipline based on conduct that occurs on the playing field, and conduct that occurs off the field but that is “detrimental to the reputation and public image of MLS, the [player’s club] and/or the game of [football]” falls within the exclusive authority of the MLS Commissioner (and his designees).⁶⁸

In general, the MLS Disciplinary Committee, acting in designation for the MLS Commissioner, ordinarily imposes discipline on players for conduct that occurs on the playing field.⁶⁹ Discipline for on-the-field conduct can include: termination of a player’s contract, suspension without pay and/or a fine in an amount to be determined by the Disciplinary Committee.⁷⁰

On the other hand, the MLS Commissioner is exclusively responsible for disciplining player for conduct that occurs off-the-field, but that is determined to be “detrimental to the public image and/or reputation” of the league and its members.⁷¹ The MLS CBA explicitly permits the MLS Commissioner to terminate a player’s contract at any time if the player is found to have, among others: violated the substance abuse policy, bet on an MLS or U.S. National Team game, been involved in an attempt to fix a match, or fails to maintain a level of physical fitness required for a professional footballer.⁷²

A player, through the players’ union, has the opportunity to appeal discipline levied against him.⁷³ Upon receipt of appeal, the Commissioner will schedule a telephonic hearing within ten (10) days, unless the player, union and/or league requests an in-person hearing.⁷⁴ The Commissioner shall issue a written decision, either affirming, reducing or vacating the discipline as soon as possible; however, a suspension may not be stayed pending appeal.⁷⁵

4.2 *Player grievances*

The MLS CBA defines a grievance as “any dispute. . . involving the interpretation or application of, or compliance with, any agreement between the Union and MLS or between a Player and MLS.”⁷⁶ In this regard, it is important to note that any employment disputes between a player and his club would fall under the latter category; based on the unique organizational structure of the MLS, players sign employment contracts with the league itself and not with their individual clubs.

Under the terms of the CBA, an individual player lacks capacity to file a grievance, and therefore the players’ union must initiate a grievance on behalf of the affected player.⁷⁷ Grievances may be brought within thirty (30) days from the

⁶⁸ MLS CBA, art. 20, § 20.1(ii) (2004).

⁶⁹ *Id.* § 20.2(i).

⁷⁰ *Id.*

⁷¹ *Id.* § 20.2(ii)(a).

⁷² *Id.* § 20.2(ii)(b).

⁷³ *Id.* § 20.2(iv).

⁷⁴ *Id.* § 20.2(iv)(c)-(d).

⁷⁵ *Id.* § 20.2(iv)(d).

⁷⁶ *Id.* § 21.1.

⁷⁷ See *Id.* § 21.2.

date the grievance arose by filing a written notice containing the specifics of the facts that lead to the grievance and a citation to the provision of the CBA or Standard Player Contract that was breached. The opposing party (be it the league, player or the union) shall have ten (10) days to answer the grievance, setting forth any defences.⁷⁸

If the parties have not reached a settlement of the dispute within seven (7) days of filing the grievance, the dispute is referred to the MLS Grievance Committee, which is comprised of a representative appointed by the league and a representative appointed by the union. The Grievance Committee will then meet with the parties, either in-person or via telephone, with a view to reach a settlement or resolution of the dispute.

Should the parties be unable to reach a resolution, the grieving party may then choose to submit the dispute to arbitration before an Impartial Arbitrator within ten (10) days after the Grievance Committee meeting.⁷⁹ The Impartial Arbitrator is appointed by the league and the players' union and hears all grievance disputes during his or her term as Impartial Arbitrator.

Once the dispute has been referred to the Impartial Arbitrator, an in-person hearing will be conducted, during which each party has the opportunity to present witness testimony. A written decision shall be issued by the Impartial Arbitrator within thirty (30) days from the close of the record.

5. *Case study: the New Orleans Saints "Bounty" case*⁸⁰

In 2012, the NFL announced the results of an investigation into a program organized by the coaching staff of the New Orleans Saints during the 2009-2011 NFL seasons that purported to financially reward Saints defensive players for injuring opposing players during games. Specifically, it was alleged that, at a defensive team meeting the night before the NFC Championship in 2010 certain Saints players and members of the coaching staff promised a "bounty" – a financial reward – to any player that could injure Minnesota Vikings quarterback Brett Favre during the game so that he could not continue to play.⁸¹

A report released by the NFL on 2 March 2012 found that several members of the Saints coaching staff and front office were aware of, and some even helped organize, the program. The NFL concluded that between twenty-two and twenty-seven defensive players for the Saints had participated in the bounty program.⁸² On 21 March 2012, the NFL announced the suspensions of the Saints' Head Coach, Sean Payton, former Defensive Coordinator Gregg Williams, Saints' General Manager Mickey Loomis and Saints' Assistant Coach Joe Vitt.⁸³ Appeals lodged

⁷⁸ *Id.* § 21.3.

⁷⁹ *Id.* § 21.4.

⁸⁰ PAUL TAGLIABUE, *In the Matter of New Orleans Saints Pay-for-Performance / "Bounty"*, 11 December 2012 (Final Decision on Appeal)

⁸¹ *Id.* at 19-20.

⁸² *Id.* at 8-9.

⁸³ *Id.* at 1.

by these coaches were later denied by NFL Commissioner Roger Goodell.⁸⁴

On 2 May 2012 the NFL announced that Commissioner Goodell had suspended four players for their participation in the bounty program: Anthony Hargrove (eight games), Scott Fujita (three games), Will Smith (four games) and Jonathan Vilma (the entire 2012 season). The players appealed the decision to Commissioner Goodell, as provided in Article 46 of the NFL CBA; the appeal was denied on 3 July 2012.

Immediately following the announcement of the player suspensions in May 2012, the players (in addition to their appeal) filed a demand for arbitration with the league, arguing that Commissioner Goodell had exceeded his authority by issuing these suspensions. The dispute was heard by the System Arbitrator who, on 4 June 2012 ruled in Commissioner Goodell's favour. The players appealed the decision of the System Arbitrator to an Appeals Panel as provided for in Article 15(8)⁸⁵ of the NFL CBA (relating to appeals from decisions of the System Arbitrator). On 7 September 2012 the Appeals Panel vacated the players' suspensions and requested that Commissioner Goodell reconsider the suspensions given limits on the Commissioner's authority to punish players for certain conduct.⁸⁶

Based on the decision of the Appeals Panel, on 9 October 2012, Commissioner Goodell issued new suspensions for the players: Anthony Hargrove (seven games), Scott Fujita (one game), Will Smith (four games) and Jonathan Vilma (the entire 2012 season). The players once again appealed the discipline pursuant to Article 46 of the CBA. In light of this new appeal, Commissioner Goodell decided to recuse himself as hearing officer in order "to bring [the] matter

⁸⁴ Gregg Williams did not file an appeal. *Id.*

⁸⁵ Article 15(8) of the NFL CBA provides:

Section 8. Procedure for Appeals:

(a) Any party seeking to appeal (in whole or in part) an award of the System Arbitrator must serve on the other party and file with the System Arbitrator a notice of appeal within ten (10) days of the date of the award appealed from.

(e) The decision of the Appeals Panel shall constitute full, final, and complete disposition of the dispute. NFL CBA, art. 15, § 8.

⁸⁶ Specifically, the Appeals Panel held that the bounty program was both an "undisclosed agreement to provide compensation to players and an agreement to cause, or attempt to cause injury to opposing players. *In the Matter of New Orleans Saints "Pay for Performance/ Bounty" Program*, Sept. 7, 2012 (Decision of the CBA Appeals Panel). The CBA Appeals Panel noted that undisclosed compensation agreements are prohibited by art. 14 § 1 of the NFL CBA. Art. 14 § 1 of the NFL CBA prohibits a club and a player from:

enter[ing] into undisclosed agreements of any kind, express or implied, oral or written, or promises, undertakings, representations, commitments, inducements, assurances of intent or understandings of any kind: (a) involving consideration of any kind to be paid, furnished or made available or guaranteed to the player, Player Affiliate, by the Club or Club Affiliate either prior to, during, or after the term of the Player Contract. . .

NFL CBA, Art. 14 § 1. The CBA Appeals Panel noted that the System Arbitrator – and not the Commissioner – has the exclusive authority to hear disputes involving these prohibited compensation agreements pursuant to Art. 15 § 2(e) of the CBA. Accordingly, the Appeals Panel held that the Commissioner did not have the authority to discipline players for violations of Art. 14 § 1 of the CBA, and that any discipline imposed by Commissioner Goodell must be limited to violations of Art. 46.

to a prompt and fair conclusion.”⁸⁷ Accordingly, on 19 October 2012, Commissioner Goodell appointed former NFL Commissioner Paul Tagliabue to serve as the appeals hearing officer pursuant to Article 46 of the NFL CBA.

After hearing the arguments of the players and the league, Commissioner Tagliabue issued a “Final Decision on Appeal” on 11 December 2012. Although Commissioner Tagliabue affirmed the factual findings as established by Commissioner Goodell, after considering the unique circumstances as applied to each player, Commissioner Goodell vacated the suspensions of all four of the players involved.

The decision of Commissioner Tagliabue placed the overwhelming majority of responsibility for the program on the Saints coaching staff. Indeed, Commissioner Tagliabue found that the improper “pay-for performance Program” was created entirely by the Saint’s coaching staff, and any reward for injuring a specific player in a game was offered only during meetings lead by the Saints’ coaching staff. Moreover, Commissioner Tagliabue concluded that the “Saints’ coaches and managers led a deliberate, unprecedented and effective effort to obstruct the NFL’s investigation into the Program and the alleged bounty.”⁸⁸

With respect to player discipline in the NFL generally, Commissioner Tagliabue emphasized that player safety should be one of the league’s chief concerns, and that overly aggressive tactics are detrimental to the game.⁸⁹ However, where conduct that threatens player safety is part of the league’s culture, any efforts to change this culture based on “prohibitions and discipline and sanctions that are seen as selective, ad hoc or inconsistent” could become “an impediment rather than an instrument of change.”⁹⁰ Indeed, Commissioner Tagliabue found that the league’s “strict compliance and strict enforcement” of the league rules had led to concerted efforts by the Saints coaching staff to improperly resist and block the league’s investigative and enforcement efforts.⁹¹

Instead, Commissioner Tagliabue suggested that, going forward, the league attempt to prevent the efforts of players, coaches and teams to obstruct the enforcement of league rules by providing individuals with a “safe haven” similar to whistle-blower protections that would allow these individuals to come forward without fear of discipline.⁹² Moreover, Commissioner Tagliabue noted that another way to effect change is to remind players, coaches and clubs of the rules and provide any necessary clarification of the same.⁹³ According to Commissioner Tagliabue, “sometimes it is necessary to clarify the rules . . . postpone discipline for a while, not forever, but maybe for a season; and then enforce the rules with

⁸⁷ JUDY BATTISTA, *After Goodell Steps Aside, Tagliabue Is Appointed to Hear Appeals in Bounty Case*, New York Times, Oct. 19, 2012, available *on line* at www.nytimes.com/2012/10/20/sports/football/paul-tagliabue-is-appointed-to-hear-appeals-in-saints-bounty-case.html?_r=0.

⁸⁸ See Tagliabue, *supra* note 80, at 1.

⁸⁹ *Id.* at 5.

⁹⁰ *Id.* at 6.

⁹¹ *Id.* at 7.

⁹² *Id.*

⁹³ *Id.* at 8.

strict discipline.”⁹⁴

Turning to the discipline imposed on the four players in question, Commissioner Tagliabue addressed the particular facts and circumstances as related to each player’s suspension in turn. First, with respect to Anthony Hargrove – who was charged with “providing false information regarding a bounty on Brett Favre” – Commissioner Tagliabue found that it was unclear from the facts what exactly Hargrove was asked by NFL investigators and therefore was unclear what Hargrove had lied about.⁹⁵ Commissioner Tagliabue also noted that Hargrove and the other Saints players were under considerable pressure by the Saints coaching staff to lie to NFL investigators.⁹⁶ Accordingly, Commissioner Tagliabue found that there was not sufficient evidence to establish that Hargrove’s misconduct was deserving of a suspension.⁹⁷

Second, with respect to Scott Fujita – who was charged with creating his own “pay for performance” pool to reward players for big plays including sacks and interceptions (but did not reward players for illegal hits or injuring opposing players) and admitted that he was aware of the Saints’ bounty program – Commissioner Tagliabue noted that, in the past, the NFL had disciplined clubs, but not players, for non-compliance with the prohibition against the payment of bonuses by players to their teammates for on-field action.⁹⁸ Commissioner Tagliabue held that to discipline Fujita for conduct which typically leads to a fine against the club would result in inconsistent treatment between players and teams. Accordingly, Commissioner Tagliabue held that Fujita’s actions did not rise to the level of “conduct detrimental.”⁹⁹

With respect to Will Smith – who was charged with endorsing, agreeing to and financially supporting the bounty program – Commissioner Tagliabue noted that Smith was one of more than twenty Saints defensive players that participated in the program, but that he was disciplined based on his role as a team leader.¹⁰⁰ Commissioner Tagliabue held that it would be inappropriate to discipline Smith “when most or all of the Saints’ defensive unit committed the same or similar acts,” especially given that Commissioner Tagliabue was unaware of previous discipline imposed by the league based on the disciplined player’s role as a team leader or captain.¹⁰¹ Accordingly, Commissioner Tagliabue held that the “selective prosecution of allegations of misconduct and enforcement of discipline relative to Smith [could not] be sustained.”

Finally, with respect to Jonathan Vilma – who was charged with contributing to the bounty program and, specifically, offering a bounty on Brett

⁹⁴ *Id.*

⁹⁵ *Id.* at 13.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 17.

⁹⁹ *Id.* at 18.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

Favre during the NFC Championship game – Commissioner Tagliabue noted that Vilma was not being punished for his on-field performance, nor had any Saints player been disciplined for on-field conduct during the particular game in question.¹⁰² Accordingly, although Vilma was being punished for his off-the-field “talk” – i.e., pledging a bounty for injuring Brett Favre – there was no evidence that the speech given by Vilma was anything more than an “inspirational talk” or just typical pre-game “trash talk.”¹⁰³ Indeed, Commissioner Tagliabue found that “there was no evidence that a player’s speech prior to a game was actually a factor causing misconduct on the playing field and that such misconduct was severe enough in itself to warrant a player suspension or very substantial fine.”¹⁰⁴ Accordingly, Commissioner Tagliabue held that although Vilma had engaged in “conduct detrimental” to the game of American football, a suspension under these circumstances was not justified.¹⁰⁵

¹⁰² *Id.* at 21.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 21–22.

¹⁰⁵ *Id.* at 22.

PART III

THE COMPARATIVE ANALYSIS

**SPORTS JUSTICE:
«FASTER, HIGHER, STRONGER» BUT ABOVE ALL FAIR AND
EFFICIENT**

by *Michele Colucci** and *Karen L. Jones***

SUMMARY: I. What is Sports Justice? – 1. Principles of Sports Justice: Fairness vs. efficiency and quickness – II. Sports Justice at International level – 1. The mother of all sports arbitration tribunals: the Court of Arbitration for Sport – 2. Analysis of the sports bodies of international sports associations – III. Summary overview of national systems – IV. Country comparison of key ordinary justice versus sports justice distinctions – V. Summary and conclusions

I. What is Sports Justice?

It was not so long ago that much attention focused on the issue of whether or not a sports law existed. Now, in this book we have well surpassed that question and are looking not only to the existence of sports law, but further, the mechanisms that facilitate its enforcement.

Moreover the book aims to fill a gap of general knowledge about the international as well as the national sports justice systems.

Sports justice has less to do with the way law is applied within the arena of sport than with the more critical objective of ensuring that justice is done in the specific and complex context of sport.

The authors have shown that achieving sports justice can take many different forms and requires various levels of consideration. Some of them are country specific while some others are dictated by the international sports associations,

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and others warrant a further distinction between the requirements under ordinary justice on one side and the specificity of sport on the other.

In view of enhancing their autonomy, many sports associations around the world developed their own judicial bodies. Some of them seem to be more effective than others but all share the same goal: to settle disputes, to mediate and to deliver the correct interpretation of sports regulations.

Notwithstanding this pursuit of a self-sustaining autonomy, the sports law systems have to operate in compliance with the general principles of law and build up the most effective relationship with international and national ordinary legal systems.

Both of these systems aim at achieving justice in their respective areas but common issues make it inevitable that at some point they cross each other and have to co-operate. In fact, at times these two systems might appear to be alike: what is treated by sports judges in one country might in fact be dealt with by ordinary tribunals in another one. Finally, what is sports justice in one legal system may not likewise be in another.

Therefore, a fundamental challenge in addressing the issue of sports justice is having a clear understanding of what sports justice entails.

In some countries, the sports legal order is recognized by constitutional rules (Italy and Brazil) while in others a specific ordinary law governs matters or refers to the autonomy of sports associations.

So, all over the world, a common notion of sports justice does not exist, nor would it even be appropriate to limit the consideration of various mechanisms for achieving sports justice to a single model since sports justice often reflects the national laws and procedures to achieve its goals.

In fact national sports justice systems refer to sports rules but they may also take into account ordinary civil and labour law in order to settle employment disputes. On the other hand, whenever the fundamental rights and interests of both clubs and athletes are at stake, the ordinary justice can step in and replace the limited jurisdiction of the sports associations.

The sports justice systems vary greatly, as it emerges from a comparative analysis of the international and national sports associations. Moreover sports justice is a concept which is constantly developing and producing a significant jurisprudence.

Some legal systems create a more expansive model of sports justice with its administrative functions that operate in parallel with ordinary justice (ex. Brazil, Czech Republic).

Certain among them incorporate sports justice as an accessory, with distinct functions divided into the multiple tasks of the national ordinary justice systems, where it is only called into action when other more acceptable and expedient means of operation fall short (ex. Croatia, Japan).

Many of the laws and practices concerning sports justice that are shared within this book are relatively new. Indeed, the countries of Eastern Europe have put them in place only over the past decade, while some – like in the Gulf

Countries – have just completed the sports legislation in more recent years.

This suggests that sports justice is a work in progress with substantial developments in the last decade and others on going and to come.

In this chapter we do not intend to define sports justice as a notion common to every country. In fact defining sports justice at this point would be far too limiting and perhaps even a futile effort since sports justice is still in many ways creating itself and being defined by the peculiarities of each national culture and legal system.

Instead we hope to highlight some of the important similarities and key distinctions that have been addressed in more detail throughout this book, by comparing them , to discover common trends and perhaps gain substantial insight into what the future holds relative to the handling of sports justice.

1. Principles of Sports Justice: Fairness vs. efficiency and quickness

The legal, financial, political but also social effects of sports disputes can be very significant on the parties involved; in some cases, they can have an important echo in the media and, more in general, in the public opinion of the concerned countries. For these reasons sports associations have every interest in developing a judicial system which proves to be efficient and rapid but also inspired to the respect of fundamental principles of law and procedure.

In this perspective, disputes must be settled fairly, quickly and cost-effectively by taking into account the specificity of sport, i.e. its specific characteristics linked to the competitions but also to the structure and to the functioning of each sports association.

As a matter of fact, not all international sports associations have the same weight: some are more important than others in terms of registered (professional and amateur) players, some have a longer tradition and have been able to get organized through the years better than others, but all of them have “rules of the game” and, above all, have a responsibility vis-à-vis their own members.

Therefore, it is of paramount importance for them that their dispute resolution mechanisms are fair to all parties involved in a dispute.

To be fair a dispute resolution system needs to be transparent, the rules governing the procedures must be clear and they must be duly and timely implemented by the same federations that enacted them.

The interested parties must be given notice of the opening of a procedure, they also should be granted the right to be heard, and the opportunity to adequately present their case as well as all supporting evidence.

All Sports Associations agree that a dispute resolution process must be as quick as possible, it must be accessible meaning that disputes must be cost-efficient because not all players or clubs can afford the costs of a procedure.

A fair dispute resolution system should also be efficient and therefore disputes should be clearly classified on the basis of the nature and content of each

dispute in order to allow the intervention of the appropriate dispute resolution mechanisms and competent judges. Following this approach **FIBA** and **FIPV** reformed their respective justice systems in order to refer a given dispute to the competent judges.

This means precisely that only those who really have an expertise in a particular area should be called to decide on a particular matter for the best interests of all parties.

A lawyer or a professional specialized in employment relationships in sport does not necessarily have the knowledge and the experience to judge on doping or on the rule of the game and, vice versa, a medical doctor does not have the skills to understand, interpret and apply the relevant pieces of legislation regarding for instance doping. Judicial bodies composed of people having a mixture of backgrounds can offer adequate guarantees to their member (**FIA**).

Of course, in order to guarantee a fair process in every country or sports association, independent and impartial tribunals are essential.

The internal sporting judicial bodies – when deciding on employment issues – should be composed of an equal number of representatives of both parties (clubs and players), with an independent president appointed or at least approved by the other components of the relevant judicial body.

In that regard, certainly notable is what **FIFA** has been doing during the last years by promoting the composition of national dispute resolution chambers at national level which could really guarantee an equal representation of all parties and the fairness of the proceedings.

II. Sports Justice at International level

1. *The mother of all sports arbitration tribunals: the Court of Arbitration for Sport*

In the international scenario the Court of Arbitration for Sport (CAS) constitutes the high supreme court in sports matters and it has been recognized by the majority of international sports federations through a jurisdiction clause in their statutes.

It was established in order to reduce the risk of spreading litigation before ordinary courts but also to ensure fast and equitable access to justice for all sports stakeholders.

In fact CAS has been offering the opportunity to the parties to challenge and eventually overturn decisions which they considered unfair, to a superior tribunal outside a given federation but still within the boundaries of the sports world.

CAS has become *de facto* the supervisory jurisdiction over the rules and practices of international and national sport bodies because it can decide appeals only after the internal remedies of a federation have been exhausted.

The Swiss Federal Court recognised it as a true and independent arbitral institution issuing regular arbitral awards and even “*the only way to resolve*

international sports-related disputes quickly and inexpensively, even though it could undoubtedly be improved”.

In fact the CAS is composed of two permanent divisions, an Ordinary Arbitration division and an Appeals Arbitration division, overseeing two different arbitral procedures governed by the CAS code.

Thanks to such division CAS is competent to solve all “sports-related disputes” and it is able to intervene in appeal against decisions taken by federations or in sports disputes where there is the explicit consent of the disputing parties.

It has been rightly pointed out that the peculiar aspect of CAS arbitration depends on the fact that in most cases, athletes or clubs are bound by an arbitration clause that is inserted into the statutes or regulations of sports associations with which they have registered in order to compete.

In other words they do not necessarily give a free consent to arbitration. This is particularly important whereas in principle all pecuniary claims may be submitted to arbitration. In other words, it is enough that at least one of the parties has some economic interest at stake in a given dispute. As a consequence, even in disciplinary cases, the sanctioned athlete has an economic interest at stake in fighting against a sanction temporarily banning him or her from competitions.

Pursuant to Article R 57 of the CAS code, CAS arbitrators have full power to review the facts and the law. Moreover, since CAS is seated in Switzerland, they may refer to Swiss law in case of conflict of law for certain procedural issues or when public policy matters are at stake.

This means that an appeal to the CAS against a decision adopted by a sports organization entails a *de novo review* on the merits of the case. As a consequence any procedural deficiency incurred during the previous intra-association proceedings is cured by the appeal to the CAS and does not necessarily yield the annulment of the appealed decision.

In principle, the CAS provides all due process guarantees granting the parties every opportunity not only to submit written briefs and any kind of evidence, but also to be extensively heard and to examine and cross-examine witnesses or experts during a hearing.

Due process also entails the right to be heard by an independent and impartial judge. In that regard the relevant procedural rules have been recently amended so that CAS arbitrators – universally recognised as highly qualified lawyers – may not act anymore as counsel of a party before the CAS, thus avoiding the switching of roles between arbitrators and counsel that may occur. This was a necessary amendment in order to give complete credibility to the system.

Moreover the role of the CAS arbitrators some time may prove problematic when they - depending on their legal culture - tend to work on different assumptions and to approach a given issue as they do in their home courts.

In some cases arbitrators may be tempted to scrutinize by themselves the rules of sports associations and they run the risk of interpreting them in a way that does not necessarily reflect the *ratio* beyond the rule as conceived by the relevant

sports association or as negotiated by the relevant sports stakeholders.

In any case a further guarantee to the parties is given by the fact that they can challenge a CAS award before the ordinary court, i.e. the Swiss Federal Tribunal which has jurisdiction and can accept complaints (although limited to some procedural issues and to violation of public order) in order to set aside CAS awards.

2. *Analysis of the sports bodies of international sports associations*

In general terms, the International Sports Associations opt in favour of an internal appeals process before allowing recourse to CAS.

In particular, pursuant to its own statute **FIFA** defends the principle according to which, as a general rule, disputes between the members of the football movement should be dealt with and settled within the structures of football decision-making bodies.

Notwithstanding the above in its Regulations on the Status and Transfer of Players, FIFA recognises the right of the parties in an employment relationship, both players and clubs, to refer their disputes to the ordinary courts.

It has done so in full compliance with the request from the European Commission following the gentlemen's agreement concluded in 2001 on the transfer of players but also with due respect to the relevant constitutional rights under certain public legislations of some European countries.

In any case, in order to avoid *forum shopping*, once they decide to refer their employment related disputes - which have an international dimension - to the ordinary court judges, players and clubs cannot submit the same matter to the FIFA Dispute Resolution Chamber.

Such a body provides dispute resolution on the basis of equal representation of players and clubs and an independent chairman. Therefore both sides can legitimately rely on an objective and just assessment of their dispute.

It is important to stress that following the success of this body, FIFA has encouraged the establishment of independent sports arbitration tribunals guaranteeing fair proceedings and respecting the principle of equal representation of players and clubs among all of its 209 member associations.

Moreover, FIFA has always made the system accessible to all players and clubs around the world by establishing that the procedures related to employment issues are free of costs.

The length of the procedure is relatively short considering the number of complaints lodged every year by thousands of stakeholders from any corner of the world.

Works are carried out on the basis of a written procedure with the judges taking a decision on the basis of the facts and evidence produced by the parties. Oral hearings are very rare but the parties who are not satisfied with the outcome of a procedure may go and appeal before the CAS, officially recognized by FIFA in its statute.

In order to make the system even more effective FIFA has also put in place judicial bodies that are capable of imposing a wide range of sanctions in case of breach of the FIFA regulations.

The scope of action of such bodies - the FIFA Disciplinary Committee, the FIFA Appeal Committee and the FIFA Ethics Committee - is very broad and - more important - tailored to a number of different situations in order to guarantee a correct and uniform application of the FIFA regulations by all football stakeholders across the world.

In this perspective, it is also significant that for some kind of infringements (doping or match-fixing) sanctions taken at national level by a sports association may be extended by FIFA to all its associations.

Thanks to the measures adopted and to the well-established case law of the DRC and the judicial bodies, FIFA has certainly gained in terms of credibility and acceptance.

If FIFA represents the pioneer in the establishment of an efficient internal dispute resolution mechanism applicable at worldwide level, **FIFA** can certainly be considered a reference for the other international sports associations for being able to develop an efficient dispute resolution system.

In fact such a system is tailored to the needs of the peculiar types of disputes present in international basketball through a clear distinction of disputes in four categories.

For *transfer matters* the disputing parties have the possibility to submit a complaint directly with FIBA which renders a decision through its Secretary General within only seven days from when the dispute arises unless circumstances dictate otherwise. The decision can be challenged before FIBA Appeals' Panel and then in a sort of third instance the parties can even go before CAS.

In general, very short deadlines characterize the proceedings allowing for a decision in the first and second instance in a matter of a couple of weeks as in the case of *nationality disputes*. The consultation of legal experts is offered in cases that involve the interpretation of complicated legal provisions and principles.

The system also proves to be flexible in cases of *disciplinary* disputes. In fact FIBA provides the option to conduct a hearing either in person, by telephone or by video conference in conjunction with the written submission. Moreover the members of the relevant arbitration panel are put in the best conditions to work because they can rely, for doping offences, on the expertise of a medical expert and, in general, on the technical support of a legal counsel who helps in guaranteeing the quality of the decisions rendered.

For *technical disputes* at the occasion of international competitions, FIBA operates its on-site hearing bodies and refers to ad-hoc proceedings in order to guarantee fairness and a rapid solution of the disputes.

Notwithstanding the above the most important and innovative FIBA dispute resolution mechanism is the *Basketball Arbitration Tribunal* (BAT) which aims at resolving financial disputes.

It has its seat in Geneva (Switzerland) and it has been recognized as an independent tribunal by the Swiss Federal Tribunal.

It is self-financed and the BAT Secretariat costs as well as the arbitrators' fees are covered by the handling fee and by the advances paid by the parties to the dispute.

Its jurisdiction is limited to the financial disputes of the parties.

It is important to stress that BAT is "not imposed" on clubs and athletes by way of registration to their national sports associations but they are rather free to decide in writing - usually through a specific clause in the contract - whether to submit a dispute to BAT or not.

Interesting to note that in order to facilitate access to the BAT, a template request for arbitration is available on the FIBA website and can be submitted electronically.

Disputes are decided by the appointment of a single arbitrator which cuts out the delays often caused by the nomination and challenge process of a three - member panel with party-appointed arbitrators. Proceedings are computer-aided (i.e. submissions and procedural orders are delivered by email) and based only on written submissions unless the Arbitrator decides that further submission or an oral hearing are needed.

Finally, unless otherwise stipulated in the arbitration agreement between the parties, the proceedings are conducted under *ex aequo et bono* principles, i.e. applying general considerations of justice and fairness without reference to any particular national or international law. In any case the parties have the possibility to go on appeal before CAS or the Swiss Federal Tribunal.

Simplified procedures, clear categorization of disputes, tailor made solutions, and short deadlines have made the FIBA dispute resolution mechanism efficient so that clubs and athletes are able to resolve disputes fairly, quickly and cost-effectively.

Following the example of the other International sports Associations, in particular FIBA, the **FIVB** (Fédération International de Volleyball) underwent a deep reform of its legal system recently.

In fact, it adopted a hybrid system whereby the FIVB undertakes to preserve, as much as possible, the integrity of the sport by managing its dispute resolution system through the new internal judicial bodies, but ultimately give deference to CAS for issues that cannot be resolved within the volleyball family.

It completely restructured its dispute resolution system with the aim to embrace the jurisdiction of the Court of Arbitration for Sport.

By doing so it removed any reference to the International Volleyball Tribunal, a judicial body internal to the federation which did not fulfill the requirements of independence and impartiality under Swiss law.

At the same time, the FIVB set up four FIVB judicial bodies: the Disciplinary Panel, the Appeals Panel, the Ethics Panel and the FIVB Tribunal. All of them adhere to the general legal principles of natural justice: right against bias, a right to a fair hearing and transparency.

Moreover in line with the same policy adopted by FIBA, the FIVB made a clear-cut classification of disputes in order to achieve more efficiency.

As a consequence, the reform fostered the specialisation within the different judicial bodies to deal with the unique nature of each category of dispute.

The first category of disputes are the so-called *horizontal disputes* between the FIVB and third parties and they have a commercial nature. In the vast majority of contracts the FIVB defers any possible commercial dispute directly to CAS, which will decide under the rules of the Ordinary Arbitration Division as the first and final instance of dispute resolution. The possibility to refer this type of matter to CAS has been given in the light of the expertise in commercial issues acquired by some CAS arbitrators.

The second category of disputes are the so-called *vertical disputes*, i.e. disputes arising within the pyramidal structure of FIVB, between persons belonging to different parts of the sports hierarchy e.g. between FIVB and an athlete.

For this kind of dispute, FIVB has adopted a three-tier process for vertical disputes whereby the FIVB will have the authority to exercise its disciplinary or administrative powers over members of the FIVB family through specialised judicial bodies. Such decisions may be challenged before an internal appeal body and, ultimately, CAS will act as the independent, external arbitral body deciding as the court of final instance.

Depending on the issues, disputes of this nature will further be categorised as (a) ethical, (b) disciplinary, including doping, or (c) administrative disputes.

In light of the specific nature of each category the FIVB has subcategorised the disciplinary offences into (i) simple, (ii) major and (iii) institutional offences depending on the seriousness and type of the offence and the person/entity that committed them.

The procedure becomes heavier or much more complex on the basis of the offence at stake.

For institutional offences, breach of the FIVB constitution by a National Federation or a confederation, the FIVB Congress and the Board of Administration are the competent bodies to impose sanctions.

In general, for all decisions other than those relating to the field of play matters, doping, or decisions issued by Congress, there is a general right of appeal to the FIVB Appeal Panel.

Finally only after the parties have exhausted all internal remedies they can go on appeal before CAS which shall have exclusive jurisdiction to definitely settle the dispute in accordance with the CAS Code.

The last category is third-party disputes of a financial nature between a player and a club over their rights and obligations under an employment contract, the FIVB has established an even more innovative internal mechanism. In fact, the FIVB established itself as having default jurisdiction in first instance. In certain circumstances the FIVB extends the jurisdiction to a particular Confederation, but only if both parties come from that confederation; otherwise, the FIVB will be the competent body to administer and decide the dispute.

FIVB decides as a quasi-judicial body and filters cases referring the most complex to the FIVB Tribunal. This is the appeal body which provides a neutral instance of dispute resolution and allowing an appeal to and a full *de novo* hearing before CAS if any of the parties so wishes.

The above analysis shows that FIVB certainly adopted a complex system but with a clear structure. Although very recently these are all conditions to prove that it has gained not only in terms of independence and transparency but also in terms of efficiency.

Like all of the other sports federations the **FIA** (Fédération Internationale de l'Automobile) has modelled its legal system on the concept of consent according to which all parties wishing to be its members accept to be bound by its regulations.

This means that they have to abide by the decisions taken by its judicial bodies composed of legal experts but also officials who master the complex technical parameters of the motor industry.

The structure of the FIA judicial system is quite special because of the nature of the motor competitions.

Essential is the role of the stewards at track race level who act as judges of first instance, and depending on the nature of the competitions, their decisions may be appealed before the National Court of Appeals or the International Court of Appeal.

The International Tribunal and the International Court of Appeal constitute the FIA courts and so far have produced a well-established jurisprudence to guide those who operate in the sports motor world.

All procedures are overseen by the FIA General Secretariat and all decisions must be implemented by the FIA members themselves.

FIA explicitly recognize the possibility of the interested party to pursue any right of action which it may have before any court or tribunal. Nevertheless such a party must have first exhausted all mechanisms of dispute resolution set out in the FIA statutes and regulations before submitting their case before the relevant French civil courts since the FIA has its legal seat in Paris.

In that regard, it is interesting to know that with the exception of matters related to doping, the FIA do not foresee or contain provisions which grant their members the right to challenge a decision at the Court of Arbitration for Sport.

In line with the other sports international associations, the **IRB** (International Rugby Board) has developed a modern judicial system for several reasons.

First of all, it is characterised by the independence, neutrality and expertise of its members.

Then, all judicial investigations, assessment and appointments arise from either a matter initiated by the IRB or from a complaint/request from a union or association to the IRB in relation to another union or association.

In any case, the IRB respects the autonomy of national member unions and, therefore, adopts and maintains a supervisory role over domestic actions.

The peculiarities of the judicial system within the IRB emerge with regard to the on-field disciplinary regime.

In fact the latter is a hybrid regime which incorporates fundamental features of the civil law systems, such as the inquisitorial system of law, together with rules of evidence which are common law based.

As such the system is one which is sport-specific, incorporating established thresholds, standards and a Rugby-specific sanctioning regime which has been devised by the Game.

Because of this particular nature, a system of sport discipline administered by personnel from different jurisdictions, a degree of inconsistency in decision-making may exist primarily of the relevant laws and regulations.

For eligibility matters, the parties may refer to the Regulation Committee in first instance and to the IRB Council on appeal.

The Union is responsible for ensuring compliance by its members with the penalties for breach being severe and deliberately so. In fact it is a strict liability offence construed in accordance with the principle of strict liability under English Law which is the governing law for the IRB regulations and Laws of the Game. It is therefore not necessary that fault or intent on the part of a union be demonstrated in order to establish a breach of the relevant regulations. Conversely, a lack of fault or intent is not a defence to a breach of the regulation and unions are deemed to be responsible and accountable for the conduct of their players under their jurisdictions.

In the international sports scenario, the **EHF** (European Handball Federation) is a relatively new sports association which has nevertheless recently shaped and improved its legal system to adapt to the needs and particularity of the sport of handball.

In the beginning such a system was composed of only one arbitration commission and some administrative bodies, then the EHF Court of Handball and the EHF Court of Appeal were created. They are composed of people having different backgrounds in order to better understand and decide on issues of a different nature.

Lately the EHF created and recognised the EHF Court of Arbitration whose proceedings are cost-effective - the ECA fees cannot exceed 1500 Euros - and quick (max 3 months). It is interesting to note that the ECA's legal seat is in Vienna (Austria) and therefore it must comply with the Austrian Code of Civil Procedures. The interested parties may refer to the ECA upon exhaustion of all legal remedies available within the EHF for disputes and matters within the competence of the EHF administrative and legal bodies. The Court can also be addressed for national cases, upon exhaustion of internal legal remedies of the national federations.

ECA's award can be challenged before the relevant Austrian court, or, in case of an arbitration agreement among the parties, before CAS.

Finally, it is important to stress that the legitimacy of EHF legal system and the EHF Court of Arbitration, was recognised by the Vienna Higher Civil Court.

III. Summary overview of national systems

The authors have explained in an exhaustive and effective way how the sports justice system operates in their country. This overview of the national sports legal realities aims to underline the huge impact that the (sports) culture and the legal framework of each country have on their own sports legal systems in general and, eventually, on their sports judicial bodies. Moreover, these summaries provide a basis for the conclusions that follow.

In **Argentina**, football is the most developed of sports, while most other sports are less developed and fall under the category of amateur sports. Professional sports are subject to ordinary judicial review. A Sports Discipline Court and an Appeals Court deal with the football disputes and case law, which result from the football federation and competition matters that affect the Asociacion del Futbol Argentino (AFA). There are also federal laws that are mandatory and apply to sports. Amateur sports are covered under private governance, yet subject to government control. Sports federations address issues based on the type of sport involved. Special courts that address certain types of sports related issues, and apply ordinary law. Finally, private law governs the dispute settlement procedures of the national sports federations and are treated as non-profit organizations.

In **Belgium**, Sports associations have their internal judicial bodies which take their decisions on the basis of the relevant sports regulations but always within the framework of the Belgian ordinary legal system. Thus their decisions are subject to scrutiny of ordinary courts. However, these courts may deal only with the violations of public order, other mandatory legislation or fundamental (procedural) rights: right to a fair trial, right to appeal, right to privacy, freedom to work and anti-discrimination laws. Civil courts cannot act as judges of second instance and the interested sports parties can submit a matter to them only when all other remedies available within the relevant sports association have been exhausted. There are no ordinary courts that deal specifically with sports cases. However litigation in criminal courts can interfere with and/or run in parallel with, sports justice. Examples in this respect are allegations of match-fixing, assault and battery, money laundering and human trafficking. When dealing with the relationship between ordinary justice and sports justice, it is equally important to note that mandatory law provisions give exclusive jurisdiction on ordinary courts for employment related disputes unless the parties expressly, after the conflict has arisen, and - above all - freely decide to opt for arbitration. Finally with regard to doping, though the Belgian Council of State acknowledged that such offences should be judged by sports tribunals according to the relevant sports regulations, the ordinary judge was also quite critical about the Court of Arbitration for Sport in Lausanne. In particular, in the *Malisse/Wickmayer* case, it questioned the fact that “*the appeal against a decision (concerning doping) of a non-purely disciplinary court is entrusted to a private-law entity (CAS), where athletes are not judged in their own language, where third parties (WADA) intervene for the first time in degree of appeal in the view*

of claiming higher sanctions, and the decisions of which are in no way whatsoever submitted to the control of a Belgian judge”.

Brazilian general law governs the area of sports, allowing ordinary courts to decide most of the issues arising from sports disputes. The law establishes 12 fundamental principles that apply to sports: sovereignty, autonomy, democratization, freedom, social right, differentiation, national identify, education, quality, decentralization, security and efficiency. Several principles are also recognized by the Brazilian Code of Sports Justice. Sports justice is an administrative justice, not connected to the judiciary system, which is governed under private law and specialized in sports matters. Only disciplinary offenses and competition regulation matters are within the jurisdiction of sports bodies. Ordinary courts or courts of arbitration are able to handle matters such as image rights, branding and licensing, and various agreements such as transfers, sponsorship, football club partnerships, etc. The competence of sports justice is determined by the federal constitution and, therefore, all recourses must first be exhausted under sports justice before ordinary justice can get involved with any sporting disciplinary dispute. In an effort to improve the sports facilities, ensure safety and end dangerous rivalry between fans, something important under Brazilian law is the “Fan’s Statute” which protects and defends the rights of supporters of football by establishing several standards for safety, sports facilities, transportation to matches, ticketing, match-fixing and fight against violence. Those inciting or committing violence may be detained and could be sentenced for a term up to two years or banned from football matches for 3 years. Under sports justice, disciplinary sanctions cannot be applied to athletes who are under the age of 14. There is also a clear differentiation in the legislation between professional athletes and non-professional athletes, whereas fines cannot be imposed on non-professional athletes.

Sport in **Croatia** is considered to be a reserved area separate from the ordinary law and judiciary systems. There is a Court of Arbitration for sport and sports associations have their internal sports bodies whose decisions are binding on all members. The Croatian constitution does not contain any specific provision on sport. However it confers on the State the task of stimulating, helping and taking care about the physical culture and sport, and that sport is within the responsibilities of the local (municipalities, cities) administration. There is a Sports Act that governs sports activity for professional sportspersons whose rights are granted – although in general terms - under the relevant civil law provisions but not the labour law ones. The players still have the status of self-employed and they cannot rely on the labour law and social law standards and benefits. The only exceptions are players with citizenship different than Croatian, because they could have a labour law contract, for instance in football. Finally, although the criminal law in Croatia does not recognize match-fixing as an offense, doping and match-fixing are identified as disciplinary misdemeanors under the relevant sports regulations.

In the **Czech Republic** sports associations enjoy a large degree of

autonomy and they have their own regulations. Sports associations or “civic association” – as they are referred to under the Association of Citizens Act – are established as legal entities adhering to applicable laws. Nevertheless the relationship between ordinary justice and sports is quite problematic. In fact fundamental principles of law as well as the right to a fair trial and all related procedural guarantees have not been fully implemented by sports organizations and some regulations/decisions have been challenged by civil courts. There is no specific sports act referring to sports justice, except for the Promotion of Sport Act – primarily providing a legal definition of sport. The main reference source for addressing legal issues that arise in sport is still “general” private law, i.e. Civil Code and Commercial Code, as well as the public regulation on finances and insurance, e.g. Income Tax Act. The application of labor law in the sport field has been problematic because sportsmen are self-employed and conclude civil contracts. The Highest Administrative Court, in general, does not eliminate the possible application of labor contracts in the area of sport but it states that the relationship between a player and a club is predominantly of commercial character. Thus, labor law regulation for sportsman remains an essential task the Parliament and sports associations will have to cope with.

Denmark has an autonomous sports justice system. However, over time, it has taken on many characteristics of the ordinary justice system – in structure and application of legal principles. Sports associations are autonomous and thus have the ability to enact rules and apply disciplinary sanctions. Initially, professional football players and clubs engage legal aspects that are regulated under a standard contract established by the Danish Football Association (DBU), and requires going forward that all contracts that are drawn up between players and clubs must be approved by the DBU. The collective agreement identifies fundamental principles that must be accomplished between the Association of Division Clubs (DF) and the Association of Players (SPF). This system has now evolved to requiring the parties to identify at the start of the contract whether or not they want to be subject to the collective agreement. Having a collective agreement makes the contractual system within Danish football resemble that of a labour market and thus seems to cross over into the realm of ordinary justice. Other issues that impact sports around dispute resolution, technical rules and issues, disciplinary and economic disputes are addressed by sports justice in concert with ordinary justice.

England operates within a multi-faceted and rather complex system of sports justice and ordinary justice. The general approach is for limited state involvement. Although there is no direct regulation of sport, there is still significant statutory influence asserted by the state on sports organizations. There are also certain expectations that have been expressed through various court holdings that impact on how sports justice is achieved. These standards as recognized under ordinary justice establish expectations to which sports bodies must comply. The basis of sports justice in England is primarily in contracts law. Governance is the responsibility of sports organizations and is not subject to ordinary justice, public

law, judicial review. This might suggest that there is no right of appeal or review of the decisions of sports governing bodies. However, there is a type of private law supervision that is imposed, having the expectations that in many ways the sport governing bodies must provide a pseudo judicial review. In certain types of actions, such as tort, there is an expected duty of care owed by key stakeholders in sport. The use of disciplinary commissions and sports arbitration bodies is an important part of the sports justice system in England.

France chose not to develop a separate justice system specifically for sport, but instead to use the ordinary justice system and to recognize specificities of sports. Therefore, sports justice falls under the ordinary law system and, as a consequence, sport is subject to public justice. However, there are also private justice aspects. In the context of sport, as well as in other organizations in France, the goal is to resolve matters internally whenever possible, preferably in a first step, the second step is, if necessary, devoted to ordinary justice of State. Mandatory preliminary conciliation procedures are foreseen while arbitration in sport related disputes is favoured as a final means of resolving a dispute.

The federal constitution provides the basis for sports justice in **Germany**. Perhaps because of its constitutional basis there is a clear respect for basic rights. Sports federations offer an alternative to ordinary justice means for resolving sports disputes. Sports disputes in Germany can be handled by a procedure of arbitration in sports association courts, provided by a significant number of major sports federations. This system of arbitration is rather broad and could benefit from consolidation amongst the various sports federations, developing a single arbitration court, which has been promoted by the German Olympic Sports Confederation (DOSB). Sports disputes that arise in the context of employment law issues, may only be addressed under ordinary justice in the labour courts and may not be arbitrated.

Italy offers one of the most sophisticated and progressive systems of sports justice. As a general rule, in the name of autonomy of sports associations, those who are registered with them accept the decisions taken by sports courts and bodies as binding and final. Nevertheless in order to safeguard individual rights and interests the right of action before ordinary justice has been guaranteed. In particular, ordinary civil courts may have jurisdiction on financial disputes among clubs, players and/or other persons or entities registered with the Federation; on the contrary, technical or disciplinary disputes remain with the sports bodies and courts; for all other disputes, once the internal remedies of a Federation, have been exhausted, the Administrative Regional Tribunal (ordinary judge) has exclusive jurisdiction. The independence of the sports bodies as well as short time limits guarantee a fair and timely resolution of the relevant disputes. Peculiar to the Italian system is the very good co-operation between ordinary and sports judicial bodies in dealing with cases having both a criminal and sport impact, such as match-fixing. In fact, with due respect to data protection and confidentiality of criminal investigations, sports disciplinary bodies may ask for a copy of the evidence

collected during the on-going – or closed – investigations led by the public prosecutor for the benefit of sports disciplinary proceedings. When the examination of such documents gives start to sports proceedings, the two proceedings continue their own path on parallel tracks with no influence of the one on the other.

Japan's Basic Act on Sports (BAS) was enacted in Japan in 2011, which for the first time recognized a sports right. Sports justice is primarily addressed within the sports organizations. Thanks to the increased awareness around issues of governance, the concepts around sports justice have been incorporated into the BAS. Because of the past discretion and autonomy that many sports organizations enjoyed, there remains the tendency to try and engage sports justice outside of the requirements that now exist under the BAS. There is much greater scrutiny now, especially considering the attention placed on sports organizations due to the corporal punishment scandals, so there is much more of a mandate for sports organizations to engage in good governance practices. Sports justice continues to develop in Japan as the principles of the BAS continue to take root. Although there is a respect for the autonomy of sports organizations, there is also a need to maintain a degree of oversight to ensure sports organizations are engaging in the types of practices envisioned by the BAS, until these types of behaviors are second nature to sports organizations in Japan.

Sports justice in **Kenya** is new and developing. Sports justice primarily addresses the available dispute resolution mechanisms available for sport. There are provisions under Kenyan law that allows ordinary courts the ability to address sports disputes, however this is not a common practice. Although the sports justice system in Kenya is still growing, and slowly confidence is building in the sports justice system where people are starting to utilize sports justice, when applicable, instead of continuing to rely on ordinary courts. A large part of establishing the sports justice system in Kenya is being able to ensure that the officials who are running the federations are also adhering to the system. These challenges are most apparent in the electoral process engaged by the sports federations and the ability to maintain some oversight on how elected officials are actually running the federations. Sports justice often removes some of the autonomy that many sports federations enjoy. Alongside of this are issues of transparency, with the expectation that issues around electoral disputes will continue to be brought before the ordinary courts. It has been suggested that perhaps the international federations can provide a degree of necessary oversight. Likewise, there is a risk of sanction if it is found that the federations have suffered a loss of autonomy and/or independence.

There is no specific sports law provision in **The Netherlands**. Ordinary justice provides the rule of law in the area of sports. Because there is no specific law governing sport, sports federations enjoy a large degree of autonomy. Sports justice is primarily responsible for disciplinary disputes; except where there are criminal law aspects involved. Public prosecution is literally required to stop when a satisfactory resolution is achieved for the respective parties and in satisfaction of the public interest. There are benefits to sports justice such as faster resolution of

issues, lower cost, and greater options around sanctions. Arbitration in football is mandatory, however there is no exclusivity of jurisdiction by ordinary courts in other sports. The issue of lack of specific state law is not an obstacle to the development of sports law in The Netherlands. Ordinary justice simply looks to ordinary law and applies it in the context of sport. There have only been very few attempts to challenge the sports judicial approach. Because of special issues around match-fixing and other types of sports corruption, there may be a need in future for specific legislation, however, at present general legislation has proven to be sufficient.

Sports law in **Portugal** is heavily state directed. There is a specific regulation in Portugal that rules sports justice - Basic Law of Physical Activity and Sport. The law primarily deals with sports justice issues that arise within public law (disputes), as opposed to private law issues, such as contracts and employment/labour issues. There is a recognition of the importance of the distinction between *strictly sport matters* as opposed to those things that fall under ordinary justice. The sports federations deal with disciplinary matters. In March 2013 a bill was approved by the Portuguese Parliament to establish a Court of Arbitration for Sport. Mandatory arbitration in issues of a public nature has been challenged on constitutional basis. Because of these challenges, in April 2013 the Portuguese Constitutional Court decided for a violation of the right of access to court, and a violation of effective judicial protection. However, in September 2013, a new act was approved and it's again under the consideration of the Portuguese Constitutional Court.

The sector of sports law in **Qatar** has undergone an enormous development during the last decade and, in particular, the last years. However, such progress still is located among a steady process which will lead to further changes and amendments in the field of sports law as well as the system of sports justice within a considerably short period of time. On the grounds of the above as well as in the light of freedom of association in Qatar, sports federations are free to create and function independent (arbitrational) tribunals within the framework of law. However, arbitrational awards rendered by such federations may be appealed at the Court of Appeal with regard to the facts and/or the law as per Article 205 CC Procedure Law if such right is not expressly waived by the parties concerned. Whereas in this context so far no arbitration tribunal in the aforesaid sense exists in Qatar, the establishment of such is likely to appear soon. In this respect, the QFA intends to set up an arbitration tribunal completely independent of QFA which shall be, in particular, competent to take decisions concerning disputes regarding contractual matters and/or regulatory matters. Such tribunal will also be in conformity with the requirements of FIFA concerning the establishment of a dispute resolution chamber at national level. In addition, such independent arbitrational tribunal may also serve as final and binding appeal instance with regards to decisions rendered by the judicial bodies of QFA, in particular, with regards to disciplinary disputes. The establishment of such a tribunal is also likely to form valuable new sources of sports law in Qatar, in particular, regarding the fact that the awards to be rendered

will be pinned by highly specialised arbitrators. In the absence of such arbitration tribunal, in any case, during the last years the method of mediation by QFA has turned out to be a successful tool of dispute resolution in Qatari football. Furthermore, it is expected that state legislation will be designed increasingly concerning special needs and requirements for the sport environment in the State of Qatar. However, and albeit the considerable amount of work which still needs to be invested with regards to the field of sports law in the State of Qatar and the Sports Justice System in particular, it can be expected that in the near future Qatar may establish a sports judicial system that is the example for others and sets the bar at a high level.

Facing minimal state intervention, the sport justice in **Romania** operates by means of national federations' regulations. Based on the self-governing prerogative exercised by observing the norms of domestic law and of the statutes and regulations of international federations, the national federations have created a law system adapted to the specificity of sport, a sport law with branch attributions influenced by criminal law norms, as a consequence of numerous institutions on the matter. This system imposes that litigation incurred in connection with sport activity be resolved exclusively by the concerned federation's juridical commission while the right to appeal to the ordinary justice is subject to the existence of a validly concluded contract between the parties stating this possibility. As a consequence of this, the disciplinary commissions and sports arbitration bodies are the main sports justice instances in Romania.

In recent years **Russia** has been progressively integrating into the international sports law system, taking measures to bring sports law in-line with international standards. Since the collapse of the Soviet Union the regulation of sport has evolved considerably. In the Soviet period it was highly ideological and served to a large extent to reinforce the prestige of the Soviet State in the international arena. Private property and other institutions typical of the market economy such as advertising, sponsorship, image rights and mass media rights did not exist, and as a result they were not regulated by legislation. However, the privatization of sport, the amounts of capital involved in sport, and the increasing number of disputes, often going beyond the national borders, have given rise to the need for appropriate sports law and dispute resolution mechanisms. There is no single legislative act in Russia consolidating the legal norms regulating sport. So sports law is a complex interdisciplinary phenomenon consisting of regulation by administrative, civil, tax, labour, and criminal law. Some norms are laid down in the Russian Constitution, federal laws, acts issued by bodies of the Russian Federation (RF) and the provisions adopted by sport federations and associations. As for specific legislation, one of the main legislative sources in the field of sport is the Federal Law of the RF of 4 December 2007, 329-FS "On Sport in the Russian Federation" repealing the law of 29 April 1999, 80-FS On Physical Culture and Sport in the Russian Federation. The regulation of sport in Russia is based on a mixed model with a significant role played by the state, together with self-regulation by professional sports bodies

(federations). Employment issues are regulated by special norms of the Labour Code (2001) while civil disputes are dealt with by relatively recently created special arbitration courts.

In the **Slovak Republic**, sports justice is administered either via regular courts, autonomous sporting bodies, or a sole arbitration court specialized in sports – the Arbitration Court of the Slovak Football Association. The Act on sports as well as the Arbitration Act place certain restrictions on the competence of relevant bodies to decide in sporting matters – especially with respect to reserving decisions in property matters to arbitration courts and regular courts rather than to autonomous bodies. Moreover, property matters relating to immovable property and labour matters are completely reserved solely to regular courts. Still, even in matters that are in the competence of autonomous bodies and arbitration courts, the principles of fair trial are not reflected properly. Current recodification trends in the Slovak Republic, stretching also to the area of sports legislation, should thus be considered a good opportunity to reconsider both the competence of sports justice bodies as well as the fair trial principles reflected in the act of parliament on sports.

Spain has both a well-established sports law and Professional Sportsmen Law, in addition to other laws around sports rights in TV. In Spain, sports are treated under public law which supports the administrative and disciplinary system control. Perhaps a foundation of sport in Spain can be found in the identification of the importance of sport included in the constitution. Adding to its complexity is the fact that there are 17 independent autonomous regions in Spain, which also have input, and where local law controls regional law regarding sporting activities. The Spanish sports justice system incorporates the expectations of these various regions. The approach to sports justice in Spain is administrative and public law. Ordinary courts control the decisions of national federations, which in some ways impact on the speed with which sports justice is administered. There is also the suggestion that by having the involvement of ordinary courts, there is a layer of protection that is afforded individual rights within sports justice; that otherwise would not exist if it were left solely to a *judicial sporting body*. With the requirements that are now being forced under Spain anti-doping law by WADA-AMA, it is becoming even more apparent that perhaps Spain must adopt a system that takes into greater consideration the specificity of sport to allow for quicker identification of sporting issues and more responsive reaction to the administration of justice on these matters. The development of the national Court of Arbitration may help to begin shifting the way Spain addresses sports justice, by moving the scale in the direction of the recognition of more of a sporting exception and stronger sports justice, as opposed to an administrative one.

Switzerland has a privileged position in the sports world. It has its own national associations but it hosts the legal seat of international sports federations, the CAS and the WADA. Therefore Swiss law and especially Swiss association law applies to them and to their relationship with their members. Swiss law recognises the principle of autonomy of sports associations but still within the limits of the

judicial ordinary review. In fact each member of an association has a compulsory right to appeal against decisions of the association before an independent court or an independent arbitration body. Swiss mandatory law includes fundamental principles such as those of equal treatment, legality and proportionality and, of course, public policy and *bona mores*. With particular regard to disciplinary cases, some other fundamental principles such as the principle *nulla poena sine lege* (no sanction without a legal basis) and *ne bis in idem* (nobody can be sanctioned twice for the same action). The system of sports justice in Switzerland basically provides a legal protection for all parties involved. Federations have their internal bodies that are able to settle most disputes. If they are not able to settle the disputes there is always the possibility to review the decisions of federations by an independent tribunal. Depending on the articles of the relevant sports association this can be either an ordinary court or an independent arbitral tribunal such as CAS. Finally the decisions taken by independent tribunals can thereafter be appealed at the Swiss Federal Supreme Court even if only for limited cases.

In **Turkey**, football is the only sport that is qualified as a professional sport, all other sports fall under the category of amateur sports. Much of the development of sports justice in Turkey has been around football as it is the sole professional sport. Under the constitution of Turkey, sport falls under the responsibility of the government. The constitution also states that the decisions regarding administration of sports by sports federations is subject to mandatory arbitration. However, because of the autonomous nature of FIFA established by law, the Turkish Football Federation enjoys an additional degree of autonomy of its structure. Sports federations have legal personalities and therefore are subject to civil law. Disputes between federations and clubs, including board decisions and disciplinary committee, are the jurisdiction of the Appeals Committee. The Professional Football Disciplinary Committee has presided over serious issues of match-fixing. The decisions by this body regarding matters of match-fixing have been appealed to the Supreme Court of Appeals. Under the Labour Code, interestingly, athletes are excluded. Athlete employment contracts are addressed under the Code of Obligations. Most of the federations establish a uniform contract that is entered into between players and clubs. There is no specialized sports justice system in Turkey, but there is recognition that this deficit is harmful to the athletes who are also without some basic protections, such as a labour union.

Sports Law is considered a very new area of law in the **United Arab Emirates (UAE)**. Accordingly, Sports Justice is considered a young jurisdiction. Despite this fact, professional sports in the UAE have grown considerably within the last decade, moving further towards the international standard of professionalism. The general approach of the Sports Justice in the UAE includes very limited state involvement. The UAE Football Association (UAEFA) is the best example to describe Sports Justice in the UAE: it has a unique structure without any involvement from the state. In order to comply with the FIFA rules, the UAEFA has created an independent sport judicial system to have jurisdiction over any football related

disputes. Significant to the development of sports justice in the UAE, a body of sports arbitration center will be established very soon. Such a sports body will greatly strengthen the current sports judicial structure and therefore we can expect to see an increased body of literature being generated in the near future. In view of these developments, the law relating to sport in the UAE will no doubt continue to grow and improve as the UAE continues to attract international sporting competitions in the future.

In the **United States** the Olympic movement as well as the professional sports leagues establish the concept of sports justice. There are procedural mechanisms that are established by Congress to ensure that athletes maintain a fair right to participate in sports. These rights are not applicable to professional sports leagues and therefore the sports organizations have created dispute resolution mechanisms through collective bargaining to address disputes that arise within United States sports leagues. Professional sports leagues in the United States are considered private associations separate from the national governing bodies. Players' ability to negotiate directly with the league through collective bargaining helps to ensure the protection of certain rights specifically around dispute resolution and disciplinary measures; which are reasonably consistent amongst the leagues.

IV. Country comparison of key ordinary justice versus sports justice distinctions

Country	Key sports regulations and legislation	Separate sports Justice Body (Y/N)	Areas of Sports Justice	Areas of Ordinary Justice	Areas dealt by both OJ and SPJ	National Arbitration Body (like CAS) (Y/N)
Argentina	Law No. 20744 on Employment Law, Civil Code, Law No. 20655 on sports regulation, Law No. 24819 on fair play in sports and drug-free sport, Law No. 24192 on prevention and punishment of violence in sporting events.	N	N/A	Employment/ Labour issues, sports bodies		N
Belgium	Constitution and Freedom of Association Act	N	N/A	Employment/ Labour issues	match-fixing, assault and battery, money laundering and human trafficking	Y

Country	Key sports regulations and legislation	Separate sports Justice Body (Y/N)	Areas of Sports Justice	Areas of Ordinary Justice	Areas dealt by both OJ and SPJ	National Arbitration Body (like CAS) (Y/N)
Brazil	Law n. 9.615/1998 (Sports General Law), Law n. 10.671 (Supporters' Statute), Brazilian Code of Sports Justice	Y	Each type of sport has its own sports justice structure, dealing with competition, disciplinary and doping	Commercial, civil, employment Supporters' protection, disciplinary, criminal offenses	disciplinary	N
Croatia	Sports Act, national sports federations regulations	N	Competitions regulations, players' status issues, players-club relationship, anti-doping, disciplinary regulations.	Competence of ordinary courts for claims brought against arbitrary decisions		Y
Czech Republic	Act No. 83/1990 Coll.,	N (sports associations have their own "justice bodies" but there is no body for all sports at national level)	N/A	Doping / Match-Fixing		N (attempt to establish one in 2013)
Denmark	Act No. 232 of 21 April 1999 on Prohibition of Certain Doping Substances (latest revision Act No. 379 17 April 2013). Act No 1438 22 December 2004 on Promotion of Doping-Free Sport and Executive Order No. 1270 17 December 2012 on Promotion of Doping-Free Sport (latest revision)	N	Lex Sportiva Issues	Employment/Labour Issues. Commercial and criminal offences.	OJ has competence to try decisions by simple association tribunals	N

Country	Key sports regulations and legislation	Separate sports Justice Body (Y/N)	Areas of Sports Justice	Areas of Ordinary Justice	Areas dealt by both OJ and SPJ	National Arbitration Body (like CAS) (Y/N)
England	The Safety of Sports Grounds Act 1975; Fire Safety and Safety of Places of Sport Act 1987; The Football Spectators Act 1989; Football Offences Act 1991; London Olympic Games and Paralympic Games Act 2006.	N (sports associations have their own “justice / disciplinary bodies” but there is no body for all sports at national level)	Doping, Selection / eligibility, Disciplinary, Financial.	Employment, Criminal, Tort, Contract, company, Administrative.	Managerial disputes, match fixing, violence, injuries, player contracts.	Sport Resolutions UK
France	Code du Sport	N		Employment/Labour issues	Doping and Disciplinary	Y
Germany	Federal Constitutional basis creation of sports federations	Y	Rules/Laws of the game (the exertion of the sport on the pitch/playing field etc.)	Employment/Labour issues	Embezzlement, match-fixing, insolvency (licensing), assault, fraud, doping, gambling, agency	Y
Italy	Law 1981/91 on Professional Sport Law 280/2003 on Sports Justice	Y	Disciplinary matters doping			N But Arbitration Court at NOC level
Japan	Basic Act on Sports (BAS)	Y	Doping, tournament qualification selection criteria, match-fixing (unless specific laws apply)	Appointment of officials in sports organisations	Employment/labour issues, corporal punishment	Y

Country	Key sports regulations and legislation	Separate sports Justice Body (Y/N)	Areas of Sports Justice	Areas of Ordinary Justice	Areas dealt by both OJ and SPJ	National Arbitration Body (like CAS) (Y/N)
Kenya	The Sports Act No. 25 of 2013 (provides for the establishment of a national sports disputes tribunal and the) The Statutes governing the various sports associations	N	Employment/ Labour/ Transfer issues / Disciplinary Doping	Electoral disputes Ethics and economic crimes Public order offences	Ethics and economic crimes	N (the national sports disputes tribunal is yet to be established)
The Netherlands	Sports federations such as the Royal Dutch Football Federation KNVB	N	N/A	Only in cases where sports regulations offer no possibility	Criminal cases that are at the same time disciplinary offences	Y ISR (Instituut voor Sportrechtpraak)
Portugal	Basic Act on Fishyical Activity and Sports	Y - sports federations organs	Disciplinary, organizational and strictly sport matters	All areas except <i>strictly sport matters</i>	All areas, except <i>strictly sport matters</i>	N
State of Qatar	Y	N	n/a	Employment related disputes.	Disciplinary, when the violations is a crime in accordance with the national law	N
Romania	<i>Law no 69/2000 of physical training and sport</i>	Y - sports internal judicial bodies	Disciplinary matters	Employment/La bour issues	<i>bribery, human trafficking, money laundering</i>	Y
Russia	Federal law on the RF of 4 December 2007, 329-FS on Sport in the Russian Federation, Russian Football Union regulations on the status and transfer of players (2011)	Y	Disciplinary matters	Employment / labour / administrative issues	Civil disputes	Y
Slovak Republic	Act on organization and promotion of sports No. 300/2008 Coll.	N	Sporting issues within the game and outside of the game	Employment/La bour issues	Some disciplinary offences	N

Country	Key sports regulations and legislation	Separate sports Justice Body (Y/N)	Areas of Sports Justice	Areas of Ordinary Justice	Areas dealt by both OJ and SPJ	National Arbitration Body (like CAS) (Y/N)
Spain	Law of Sports 10/1990. Royal Decree for Professional Sportsmen 1006/1985.	Superior Council of Sports has a Spanish Committee of Sporting Discipline (CEDD)		Employment/Labour Issues – Employment Tribunals Match fixing Money laundering – Criminal Courts		Not yet but will be soon brought by the State. Now only private Tribunals like the (TAF - Football) (TEAD - NOC)
Switzerland	Constitution and Federal Statute on Furthering of Sport and movement.	N	Yes (if arbitration clause)	Yes (everything that is not covered by any arbitration clause)	Yes in areas where the penal code is applicable or where you can appeal a decision of a sport justice body to the ordinary court.	Y (where arbitration clause exists)
Turkey	Constitution, Law No 3289 Law Regarding Sports General Directorate's Organisation and Duties, Law No 6222 Law Preventing Violence and Disorderliness in Sports, Law No 5894 Law Regarding the Establishment and Duties of Turkish Football Federation	N	Competitions regulations, players' status issues, players-club relationship, anti-doping, disciplinary regulations.	Criminal and civil procedures regarding contractual disputes	Match fixing	N (if both parties agree on arbitration Y for football contractual disputes, National Dispute Resolution Chamber of Turkish Football Federation)

Country	Key sports regulations and legislation	Separate sports Justice Body (Y/N)	Areas of Sports Justice	Areas of Ordinary Justice	Areas dealt by both OJ and SPJ	National Arbitration Body (like CAS) (Y/N)
United Arab Emirates	United Arab Emirates	Article 33 of the UAE Constitution provides the legal basis for the establishment of sports associations. Also, Federal Law No. 12 of 1972 relates to the organising of clubs and societies operating in the field of youth care in the UAE. The General Authority for Youth and Sport Welfare, established pursuant to Federal Law 25 of 1999, is the highest authority concerned with all youth care and sport affairs. Finally, the UAE Football Association has the most developed set of rules and regulations.	Y, there is a sports justice bodies under the structure of the UAE Football Association. Also, there is a draft law of national sports arbitration centre as it would be the highest sports justice body in the country.	The disciplinary issues and the direct pure sports dispute, such as a dispute between a player and his football club.	Indirect sports disputes, such as a broadcasting dispute or a sponsorship dispute.	match-fixing, assault and battery that is punishable by the Penal Code, money laundering.

Country	Key sports regulations and legislation	Separate sports Justice Body (Y/N)	Areas of Sports Justice	Areas of Ordinary Justice	Areas dealt by both OJ and SPJ	National Arbitration Body (like CAS) (Y/N)
United States	National Labor Relations Act, 29 U.S.C. § 151 <i>et seq.</i> (in particular, 29 U.S.C. § 158(d) – the obligation to bargain collectively). Ted Stevens Olympic and Amateur Sports Act, 36 U.S.C. § 220501 <i>et seq</i> Collective bargaining agreements in each of the professional sports leagues.	N	The Olympic movement sports and professional sports leagues have their own sports justice mechanisms, which address topics including, but not limited to: violations of the rules of the game, athlete eligibility, conduct of an athlete off the field or court of play, employment disputes and antidoping.	Certain labour and employment disputes; alleged violations of antitrust law	Certain employment disputes	N

V. Summary and conclusions

Sports justice, whether it is a separate and autonomous system or part of the ordinary legal order of a country, it does not stand alone.

In fact, although sports justice has been conceived to provide the smooth functioning of sports associations and to safeguard the specificity of sport, it cannot exclude the intervention of ordinary judges unless it proves to be fair and efficient for all stakeholders.

In general, sports associations enjoy a large degree of autonomy which is necessary to enable them to deal with the specificity of the sector. Their judicial bodies are responsible for ensuring that their members correctly apply sports regulations and issue disciplinary sanctions.

The Dilemma: sports justice v. ordinary justice

The role of sports associations in sports justice varies from one country to another. Nevertheless when the protection of individual rights is required, this necessitates the intervention of ordinary justice.

In fact, players are citizens and – if professionals - workers, therefore they have rights and obligations under both the ordinary and sports systems. The same is true for clubs, leagues and federations which are important actors in the sports field but also as business-like entities, operating as private law companies in a free market.

The relationship among them is governed by sports regulations for the sports profiles, but it is based on fundamental rights and general principles of law for the purely business aspects.

There are other factors that must be considered when attempting to reconcile the requirements of sports justice with those of ordinary justice.

In some cases, harmonization of certain international and national laws as well as sports regulations is inevitable. For instance, the rules governing anti-doping are now harmonized and coordinated by the sports associations through the recognition of the WADA Code and the CAS jurisdiction.

On the contrary, in other fields such as match-fixing, most states' legislations fall short of a proper handling of these phenomena in the sports systems since this area of law seems to straddle that line between sports justice and ordinary justice.

In general, ordinary justice deals with corruption acts while match-fixing only occurs in the context of sport and therefore, raises issues of sports justice that often involves action, disciplinary or otherwise, by sports federations. This type of teetering effect makes it difficult for many countries to address match-fixing (and similar issues) under either system. Therefore, the need for reforming national legal frameworks in order to clarify the handling of sports corruption and match-fixing cases is imperative.

Finally both sports organizations and governments should set up rules and effective measures to detect, deter and prevent match fixing and fraud in sport.

Best Practices

There are several effective models of sports justice. For sure the ones that achieve a consistent degree of effectiveness are those established by the six International Sports Associations examined in this book.

Their engaged reforms can be used as best practices to develop fair and credible global sports justice systems. In particular:

- *Developing sports justice systems that are flexible and adjusts to the needs of the specific disputes*

Many of the latest developments in international federations (FIFA, FIBA, FIPV, IRB, and Formula 1) set more flexible sports justice mechanisms by taking into account the peculiarities of each dispute.

- *Classifying disputes in a clear manner*

It is essential to clearly classify disputes according to their nature in order to enhance tailor made rules and sanctions (FIFA, FIBA, and IRB).

- *Clearly identifying those areas that are addressed by ordinary justice or sports justice, as well as those areas that may impact both*

This will improve co-ordination among the two systems and would eventually lead to better results in terms of, for instance, fight against doping and match-fixing. Possible areas of conflict among them, gaps as well as deficiencies should be identified and specific policies developed for how to appropriately handle them under sports justice or ordinary justice.

- *Extending CAS jurisdiction*

CAS could play an important role as a body of second instance to national sports bodies where currently there is none or limited opportunity for appeal.

- *Clarification of the role of international federations as bodies of appeal for national federations on sports justice matters.*

Perhaps better use of the international federation dispute process for the benefit of the stakeholders at the national level, with international federations providing a sort of review or appeals procedure. The FIBA offers a good model for this as it presents a more flexible system that fits the needs of a particular type of dispute. Further, the system is efficient in addressing matters and when necessary acts as an appeals body.

- *Don't reinvent the wheel. If there are international sports bodies with a judiciary function that can provide sports justice, there is no need to create new sports justice bodies.*

Since international sports bodies already allow use of their judiciary at the national level (ex. ECA), perhaps nations might take better advantage of these instead of trying to develop their own.

Future Trends

Scholars and sports operators might focus on those countries where sports justice is autonomously organized and administered through sports association bodies, keeping at bay and far away the ordinary justice rules and procedures.

They should define a clearer concept of the essential elements of what is

actually meant by sports justice.

Moreover it is time to begin identifying which areas are considered exclusive sports justice fields and which ones will admit the external intervention of the national ordinary justice bodies.

As the above chart shows, there is no overall consistency among countries in that regard.

However, we may outline some trends that are beginning to emerge.

It seems that contracts law is to be reserved to ordinary courts as this field raises substantial issues of civil and commercial law with mere material interests for all the stakeholders. These implications expand far and well beyond purely sport's matters. The same happens with national situations, where collective bargaining agreements for sport professionals apply to deal with economic aspects of the employment relationship between athletes and clubs. In many countries, this will still fall within the responsibility of the ordinary courts.

On the contrary, disciplinary matters are consistently dealt with by sports justices, although appeals in this field may be shared between sports and ordinary justice.

We have also noticed a very interesting development in the sports justice of some States, which having developed arbitration bodies at the national level which essentially replicate the CAS. They address sports specific issues as a means of providing swift, efficient additional redress either first instance or appeal from the internal review provided by the sports organization disciplinary process.

Final Thoughts

A first reading of this sports justice systems' review might generate in the swift reader the conviction that overall and nearly everywhere sport justice is well settled. In fact, the situation is not uniform, consistent, or monochromatic.

It is true that some systems of sports justice are much more advanced than others. It is also true that some countries have developed very complex systems that incorporate or even intertwine sports justice and ordinary justice. The very existence of such diverse models implemented in the reviewed countries conveys another message: sports justice systems are still a work in progress, which continues to develop and evolve both at international and national level.

For countries and legal systems that are still trying to determine the best way to acknowledge the specificity of sport and/or appropriately incorporate those aspects into the ordinary justice system, the process of sports justice finds itself in the middle of a stream. Indeed those countries continue to deploy efforts to find out the most effective legal rules and procedures to administer sports law disputes.

On the other hand, for those countries that have established solid sports justice systems, the issue is finding the best approach to deal with new matters in sports that do not sit neatly within either ordinary justice or sports justice. In those cases, the process for refining means of adequately protecting the rights of individuals that may impact sports is ever evolving.

In conclusion, this book promotes the circulation of the best practices of the international sports justice systems and transparency of information on their rules and procedures.

It captures various models of sports justice from around the world, by bringing into the open a somewhat unknown or often covert area of the national law systems. In fact, shedding light on the different systems provides an opportunity to identify the best practices and benefit from them.

In this way, they will extend their positive outcomes from that particular national justice system, to other national and international sports justice systems, contributing to their evolution.

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