

## LEX SPORTIVA AND THE FAIRNESS PRINCIPLE

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**Abstract:** *Should the fairness principle be confined to the playing field or should its reach extend to the courtroom? How are the fairness principle and the lex sportiva connected with each other? Regarding the decisions of the CAS it is clear that, in procedural matters, fairness is of fundamental importance (e.g. the right to be heard). It should be seen as an integral part of the lex sportiva. We must then ask whether this fairness is restricted to procedural matters. In order to provide an answer to this question, it is instructive to examine more closely the method by which courts review the decisions of sports organizations. There can be three sources of error which are subject to review: incorrect findings of fact, incorrect application of the rules and regulations and, last but not least, the unlawful content of the rules and regulations themselves. When one examines the decisions of the CAS, one can appreciate the importance which it attaches to these first two points. Regarding the third point, the CAS lays claim to the right to examine the content of the rules and regulations of the sports organizations in order to ascertain whether these infringe on mandatory statutory provisions and legal principles. In practice, however, it very seldom exercises this right. As an independent court of arbitration, the CAS should be more courageous in reviewing the content of the rules and regulations of the sports organizations. In particular, the guarantee of autonomy for associations leaves room for recognition of the principle of proportionality, which is related to the fairness principle. The litmus test is whether the rules and regulations provide a reasonable balance between the interests of the sports organizations and the athletes. The fairness principle – as a part of the lex sportiva – contributes significantly to the harmonization of international sports law.*

**Keywords:** principle, athletes, lex sportiva, international sports law

### Introduction

For several years now, the lex sportiva has been a source of intense discussion in the world of sports law.<sup>1</sup> This should come as no surprise; sport has become increasingly internationalised and commercialized, and is a constant focus of media attention. This in turn has given rise to a need for new ways in which to

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<sup>1</sup>Siekman/Soek (eds.), *Lex Sportiva: What is Sports Law?*, 2012; *Vieweg/Staschik, SpuRt* 2013, pp. 227 et seq.; *idem*, The lex sportiva – the phenomenon and its meaning in the international sporting arena, in: *Vieweg* (ed.), *Lex sportiva* (currently at press); *Adolphsen*, Eine lex sportiva für den internationalen Sport?, in: *Witt et al* (ed.), *Jahrbuch der Gesellschaft Junger Zivilrechtswissenschaftler*. V. 2002, pp. 281 et seq.; *Nafziger*, *International Sports Law Journal (ISLJ)* 2004/1-2, 3 et seq.; *Panagiotopoulos*, *Sports Law – Lex Sportiva and Lex Olympica*, 2011.

tackle the unavoidable conflicts which arise globally. It is of particular importance that this is done in a manner that does not lead to any undesirable fragmentation of the law. The WADA code, which was created in order to combat doping, is a good example of the efforts of the global community to ensure that the various sources of sports law are harmonised.<sup>2</sup> Fairness – and the lack thereof – in the realm of sport is also a constant source of discussion, both in relation to sports rules and – increasingly – in the jurisprudence of the courts<sup>3</sup> and in academic writing<sup>4</sup>. The emphasis placed on the principle of fairness is in part due to the fundamental principles laid out in the Olympic Charter, which demand “mutual understanding with a spirit of friendship, solidarity and fair play”.<sup>5</sup> It is also demonstrated by the fact that, in 1998, the Konstanzer Arbeitskreis für Sportrecht (the Konstanz Working Group for Sports Law, now known as the Deutsche Vereinigung für Sportrecht, the German Association of Sports Law) published the “Karlsruher Erklärung zum Fair Play”<sup>6</sup> (the Karlsruhe Declaration on Fair Play), which does not confine itself solely to setting out noble principles, but rather sets out specific, well-formulated requirements that are aimed at all who play sports.

In order to further investigate the relationship between the *lex sportiva* and the principle of fairness, it is first necessary to clarify the relevant definitions and sources. In doing so, one must also examine their functions and effects more closely. To this extent, one must pay particular attention to the significance of this matter for court rulings (see II). On this basis, it is worth analysing the extent to which the Court of Arbitration for Sport (CAS) – the international sports court of arbitration, which has existed since 1984 – applies the fairness principle, whether the principle can be regarded as a material part of the *lex sportiva*, and whether it places limits on the autonomous power of federations to enact norms (see III).

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<sup>2</sup>Cf. the preparatory comparative analysis by Vieweg/Siekmann (eds.), *Legal Comparison and the Harmonisation of Doping Rules*, Berlin 2007, *passim*.

<sup>3</sup>A search of juris, a German legal database, carried out on 16th October, 2013, showed that the word ‘fair’ appears 10,167 times in CAS jurisprudence, and the word ‘fairness’, 1,190 times.

<sup>4</sup>Tettinger, *Der Staat* 1997, 575 et seq.; Vieweg, *Fairness und Sportregeln – Zur Problematik sog. Tatsachenentscheidungen im Sport*, in: Crezelius/Hirte/Vieweg (eds.), *Festschrift für Volker Röhrich zum 65. Geburtstag – Gesellschaftsrecht, Rechnungslegung, Sportrecht*, 2005, pp. 1255 et seq.; Nafziger, *ISLJ* 2010/3-4, 3 et seq.; *id.*, *The Principle of Fairness in the Lex Sportiva of CAS Awards and Beyond*, in: Siekmann/Soek (eds.) (fn. 1), pp. 251 et seq.; Morgenroth, *Zeitschrift für Stiftungs- und Vereinswesen (ZStV)* 2013, 132 et seq.

<sup>5</sup>§ 4 Fundamental Principles, Olympic Charter.

<sup>6</sup>Konstanzer Arbeitskreis für Sportrecht e.V. (now known as the Deutsche Vereinigung für Sportrecht – the German Association for Sports Law), *Karlsruher Erklärung zum Fair Play*, n.d. (1998).

## Definitions, Functions and Sources

### Definition

The *lex sportiva* is sometimes described as the basis for decisions, or mentioned in legal academic articles, even though it remains unclear what the decision makers or the authors actually understand the term to mean. The CAS itself has not yet managed to produce a uniform definition and, in one ruling<sup>7</sup>, expressly rejected the notion that the *lex sportiva* was applicable, basing this assertion on the argument that the *lex sportiva* is an undefined concept, the content and scope of which are still far too vague. In other decisions<sup>8</sup>, however, it recognised the concept. In light of the divergent interpretations of the *lex sportiva* and contrasting views as to its impact, this is not surprising. For this reason, it must be clarified whether the *lex sportiva* is a generally recognized concept, or whether there are different interpretations of the term? Is it really a usable instrument, or simply a wish, a hope, a phantom, a dream? Could it really be a cure-all for the legal problems that arise in the world of sport?

It would appear preferable<sup>9</sup> to develop an *all-encompassing definition* that includes the entire phenomenon of self-regulation in sport. This term relates to the rules and regulations that the stakeholders in the realm of sport create in order to create a global, uniform sports law, independent of nationality and detached from the states themselves. For this reason, in this lecture, the term *lex sportiva* will be interpreted as encompassing the self-enacted, non-state law of international sport. The rules and regulations enacted by national and international sports federations in their entirety will also be addressed, as well as the general legal principles<sup>10</sup> arising out of the arbitral awards of the CAS. State and sports law, on the other hand, will not be dealt with. A conscious decision has been made not to address the matter of whether the *lex sportiva* has legal functions and

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<sup>7</sup>FIFA & WADA, CAS 2005/C/976&986, margin no. 124.

<sup>8</sup>I. v. FIA, CAS 2010/A/2268, margin no. 75; FCP v. FIRS, CAS 2004/A/776, margin no. 16; COC & Scott v. IOC, CAS 2002/O/373, margin no. 14; AEK Athens & SK Slavia Prague v. UEFA, CAS 1998/200, Digest II, 38 (102 et seq.); GFA v. UEFA, CAS 2002/O/410, Digest III, 68 (75).

<sup>9</sup>Based on the results of an enquiry carried out by *Vieweg/Staschik* (fn. 1).

<sup>10</sup>*Wax* also interprets the term *lex sportiva* as encompassing not only the by-laws and rules of the federations and associations, but also the arbitral awards passed by the CAS, see *id.*, *Internationales Sportrecht – Unterbesonderer Berücksichtigung des Sportvölkerrechts*, 2009, pp. 178 et seqq. Similarly, *Casini*, ISLJ 2011/3-4, 21 (22); *Id.*, *The Making of a Lex Sportiva by the Court of Arbitration for Sport*, in: Siekmann/Soek (eds.) (fn. 1), p. 149 (pp. 151 et seqq.); *Latty*, *La lex sportiva: Recherche sur le droit transnational*, 2007, pp. 41 et seqq.; *Ipsen*, *Private Normenordnungen als Transnationales Recht?*, 2009, pp. 136 et seqq.; *Schleiter*, *Die lex sportiva – Ein autonomer Begründungsansatz zur internationalen Rechtsharmonisierung im Sport?*, in: *Vieweg* (ed.), *Facetten des Sportrechts*, 2009, p. 231 (p. 235). *Buck-Heeb/Dieckmann*, on the other hand, interpret the term *lex sportiva* as being comprised solely of the general legal principles of sport that apply to all types of sports and that are carved out by the CAS, *id.*, *Selbstregulierung im Privatrecht*, 2010, p. 85.

effects, or what these functions and effects might be. Instead, the extent to which the *lex sportiva* is recognised by national legal systems will be considered.

### Functions and Impact

The application of individual national legal norms to international sports law disputes would lead to inequality and legal uncertainty in the review of decisions made by the sports federations, which would be particularly unacceptable in the realm of sport where the basic principle of equal opportunities – as a part of the principle of fairness – is hugely significant.<sup>11</sup> For this reason, the *lex sportiva* is accompanied by the expectation that it will dissolve the tension between the diverse range of legal mechanisms for conflict resolution, both on the national and international level, and provide a source of law that is the same the world over. The central problem in this regard is the question as to whether sport itself can create this kind of uniform sports law, and whether it would be recognized by the various individual national legal systems and courts.

The *lex sportiva*'s source of validity originates in the voluntary decision of the relevant parties to abide by it.<sup>12</sup> To this extent, the international sports federations are not awarded the ability to enact laws independently; it is rather the case that they are granted the power to enact law by the relevant state.<sup>13</sup> The proposition put forward by several legal academics that the *lex sportiva* is an original, anational legal system is erroneous.<sup>14</sup> It is rather the case that federation norms, as the law enacted by private associations, require acknowledgement by the state in question in order to acquire legal status and force.<sup>15</sup> They are thus subject to elaboration, review and correction by the state, in particular by the courts.<sup>16</sup> This is because only states possess the competence (*Kompetenzkompetenz*) under the law of conflicts to do so and furthermore the monopoly on granting recognition to legal norms and the authority to grant force to legal norms. In spite of this,

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<sup>11</sup>Cf. *Wax* (fn. 10), p. 135.

<sup>12</sup>*Röthel*, *JuristenZeitung* (JZ) 2007, 755 (757).

<sup>13</sup>*Oschütz*, *Sportschiedsgerichtsbarkeit – Die Schiedsverfahren des Tribunal Arbitral du Sport vor dem Hintergrund des schweizerischen und deutschen Schiedsverfahrensrechts*, 2005, p. 353; *Summerer*, *Internationales Sportrecht – eine dritte Rechtsordnung*, in: *Aderhold et al* (eds.), *Festschrift für Hans Hanisch*, 1994, p. 267 (pp. 269 et seq.).

<sup>14</sup>For further details, cf. *Vieweg/Staschik* (fn.1); *Pfister*, *Praxishandbuch Sportrecht*, *Fritzweiler/Pfister/Summerer* (eds.), 2. edn., 2007, VI 1 margin no. 8; *Adolphsen* (fn. 1), p. 281 (pp. 287 et seq.); *Wax* (fn.10), p. 175; *Kolev*, *ISLJ* 2008/1-2, 57 (62); *Latty* (fn.10), pp. 423 et seq., 514, 768; *Nolie*, *Vereinbartes Recht am Beispiel der lex sportiva – Wechselwirkungen zwischen “lex sportiva” und “lex extra sportiva”*, in: *Bumke/Röthel* (eds.), *Privates Recht*, 2012, p. 107 (p. 116).

<sup>15</sup>*Wax* (fn. 10), pp. 175 et seqq.

<sup>16</sup>Cf. *Vieweg*, *Normsetzung und -anwendung deutscher und internationaler Verbände*, 1990, pp. 159 et seqq.

however, the autonomy to self-govern and enact laws is granted to federations in almost every state. The requisite authority of sporting associations and federations to self-regulate is generally recognised by the state.<sup>17</sup> Sports are granted the power to enact their own norms so that they can create and enforce their own rules and regulations. In Germany, for instance, the autonomy of sports federations to create their own by-laws is granted in Art. 9 (1) German Basic Law (GG) and, under EU law, it is guaranteed by Art. 12 (1) Charter of Fundamental Rights of the European Union.

As the authority of the sports federations to enact laws derives from state law, the autonomy of sports federations to create their own *lexsportiva* is restricted by both European and national law. EU law – the fundamental freedoms and, in particular, competition law – is directly applicable to the rules and regulations of the sports federations, insofar as the athletes engage in economic activities. The Court of Justice of the European Union (CJEU)<sup>18</sup> correctly rejects the proposition that there are any general exceptions to this rule within the realm of sport. Thus, in the event of conflict, European law supersedes the *lexsportiva*. In applying EU law to sports, however, the CJEU<sup>19</sup> does take the particular characteristics of sport into account, e.g. it classifies the rules and regulations of sports federations as conforming to EU law if they are necessary for the organization of the sport and for ensuring that the sport's unique features are not eroded, and if the principle of proportionality is observed. National law also places restrictions on the right of associations and federations to create their own by-laws, although the scope and the intensity of the review of by-laws vary from state to state.<sup>20</sup> In Germany the Federal Court of Justice (Bundesgerichtshof – BGH) examines whether the content of laws enacted by sporting federations is appropriate. In doing so, it treats the laws as it would the by-laws of any economically and/or socially powerful association and examines them to ensure that their content is appropriate.<sup>21</sup> The basis for this review is § 242 German Civil Code (Bürger-

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<sup>17</sup>*Pfister*(fn. 14), VI 1 margin no. 8.

<sup>18</sup>For further details, see ECJ ECR 1974, 1405 – *Walrave & Koch*; ECJ ECR 1995, I-4921, NJW 1996, 505 – *Bosman*; ECJ ECR 2000, I-2549, *Zeitschrift für Sport und Recht (SpuRt)* 2000, 148 – *Deliège*; ECJ ECR 2000, I-2681 – *Lehtonen*; ECJ ECR 2006, I-6991, *SpuRt* 2006, 195 – *Meca-Medina*; ECJ ECR 2008, I-4863, *SpuRt* 2008, 193 – *MOTOE*; ECJ ECR 2010, I-2177, , *Neue Juristische Wochenschrift (NJW)* 2010, 1733 – *Bernard*. Cf. *Siekman*, *ISLJ* 2011/3-4, 75 et seqq.; *Ipsen* (fn. 10), pp. 149 et seqq.

<sup>19</sup>This was expressly stated in the *Bernard* case, ECJ ECR 2010, I-2177 *NJW* 2010, 1733 (1735).

<sup>20</sup>Cf. *Röthel*, *JZ* 2007, 755 (757).

<sup>21</sup>Cf. *Vieweg* (fn. 16), pp. 227 et seqq.; *Ipsen* (fn. 10), p. 153.

lichesGesetzbuch – BGB)<sup>22</sup> or §§ 134, 138 BGB<sup>23</sup>. The appropriateness of the content is determined by reference to the fundamental rights, such as, for example, the athletes' freedom of profession and the autonomy of the associations and federations. These must be balanced against one another so that a practical concordance between the two is achieved.

After much scepticism initially, it is by now universally acknowledged that the *lex sportiva* can be selected as a possible choice of law in courts of arbitration, e.g. in Germany pursuant to § 1051 (1) Code of Civil Procedure (*Zivilprozessordnung – ZPO*) or in Switzerland pursuant to Art. 187 Law governing International Private Law (*Bundesgesetz über das Internationale Privatrecht – IPRG*). This is because – subject to the condition that the *ordre public* is observed – national law allows non-state rules and regulations to supersede state law if this is desired by the parties involved.<sup>24</sup> This facilitates the application of an internationally uniform law to similar cases – at least those appearing before the CAS. The legality of decisions reached by associations and federations, or rather, the application of association and federation rules and regulations in individual cases, are reviewed for their lawfulness using the *lex sportiva* as a basis. Decisions reached by the CAS on the basis of the *lex sportiva* are usually recognized by national courts (particularly the Swiss Federal Court of Justice – *Schweizer Bundesgericht*).<sup>25</sup> However, observance of the *ordre public* is the absolute limit on this. Arbitral awards will only be recognized by national courts if they do not violate the principle of the *ordre public*, cf. § 1059 (2) No. 2b ZPO, Art. 190 (2e) IPRG.<sup>26</sup> The

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<sup>22</sup>BGHZ 105, 306 (316 et seq.); *Heß*, Voraussetzungen und Grenzen eines autonomen Sportrechts unter besonderer Berücksichtigung des internationalen Spitzensports, in: *Heß/Dressler* (eds.), *Aktuelle Rechtsfragen des Sports*, 1999, p. 1 (pp. 30 et seq.).

<sup>23</sup>BGHZ 13, 5 (11); 21, 370 (373); 29, 352 (354); 36, 105 (109); 47, 381 (384).

<sup>24</sup>*Wax* (fn. 10), p. 184; *Heß* (fn. 22), p. 1 (p. 43); *Röthel*, *JZ* 2007, 755 (757); *Adolphsen* (fn. 1), p. 281 (p. 288); *id.*, *Internationale Dopingstrafen*, 2003, p. 633. For a dissenting opinion, cf. *Oschütz* (fn. 13), p. 395.

<sup>25</sup>Cf. the two decisions of the Swiss Federal Court of Justice in the case *FC Sion*: in its decision of 12 January, 2011, 4A\_392/2010, the court confirmed the arbitral award that had been handed down by the CAS which held *inter alia* that a ban on the *FC Sion* taking on new players should be upheld, basing this on the grounds that neither the right to a fair hearing nor the *ordre public* had been infringed. In its grounds, the Federal Court of Justice emphasised that it had only a limited power to review decisions of the CAS on the basis of international jurisdiction. Subsequently, *FC Sion* did in fact take on new players and, for this reason, was disqualified from competing in the 2011/2012 season of the European League. The Swiss Federal Court of Justice rejected a complaint filed by the team against the arbitral award of the CAS, which had confirmed this disqualification, decision of 16.7.2012, 4A\_134/2012. In the view of the Swiss Federal Court of Justice, *FC Sion* did not possess the requisite legal interest in having the disqualification from the Europa League reversed, as the competition had, in the meantime, come to an end.

<sup>26</sup>Cf. *Savic v. PITO*s, CAS 2011/A/2621, margin no. 8.5; *Grunsky*, *Überprüfung der Sportrechtssprechung durch staatliche Gerichte*, in: *Württembergischer Fußballverband e.V.* (ed.), *Sportrechtssprechung*, 1995, p. 15 (pp. 21 et seq.); *Latty* (fn. 10), p. 514; *Heß* (fn. 22), p. 1 (p. 44).

principle will be found to have been violated if international mandatory norms have not been observed. For this reason, the arbitral court must have regard to these norms in order to perform properly the task of reaching enforceable decisions.<sup>27</sup> Some examples of international mandatory provisions are, for example, the German § 130 (2) Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen – GWB*) and the European laws on competition (Artt. 101, 102 TFEU).

Thus it can be seen that, although the *lex sportiva* is not an anational, completely autonomous system of norms, it is indeed an international one which is generally recognized by national states and can be used as the sole basis upon which to resolve sports disputes in courts of arbitration.<sup>28</sup> The *lex sportiva* is, however, subject to considerable influence by both national and European law, and relies upon a certain degree of acceptance by national legal systems. This is, however, generally guaranteed in the realm of sport. Thus we can see that, although the *lex sportiva* is by no means a cure-all, it does offer participants in the realm of sport the “chance to self-regulate”.<sup>29</sup> In this way, it can help to achieve a certain harmonization of international sports law.

### **Analysis and Criticism of the Jurisprudence of the CAS**

As the CAS applies the *lex sportiva* to the cases upon which it rules, but also continues to develop independently by setting out general legal principles that are of application even if they are not anchored in the rules and regulations of the sports federations,<sup>30</sup> one must question whether the CAS pays sufficient heed to the many aspects of the fairness principle.

### **Principle of Procedural Fairness**

The CAS acknowledges unreservedly the fairness principle on a procedural level<sup>31</sup> and requires that the principle of fair procedure<sup>32</sup> is observed as one of

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<sup>27</sup>*Oschütz* (fn. 13), p. 395. A good example is provided by *WADA v. Jobson et al*, CAS 2010/A/2307, margin no. 173 et seqq.

<sup>28</sup>This possibility is not available in respect of interlocutory injunctions, as, according to the prevailing view, the jurisdiction of state courts for interlocutory injunctions (in Germany, § 1033 ZPO) cannot be excluded by means of an arbitration agreement, cf. *Wax* (fn. 10), pp. 147 et seq.; *Adolphsen* (fn. 24), pp. 569 et seq.; *Oschütz* (fn. 13), pp. 399 et seqq.

<sup>29</sup>*Vieweg* (fn. 16), p. 195.

<sup>30</sup>Cf. The overview provided by *Vieweg/Staschik* (fn. 1). *AEK Athens & SK Slavia Prague v. UEFA*, CAS 1998/200, Digest II, 38 (102 et seq.).

<sup>31</sup>*Fusimalohi v. FIFA*, CAS 2011/A/2425, margin no. 71; *ARcycling AG v. UCI*, CAS 2004/A/777, margin no. 56; *GFA v. UEFA*, CAS 2002/O/410, Digest III, 68 (75); *AEK Athens & SK Slavia Prague v. UEFA*, CAS 1998/200, Digest II, 38 (61, 103). Cf. *Ipsen* (fn. 10), p. 143.

<sup>32</sup>Cf. for more detail *Soek*, *The Strict Liability Principle and the Human Rights of the Athlete in Doping Cases*, 2006, pp. 276 et seqq.

the minimum procedural standards that must also be observed during hearings conducted by sports federations. It has, for example, ruled that the fundamental principle of fair play requires that international sports federations set out in their rules and regulations an appeals procedure to which athletes and other concerned parties can have immediate recourse in the event that rules are applied erroneously by officials.<sup>33</sup> One particular offshoot of the procedural fairness principle is the right to a fair hearing.<sup>34</sup> The CAS has stated that this is a fundamental and general legal principle that derives from the elementary provisions of natural law and the rule of law.<sup>35</sup> The right to a fair hearing must be observed by sports federations when reaching decisions and in cases where their own internal courts conduct internal hearings.<sup>36</sup> Based on considerations of fairness, then, the jurisprudence of the CAS would appear to provide cause for concern. According to one line of jurisprudence, any violations of procedural rules by federation courts can be cured by means of a hearing by the CAS, in which the dispute is comprehensively reviewed and a so-called *de novo* decision<sup>37</sup> is reached. This would seem to be appropriate only if it can be ascertained that the violation of the principle of a fair hearing had no effect on the final decision. This is on condition that the decision is based on clear legal provisions and can therefore be reached by the CAS instead of the federation court. A cure is not possible, however, in cases where the competent federation court possesses a considerable margin of appreciation in reaching its decision and this margin of appreciation cannot be reviewed by the CAS.

### **The Fairness Principle as Part of the *Lex Sportiva* in Substantive Law**

#### *Interpretation and Application of the Rules and Regulations of Sports Federations*

The substantive content of the fairness principle is also acknowledged by the CAS as a general legal principle and the court also expressly relies on the principle in applying federation rules and regulations and filling lacunae when reaching its own decisions.<sup>38</sup> What is more, the fairness principle applies to the

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<sup>33</sup>SNOG & Abrahamina v. FILA, CAS OG 08/007, margin no. 11 et seqq.

<sup>34</sup>CGF v. EGA, CAS 2010/A/2275, margin no. 29 et seq.; FINA v. CBDA & G., CAS 2007/A/1373, margin no. 26; FIFA & WADA, CAS 2005/C/976&986, et seq. 126; ARcycling AG v. UCI, CAS 2004/A/777, margin no. 56; A. v. FILA, CAS 2001/A/317, margin no. 6; A. et al v. NOC CV, CAS OG 1996/005, Digest I, 397 (399 et seqq.); USA Shooting & Q. v. UIT, CAS 1994/129, Digest I, 187 (202 et seq.).

<sup>35</sup>CGF v. EGA, CAS 2010/A/2275, margin no. 29 et seq.

<sup>36</sup>CGF v. EGA, CAS 2010/A/2275, margin no. 30; cf. A. v. FILA, CAS 2001/A/317, margin no. 6, and G. v. FEI, CAS 91/53, Digest I, 79 (86 et seq.).

<sup>37</sup>Cf. Art. R57 CAS-Code.

<sup>38</sup>UCI/WADA v. Contador & RFEC, CAS 2011/A/2384&2386, margin no. 356 et seq.; MTK Budapest v. FC Internazionale Milano S.p.A., CAS 2009/A/1757, margin no. 31; FCP v. FIRS, CAS 2004/A/776, margin no. 16; COC & Scott v. IOC, CAS 2002/O/373, margin no. 14; COC v. IIHF, CAS OG 1998/004-5, Digest I, 435 (442); W. v. ACF, CAS 1996/153, Digest I, 335 (341, 348).



relationships between all participants in sport, i.e. to any dealings between the sports federations, associations, clubs and individual athletes. No participant or stakeholder in sport should be dealt with in an arbitrary or patently unfair manner.<sup>39</sup> It would, for example, be an infringement of the fairness principle if time limits upon the selection for sporting events were unclear or not sufficiently advertised.<sup>40</sup> The fairness principle can, amongst other things, limit the ability of stakeholders and participants to exercise their rights; for instance, a team cannot appeal the result of a game because another team violated a rule if the former team was not affected by this violation in any way, and if it would benefit disproportionately from any correction of the result.<sup>41</sup> Any sanction imposed on an athlete must be comparable to sanctions imposed on other athletes in similar cases in order to ensure that the fairness principle is observed.<sup>42</sup> The fairness principle can also be of significance in the interpretation of sports federation rules and regulations and can lead to an interpretation that is not purely formalistic, but rather meets the aim of the regulation. Further derivatives of the fairness principle are the principles of good faith, estoppel and *venire contra factum proprium*, all of which are recognized by the CAS as general legal principles.<sup>43</sup> For instance, in cases where the conduct of a sports federation causes other stakeholders to rely on it (e.g. in relation to the nomination of an athlete or the acceptance of a sports association into a sports federation), and this reliance is justified, it will be regarded as a violation of the fairness principle if the sports federation deviates from its initial stance without having material reason to do so.<sup>44</sup>

### **Limitation of the Authority of Sports Federations to enact their own Rules and Regulations**

The CAS has not yet managed to achieve a unified line of jurisprudence as regards whether the fairness principle, as part of the *lex sportiva*, can be invoked in cases that extend beyond the application of federation rules and regulations, and the filling of any *lacunae* that arise; it is still unclear whether the principle can limit the authority of sports associations and federations to enact their own rules and regulations and whether the CAS can – or, perhaps, is obliged to – quash

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<sup>39</sup>Peternell v. SASCOC & SAEF, CAS 2012/A/2845, margin no. 24.

<sup>40</sup>Peternell v. SASCOC & SAEF, CAS 2012/A/2845, margin no. 24.

<sup>41</sup>COC v. IIHF, CAS OG 1998/004-5, Digest I, 435 (442).

<sup>42</sup>UCI/WADA v. Contador & RFEC, CAS 2011/A/2384&2386, margin no. 356 f.

<sup>43</sup>Peternell v. SASCOC & SAEF, CAS OG 12/01, margin no. 41; Murofushi & JOC v. IOC, CAS 2012/A/2912, margin no. 108; BEF v. FEI, CAS 2010/A/2058, margin no. 18; Club Toftaltróttarfélag B68 v. R, CAS 2009/A/1956, margin no. 16; Simms v. FINA, CAS OG 08/002, margin no. 12; Boxing Australia v. AIBA, CAS 2008/A/1455, margin no. 16; GFA v. UEFA, CAS 2002/O/410, Digest III, 68 (76).

<sup>44</sup>GFA v. UEFA, CAS 2002/O/410, Digest III, 68 (76).

federation rules and regulations if they are found to be in violation of the fairness principle. The general legal principles connected with the fairness principle – i.e. the principle of equal treatment<sup>45</sup> and the principle of proportionality – are of particular significance when reviewing the rules and regulations of federations. These requirements are anchored in the national legal systems and in EU law and may also be considered a part of the *ordre public*, which must be complied with in order to ensure recognition of the arbitral awards by the states concerned. Thus, within the context of review by courts of arbitration of a federation decision, the fairness principle can be regarded as a bridge between the weighing-up of the relevant interests that is essential in such a review when assessing elements such as the appropriateness or proportionality of the federation rules and regulations.

The CAS must also take into account that the fairness principle applies not only on the playing field, but also off of it, not only between athletes, but also between other stakeholders in the sporting arena, such as the sports federations (i.e. between sports federations and athletes).<sup>46</sup> However, the CAS has not provided a definitive answer to the question as to whether it simply applies the rules and regulations of sports federations or, instead, evaluates them (and possibly even quashes them) using higher-ranking law as a yardstick – for instance, the fairness principle, as one of many generally applicable legal principles, or mandatory provisions of national and European law.<sup>47</sup> In this context, the decision of the CAS<sup>48</sup> in which it confirmed the validity of a UEFA rule pursuant to which two clubs that have the same owner cannot take part in UEFA competitions is a commendable example. In the arbitral award, the CAS conducted a comprehensive review of the compatibility of UEFA by-laws with Swiss civil and antitrust law, EU law and the general legal principles of the *lex sportiva*, specifically the fairness principle. In the course of its review of EU antitrust law, the CAS paid particular attention to the proportionality and the objective necessity of the UEFA rule and determined that the ban on unreasonable rules was also a part of the

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<sup>45</sup>For more detail, see *Vieweg/Müller*, *Gleichbehandlung im Sport – Grundlagen und Grenzen*, in: Manssen/Jachmann/Gröpl (eds.), *Nach geltendem Verfassungsrecht – Festschrift für Udo Steiner zum 70. Geburtstag*, 2009, pp. 888 et seqq.

<sup>46</sup>Expressly stated in *SNOC & Abrahamian v. FILA*, CAS OG 08/007, margin no. 19. Cf. *COC & Scott v. IOC*, CAS 2002/O/373, margin no. 32; *Chiba v. JASF*, CAS 2000/A/278, margin no. 6. Also stated by *Vieweg*, *The Appeal of Sports Law*, 2<sup>nd</sup> edn., 2010, p. 27 (accessible at <http://www.irut.de/Forschung/Veroeffentlichungen/OnlineVersionFaszinationSportrecht/FaszinationSportrechtEnglisch.pdf>).

<sup>47</sup>On 1 January, 2012, the power of sports associations and federations to demand an opinion from the CAS in respect of the compatibility of the federation rules and regulations with superior law, which had previously been set out in the procedural rules of the CAS, was abolished, cf. Art. R60 CAS-Code a.F. (2004).

<sup>48</sup>*AEK Athens & SK Slavia Prague v. UEFA*, CAS 1998/200, Digest II, 38 et seqq.

lexsportiva. In its ruling, *COC & Kibunde v. AIBA*<sup>49</sup>, too, the CAS made clear that a federation rule may not violate general legal principles, which include the principle of equal treatment, the principle of proportionality, and the fairness principle. These principles include the principle of equal treatment, the principle of proportionality and the fairness principle. In reviewing federation rules the CAS frequently does not make express reference to the fairness principle, but rather bases its decision on the directly related principles of equal treatment<sup>50</sup> and proportionality<sup>51</sup>. While it is true that, in doing so, the CAS regularly takes the liberty of reviewing the by-laws of associations and federations using higher-ranked law as a yardstick,<sup>52</sup> it does limit itself in the practical application of these by-laws and seldom quashes a clearly-worded federation rule based on an opposing higher-ranking legal principle.<sup>53</sup> Rather, it generally sets out its objections to the rule in obiter dicta or limits itself to reviewing the compatibility of the rule's actual application with higher-ran.<sup>54</sup>

## Criticism

The CAS has variously acknowledged the fairness principle in its jurisprudence

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<sup>49</sup>*COC & Kibunde v. AIBA*, CAS OG 00/004, margin no. 11.

<sup>50</sup>Cf. e.g. *WADA v. Jobson et al*, CAS 2010/A/2307, margin no. 130; *Benfica v. UEFA & FC Porto*, CAS 2008/A/1583&1584, margin no. 45; *Rinaldi v. FINA*, CAS 2007/A/1377, margin no. 49; *FIFA & WADA*, CAS 2005/C/976&986, margin no. 137; *COC & Kibunde v. AIBA*, CAS OG 00/004, margin no. 12.

<sup>51</sup>Cf. e.g. *I. v. FIA*, CAS 2010/A/2268, margin no. 132 et seqq.; *WADA v. Jobson et al*, CAS 2010/A/2307, margin no. 131, 175 et seqq.; *NADO v. N*, CAS 2009/A/2012, margin no. 39 et seqq.; *Benfica v. UEFA & FC Porto*, CAS 2008/A/1583&1584, margin no. 45; *Rinaldi v. FINA*, CAS 2007/A/1377, margin no. 49; *FIFA & WADA*, CAS 2005/C/976&986, margin no. 124, 138 et seq.; *S. v. FINA*, CAS 2005/A/830, margin no. 44; *H. v. ATP*, CAS 2004/A/690, margin no. 50; *COC & Kibunde v. AIBA*, CAS OG 00/004, margin no. 12.

<sup>52</sup>CAS OG 04/009, margin no. 6.8; *COC & Kibunde v. AIBA*, CAS OG 00/004, margin no. 11; cf. also *Savic v. PITOs*, CAS 2011/A/2621, margin no. 8.5; *Fusimalohi v. FIFA*, CAS 2011/A/2425, margin no. 96; *UEFA v. Olympique des Alpes SA/ FC Sion*, CAS 2011/O/2574, margin no. 328 et seqq.; *FIFA & WADA*, CAS 2005/C/976&986, margin no. 123, 173; *UCI v. Ullrich & Swiss Olympic*, CAS 2010/A/2083, margin no. 34.

<sup>53</sup>Cf. *Ipsen* (fn. 10), pp. 143 et seq., 156. In its decision *WADA v. Hardy & USADA* the CAS regards itself as being bound by, for instance, a minimum penalty set out in the doping regulations of FINA and WADA, and bases its judgment inter alia on the assertion that disregarding the federation rules and regulations because of an infringement of the principle of proportionality or the principle of non-discrimination as well as completely rewriting the applicable rules in order to correct an unfair result lie outside of its jurisdiction, *WADA v. Hardy & USADA*, CAS 2009/A/1870, margin no. 61. On the other hand, the CAS completely disregards a clear federation rule in *I. v. FIA*, CAS 2010/A/2268, margin no. 132 et seqq.

<sup>54</sup>This was expressly clarified by the CAS in the arbitral award *Mutu v. Chelsea Football Club Ltd.*, CAS 2008/A/1644, Rn. 18. *RIIS v. UCI*, CAS 2012/A/3055, margin no. 8.38; *Adolphsen* (fn. 24), pp. 641 et seq.

as a general legal principle of the *lex sportiva*.<sup>55</sup> However, the extent to which the fairness principle is applied in practice varies depending on which particular aspect is involved. The CAS pays sufficient heed to the procedural aspect of the fairness principle. On a procedural level the CAS correctly emphasizes the significance of a “fair hearing”. This is due to the fact that observance of the requirement – specifically, the guarantee – of a fair hearing as part of the procedural *ordre public* (§ 1059 (2) no. 2b ZPO) can be a requirement for the recognition of arbitral awards by national courts. However, the CAS should be more hesitant to accept that the procedural error of a federation court has been cured by means of a hearing before the CAS. In such cases, the CAS should only accept that an error has been cured if it can rule out that the procedural error influenced the result of the federation’s decision.<sup>56</sup>

The CAS has frequent recourse to the substantive content of the fairness principle, at least in the application and interpretation of federation rules, and in filling any lacunae that arise. It – correctly – makes clear that the fairness principle applies not only on the playing field, but also off of it, not only between athletes, but also between other stakeholders in the sporting arena, such as the sports federations (i.e. between sports federations and athletes).<sup>57</sup> In order to develop a globally uniform sports law, however, one hopes that the CAS also makes clear the important role played by the fairness principle in providing a limit to the power of sports federations to enact laws, and the validity of federation rules when assessed using higher-ranking law and generally applicable legal principles (specifically the fairness principle and the closely related principles of equal treatment and proportionality) as yardsticks. In general the CAS claims this right for itself; however, in applying it in practice, the CAS should be less hesitant in order to ensure that it does not jeopardize the exclusion of state courts that is necessary for the harmonization of sports law.<sup>58</sup> It is only in this way that the athletes can be sure of receiving protection from rules enacted by the sports federations that do not benefit them and that the imbalances in power between the sports federations and athletes can be counteracted.<sup>59</sup> This would remove concerns that an arbitral agreement was invalid due to the imbalance between the parties to the arbitration. Furthermore, the risk that an arbitral award

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<sup>55</sup>Cf. *McLaren*, *The Court of Arbitration for Sport*, in: Nafziger/Ross (eds.), *Handbook on International Sport Law*, 2011, p. 32 (pp. 54 et seq.).

<sup>56</sup>*McLaren* also acknowledges that not every procedural error in cases that come before the CAS can be corrected, *Id.* (fn. 55), p. 32 (p. 55).

<sup>57</sup>*Morgenroth* is of the same opinion, ZStV 2013, 132 (134 et seq.)

<sup>58</sup>*Adolphsen* (fn. 24) is also in favour of this approach, pp. 621 et seqq. He regards the court of arbitration as being obliged to review the content of federation rules and regulations. In his opinion, any rules and regulations that are found to be contrary to the standards required by the CAS should at least be mentioned in *obiter dicta*. He has already done this in several arbitral awards.

<sup>59</sup>Cf. Pfister (fn. 14), VI 1 Rn. 8; *Wax* (fn. 10), p. 182.

would be quashed due to a violation of the *ordre public* would be minimized.<sup>60</sup> Ultimately, if the CAS were to receive the power to quash federation rules, this would help to achieve the creation of a comprehensive *lexsportiva*, and to increase the acceptance of arbitral awards handed down by the CAS by the parties involved. To this extent, it would be desirable if the sports federations were to provide for the competence of the CAS to review the validity of their regulations.

## Conclusion

There are no generally applicable definitions for the *lexsportiva*, or for fairness. In this article, the term *lexsportiva* is taken to mean the entire breadth of self-enacted, non-state rules and regulations within the realm of international sport, and the general legal principles of application to sports that have been developed by the CAS. The *lexsportiva* is not an anational, completely autonomous system of legal norms, but rather requires state recognition. This recognition is granted to various, differing degrees by national legal systems within the boundaries of the power of associations and federations to enact by-laws guaranteed in the respective system. The legal term ‘fairness’ comprises two layers of meaning: on the one hand, it has a procedural law element and sets out procedural requirements that must be met, and, on the other, it acts as a rule of conduct and demands that all participants respect each other – specifically that they have regard for the interests of each other and work to develop equal opportunities (substantive law element). The term ‘fairness’ is employed the world over and is increasingly to be found in legal norms.

The *lexsportiva* and the fairness principle are, in many ways and on many different levels, connected with each other. For one thing, the principle of equal opportunities so central in the field of sports is given a legal basis by the *lexsportiva*. For another, the fairness principle, in its many different forms, constitutes part of the *lexsportiva* and, as a generally applicable legal principle, and independent of its entrenchment in various legal norms, lays claim to validity. On a procedural level the CAS has – correctly – recognized the procedural aspect of the fairness principle in a large number of decisions. Recourse is had by the CAS to the substantive law element of the fairness principle primarily when applying and interpreting federation by-laws and filling in *lacunae*. On the other hand, the significance of the fairness principle as a limit to the power of sports federations to enact laws must be more strongly emphasized by the CAS. The *lexsportiva* can only bring about a comprehensive harmonization of international sports law if the CAS reviews the rules and regulations of associations and federations using higher-ranking law and generally applicable legal principles (i.e. the fairness principle and the related principles of proportionality and equal treatment) as yardsticks.

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<sup>60</sup>Cf. *Ipsen* (fn. 10), pp. 236 et seq., which stipulates that the sports federations and associations must observe the fundamental elements of the principles of a rule of law state, including the right to a fair hearing and the principle of proportionality, in order to avoid acting contrary to the *ordre public*.