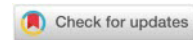


LEX SPORTIVA AND THE COURT OF ARBITRATION FOR SPORT

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Abstract: This comprehensive analysis explores the profound impact of the Court of Arbitration for Sport (CAS) on the realm of global sports law. Against the backdrop of a remarkable increase in case procedures, this study highlights at least three pivotal functions of CAS.

Firstly, CAS has introduced the application of general legal principles within sports institutions, leading to the formulation of the distinct “*principia sportive*,” which has bolstered legal certainty in the field. Secondly, CAS assumes a vital role in interpreting and implementing sports law, influencing the establishment of binding regulations within sports organizations. Thirdly, CAS’s superior status allows it to harmonize the global legal landscape by assuming jurisdiction over disputes involving sports bodies and federations.

Keywords: Sports law, lex sportiva, arbitration, court.

Field: Science

1. THE CONCEPT OF LEX SPORTIVA

In today’s legal system, there is a great need for regulating social relationships that are evolving at an incredible pace, which sometimes leads to the emergence of various legal gaps that can undermine the very foundations of the legal order and create legal uncertainty. If we start from the principle that everything within a state must be subordinate to constitutional and legal provisions, then it further means that the new creation of a corpus of legal rules known as “*lex sportiva*” must be subject to the same. One of the definitions that provides a clear picture of the legal nature of this corpus of rules is as follows: “Sports law is not only international, it is also non-state, which sets it apart from all other forms of law.” (Bellof, Demetriou, 1999: 5). Therefore, according to respected professors, sports law represents an area within the realm of international law that is not constructed by states, but rather by other entities and institutions.

Furthermore, to make the explanation even clearer, the dimensions of sports have been so normalized that it has led to the establishment of a global sports law that encompasses a set of legal norms created and implemented by sports governing bodies. (Latty, 2007: 5) This detail doesn’t only pertain to the normalized rules by the International Olympic Committee and International Federations, but it also includes hybrid rules created by the World Anti-Doping Agency. (Koster, 2003: 1). Speaking about global sports law, esteemed professors state: “It is a transnational autonomous legal order created by global institutions governing international sports.” (Koster, 2003: 1). They also note that “this order arose based on agreements and its imperative-binding force stems from agreements that require us to submit to the authority and jurisdiction of international sports organizations.” (Koster, 2003: 2). In any case, *lex sportiva* represents a legal creation that lacks sufficient legitimacy within the circles of eminent jurists. (Schwab, 2018: 1). It truly lacks legitimacy for several reasons, as outlined by Professor Berdan Schwab. The first reason is the significant lack of participation of legal experts in the creation of *lex sportiva*. The second reason is the constant harassment of athletes and the denial of their rights, particularly affecting vulnerable players who are often subject to various forms of discrimination. As the third reason, Professor Schwab highlights that *lex sportiva* evidently lacks alignment and harmony with recognized human rights. (Schwab, 2018: 1). It seems that all the problems this corpus of rules faces and will face stem from the first reason mentioned. We believe this because legal experts are the primary participants in the process of affirming fundamental human rights, and their absence necessarily renders human rights rudimentary.

2. DESTRUCTIVE IMPACT ON LEX SPORTIVA

The frequent revelations of undermining athletes’ rights and usurping their contractually secured rights by sports governing bodies (SGBs) have instilled significant public mistrust regarding the assurance of legal security (Schwab, 2018: 2-3). Each sport has various types of sports governing bodies actively involved in shaping the direction in which a particular sport will progress. They do so in a straightforward

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manner, influencing various clubs, teams, and associations (Schwab, 2018: 50).

A study from 2014 by the Institute for Human Rights and Business (IHRB) highlighted the contentious aspects of sports governing bodies and criticized their conduct concerning the human and labor rights of professional athletes. Among others, FIFA is cited as a major contributor to creating a situation where unfair treatment occurs without any sanctions or accountability (Amis, 2014: 8). It is also noted that sports governing bodies position themselves as authorities above all else, expecting unquestioning acceptance and compliance with every rule created within their realm, stifling any questioning (Amis, 2014: 4). However, legal experts possess a sixth sense that distinguishes truth from falsehood, justice from injustice. This can be compared to a logical fallacy, specifically argumentum ad auctoritate, in which authority is used as evidence for certain claims, theses, or occurrences. An intriguing observation by Teubner argues that “global world law represents a significant example of spontaneous creation of global rules without state involvement.” (Amis, 2014: 6).

This unchecked power of certain groups can lead to the erosion of fundamental rights. The danger of this can be seen in the words of Judge Sir Stephan Sedley, former judge of the Court of Appeal of England and Wales, who stated, “The main concern of rights in relation to the exercise of power is not the content of that power, but who exercises it and on whom it bears” (O’Leary, 2017: 7). The question arises as to why we allow certain groups to be above the law and whether we are aware of it. Otto van Bismarck once said, “Laws are like sausages. It’s better not to see them being made.” We are aware that sports governing bodies are established through a specific procedure and have a “distinct nature,” a sui generis legal nature, but that doesn’t make them legally independent. What sports governing bodies often overlook is that athletes are first and foremost human beings who need protection, and only secondarily professional athletes (Fujita, 2013: 4). Despite the significant success of sports law today, its independent existence remains a subject of various debates, and some countries refuse to accept complete independence. For example, the Regional Appellate Court in Frankfurt (Oberlandesgericht) holds the position that: “There is no lex sportiva that is independent of any state law.” (Frankfurt Oberlandesgericht, D. Baumann / D.L.V., 2001: 161). Lex sportiva functions hierarchically and has been created, as mentioned earlier, by various legal creators. Among these creators, there is an interesting judicial body established in 1984 that has become a key player in the sports law system: the Court of Arbitration for Sport (CAS). This body has fought and continues to fight to liberate professional athletes from the clutches of different sports associations and federations, aiming to establish a certain degree of legal certainty in global sports law. Over the decades, the number of decisions by this body has grown to the extent that we now have a set of principles and rules strictly related to sports, referred to as lex sportiva (Schwab, 2018: 49). This formulation is not foreign to legal professionals, as we already have creations like lex mercatoria and lex electronica.

3. STRUCTURE AND JURISDICTION OF CAS

This arbitration body was established thanks to the vision of a man named Juan Antonio Samaranch. At that time, he was the President of the International Olympic Committee, with the desire to establish a mechanism strictly focused on sports law. It is noted that the intention was to create a “Supreme Court for Sports Law.” However, the initial establishment of this quasi-judicial body faced significant challenges, and the reasons for such a situation are outlined. The first reason was the extremely limited number of cases handled by this body. Initially, the Court issued only three decisions per year, which did not meet the initial enthusiasm and led to overall dissatisfaction among professional athletes who expected more (Lindholm, 2019: 4). This disappointment was justified considering the creators’ intentions for the Court to be a “kind of Hague Court in the world of sports” (Lindholm, 2019: 4). Nonetheless, every court needs time to establish an audience, particularly true for arbitration bodies (Lindholm, 2019: 4). Between 1986 and 2000, there were only a few hundred cases. However, from 2000 to 2021, there has been an incredible growth in procedures under the jurisdiction of the Court, with a reported increase of 8,000 distinct sports law cases during that period. The second reason for the slow evolution of this body was that International Federations ignored and boycotted the Court of Arbitration for Sport, and some even had their own judicial structures, rendering legal and judicial assistance in resolving disputes unnecessary. Some of these organizations eventually abandoned their judicial bodies. A third reason was the Court’s structural affiliation with the International Olympic Committee, which contributed to creating an image of dependence on this judicial body (Fujita, 2013: 14).

Arbitration, including sports arbitration, represents a means of “peaceful settlement of international disputes by one or more arbitrators. The decision made by an arbitrator or a panel of arbitrators,

constituting an arbitral tribunal, is binding on the parties in the dispute and must be executed, provided that the parties or states voluntarily submit to arbitration” (Ganić, 2017: 369). Arbitration decisions are legally binding judgments, not mere advice or opinions. An arbitrator is a judge chosen by the parties, and they usually only address legal issues, broadly understood. The existence of a factual or legal issue that needs to be decided in accordance with legal principles is necessary (Le Fir, 2010: 279). Thus, arbitration is based on the principle of absolute autonomy of will, although this will becomes dependent when the arbitration clause indicates the arbitrability of a particular dispute. In this sense, the Court of Arbitration for Sport constitutes a permanent arbitration body with the goal of resolving sports-related disputes through arbitration and mediation. The Court is structured with two distinct divisions, both located in Lausanne, with branches in New York and Sydney. As previously mentioned, without an arbitration agreement, no arbitration body can establish jurisdiction, as the agreement dictates when and to what extent the court can act. The New York Convention, in Article 2, outlines the foundation for the arbitration agreement, specifying the circumstances in which a party seeks relief from its state court when an existing arbitration agreement exists. The court must refer the party to the agreed arbitration and provides explicit scenarios when the court may proceed, such as the nullity of the arbitration agreement or its incapacity (Varadi, Knežević, Bordaš, Pavić, 2012: 581). The Court consists of at least 150 arbitrators and 50 conciliators. The former are responsible for arbitrating disputes involving one arbitrator or a panel of three arbitrators or more, while the latter mediate between the parties involved (Article C3, Statutes of the Bodies Working for the Settlement of Sports-related Disputes). Despite the possibility of mediation, the main task of this arbitration body is dispute resolution through the Ordinary Arbitration Division and the Appeals Arbitration Division (Article C20, Statutes of the Bodies Working for the Settlement of Sports-related Disputes). The finality of the arbitration decisions by this body and the lack of appeal is based on the principles of *res judicata* and *ne bis in idem* (More on the finality of arbitration decisions in: Avramov, Kreća, 2009: 546, Turner, 2005: 10, Article 81 of the Hague Convention of 1907, Article 52 of the ICSID Convention). The Ordinary Arbitration Division comprises chambers tasked with efficiently and successfully resolving all disputes brought before the Court through various structures of the Court’s arbitration system (Articles R27-R37 and R38-46 CAS Procedural Rules). The Appeals Arbitration Division handles disputes involving decisions made by federations, associations, or other bodies related to sports. This happens when the organization’s statutes prescribe such jurisdiction or when a specific contract mandates it (Articles R47-R59 CAS Procedural Rules).

4. THE IMPACT OF THE COURT

The Court’s extensive activities are of significant relevance in the realm of the global sports law, particularly given the surge in procedures in the new millennium, which saw a growth of over 8000 cases. At least three relevant functions can be highlighted: 1) The Court has begun applying general principles of law within sports institutions, leading to the creation of the distinct “*principia sportive*.” The use of legal principles has undeniably elevated legal certainty within the global sports law sphere; 2) Its role is highly esteemed in the interpretation and application of sports law, exerting influence over the establishment of binding rules within sports organizations; 3) The Court plays a pronounced role in harmonizing the global legal framework, attributable to its recognition as a superior court. This superiority is most evident in the Court’s jurisdiction to deliberate upon and render decisions on matters involving sports organizations, federations, and similar entities. 4) The Court’s resolute stance in purging sports law from the influence of extralegal factors is noteworthy. The first activity we have mentioned is manifest in the arbitration rules for the Olympic Games, stating that the Court shall “adjudicate disputes in accordance with the Olympic Charter, applicable regulations, universally recognized legal principles, and principles of the rule of law, and shall apply what the Court deems appropriate.” On several occasions, the Court of Arbitration for Sport has highlighted the interconnectedness between sports governing bodies and state authorities, acknowledging their roles in legal, administrative, and sanctioning realms (CAS 98/2000, AEK Athens & S.K. Slavia Prague v. UEFA, award of 20 August 1999, para. 58). Hence, the Court endeavors to oversee sports institutions by comparing their operations to those of public administration. For instance, in the Pistorius v. IAAF case, the Court endorsed the decisions made by IAAF with the intention of assessing the degree of irregularity and whether the athlete’s contested decision was “procedurally unfounded” (CAS 2008/A/1480, para. 56). Undoubtedly, the most significant principle established by the Court is the respect for fundamental human rights, which finds its basis in several decisions rendered by the Court. As exemplified by a decision stating that the Court has “always considered the right to *audiatur et altera pars* as a recognized legal principle that must be respected even in situations of internal proceedings within

federations. Federations must respect the right of individuals to be heard, as it is a cornerstone of the legal order” (CAS 2001/A/317 A. / Fédération Internationale de Luttés Associées (FILA), 9 July 2001, citing CAS 91/53 G. v/ FEI, award of January 15, 1992, Digest, p. 79, 86). In the early 2004, the Court stated that it “will always have jurisdiction to overturn decisions of any sports federation if the decision is not in accordance with good faith and is not aligned with fundamental human rights” (CAS OG 04/009, H.O.C. & N. Kaklamanakis / I.S.A.F., 2004). From this perspective, the Court of Arbitration for Sport appears as a law creator, holding a supervisory role, as it has contributed to making fundamental human rights and all other guaranteed rights the focal point to which everything must adhere, even powerful sports governing bodies (Lever, 1999: 285). Furthermore, there is a possibility that the Court could establish a new principle that gains legitimacy by incorporating it into the aforementioned concept of “*principia sportiva*,” as these principles are reserved exclusively for the field of sports. For instance, principles like “fair play” or the principle of “strict liability” in doping situations could be incorporated (CAS 98/200 AEK Athens and SK Slavia Prague / Union of European Football Associations (UEFA), 158). What can be deduced from this is that apart from its overarching role in the world of sports law, the Court exhibits its superiority in another way by having the potential to be a creator of new rules in the field of sports law. This is also a demonstration of judge-made law at the international level. Regarding the interpretation of sports law, the Court’s role is significantly pronounced, as evidenced by its influence on other sports bodies and larger bodies within the Court. The essence is that no larger body is obligated to follow the actions of another larger body; there is no legal framework for such. However, for the sake of coherence, larger bodies ensure that they do not contradict each other, resembling the World Trade Organization and its dispute resolution body, where though there is no formal *stare decisis* or precedent, these bodies still strive to follow their jurisprudence (Bhala, 1999: 845). Although we lack formal precedent, it is still taken into account within the larger bodies of the Court of Arbitration for Sport. One could even say that the procedural code has fallen silent regarding precedent, and the essence is that the Court can be guided by its own decisions but also deviate from them without any legal repercussions (Lindholm, 2019: 91). As an example of this situation, we refer to the Webster case, which is characteristic in that the Court ruled that in the event of a unilateral unjustified repudiation of the contract (repudiatory breach) by an athlete, the employer has no legal entitlement to any part of the athlete’s market value. However, in the case of Matuzalem, although the Court noted similarities to the Webster case, it ruled that the loss of potential transfer funds can be considered compensable damages (Lindholm, 2019: 91). According to our references, five decisions have explicitly referred to previous judgments and rely on them. The first such decision was made in the Cullwick case in 1997 (Lindholm, 2019: 91). The role of this Court also involves the harmonization of global norms, accomplished by its rules serving as a pinnacle within the intricate legal system composed of multiple levels. However, the fundamental level is the “absolute right of the Court to exercise supervision over facts and law” (Karaquillo, 2008: 33). The Court is also empowered to issue new decisions for the purpose of legal harmonization, which may replace existing decisions or remand the matter to the previous instance (Kohler, Rigozzi, 2005: 30). After considering all the arguments presented, the question arises as to why we should study this arbitral body and its influence. It is cited as a primary reason due to the authority possessed by this arbitral body and its capacity to resolve important sports law matters through arbitration jurisdiction. Another reason is that the Court of Arbitration for Sport is the crowned monarch in the field of sports law, representing the “superior court of international sport” (Lindholm, 2019: 5). A third reason is that the unification of sports law through decisions of this Court will result in fair and equitable legal rules that will be applicable to athletes (Lindholm, 2019: 6).

5. CONCLUSION

In summary, the Court of Arbitration for Sport (CAS) plays a pivotal role in the sports world by providing a neutral and expert platform for resolving disputes. Its consistent adherence to principles of fairness and its influential decisions have a lasting impact on sports governance and law. CAS’s existence ensures that the spirit of sportsmanship and integrity remains upheld while offering athletes and organizations a reliable avenue for conflict resolution. By offering a specialized panel of arbitrators and a comprehensive jurisdiction, CAS stands as a crucial mechanism in maintaining a level playing field and upholding the principles of transparency and justice in sports. As sports continue to advance, CAS’s significance in shaping sports law and fostering trust among stakeholders remains undeniable. As sports continue to evolve and grow in complexity, CAS remains at the forefront of resolving conflicts and maintaining the integrity of sports competitions. Its ongoing commitment to fairness, impartiality, and expertise ensures that athletes and stakeholders have a reliable avenue for resolving disputes while

upholding the values that underpin the spirit of sportsmanship. In essence, the Court of Arbitration for Sport serves as a beacon of equity in the dynamic arena of sports law, fostering a climate of trust and accountability for all those involved.

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