# Rule of Law in Organised Sport

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**Abstract**

The rule of law which mandates that all persons and authorities within the state are bound by the law, plays a role in every part of our society, which includes recreational and professional sport. This article addresses the different layers of the rule of law in organised sport. Sport has its specificities in the execution of authority. Authority may only be executed by sports organisations over persons who have submitted to their rules and regulations at a national and international level. In addition, authority over members is only established if the validity of sports rules and regulations is established through their accessibility so that the persons that are bound by them know what conduct is expected and permitted. As such, sports organisations enjoy a wide autonomy to organise and regulate the internal association life. This autonomy grants sports organisations regulatory and disciplinary jurisdiction over their direct and indirect members. But despite being afforded autonomy in many aspects of its organisation and operations, national and internationl sports organisations do not act in a legal vacuum and are still

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bound by the rule of law and the laws of the state. In other words, all activities by sports organisations are limited by their own statutes, rules and regulations and by law. This means that the rule of law must be respected both internally, within a sports organisation, and externally in accordance with the applicable national and international law. Finally, in the event of disputes between sports organisations and their direct and indirect members, all persons must be granted effective access to justice and legal remedy.

**Keywords:** Sports Law, Human Rights Law, EU Law, Court of Arbitration for Sport, Organised Sport

## A. Introduction

The rule of law is a well-known concept that has been discussed over centuries and there are diverging and different definitions on what the rule of law has been over this period. For the purpose of this article, the author will discuss the topic of the rule of sports law on the basis that the term of the rule of law means that "all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts."[1]

While the majority of the debates in relation to the rule of law revolve around the behaviour and actions of public authorities and the equality of all persons before the law, the rule of law is also applicable in other aspects of society, like sports. For example, sport is essentially characterised by compliance with the rules of the game. Sport without rules would cause chaos and render any sporting competition ineffective. This is because participants in both professional and recreational sports competitions expect and trust that everyone will be treated equally in conformity with the applicable sports rules and regulations in order to achieve fair, comparable, and harmonised sporting results.[2] In the absence of fair sporting competitions and results, athletes would lose interests in participating in sporting competitions if one athlete had an undue competitive advantage over another. The same is true for spectators of such sports competitions as they will inevitably lose interest in sport if the results of sports competitions were achieved based on factors that are not compatible with the applicable sports rules and regulations.

An apt example is if an athlete is found to have taken prohibited substances for performance-enhancing purposes. An athlete could also manipulate a sports competition by deliberately underperforming or making intentional mistakes, such as an own goal in football or a double fault in tennis, to gain a sporting or financial advantage. In both examples, competitors and spectators believe that the acts of doping and match-fixing are unfair because sports competitions are based on the silent agreement among competitors that there is a sporting level playing field

1 *Bingham*, p. 37.
2 CAS 2010/A/2311 & 2312, award of 22 August 2011, para. 19.



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among the participants which allows everyone to win the competition on purely sporting grounds. In other words, equality plays just as important a role in sports as it does under the rule of law. However, equality and fairness in sport is not an easy endeavor and may only be accomplished through harmonised sports rules and regulations at national and international level.

In international sport, this equality shall be created by the so-called *Ein-Platz Prinzip* (single-place principle) which means that each sport should in principle be governed by one international federation, one continental federation and one national federation.[3] This principle is, *inter alia*, found in the statutes of international sports federations. For example, according to the statutes of the *Fédération Internationale de Football Association* (FIFA), the international sports governing body for the sport of football, one of the requirements for a national football association or British association, such as the German Football Association (DFB) or the Football Association (FA), to become a member of FIFA is that only one national member association per country or territory is recognised as a member association of FIFA.[4] The creation of this common organisational structure in international sport falls within the autonomy of sports organisations rooted in national association law. Based on this autonomy, sports organisations can in principle decide on the requirements for membership in their organisation.[5] This is part of the regulatory autonomy of sports federations at international and national level with the consequence that international and national sports federations act as *quasi* legislator in the respective sport. However, this means that sports organisations are not only obliged to draft and adopt their statutes, rules and regulations to their members. At the same time, they are also obliged to comply with their own rules and regulations. For example, Article 3 of the FIFA Statutes provides that "*FIFA is committed to respecting all internationally recognised human rights and shall strive to promote the protection of these rights.*"

The regulatory autonomy of sports associations is a good example to identify similarities to the rule of law. The sovereignty of states and the sovereign legislative power of parliament can also be recognised in sports law. The rule of law is applicable to sports in two dimensions. The first dimension relates to the organisational and regulatory jurisdiction. Sports associations generally enjoy regulatory autonomy of how they regulate their internal association life. Put simply, a sports organisation can, in principle, enact regulations on any subject it deems appropriate and impose them on its members. This autonomy generally derives from the freedom of association guaranteed under, for example, national constitutional law and Article 11 of the European Convention on Human Rights (ECHR). Therefore, the second feature of the rule of law, meaning that all persons and authorities should adhere to and be entitled to the benefits of law, can also be found in organised sport which relates to the question whether or not members of international and

3 See, e.g. Article 25 of the Olympic Charter; CAS 2018/O/5830, award of 5 August 2020.
4 Article 11 para. 2 of the FIFA Statutes.
5 CAS 2014/A/3828, award of 17 September 2015, para. 143.



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national sports federations, including athletes and officials, and international and national sports association themselves as the rule-making authority are bound by and obliged to respect the same set of sports rules and regulations within the sports organisation. For the purpose of this article, sports associations can therefore be equated with states in the sense that they make rules for their own members and themselves to which all are, in principle, equally bound. However, the sovereignty of sports organisations to act as a *quasi* legislator is not absolute and may be limited by national and international law. This limitation of authority constitutes the second dimension of the rule of law in organised sport and must be kept in mind when discussing the authority of sports organisations and the validity of sports rules and regulations.

A further feature of the rule of law is access to justice and effective legal remedy. In organised sport, most international sports organisations have decided to refer certain disputes to a private arbitral tribunal, i.e. the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland. The mandate of the CAS derives from an arbitration agreement or arbitration clauses included in the applicable rules and regulations of sports organisation. If the arbitration clause in favour of CAS is included in the applicable rules and regulations of sports, the sports organisation concerned refers their dispute(s) to the CAS to the exclusion of state courts.

This article first introduces the role of international and national sports organisations as *quasi* legislators in organised sport and the characteristics of the application of their rules and regulations to their direct and indirect members. It then discusses the limitations of the autonomy of sport through national and international law. It further addresses the predictability and accessibility of sports rules and regulations as a prerequisite for their validity before delving into the issues of equality as well as dispute resolution and the access to justice. Finally, the article concludes that the rule of law is very much alive in organised sport. While sports organisations enjoy a wide autonomy to decide on their internal association life on their own, it remains necessary that all sportspersons and the sports association itself are bound by the same rules and regulations and comply with them in order to ensure fairness and equality in sport and the functioning of the organisation.

## B. Authority

### 1. The sporting pyramid

The present discussion about the rule of law and sports law is based on the so-called *Ein-Platz Prinzip* (single-place principle) which is based on a pyramidal structure. The sporting pyramid consists of hierarchical levels from top to the bottom of the pyramid.[6] Most international sports follow this structure which means that in principle each sport has one international and one national federation which govern

6 *Pagé/Taylor*, in: Lewis/Taylor (eds.), p. 18.



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the sport at an international and national level from grassroots to elite level.[7] In simple terms, the international sports federation, for example FIFA, World Athletics or World Aquatics, is at the top of the sporting pyramid in their respective sport. One national federation per country or territory becomes a member association of the international sports governing body. Through the national federation's membership, the international federation recognises that this member federation shall be the exclusive responsible authority for governing the sport at national level.[8] For example, the German Football Association is a member of the hierarchically higher international[9] and continental sports federations, i.e. FIFA and UEFA. Based on the membership agreement between the national and international sports federation, the national federation is bound by the statutes, rules and regulations of the international federation and, in turn, accept the international federation's exclusive authority to govern the sport internationally.[10] This membership agreement ensures that all member associations are bound by the same set of rules at an international level. It therefore has only legal effects for direct members of the international sports federation and the international federation itself.

### 2. *Quasi* legislators

This is an important consideration when looking at sports law from a rule of law perspective. International sports federations create their own authoritative "microcosmos" in the way that they can generally decide on their own rules and regulations within the so-called autonomy of sport.[11] Within the association life, the federation has a position that is comparable to state governments and all members of the federation, the federation itself and the authorities acting on behalf of the federation must comply with the statutes, rules and regulations of sports organisations.[12] Sports organisations have, *inter alia*, the regulatory and disciplinary authority over their members for which they need to ensure that all members are treated equally on and off the field. National sports federations enjoy the same autonomy in relation to setting and enforcing their rules and regulations upon its own members whereby their autonomy may be limited by the rules and regulations of the higher-ranked federation, i.e. continental and international federations, which they accept to be subject to as part of the membership agreement with the higher-ranked sports organisations.[13]

7 *European Commission*, White Paper on Sport, COM(2007) 391, p. 13.
8 Lewis/Taylor, *Sport: Law and Practice*, p. 19; see also Article 7.3 of the World Athletics Constitution (2023 edition); Article 11 para. 1 of the FIFA Statutes (2024 edition);
9 To simplfy the illustration, reference to continental associations, such as the *Union des associations européennes de football* (UEFA) has been omitted.
10 *Pagé/Taylor*, in: Lewis/Taylor, p. 19.
11 *Haas/Hessert*, in: Schimke/Dauernheim/Schiffbauer (eds.), p. 1618; CAS 2014/A/3828, award of 17 September 2015, para. 142.
12 CAS 98/200, award of 20 August 1999, para. 58; CAS 2006/A/1181, award of 14 May 2007, para. 10.
13 See e.g. Article 3 of the German Football Association Statutes (2023 edition).



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### 3. Access to the association life of sports organisation

A right to admission does generally not exist since the composition of membership is part of a sport association's autonomy.[14] However, this can be different for applications for membership of international and national sports federations. Due to the monopolistic and monopsonist structure in organised sport, international and national sports organisations must carefully exercise the process for member candidates to join their organisation as members, taking into account the *Ein-Platz Prinzip* described above. In the spirit of the rule of law, each member candidate must be subject to the same procedure, criteria and regulations for membership of the respective sports organisation before the sports organisation can make a selection from among the competing lower-ranked sports organisations applying for membership of the higher-ranked sports organisation. In addition, the refusal of membership by a monopolistic national or international sports organisation may constitute – depending on the applicable national law – a violation of competition law[15] or the applicant's personality rights[16].[17]

In case the applicant's membership application is rejected, the applicant can file a complaint for admission before the competent state courts or arbitration tribunals, such as the CAS.[18] As such, if the complaint is filed, the competent adjudicatory body will look at the requirements for membership and at the application procedure conducted.[19] For example, in the *Gibraltar*[20] case before the CAS, the Gibraltar Football Association (GFA), i.e. the sports governing body of football within the territory of Gibraltar, applied to become a member of FIFA. The FIFA Executive Committee rejected the application of the GFA on the basis that the requirements for admission under the applicable FIFA rules were not fulfilled.[21] This case is a good example to illustrate the interplay between the freedom of associations and the application of general legal principles to rules and decisions of monopolistic sports federations, meaning that sports federations may be held to the same standard as state actors if their decisions and regulations are comparable to those of state actors in the governance of the respective sport at international or national level.[22]

In this particular case, the CAS panel had to examine the application procedure before FIFA in the light of the legal principle of non-retroactivity of law (respectively, sports rules and regulations). This is because the GFA application under re-

14 CAS 2014/A/3828, award of 17 September 2015, para. 142.
15 *Osnabrügge*, in: Schimke/Dauernheim/Schiffbauer (eds.), p. 26.
16 *Riemer*, BK-Vereine, Art. 70 ZGB, para. 71.
17 *Haas/Hessert*, in: Schimke/Dauernheim/Schiffbauer (eds.), p. 1633.
18 *Riemer*, BK-Vereine, Art. 70 ZGB, para. 97; see also Swiss Supreme Court 4A_314/2017, judgment of 28 May 2018; CAS 2024/A/10290, award of 10 July 2024.
19 See e.g. CAS 2014/A/3828, award of 17 September 2015; CAS 2014/A/3776, award of 26 April 2016; CAS 2016/A/4602, award of 24 January 2017; CAS 2017/A/5200, award of 10 July 2018.
20 CAS 2014/A/3776, award of 26 April 2016.
21 The current requirements for admission can be found in Article 11 of the FIFA Statutes (2024 edition).
22 CAS 2006/A/1181, award of 14 May 2007, para. 10.



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view was filed in 1997 and resumed in 2013. FIFA decided on the GFA's application for admission in September 2014 on the basis of the FIFA Statutes and regulations that were in force at the time of the rejection of membership. The question that had to be assessed was therefore whether (i) the principle of non-retroactivity of law applied to this matter and (ii) FIFA had violated this principle when rejecting the GFA's application.

In this regard, the CAS panel pointed out that FIFA's admission requirements for membership have a substantive nature and therefore the legal principle of *tempus regit actum* applies in the sense that the law applicable at the time the application for membership of FIFA was filed by the GFA.[23] In general, exceptions to the legal principle of *tempus regit actum* may apply to sports-related disputes on limited and strict bases. The sports rule applicable at the time of the decision may apply if the retroactive application of the provision in question are explicitly mandated in the sports regulation that is applicable at the time of the decision.[24] However, this exception further requires, *inter alia*, that the application of the new provision must not cause any unacceptable legal inequality and be justified by overriding reasons. Another exception to the principle of non-retroactivity may apply in sports disciplinary proceedings[25], for example in doping matters. In disciplinary matters, sports organisations may apply rules and regulations retroactive in accordance with the legal principle of *lex mitior*. According to the principle of *lex mitior*, a sports regulation may be applied retroactively if the new provision is more favourable to the athlete or other sportsperson than the sports rule or regulation that was in force at the time of the violation of the sports regulation concerned.[26]

The CAS panel in the Gibraltar case did not have to consider these exceptions and in answering the aforementioned question found that:

> "[w]hile FIFA is unquestionably free to change its membership criteria at any time, it cannot retroactively apply such changes to already pending membership applications, but only to future instances. It would be improper if FIFA, in its position as a world-wide monopolistic association having a global reach, could retain the unfettered right when reviewing a candidate football association's application to change, so long as the application has not been accepted, the general terms and conditions of membership to the detriment of the applicant. Accepting such an approach would essentially give absolute control to FIFA vis-à-vis any applicant for admission and could render any and all of admission regulations and procedures irrelevant and unreliable. For these reasons, FIFA may not apply its membership criteria retroactively."

23 CAS 2014/A/3776, award of 26 April 2016, para. 288.
24 CAS 2014/A/3776, award of 26 April 2016, para. 288; Swiss Supreme Court 113 Ia 412, judgment of 18 March 1987, consid. E.6.
25 For the distinction between administrative and disciplinary provisions see *Haas/Hessert*, in: Chaussard/Fortier/Jacotot (eds.), pp. 287–307.
26 CAS 2010/A/2083, award of 9 February 2012, para. 63; CAS 2019/A/6148, award of 22 June 2021, para. 209; CAS 2021/A/8311, award of 29 December 2023, para. 155; see also Article 27.2 of the WADA Code.



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Therefore, FIFA was bound by the principle of non-retroactively and did not respect this principle when rejecting the membership application of the GFA.

If a membership relationship can be established between the superordinate and subordinate sports organisation within the sporting pyramid, for example between FIFA and the German Football Association, then the superordinate sports organisation has the regulatory power to implement and enforce its rules and regulations *vis-à-vis* its own direct members.

## 4. Authority over indirect members

With a few exceptions, athletes and other sportspersons do not sign membership agreements with international sports federations and cannot be qualified as "direct members". For the reasons of harmonisation, fairness, and comparability of sporting competitions, it is however of utmost importance that for example, athletes, other sportspersons (e.g. coaches or referees) and clubs are subject to the same set of regulations. Therefore, there must be an alternative legal construct through which sports organisations be granted authority to govern their respective sports in relation to the aforementioned individuals (so-called "indirect members"). Under the sporting pyramid in organised sport, this authority is generally achieved in two ways.

The first way is through membership agreements between the individual and subordinate sports organisations by which they accept the applicable regulations of the national and/or international sports federation. Through this mechanism, all stakeholders, within the sporting pyramid, including athletes and clubs, are bound by the rules and regulations of the superordinate sports federation. This chain of affiliation has been described by the CAS as follows:

> "a club is a member of its national (or regional) federation and therefore bound by the applicable national regulations, while these regulations, inter alia, refer to the applicable international regulations and declare these regulations equally binding on a club at national level. As a result, the club is, on the basis of its (direct or indirect) membership with the national federation, also bound to the applicable international regulations."[27]

This mechanism may also apply to athletes and sportspersons through which they become so-called indirect members of international sports federations.

Another way for athletes, other sportspersons, and clubs to become indirect members and be bound by the rules and regulations of international sports federations is by signing entry forms, rule recognition contracts, athlete's agreements or any other contract through which individuals submit themselves to the rules and regulations of national and international sports federations. The contracts are generally a requirement for the participation in the competition.[28] By signing these contracts, individuals accept that sports federations have, *inter alia*, the regulatory

27 CAS 2012/A/3032, award of 24 October 2013, para. 55.
28 *Pagé/Taylor*, in: Lewis/Taylor (eds.), p. 20.



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and disciplinary authority over them. For example, the disciplinary power over sportspersons entitles sports federations to impose sporting sanctions against those individuals who have agreed to be bound by their rules and regulations.

In turn, athletes and sportspersons are entitled to challenge decisions or regulations[29] of sports organisations in accordance with the applicable sports regulations and/or national law.[30] Equally, natural, or legal persons may challenge the sports organisation's power to exercise authority over them on the basis that they have never accepted the rules and regulations of sports organisations and that they shall therefore not be subject to them. In this case the adjudicatory body must review whether the person concerned is an (indirect) member at the time when, for example, the disciplinary authority was executed or whether an indirect membership relationship did not exist[31] or no longer exist[32] at this material time. Finally, sports organisations may decide to exclude members on justified grounds[33] if, for example, the excluded member behaves in a way that does not correspond to what can be expected from a member as part of the association life.[34]

## 5. Limitations to the autonomy of sport

If an indirect membership can be established, the power of sports organisations to exercise authority over such members, particularly athletes, may be limited. As such, due to the above-mentioned monopolistic and monopsonist structure in organised sport athletes and other sportspersons generally have no real choice whether or not to accept the rules and regulations of sports organisations if they wish to compete at a professional level. Through this compelling acceptance of sports rules and regulations, sports governing bodies create a harmonised regulatory landscape in sport. At the same time, sportspersons may be compelled to waive certain basic rights in order to be eligible for professional sports competitions. The waiver of basic rights may be justified by the interest of, for example, fairness and comparability of sports competitions. However, the impairment of the rights of the individual must then be counterbalanced by the review of adjudicatory bodies which must then review any perceived violation of individual basic rights in their decision-making process.[35] Accordingly, the autonomy of sports organisations and the right to exercise authority over their indirect members is not unlimited.

29 See e.g. CAS 2014/A/3759, award of 24 July 2015; CAS 2018/O/5794 & 5798, award of 30 April 2019; CAS 2023/O/10000, award of 10 June 2024.
30 See e.g. Article 75 of the Swiss Civil Code.
31 See e.g. CAS 2016/A/4697, award of 3 February 2017, para. 92.
32 Riemer, BK-Vereine, Art. 70 ZGB, para. 209; *Dehesselles,* in: Schimke/Dauernheim/Schiffbauer (eds.), p. 734.
33 See e.g. Article 72 para. 3 of the Swiss Civil Code.
34 See CAS 2023/A/9795, award of 2 April 2024; *Haas/Hessert*, in: Jung/Krauskopf/Cramer (eds.), pp. 288 et seq.
35 *Hessert*, p. 30; ECtHR, Nos. 40575/10 and 67474/10, *Mutu and Pechstein v. Switzerland*, judgment of 2 October 2018, para. 115.



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As such, the authority of sports organisations can be limited by the fundamental rights of sportspersons, notwithstanding the fact that sports federations are generally organised as private entities in the form of associations or companies and the primordial nature of international human rights, which oblige state actors to respect, protect and fulfil human rights of individuals.[36] This may even extend to adequate procedural safeguarding in the sense that the autonomy of sport can be limited by fundamental criminal law principles in disciplinary proceedings, taking into account the criminal character of the sports rule violation in question, such as the above-mentioned principle of *lex mitior* or the legal principle of *nemo tenetur se ipsum accusare* (privilege against self-incrimination).[37] This recent development in sports law adds one layer of the rule of law to organised sport, namely, the sufficient respect, protection and fulfilment of international human rights law in sports-related inter-individual relationships.[38]

This can be demonstrated when looking at some of the recent developments and legal proceedings relating to sport. For example, sports federations and other stakeholders have discussed and developed mechanisms for the protection of sportspersons against all forms of abuse and discrimination in sport. This discussion about safeguarding is currently "on high alert" and it requires the effort of all stakeholders to protect affected individuals, especially children and young athletes, from such atrocities.[39] International procedural and substantive human rights were also considered in recent sports-related proceedings before the CAS[40] and the European Court of Human Rights (ECtHR)[41].

A good example in this regard are so-called whereabouts obligations of athletes. According to the applicable anti-doping rules of the signatories to the World Anti-Doping Code (WADA Code) of the World Anti-Doping Agency (WADA), which incorporate both the WADA Code and the so-called International Standards[42], athletes who are part of so-called registered testing pools are obliged to file every

36 *De Schutter*, p. 292.

37 *Hessert*, p. 49; ECtHR, Nos. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, *Engel and Others v. the Netherlands*, judgment of 8 June 1976, para 82; the question was left open by Swiss Supreme Court 4A_540/2018, judgment of 7 May 2019, consid. E.3.2.

38 *Bingham*, p. 66; *Hessert*, p. 18.

39 *Stirling/Kerr*, in: Lang/Hartill (eds.), pp. 143–152; *Gallafent/Bush*, in: Lewis/Taylor (eds.), pp. 642–671; *Soublière/Hessert*, CAS Bulletin 2024/01, pp. 6–32.

40 See e.g. CAS 2018/O/5794 & 5798, award of 30 April 2019; CAS 2018/A/6007, award of 18 July 2019; CAS 2019/A/6388, award of 14 July 2020; CAS 2019/A/6669, award of 28 April 2022;

41 ECtHR, Nos. 48151/11 and 77769/13, *National Federation of Sportspersons' Associations and Unions (FNASS) and Others v. France*, judgment of 18 January 2018; Nos. 40575/10 and 67474/10, *Mutu and Pechstein v. Switzerland*, judgment of 2 October 2018; No. 7198/07, *Erwin Baker v. Switzerland*, judgment of 3 September 2019; Nos. 30226/10, 17880/11, 17887/11, 17891/11 and 5505/16, *Ali Riza and Others v. Turkey*, judgment of 28 January 2020; No. 526/18, *Platini v. Switzerland*, judgment of 11 February 2020; No. 10934/21, *Semenya v. Switzerland*, judgment of 11 July 2023 (currently pending before the Grand Chamber of the ECtHR); see also *Rigozzi*, in: Müller/Besson/Rigozzi (eds.), pp. 77–128.

42 Cf. Article 23.2 of the WADA Code.



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quarter information about their living, training and competition locations.[43] They are further required to indicate for each day a 60-minute time window where the athletes can be found.[44] It is the athletes responsibility to update the whereabouts if the place of stay originally stated changes for whatever reason.[45] This system is designed to ensure that athletes can be located for unannounced testing, particularly when they are not competing, as this time is considered to be the relevant time where athletes attempt to gain undue, performance-enhancing advantages over their competitors. The whereabouts system is therefore considered as an important measure in the fight against doping which is why athletes are subject to ineligibility sanctions of up to two years if they fail to file their testing and/or file their whereabouts three times within twelve months.[46] This is a considerable long occupational ban if one considers that most sporting careers are very limit in time. At the same time, this system imposes stringent requirements on athletes to be present for testing every day of the year, including during the most private time of their lives.

Due to these restrictions on private life, French athletes challenged the whereabouts system before the ECtHR.[47] In France, national sports federations are public entities and the whereabouts system is provided in national law, namely Article L232–15 of the *Code du Sport.* The ECtHR recognised that the athletes' whereabouts obligations interfere with the athletes' right to privacy guaranteed under Article 8(1) of the ECHR.[48] However, these rights are not absolute and the limitation of the enjoyment of fundamental rights may be justified. Consequently, the Court carried out a balancing proceed by asking whether this interference of privacy rights was necessary and proportionate in the international fight against doping and in protection of athletes' health. The ECtHR finally decided that the whereabouts system is justified and proportionate based on the following considerations:

> "The Court does not underestimate the impact of the whereabouts requirements on the applicants' private lives. Nevertheless, the general-interest considerations that make them necessary are particularly important and, in the Court's view, justify the restrictions on the applicants' rights under Article 8 of the Convention. Reducing or removing the requirements of which the applicants complain would be liable to increase the dangers of doping to their health and that of the entire sporting community, and would run counter to the European and international consensus on the need for unannounced testing. The Court therefore finds that the respondent State struck a fair balance be-

43 Article 5.5. WADA Code and Article 4.8.6.2 lit. a) of the International Standard for Tsting and Investigations.
44 Article 5.5. WADA Code and Article 4.8.6.2 lit. b) of the International Standard for Tsting and Investigations.
45 Article 5.5. WADA Code and Article 4.8.6.2 lit. a) of the International Standard for Tsting and Investigations.
46 Article 2.4 of the WADA Code.
47 ECtHR, Nos. 48151/11 and 77769/13, *National Federation of Sportspersons' Associations and Unions (FNASS) and Others v. France*, judgment of 18 January 2018.
48 ECtHR, Nos. 48151/11 and 77769/13, *National Federation of Sportspersons' Associations and Unions (FNASS) and Others v. France*, judgment of 18 January 2018, para. 159.



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tween the different interests at stake and that there has been no violation of Article 8 of the Convention."[49]

Apart from the author's opinion on the direct application of international human rights law through the acceptance of sports regulations on compulsory basis, a further category of limitation on the autonomy of sport through international human rights law has evolved in recent years. The adequate protection of international human rights law within the association life of international sports federations has been realised through human rights-related provisions in the rules and regulations of sports organisations. In other words, sports federations have included provisions in their statutes, rules and regulations through which they either commit to respect international human rights treaties or to individual human rights, such as the prohibition of discrimination.[50] For example, Article 4.1 lit j) of the World Athletics Constitution (2021 edition) states that "[t]he purpose of World Athletics [is] to preserve the right of every individual to participate in Athletics as a sport, without unlawful discrimination of any kind undertaken in the spirit of friendship, solidarity and fair play". The practical importance of this development is also recognised in practice and members of sports organisations can invoke these rights in sports-related proceedings.[51] In addition, sports organisations that have committed themselves to international human standards must afford sufficient respect and protection when implementing rules and regulations and when making decisions in due consideration of the principle of proportionality.

The autonomy of international sports federations can further be limited by other sources of law. Firstly, international sports organisations are private entities founded under either national association law or company law. Therefore, they do not operate in a legal vacuum, but they need to respect and comply within the applicable national mandatory statutory provisions. The autonomy of sports organisations may further be limit by other legal sources, such as EU law[52]. This creates an area of tension between the constitutionally guaranteed freedom of association[53] and national and international law, whereby the question of how far the freedom of association and their autonomy extends and when it is exceeded must constantly be considered.

This legal tension can also be discovered when looking at the jurisprudence of the Court of Justice of the European Union (CJEU) in disputes related to sport. The first sports-related judgment of the CJEU in *Walrave and Koch*[54] was rendered

49 ECtHR, Nos. 48151/11 and 77769/13, *National Federation of Sportspersons' Associations and Unions (FNASS) and Others v. France*, judgment of 18 January 2018, para. 191.

50 See also, e.g. Article 3 of the FIFA Statutes (2024 edition) in conjunction with the FIFA's Human Rights Policy (2017 edition); Article 2.5 of the IOC Charter; see also *Haas/Hessert*, in: Chaussard/Fortier/Jacotot (eds.), pp. 287–307.

51 See e.g. CAS 2018/O/5794 & 5798, award of 30 April 2019; CAS 2020/A/6807, award of 23 October 2020; CAS 2023/O/10000, award of 10 June 2024.

52 ECJ, Case C-36/74, *Walrave*, ECR 1994, 1405, para. 17.

53 See for example Article 9 of the German Constitution; Article 23 of the Swiss Federal Constitution; see also Art. 11 of the European Convention on Human Rights.

54 ECJ, Case C-36/74, *Walrave*, ECR 1994, 1405.



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fifty years ago and the case law of the CJEU in matters related to sport has evolved since then. In this decision, the Court considered that (i) the Treaty is not only applicable to actions of public authorities but may also apply to sporting regulations if those are "aimed at regulating gainful employment in a collective manner"[55] and sports regulations may not fall within the scope of the Treaty if they are of a purely sporting interest in absence of an economic activity.[56] This finding of the CJEU was then further developed in the *Bosman*[57] judgment. In *Bosman*, the CJEU recognised that the Treaty "do not preclude rules or practices justified on non-economic grounds which relate to the particular nature and context of certain matches."[58] In addition, in the *Meca-Medina*[59] judgment, the CJEU clarified that even if the sports regulation in question concerns a purely sporting interest this

> "does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule or the body which has laid it down. If the sporting activity in question falls within the scope of the Treaty, the conditions for engaging in it are then subject to all the obligations which result from the various provisions of the Treaty. It follows that the rules which govern that activity must satisfy the requirements of those provisions, which, in particular, seek to ensure freedom of movement for workers, freedom of establishment, freedom to provide services, or competition."[60]

This has the effect that sports regulations are subject to EU competition law under Articles 101 and 102 of the Treaty of the Functioning of the European Union (TFEU).

Any sports regulation that restricts free competition[61] within the internal market of the EU and EEA[62] will be subject to the Treaty and sports regulations in question must be reviewed to determine whether in relation to competition law it constitutes a restriction by "object" which are anticompetitive and not in compliance with EU law[63] that can only be justified under Article 101(3) of the TFEU. The requirements for a justification under Article 101(3) of the TFEU are generally high and the sports organisation that enacted the regulations in question bears the burden of proof for this, which are not easy to prove.[64] A restriction of free competition by "effect" may also be justified under Article 101(3) of the TFEU. In addition,

55 ECJ, Case C-36/74, *Walrave*, ECR 1994, 1405, para. 17.
56 ECJ, Case C-36/74, *Walrave*, ECR 1994, 1405, para. 8.
57 ECJ, Case C-415/93, *Bosman*, ECR 1995, I-5040.
58 ECJ, Case C-415/93, *Bosman*, ECR 1995, I-5040, para. 76.
59 ECJ, Case C-519/04 P, *Meca-Medina*, ECR 2006, I-7006.
60 Ibid., paras. 27 and 28.
61 Similar issues may arise in relation to the restriction of the movement of persons, goods, capital or services.
62 Cf. Article 54 of the Agreement on the European Economic Area.
63 ECJ, Case C-333/21, *European Superleague Company*, ECLI:EU:C:2023:1011, para. 159; Case C-650/22, *FIFA*, ECLI:EU:C:2024:824, para. 125.
64 ECJ, Case C-333/21, *European Superleague Company*, ECLI:EU:C:2023:1011, paras. 191, 206, 236; see also Vorsitzendenschreiben des Bundeskartellamtes, 26 February 2024 (DFL Deutsche Fußball Liga GmbH, Frankfurt am Main (D); Zentralvermarktung der Medienrechte ab Saison 2025/2026 Prüfung nach § 1 GWB, Art. 101 AEUV).



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such restriction can be justified in the light of the principle of proportionality,[65] meaning that the sports regulation under review pursues a legitimate objective and "are suitable for ensuring the achievement of that objective and do not go beyond what is necessary for that purpose"[66]. As such, it is important to recognise that this justification by proportionality, deriving from the so-called "Wouters test"[67], is not applicable to restrictions by "object", which means that such restriction may only be justified pursuant to Article 101(3) of the TFEU.[68]

In the light of the above, the autonomy of sports organisations is limited if a sports regulation that falls within the scope of the TFEU is anticompetitive by object and cannot be justified under Article 101(3) of the TFEU or is a restriction by "effect" that cannot be justified either pursuant to Article 101(3) of the TFEU or in accordance with the principle of proportionality. This finding is not only important for sports organisations and its members in which the sports regulation concerned has an effect in the EU. EU competition law can have an impact on the determination of anticompetitive sports regulations that goes beyond the territorial scope in which the national court uses EU competition law as an interpretative guideline. For example, in the *SISTIC.com* case, the Competition Commission of Singapore held as follows:

> "The section 47 prohibition is modelled after the Chapter II prohibition of the United Kingdom ('UK') Competition Act 1998 and Article 82 of the European Union ('EU') Treaty [now Article 102 of the TFEU]. As competition law is a new area of law in Singapore, cases from these jurisdictions may be persuasive or useful in assisting CCS in reaching its decision. However, the value of any foreign competition cases will depend very much on the overall context and the extent to which the facts of such cases are applicable to the local context and the facts of the existing case."[69]

### C. Accessibility and predictability of sports regulations

A lawful application of sports rules and regulations to members requires accessibility.[70] This means that such rules and regulations may only be valid if members have

65 ECJ, Case C-415/93, *Bosman*, ECR 1995, I-5040, para. 104; Joined Cases C-51/96 and C-191/97, *Deliège*, ECR 2000, I-2549.

66 ECJ, Case C-415/93, *Bosman*, ECR 1995, I-5040, para. 104; Case C-519/04 P, *Meca-Medina*, ECR 2006, I-7006, para. 54; Case C-22/18, *Topfit and Biffi*, para. 48; Case C-333/21, *European Superleague Company*, ECLI:EU:C:2023:1011, para. 251; Case C-124/21 P, *International Skating Union*, ECLI:EU:C:2023:1012, para. 111; Case C-650/22, *FIFA*, ECLI:EU:C:2024:824, para. 95.

67 ECJ, Case C-309/99, *Wouters and Others*, C-309/99, EU:C:2002:98, para. 97; see also Case C-519/04 P, *Meca-Medina*, ECR 2006, I-7006, paras. 42 et seq.

68 ECJ, Case C-333/21, *European Superleague Company*, ECLI:EU:C:2023:1011, paras. 187; Case C-124/21 P, *International Skating Union*, ECLI:EU:C:2023:1012, para. 113; Case C-438/22, *Em akaunt BG*, EU:C:2024:71, para. 33; Case C-650/22, *FIFA*, ECLI:EU:C:2024:824, para. 151. See also *Orth*, SpuRt 2024/6, p. 487.

69 Competition Commission of Singapore, Case CC 600/008/07, 4 June 2010, para. 4.1.3.

70 *Soublière/Hessert*, CAS Bulletin 2024/1, p. 9; CAS 2014/A/3665, 3666 & 3667, award of 2 December 2014, para. 73; 2022/A/9018, award of 15 March 2023, para. 88.



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the possibility to be provided with and have access to them. This is important so that sportspersons who have submitted to the authority of sports organisations can read and familiarise themselves with those rules and regulations. In other words, the legal principles of legality and predictability require that sportspersons who are under the regulatory and disciplinary authority of sports organisations must be able to access the applicable rules and regulations so that they know what conduct is permitted and what is not. As such, not only can sportspersons know what behaviour is outside the law, but the aspect of predictability also has a deterrent effect. Sportspersons are discouraged from committing sports rule violations, given the sporting and financial consequences provided for in the applicable regulations. The legal principles of legality und predictability are well-recognised principles in CAS jurisprudence:

> "[t]he purpose of disciplinary sanctions is to influence the behaviour of its members, in particular to encourage them not to engage in certain unwanted activity by threatening to sanction them. In order to achieve this goal, there must be clarity for all stakeholders on what constitutes misconduct. Furthermore, equal treatment of all members is only possible if there is legal certainty with respect to the contents of the rule. In order to protect the aforementioned interests, criminal law follows the principles of nullum crimen, nulla poena sine lege scripta et certa, pursuant to which no sanction may be imposed unless there is an express provision describing in sufficient clarity and specificity, not only the misconduct but also the applicable sanction. The Panel finds that this principle is applicable by analogy to disciplinary proceedings."[71]

Therefore, the application of the legal principles of legality and predictability is a further example that principles deriving from criminal law may be applicable in sports disciplinary proceedings.

### D. Equality

The rule of law requires that all people are equal before the law.[72] This principle also applies within the life of sports organisations. This means that sports officials are not above the law and may be sanctioned if they act contrary to the rules and regulations of sports organisations.[73] In addition, the CAS has emphasised that

> "[t]he fight against doping is arduous, and it may require strict rules. But the rule-makers and the rule-appliers must begin by being strict with themselves. Regulations that may affect the careers of dedicated athletes must be predictable. They must emanate from duly authorised bodies. They must be adopted in constitutionally proper ways. They should not be the product of an obscure process of accretion. Athletes and officials should not be confronted with a thicket of mutually qualifying or even contra-

71 CAS 2017/A/5272, award of 13 April 2018, para. 62; see also CAS 2020/A/7019 & CAS 2020/A/7035, award of 14 August 2020, para. 111; CAS 2022/A/9018, award of 15 March 2023, para. 89.

72 *Bingham*, p. 55.

73 CAS 2016/A/4501, award of 5 December 2016; CAS 2017/A/5003, award of 27 July 2018; CAS 2019/A/6388.



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> dictory rules that can be understood only on the basis of the de facto practice over the course of many years of a small group of insiders."[74]

This statement emphasises that sports organisations must respect certain procedures and principles when executing their authority over its members.

In addition, equality must also be given among competitors in sporting competitions. As already mentioned above, equal opportunities and chances of competitors in sporting competitions is the key feature of a sporting level playing field. Sports organisations may also decide to impose financial restrictions on its competitors in order to guarantee a financial level playing field. Equal treatment of athletes under the applicable sports rules and regulations is necessary for the fairness and comparability of sports competitions internationally. However, the principle of equal treatment may not be invoked when all competitors suffered the same disadvantages.[75] It is further noteworthy to mention that competitors may not be able to challenge the decisions notified against his or her competitor. Instead, the member may only request that they will be treated equally under the applicable membership rights. This is because the sportsperson who wants to take action against the decision affecting another sportsperson does not assert their own membership rights and is therefore not invoking a right of their own.[76] Therefore,

> "[n]o rule of law, either in the FIFA Regulations or elsewhere, is allowing the club victim of the breach of contract to request that a sanction be pronounced. Indeed, the system of sanctions lays down rules that apply to the FIFA, on the one side, and to the player or to the club that hired the player, on the other side. A third party like the club victim of the breach of contract has no legally protected interest in this matter and has therefore no standing to require that a sanction be imposed upon the player and/or the club that hired the player."[77]

Equality may also come into play when determining whether a sporting level playing field is given, meaning that all competitors have equal chances to succeed within the limits of the applicable rules and regulations so that no participate gains any undue advantage over the other competitors.[78] For example, in the *Leeper* case, the CAS panel had to assess whether Blake Leeper, an amputee sprinter, gained any competitive advantage over his able-bodied competitors when using his running-specific prothesis. To determine competitive equality between Mr Leeper and his competitors, the CAS panel referred to the following formula:

> "[a] disabled athlete who uses a mechanical aid which does no more than offset the disadvantage caused by their disability cannot be said to have an "overall competitive advantage" over a non-disabled athlete who is not using such an aid. In such a case,

74 CAS 94/129, award of 23 May 1995, para. 34; CAS 2010/A/2311 & 2312, award of 22 August 2011, para. 19.
75 CAS 2019/A/6483, award of 18 September 2020, para. 98.
76 *Haas*, in: Bernasconi/Rigozzi (eds.), p. 69.
77 CAS 2014/A/3707, award of 19 June 2015.
78 See e.g. CAS 2017/A/5114; CAS 2018/O/5794 & 5798, award of 30 April 2019; CAS 2020/A/6807, award of 23 October 2020; *Goh*, ISLJ 2021/1-2, pp. 47–61.



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> the mechanical aid does no more than counteract a disadvantage which the able-bodied athlete does not share. Conversely, a disabled athlete who uses a mechanical aid which does not merely offset the disadvantage caused by their disability, but enables the athlete to achieve better overall performances than they would have achieved had not had that disability, can be said to have an "overall competitive advantage."[79]

Equality before the law can have many facets in sport. It is not only an important feature of the rule of law, but it is also of fundamental importance in sport in order to ensure fairness, comparability, credibility, and harmonisation in international sport.

### E. Sports Dispute Resolution

The final aspects of the rule of law discussed in this article is dispute resolution, fair trial and the procedural equal treatment of the parties. Fairness and harmonisation also play a vital role in relation to these rule of law aspects. All sports organisations and members must have access to justice in order to resolve their disputes. In international sport, it is however important that the rules and regulations are consistently applied and interpreted by a single forum to create a legal level playing field. In other words, it is essential that one single adjudicatory body exists that is able to harmonise the decision-making process in international sport.[80] The international sports arbitration institution that is vested with the power to ensure consistent decision-making in organised sport is the CAS with seat in Lausanne, Switzerland. The CAS is an independent and impartial arbitral tribunal which awards are "proper judgments comparable with those of a national court".[81] The independence and impartiality of the CAS has been confirmed by national courts and the ECtHR.[82] The CAS has three permanent divisions, i.e. the Anti-doping Division (ADD), the Ordinary Arbitration Division and the Appeals Arbitration Division.[83] The majority of proceedings before the CAS involve appeals against first-instance decisions by sports-related bodies.[84] All CAS arbitration proceedings before the CAS are generally governed by Chapter 12 of the Swiss Federal Private International Law Act (PILA) if one of the parties to the arbitration agreement did not have the domicile, habitual residence or seat in Switzerland at the time the arbitration agreement was concluded between the parties, cf. Article 176 para. 1 of

79 CAS 2020/A/6807, award of 23 October 2020, para. 310.
80 CAS 2010/A/2311 & 2312, award of 22 August 2011, para. 19.
81 ECtHR, Nos. 40575/10 and 67474/10, *Mutu and Pechstein v. Switzerland*, judgment of 2 October 2018, para. 149; see also *Rigozzi*, in: Müller/Besson/Rigozzi (eds.), pp. 77–128.
82 See ECtHR, Nos. 40575/10 and 67474/10, *Mutu and Pechstein v. Switzerland*, judgment of 2 October 2018; Swiss Supreme Court, judgement of 27 May 2003 – 129 III 445; judgment of 20 February 2018 – 4A_260/2017; judgement of 29 July 2019 – 4A_248/2019. The case of *Claudia Pechstein* is currently pending before the Higher Court of Munich after the German Constitutional Court set aside the decision of the German Federal Tribunal, cf. Federal Constitutional Court, Order of 3 June 2022 – 1 BvR 2103/16.
83 Cf. S20 of the CAS Code.
84 Cf. S20 and R47 para. 1 of the CAS Code.



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the PILA. In cases of domestic arbitration proceedings, the proceedings before the CAS are governed by Articles 353 et seq. of the Swiss Civil Procedure Code.

### 1. Arbitration agreements

Parties that submit a case with the CAS generally agree that their procedure is governed by the CAS Code of Sports-related Arbitration (CAS Code). The CAS has jurisdiction to resolve the sports-related matter if the parties to the procedure before CAS have agreed on an arbitration agreement or an arbitration clause by which they referred the dispute to the CAS to the exclusion of ordinary courts.[85] An arbitration agreement between the parties must fulfil the formal and substantive requirements under Article 178 of the PILA. As part of the *essentialia negotii* of the arbitration agreement, the parties must further agree on the determined or determinable arbitral tribunal and the determined or determinable dispute that shall be referred to the CAS.[86] In international sport, arbitration clauses in favour of the CAS are often contained in the statutes, rules, and regulations and, consequently, indirect members generally do not enter into individual arbitration agreements with international sports federations. Instead, indirect members are usually bound by the arbitration clause in favour of the CAS through reference to the statutes, rules and regulations by way of their membership of the national federation or entry form, as described above. For example, Rule 61 para. 2 of the IOC Charter provides that "[a]ny dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sports-Related Arbitration." Such references in statutes, rules and regulations of sports organisations are called "arbitration agreements by reference".[87] The Swiss Federal Tribunal has considered such arbitration agreements valid in due consideration of the benefits of arbitration in organised sport:

> "The arbitration agreement must take the form prescribed by art. 178 (1) PILA. While it cannot completely disregard this requirement (judgment 4A_358/2009 of November 6, 2009 at 3.2), the Federal Tribunal nevertheless examines with 'benevolence' the consensual nature of the recourse to arbitration in sports matters, with the aim of promoting the rapid settlement of disputes by specialized courts offering sufficient guarantees of independence and impartiality, such as the CAS"[88]

Here, the Swiss Federal Tribunal not only recognises the validity of arbitration agreements by reference and points out its "*branchentypisch*" character in sports matters[89], the Court also stresses the importance of the CAS as a specialised sports arbitral tribunal and its swift resolution of sports-related disputes.

85 Article R27 of the CAS Code.
86 Swiss Supreme Court, judgment of 18 February 2016 – 142 III 239, consid. 3.3.1.
87 *Girsberger/Voser*, para. 385.
88 Swiss Supreme Court, judgment of 13 February 2012 – 4A_428/2011, consid. 3.2.3.
89 Ibid.



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These benefits of sports dispute resolution must further be considered when looking at the argument of compulsory arbitration. In this regard, the ECtHR found in its *Mutu and Pechstein* judgment that if a person, for example athletes, were not able to accept arbitration clauses in favour of the CAS voluntarily, then the proceedings before the CAS must afford the safeguards of a fair trial guaranteed under Article 6 (1) of the ECHR.[90] This does, however, not mean that compulsory arbitration agreements are invalid. Instead, one must consider the effects of an invalidity of an arbitration agreement and the consequences it would have for the fairness and equality in international sport, taking into account the interest of athletes and sports organisations for efficient and rapid dispute resolution in organised sport. As such, compulsory arbitration agreements are not invalid *per se*.

### 2. Law applicable to the merits

In appeals arbitration proceedings before the CAS, Article R58 of the CAS Code provides that the CAS panel shall resolve the merits of the dispute according to the applicable sports rules and regulations and, subsidiarily, the rules of law chosen by the parties, the domicile of the sports organisation that rendered the appealed decision or the rules of law the panel deems appropriate. According to the CAS panel in CAS 2021/A/7930, general principles of law may also fall within the rules of law to the merits under Article R58 of the CAS Code:

> "Regarding the application of general principles of law, the Panel notes that prior CAS panels have held that, given the 'transnational character of international sporting competitions' and 'the global effects of the actions and omissions of international federations', national and international sports federations must conform to 'a set of unwritten legal principles – a sort of lex mercatoria for sports or, so to speak, a 'lex ludica' or 'lex sportiva' (CAS 98/200, para 156; CAS 2014/A/3776, para 269). Such general principles may include 'general principles of law drawn from a comparative or common denominator reading of various legal systems' (CAS 98/200, para 156), such as 'fairness', 'good faith', 'prohibition of arbitrary rules and measures', 'venire contra factum proprium', 'non-retroactivity of laws', 'the right to be heard', and 'proportionality' (CAS 98/200, para 158). The only exception to their application is if 'such general principles were in conflict with some national or transnational public policy provision applicable to a given case' (CAS 2014/A/3776, para 269; CAS 2002/O/410, paras 4, 11; CAS 2014/A/3776, para 164; CAS 2015/A/3944, para 67). Accordingly, the Panel considers that general principles of law are also applicable to the present dispute as 'rules of law [whose application] the Panel deems appropriate' under Article R58 of the CAS Code."[91]

90 See ECtHR, Nos. 40575/10 and 67474/10, *Mutu and Pechstein v. Switzerland*, judgment of 2 October 2018, paras. 114 and 115.

91 CAS 2021/A/7930, award of 4 November 2021, para. 75.



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### 3. The power of review in CAS appeals arbitration proceedings

The power of review of the CAS panel in appeals arbitration proceedings is not limited to the review of errors, violations of the law, abuse of discretion or incorrect facts and circumstances. Instead, Article R57 para. 1 of the CAS Code provides for a *de novo* review: "*The Panel has full power to review the facts and the law.*" This means that CAS panels will generally hear the dispute afresh and may generally accept facts and evidence that were not introduced in the proceedings at the lower instances.[92] The *de novo* procedure before the CAS has also been confirmed in some rules and regulations of sports organisations. For example, Article 13.1.1 of the WADA Code states as follows:

> "The scope of review on appeal includes all issues relevant to the matter and is expressly not limited to the issues or scope of review before the initial decision maker. Any party to the appeal may submit evidence, legal arguments and claims that were not raised in the first instance hearing so long as they arise from the same cause of action or same general facts or circumstances raised or addressed in the first instance hearing."

It is well-established CAS jurisprudence that the *de novo* review of CAS panels in appeals arbitration proceedings has a curing effect in the way that if the parties to the proceedings before the CAS have the full opportunity to present their case to the CAS panel, all procedural flaws, deficiencies and violations in the previous instances "fade to the periphery" and are, in principle, fully cured.[93]

The Panel's scope of review in appeals arbitration proceedings may only be limited in exceptional circumstances. One exception is provided in Article R57 para. 3 of the CAS Code which provides that the CAS panel may exclude new evidence "*if it was available to them or could reasonably have been discovered by them before the challenged decision was rendered.*" However, this provision is applied restrictively and the evidence will only be declared inadmissible if the withholding of evidence in the lower instances was abusive or in bad faith.[94] A second exception to the unlimited scope of review of CAS panels is the so-called "field of play" doctrine according to which a CAS panel should not review a decision of a referee, umpire or judge taken during a game or other sporting competition, unless the appellant presents evidence that the decision was based on "bias, malice, bad faith, arbitrariness or legal error"[95].[96]

In summary, the CAS is the single forum that provides a fair trial and effective sports dispute resolution in due consideration of the procedural equal treatment and the right to be heard of the parties.[97]

92 CAS 2018/A/5654 & CAS 2018/A/5655, award of 29 March 2019, para. 54.
93 CAS 2019/A/6210 & CAS 2019/A/6277, award of 20 February 2019, para. 96.
94 CAS 2022/A/8651, award of 14 June 2023, para. 109.
95 CAS 2017/A/5373, award of 28 June 2018, para. 50.
96 See e.g. CAS 2004/A/727, award of 8 September 2005, paras. 9 et seq.; CAS 2017/A/5373, award of 28 June 2018, para. 50.
97 CAS 2019/A/6463 & CAS 2019/A/6464, award of 10 November 2020, para. 100.



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## F. Conclusion

The author has identified fundamental principles of the rule of law that have important functions in organised sport. Sports organisations generally have the power to exercise their authority over their direct and indirect members. This pyramidal system in organised sport shall ensure that all members of the association life are bound by the same set of rules and regulations in pursued of the objectives of fairness, comparability, credibility, and harmonisation. These rules are binding on both sports organisations and members and must be applied by sports organisations and sports adjudicatory bodies, such as the CAS, consistently. In summary, it can be said that the rule of law is very much alive in organised sport.

### Bibliography

BINGHAM, TOM, *The Rule of Law*, London, 2010

DE SCHUTTER, OLIVIER, *International Human Rights Law*, 3rd edition, Cambridge University Press, 2019

DEHESSELLES, THOMAS, *Die Ordnung im Verein und deren Durchsetzung*, in: Schimke, Martin; Dauernheim, Jörg; Schiffbauer, Björn (eds.), Handbuch Vereins- und Verbandsrecht, 15th edition, Basel, 2024

GALLAFENT, KATE; BUSH, RICHARD, *Safeguarding*, in: Lewis, Adam; Taylor, Jonathan (eds.), Sport: Law and Practice, 4th edition, London, 2021, pp. 642–671

GIRSBERGER, DANIEL; VOSER, NATHALIE, *International Arbitration*, 5th edition, Zürich, 2024

GOH, CHUI LING, *The challenge of regulating doping and non-doping 'performance-enhancing strategies' in elite sports*, International Sports Law Journal, 2021, Vol. 21(1–2), pp. 47–61

HAAS, ULRICH, *Standing to Appeal and Standing to be Sued*, in: Bernasconi, Michele; Rigozzi, Antonio (eds.), International Sport Arbitration, Bern, 2018, pp.53 – 88

HAAS, ULRICH; HESSERT, BJÖRN, *Internationale Vereine und ausländisches Vereinsrecht*, in: Schimke, Martin; Dauernheim, Jörg; Schiffbauer, Björn (eds.), Handbuch Vereins- und Verbandsrecht, 15th edition, Basel, 2024

HAAS, ULRICH; HESSERT, BJÖRN, *Sports Regulations on Human Rights Applicability and Self-Commitment*, in: Chaussard, Chaussard; Fortier, Charles; Jacotot, David (eds.), Le sport au carrefour des droits – Mélanges en l'honneur de Gérard Simon, Wien, 2021, pp. 287–307

HAAS, ULRICH; HESSERT, BJÖRN, *The legal regime applicable to disciplinary measures by sports association – one size does not fit all*, in: Jung: Peter; KRAUSKOPF, FRÉDÉRIC; CRAMER, CONRADIN, *Theorie und Praxis des Unternehmensrechts*, Zürich, 2020, pp. 279–291



https://doi.org/10.5771/1435-439X-2024-4-517 https://www.inlibra.com/de/page/agb - Open Access - (cc) BY

HESSERT, BJÖRN, *Sports Investigations Law and the ECHR*, London, 2023

ORTH, MARK-E., *Anmerkung zu EU-Rechtswidrigkeit von Bestimmungen des FIFA RSTS („Diarra")*, Zeitschrift für Sport und Recht, Vol. 31(6), pp. 487–500

OSNABRÜGGE, STEPHAN, *Das allgemeinverbindliche Vereinsrecht (Vereinsrahmenrecht)* in: Schimke, Martin; Dauernheim, Jörg; Schiffbauer, Björn (eds.), Handbuch Vereins- und Verbandsrecht, 15th edition, Basel, 2024

PAGÉ, LAUREN; TAYLOR, JONATHAN, *The Autonomy of the Sports Movement and its Limits*, in: Lewis, Adam; Taylor, Jonathan (eds.), Sport: Law and Practice, 4th edition, London, 2021, pp. 3–71.

RIEMER, HANS MICHAEL, *Berner Kommentar zum Schweizerischen Privatrecht* – Das Personenrecht, Bern, 1990

RIGOZZI, ANTONIO, *Sports Arbitration and the European Convention of Human Rights – Pechstein and beyond*, in: Müller, Christoph; Besson, Sébastien; Rigozzi, Antonio (eds.), New Developments in International Commercial Arbitration 2020, Bern, 2020

SOUBLIÈRE, JANIE; HESSERT, BJÖRN, *Safeguarding and beyond – The role of sports regulations, human rights and the balance between the rights of interested parties in sports investigations and the disciplinary proceedings that arise from them*, CAS Bulletin 2024/01, pp. 6–32

STIRLING, ASHLEY; KERR, GRETCHEN, in: Lang, Melanie; Hartill, Mike (eds.), *Safeguarding Child Protection and Abuse in Sport*, London, 2015, pp. 143–162

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