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Lex Sportiva and *Lex Ludica*: the Court Of Arbitration for Sport's Jurisprudence

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ABSTRACT

What does the jurisprudence of the Court of Arbitration of Sport (CAS) reveal about international sports law? It is claimed that CAS applies lex sportiva; distinct universal legal principles of sports law. I argue that lex sportiva is an imprecise term covering different concepts.

The awards of CAS are studied and it is argued that five different legal principles are employed: a lex ludica, good governance, procedural fairness, harmonisation of standards between international sporting federations and equitable treatment. These principles are then explained and illustrated by reference to arbitration awards of CAS. It is concluded from this case law that CAS has several functions and that its work could fit various models of adjudication. Each of these functions corresponds to a different legal model of its purpose and in turn to one of the five jurisprudential principles explained in the article.

CAS needs to recognise that it has different functions. The danger is that it will be seen solely as part of the private regulatory power of international sporting federations. The imposition of mandatory arbitration by sporting federations may then appear to be a method of avoiding proper legal processes and standards.

KEYWORDS

Sport – Court of Arbitration for Sport – Lex Sportiva – Lex Ludica - International Sports Law – Arbitration.

INTRODUCTION

One of the claims made for the work of the Court of Arbitration for Sport is that it is developing a *lex sportiva*. This jurisprudence, it is argued, is an international sports law. It is more than the application of international law, or of general legal principles, to the arbitration of sporting disputes. A distinct jurisprudence is emerging, it is claimed: a unique set of universal legal principles used by the Court of Arbitration for Sport in its adjudications. 1

That the jurisprudence is seen as a separate legal code was articulated in *Norwegian Olympic Committee and Confederation of Sports (NOCCS) & others v International Olympic Committee (IOC)* (CAS 2002/O/372). In this award the Court of Arbitration for Sport considered what the applicable law would be for deciding certain aspects of the case. They concluded that there were three main sources used by the parties in their arguments and that therefore they had impliedly agreed that these sources would govern the case. The sources were the Olympic Charter, Swiss procedural law and 'CAS jurisprudence relating to doping cases.' What is significant here is the self-reflexive ruling that the Court of Arbitration for Sport has an analytically distinct jurisprudence. The panel concluded: 2

> 'CAS jurisprudence has notably refined and developed a number of principles of sports law, such as the concepts of strict liability (in doping cases) and fairness, which might be deemed as part of an emerging 'lex sportiva'. Since CAS jurisprudence is largely based on a variety of sports regulations, the parties' reliance on CAS precedents in their pleadings amounts to the choice of that specific body of case law encompassing certain general principles derived from and applicable to sports regulations' (CAS 2002/O/372; para 65 at fn.15).

This is a bold and sweeping claim. In this article, I want to examine it closely by first arguing that the imprecise use of 'lex sportiva' as a concept confuses different legal streams that are present in the case law of the Court of Arbitration for Sport; secondly by studying the jurisprudence of the Court of Arbitration for Sport to see whether the practice of the arbitrators corresponds to the claim; and thirdly by using the jurisprudence to illustrate that the Court of Arbitration for Sport has conflicting functions. 3

WHAT ARE THE LEX SPORTIVA AND THE LEX LUDICA?

I have argued elsewhere that the concept 'lex sportiva' is an imprecise term covering several different concepts (Foster: 2003). It might be helpful initially to distinguish different uses. 4

The language used in the Norwegian award above suggests a specific and limited use for the concept *lex sportiva*. It talks about principles that are applicable to sport because they are 'general principles derived from...sports regulations.' This implies that the *lex sportiva* is little more than the proper interpretation and application of the legislative codes of sports federations. It is thus a *lex specialis* that is applicable to the governance of international sport because of its source in the constitutional order created by sports federations to run sport. 5

More widely, it might be extended to those general principles that can be extracted from the diverse practice of sports federations and the codes by which they govern themselves. The function of the Court of Arbitration for Sport, on this view, is not only to interpret the legislative codes of sports federations, but to select the best examples and create a set of harmonised 'best practice' standards. These harmonised standards are then applied to all sports federations, either directly in arbitration awards, or indirectly by encouraging changes in these codes to incorporate the 'best practice'. The Court of Arbitration for Sport becomes a standards council that leads and regulates the practice of international sporting federations. 6

This is a narrow but specific use of the concept lex sportiva. It corresponds roughly to my definition of a 'global sports law', which I would equate with *lex sportiva*. This concept has several important elements to it. It is essentially a transnational autonomous private order. It is constituted by the legislative and constitutional order created by international sporting federations. It has a formal contractual basis and its legitimacy comes from voluntary agreement or submission to the jurisdiction of sporting federations by athletes and others who come under its jurisdiction. It is, therefore, created by, and has its source in, the private global institutions that govern sport. It is the custom and practice of international sporting federations. This, it is claimed, gives it autonomy from national legal systems, either as an immunity from suit or as a directive to national courts that they are obliged to follow. Global sports law is a private system of governance, with its own global forum - the Court of Arbitration for Sport- and a unique jurisprudence. 7

A further set of principles and rules that can be distinguished, and separated from the concept of *lex sportiva*, are what can be termed the sporting law, or rules of the game. I propose to call these principles '*lex ludica*'. These encompass two types of rules that are distinctive and unique because of the context of sport in which they occur and are applied. One covers the actual rules of the game and their enforcement by match officials. The approach here by the Court of Arbitration for Sport has been to treat these rules as sacrosanct and immune from legal intervention. The second type is what can be termed the 'sporting spirit' and covers those ethical principles of sport that should be followed by sports persons. The concept *lex ludica* thus includes both the formal rules and the equitable principles of sport. They are arguably immune from legal intervention because they are an 'internal law' of sport - a private governance that is respected by national courts, and as such is best applied by a specialised forum or system of arbitration by experts. 8

It is also important to exclude from these narrow and specific concepts other legal principles. The concept does not include principles of international law as applied to sport nor does it include general legal principles, such as procedural fairness, as applied to sport. These are independent legal sources that do not need to be traced back to the practice of international sporting federations. They are simply legal principles, that as a matter of the 'rule of law' in sport, are applicable to sport. They should, therefore, be applied by any arbitrator who is seized of a sporting dispute. In the main these legal principles are basic safeguards that ensure fair treatment of athletes and insist that sporting federations do not make irrational or arbitrary decisions. They are minimum standards that sporting federations must meet as private organisations exercising disciplinary power. If these minimum standards are not met, legal challenges by athletes are likely to be successful before national courts. The function of the Court of Arbitration for Sport, when it is using these general principles of law, is essentially to ensure that sporting federations do not incur costly litigation. This is achieved by insisting on their compliance, especially in disciplinary cases. The essence, therefore, of these principles is that they are general standards that are compulsory on sporting federations as a matter of law. They are thus applicable without being created by the practice of sporting federations or being expressed in the rulebook. The Court of Arbitration for Sport expressed it well in *AEK Athens & SK Slavia Prague v Union of European Football Associations (UEFA)* (CAS 98/200). 9

> 'Sports law has developed and consolidated along the years, particularly through the arbitration settlement of disputes, a set of unwritten legal principles -a sort of lex mercatoria for sports or, so to speak, a lex ludica -to which national and international sports federations must conform,

> regardless of the presence of such principles within their own statutes and regulations or within any applicable national law' (98/200; Digest, Vol. 2 p.38; para 156, at p.102).

THE EMERGING JURISPRUDENCE OF THE COURT OF ARBITRATION FOR SPORT

In this section, I want to analyse the awards made by the Court of Arbitration for Sport to assess what jurisprudence is emerging. I organise the principles into five main categories: 10

1. *Lex ludica*: these are the rules of the game. There is a self-imposed reluctance on the Court of Arbitration for Sport to interfere with what it considers to be purely sporting matters. This covers not only the obvious refusal to reopen decisions made by match officials, but issues that are essentially about the nature of sport in a wider sense.

2. Good governance: this covers the proper standards that are legally required of decision making within a private organisation that has disciplinary power over athletes. Specifically, it encompasses having clear authority in the rules to make a decision (the *ultra vires* principle); avoiding arbitrary decision making by decreeing that a sporting federation cannot be the sole arbiter of the interpretation of its rules; not acting in bad faith; not making such unreasonable decisions that no reasonable body could have reached them; and using transparent and objective criteria in reaching its decisions.

3. Procedural fairness: these are a set of minimum standards that sporting federations must follow in hearing disciplinary matters.

4. Harmonisation of standards: as an international body, the Court of Arbitration for Sport tries to ensure consistency. The general principles that it formulates should apply to all federations. So it harmonises standards. This policy also entails formulating the principle that international sporting federations have primacy over national federations, and exercising a supervisory function over the rulebooks of federations, suggesting amendments where necessary.

5. Fairness and equitable treatment: the Court of Arbitration for Sport has a major function to achieve fairness in individual cases. This has been especially evident in its approach to penalties. It has disapproved of automatic fixed penalties; followed the principle of proportionality; and required sanctions to 'fit the crime'. It has also, where appropriate, followed the principles of legitimate expectation and of estoppel.

LEX LUDICA

Autonomy for match officials

The Court of Arbitration for Sport has consistently maintained that the autonomy of the officials, who make decisions during the game, is unchallengeable except in very limited circumstances. 11

The leading example of this was the award *Mendy v Association Interantionale de Boxing Amateur (AIBA)* (CAS OG Atlanta 1996/006). A boxer had been disqualified for a blow below the belt, which is forbidden by the rules. The boxer protested that the hit was clearly above the belt and that, therefore, the disqualification was wrong. The protest was rejected by the governing body and the boxer appealed to the ad hoc division of the Court of Arbitration for Sport established to hear cases during the 1996 Atlanta Games. The panel declined to review the decision, arguing that purely technical rules of the sport were 'the responsibility of the federation concerned' (OG 96/006, Digest Vol 1. p.413 para. 13). The panel said this was necessary because they were 'less well placed to decide than the referee in the ring or the ring judges' (OG 96/006, Digest Vol 1. p.413 para. 13). They relied on a Swiss precedent that excluded the rules of the game from judicial review because 'the game must not be constantly interrupted by appeals to a judge' (OG 96/006, Digest Vol 1. p.413 para. 13). This award confirms that the Court of Arbitration for Sport views the match official's decision as final. Referees make mistakes, but that is all part of the game, and the players have to accept it as a risk. The panel nevertheless noted certain limits. They said that, even a technical rule decision could be reviewed, if there was an error of law, an arbitrary decision, or malicious intent; and when 'decisions are taken in violation of ... social rules or general principles of law' (OG 96/006, Digest Vol 1. p.413 para. 13-14). 12

This principle of autonomy for match officials was further illustrated in *Segura v International Amateur Athletic Federation (IAAF)* (CAS OG Sydney 2000/13: Digest Vol.2 p. 680), where the Court of Arbitration for Sport refused to interfere when the Mexican 'winner' was disqualified from the 20 kilometres' walking event at the Sydney Olympics. They reiterated the principle that 13

> 'CAS arbitrators do not review the determinations made on the playing field by judges, referees, umpires, or other officials who are charged with applying what are sometimes called 'rules of the game'...[T]hey are not, unlike on-field judges, selected for their expertise in officiating the

> particular sport' (CAS OG Sydney 2000/13: Digest Vol.2 p.680. para. 17).

14 This autonomy may not cover the technical equipment operated by the officials. In *Neykova v International Rowing Federation (FISA) & International Olympic Committee (IOC)* (CAS OG Sydney 2000/12) the losing Bulgarian rower questioned the photo-finish that placed her second in her event at the Sydney Olympics. The Court of Arbitration for Sport felt that this was 'different to that of a typical official's field of play decision' (CAS OG Sydney 2000/12 Digest Vol.2 p.674. para. 13). But they found it unnecessary 'to determine to what extent a field of play decision based on faulty equipment may be reopened' (CAS OG Sydney 2000/12 Digest Vol.2 p.674. para. 13), as the rower had not discharged her burden of proof basing her application solely on television cameras which, unlike the official cameras, were not placed directly on the finishing line.

15 Neither does the autonomy for officials extend to a situation where there is a conflict as to which official has jurisdiction. In *Canadian Paralympic Committee (CPC) v International Paralympic Committee (IPC)* (2000/A/305; Digest Vol.2 p. 567), the Court of Arbitration for Sport had to decide whether a race referee had the power to order a rerun of the race when there had been a collision between athletes in the first 200 metres. The rules made the starter the sole judge of whether to restart the race. The IPC, as the governing body, objected strongly to the referee's decision to restart being challenged, arguing that it infringed their control over technical matters and the 'rules of the game'. Nevertheless the Court of Arbitration for Sport upheld the original result and declared the referee's decision invalid because he had no power under the rules. In this particular case, the principle that a sporting federation must follow its own rule seems to have trumped any principle of autonomy.

No unsporting advantage

16 A specific application of general legal principles to sporting contexts, especially to the disciplinary process of federations, can yield satisfactory solutions to most problems in sports law. To that extent, there is nothing distinctive about a supposed *lex sportiva*. However, there are some contexts where the particularities of sport are distinctive enough to produce an unusual approach that may fairly be termed a *lex ludica*.

17 The doctrine, seen above, that the match officials have autonomy so that their decisions during the game cannot be revisited retrospectively is part of this 'lex ludica'. At one level, this can be seen as part of a general principle that the autonomy of decision making and governance within a private organisation should not be challenged - at least by those who have agreed to the rules of that organisation. However, it could also be argued that it is an illustration of another, more sporting, idea: that the match result is final and cannot be challenged. To allow the results of matches to be upset retrospectively will create all kinds of difficulties in tournaments and leagues if it is decided that a previous result can be changed. A similar problem can occur for sports leagues when a team prematurely quits the league. Should its past results be expunged so that all previous games are annulled, or do previous results stand even if this has an arbitrary and unfair effect on the league positions?

18 An illustration of this type of sporting dilemma occurred in *Czech Olympic Committee, Swedish Olympic Committee & S. V International Ice Hockey Federation (IIHF)* (CAS OG Nagano 1998/004-005; Digest Vol.1 p. 435). In the ice hockey tournament, Sweden fielded an ineligible player, who was not a Swedish national. As a consequence, under the federation's rules, Sweden should have forfeited the two matches in which he played. However, the consequence of applying this rule strictly was that Sweden would have finished bottom of their qualifying group rather than second. As the later knockout stages of the tournament were seeded according to the finishing places in the qualifying groups, this would have given Sweden a more difficult game against Russia. But, of course, this also meant that Russia, who won their qualifying group, would now face Sweden rather than a manifestly weaker team as they may have anticipated. Indeed, the demotion of Sweden - as apparently required by the rule - would result in all teams being affected and ending up playing different teams. The federation, therefore, decided not to invoke the rule and let the original positions stand. The Czech Republic, who now felt that they had suffered adversely, complained and the matter was dealt with by the Court of Arbitration for Sport. Their complaint was rejected and the original positions allowed to stand. The panel was clearly unimpressed with a team trying to gain a sporting advantage from another team's infraction of the rules. The panel said that the Czechs were

> 'singularly ill placed ... to insist on the application of a rule in circumstances where its team had not been in the least affected by the infraction....The Panel finds this stance offensive to the Olympic ideal of fair play' (CAS OG Nagano 1998/004-005; Digest Vol.1 p.435; para. 29).

19 However, interestingly, the panel said that it would have come to a different decision had either of the two teams who had lost to Sweden when it fielded the ineligible player, complained. Then the case would have been different. These teams were the direct victims and thus had to face higher ranked teams. The

panel said that it would have decided in their favour as against other teams that had indirectly benefited from the revised league positions. This may be crude justice but it would have also benefited the Czech Republic. In other words, the Czechs could benefit if the real victims complained, but if they complained themselves they were adjudged to be acting in an unsporting manner.

The outcome of the case would have been unsatisfactory whatever decision was taken. The panel quickly rejected the easy formal legal approach, which would have simply decided that rules are rules and insisted on their application - whatever the sporting consequences. Instead, it tried to do sporting justice, but still concluded with a formalistic position - that it all depended on whether the victim instigated the case by using the equitable concept that one should come with clean hands. It does, however, give support to the principle that sporting results should not be reopened and to the principle that players or teams should not try to obtain a sporting advantage in an unsporting way. 20

Team punishment

Another example of *lex ludica* is that the principle of autonomy extends to the sanctions applied by federations for breaches of the rules in team sports, even when these sanctions infringe individual rights. In *Federazione Italiana Nuoto (FIN) v Federation Internationale de Natation (FINA)* (CAS 96/157: Digest Vol.1 p. 351), there had been violence between the Italian and Croatian water-polo teams in the World Junior Championships. A FINA committee investigated the events and imposed sanctions on the Italian team. They disqualified the Italians from the rest of the championships and excluded them from the next world junior championships. In a very non-interventionist award, the Court of Arbitration for Sport examined the applicable regulations as to sanctions and decided that the rules had been constitutionally established and that FINA had acted within their rules. The panel laid down general guidance on intervention when the rules have been correctly followed. They said that 21

'the panel ... can intervene in the sanction imposed only if the rules adopted by the FINA Bureau are contrary to the general principles of law, if their application is arbitrary, or if the sanctions provided by the rules can be deemed excessive or unfair on their face' (CAS 96/157: Digest Vol.1 p.351: para. 22).

Thus, the only question that the panel felt was relevant was whether the rules themselves, as opposed to their application to these facts, were illegal. The essence of the complaint by the Italian federation, however, was that the sanctions were not 'fair and appropriate' because they missed their target. The guilty individuals were not punished; indeed, ironically, they could have competed in the next world championships as members of the senior team. The exclusion from the next championships was a collective future penalty that punished the innocent and not the guilty. However, the panel decided that these considerations of fairness and justice were merely a sporting issue on which the federation 'is in the best position to decide which rules are fair and appropriate in light of the facts constituting the violation' (CAS 96/157: Digest Vol.1 p.351: para. 22). 22

Expert knowledge

The reasoning behind the water-polo award is mainly based on the idea that sporting decisions are best made by those with a technical knowledge of the sport. This entails a respect by the Court of Arbitration for Sport for such expert opinion. *Australian Olympic Committee (AOC)* (CAS 2000/C/267: Digest Vol.2 p.725) extends this principle of non-interference further. A company had developed a new full-body swimsuit that increased a swimmer's speed by reducing drag. FINA, the governing body, approved its use for the 2000 Olympic Games. They ruled that its use did not infringe their rule about artificial devices, which stated that no 'swimmer shall be permitted to use or wear any device that may aid his speed, buoyancy or endurance during a competition'. The swimsuits were not performance-enhancing technology, but merely an improved swimsuit. Worried about challenges to its use during the games, the Australian Olympic Committee asked for an advisory opinion from the Court of Arbitration for Sport. The opinion refused to question the substance of FINA's ruling, and was not prepared to query FINA's interpretation of its rules. The opinion emphasised procedural issues. As long as the federation had firstly followed its rules and secondly had not infringed minimum standards of due process, such as an unfair procedure, bad faith or unreasonableness, their technical decision was immune from legal challenge. This takes the principle of non-interference well past the boundaries established in the *Mendy* award. It grants autonomy to federations over all aspects of the interpretation and application of their rules even where there is no game-related need for urgency or finality. It is hard to see how any 'technical decision', at least if taken with respect for due process, can be challenged before the Court of Arbitration for Sport on the authority of this award despite the enormous commercial implications that such a ruling may have by approving or banning the clothing or equipment of a specific manufacturer. 23

GOOD GOVERNANCE

Clear authority

The need for clear authority for action by a sporting federation in its rules was shown by *R. v International Olympic Committee (IOC)* (CAS OG Nagano 98/002: Digest Vol.1 p. 419). The snowboarder, who won the 24

gold medal for snow boarding at the Winter Olympics of 1998, tested positive for marijuana and was initially disqualified by FIS, the governing body, at the insistence of the IOC. The Court of Arbitration for Sport reversed the decision. Marijuana was not a prohibited substance under the IOC's Medical Code and is not banned unless the IOC agrees it with the specific sporting federation. This had not occurred, and so the panel could find no authority for the disqualification. The Court of Arbitration for Sport said that 'if sports authorities wish to add their own sanctions to those that are edicted by public authorities they must do so in explicit fashion.' They 'cannot invent prohibitions or sanctions where none appear.' The sanction here lacked the 'requisite legal foundation' (CAS OG Nagano 98/002: Digest Vol.1 p.419; paras. 26-7).

This principle had also been enunciated in an earlier award *USA Shooting & Q. v. International Shooting Union (UIT)* (CAS 94/129; Digest Vol.1 p. 187). A panel refused to imply a strict liability rule into the rules and practice of a sporting federation. They said that 25

> '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 contradictory 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' (CAS 94/129; Digest Vol.1 p.187; para. 34).

Related to the need for authority in the rules is the principle that the proper organ of the federation should take the decision in accordance with the constitutional powers. In *Royal Sporting Club Anderlecht v Union of European Football Associations (UEFA)* (CAS 98/185; Digest Vol.2 p. 469), Anderlecht had been found guilty of attempting to bribe a referee in a European game fifteen years previously. UEFA decided to take disciplinary action against the club. They used the powers given to the Executive Committee to deal with 'extraordinary' matters. The Court of Arbitration for Sport panel decided that, on the proper interpretation of UEFA's constitutional documents, the only body able to issue the penalty of a season's suspension from European competition was the Judicial Committee of UEFA not the Executive Committee. As there was a time limit of ten years on disciplinary matters, the Judicial Committee had no longer any jurisdiction and, therefore, the conclusion of the Court of Arbitration for Sport was that UEFA had no powers to impose the penalty. 26

Interpretation of rules

The legal interpretation of the rules is a clear function of the Court of Arbitration for Sport. Where parties disagree as to the proper legal interpretation of a rule, then the Court of Arbitration for Sport is competent to rule. An example is *B. v International Judo Federation (IJF)* (CAS 99/A/230; Digest Vol.2 p.369) where the federation tried to disqualify the applicant and remove his silver medal gained at the world championships because he had tested positive out-of-competition seven days previously. The applicant's argument, upheld by the panel, was that the federation's rules only allowed disqualification when testing positive during competitions. The panel took the view that strict sanctions should be interpreted in the athlete's favour. They said that 'if regulatory documents define sanctions and how they should be applied to particular offences, they should be strictly interpreted by the sports authorities and the CAS' (CAS 99/A/230; Digest Vol.2 p.369; para.10). It follows from this narrow approach that the Court of Arbitration for Sport will not give itself any wider powers than the federation that it is reviewing. This was exemplified in *R v International Basketball Federation (FIBA)* (CAS 2000/A/262: Digest Vol.2 p.377) where a panel agreed that it could not have awarded damages to the applicant if his case had been successful. It said that this was because 27

> 'the jurisdiction of the CAS can however not go beyond the competence of the body whose decision the appeal is lodged against....the panel itself is to be considered as an organ of FIBA' (CAS 2000/A/262: Digest Vol.2 p.377; para.12).

This is not a body that considers itself a court but merely the final stage of the internal appeal system of the federation. 28

A similar attitude was displayed in *Spanish Basketball Federation (FEB) v International Basketball Federation (FIBA)* (CAS 98/209; Digest Vol.2 p. 500) in a dispute between two national federations over a basketball player's nationality. The panel started by asserting that 'sports governing bodies are usually established by private contractual arrangements with their members.' From this proposition it went on to assert that the federation was not a court of law but was only empowered to act through the rules already agreed. From this it followed that 29

> 'any judicial body subsequently examining such matters should be reluctant to impose on the

> sports body a materially different standard....than that which the parties accepted though their membership of the sports body' (CAS 98/209; Digest Vol.2 p.500; para. 6).

This again is close to a view that the arbitrator has no independent powers but merely confirms any decision, and arguably any interpretation that the federation makes that is within a rational range of decisions. 30

Bad faith

The presence of bad faith is often cited by arbitrators of the Court of Arbitration for Sport as a reason for invalidating a decision, or for intervening where otherwise they would not. Fortunately, awards where this ground has been used to invalidate a federation's decision are absent from the published case law. The nearest example is *S v Federation Internationale de Natation (FINA)* (CAS 2000/A/274; Digest Vol.2 p. 389) where FINA argued that an athlete's sample could be retrospectively retested for drugs by a new improved procedure. The panel wondered, whilst still dismissing the swimmer's appeal, whether this was 31

'satisfactory and questions whether FINA's conduct is consistent with the principles of good faith which should characterise all dealings between international sporting federations and the athletes within their jurisdiction' (CAS 2000/A/274; Digest Vol.2 p.389; para 34 p. 399).

Irrational decisions

A general legal principle used in reviewing administrative decisions is that decisions are invalid when they are so irrational that no reasonable body could have come to that decision. Again, there appears to be no reported award that turns on this principle. However, in *Canadian Olympic Association (COA) v Federation Internationale de Ski (FIS)* (CAS OG Salt Lake City 02/002), the analogous argument of arbitrary decision making without authority in the rules was rejected. The allocation of spare slots by the international federation in one of the Olympic events was challenged. The federation had no rules to cover the situation and exercised its discretion. An argument that the absence of rules in itself constituted arbitrary action and an abuse of discretion was rejected. 32

Transparent and objective criteria

The need for transparency and objective criteria in decision making has been enunciated in cases that have come before the Court of Arbitration for Sport concerning the selection of athletes to compete in the Olympic Games. In *Chiba v Japan Amateur Swimming Federation (JASF)* (2000/A/278; Digest Vol.2 p. 534), a Japanese swimmer challenged her non-selection for the Sydney Olympics. She claimed that she had swum a qualifying time and finished first in the qualifying trials. These two criteria had been previously announced by the federation. The federation justified her exclusion by a third announced criterion, that a policy of 'few but best' would be used to select amongst those who had met the first two criteria. The Court of Arbitration for Sport decided that this discretionary criterion justified a conclusion that the federation had not acted unfairly. The panel did, however, issue a strong statement that selection criteria should be announced in advance; that professional athletes have a right to know the criteria; and that federations 'should pursue a policy of transparency and open information.' (2000/A/278; Digest Vol.2 p. 534; para. 10). 33

This principle seems to have been applied in other awards where athletes have successfully challenged their exclusion, although each of the awards can be justified on different principles. In *Watt v Australian Cycling Federation (ACF) & Tyler-Sharman* (CAS 96/153; Digest Vol.1 p. 335), the Court of Arbitration for Sport directed the inclusion of the applicant as the single Australian cyclist in the 3000 metres pursuit event in the Atlanta games. The federation had already pre-selected her as their nominated cyclist in this event and so had created 'expectations in and obligations upon that individual ... [and] should be bound by its choice unless proper justification can be demonstrated for revoking it' (CAS 96/153; Digest Vol.1 p. 335; para. 26(h)). In *Beashal & Czislowski v Australian Yachting Federation (AYF)* (CAS 2000/A/260; Digest Vol.2 p. 527), a selection for the Sydney Olympics was referred back to the federation because it had failed to follow its procedures for nomination and, because it was a close sporting call, it was possible that this may have made a difference to the outcome. In *Sullivan v Judo Federation of Australia, Judo Federation of Australia Appeal Tribunal & Raguz* (CAS 2000/A/282; Digest Vol.2 p. 542) the federation had announced that selection would be based solely on points awarded for finishing places in three selection events. On that basis, the applicant had a better score than her rival who was selected. The federation had retrospectively adjusted its ranking points in favour of the selected judoka. The panel judged that the federation had no power to alter its criteria retrospectively, for to do so would defeat a legitimate expectation. 34

PROCEDURAL FAIRNESS

The most consistent line of reasoning in the jurisprudence of the Court of Arbitration for Sport is the need for sporting federations to respect due process. This has been stressed - at least negatively - in many awards. There have been regular pronouncements that the decisions of sporting federations can be 35

challenged for various reasons that constitute an unfair procedure or an unfair hearing. For example, in AEK *Athens & SK Slavia Prague v Union Of European Football Associations* (UEFA CAS 98/200; Digest Vol.2 p. 38), the panel said that 'under CAS jurisprudence the principle of procedural fairness is surely among the unwritten principles of sports law to be complied with by international federations'.

In general, this principle again involves minimum standards that a disciplinary body needs to observe to avoid legal challenge before national courts. These include proper and precise notification of the charge; an opportunity to present their case; cross-examination of witnesses; legal representation; unbiased and impartial adjudicators; reasons for decisions; and a right of appeal (Morris & Little 1998). In *DeBruin v Federation Internationale de Natation (FINA)* (CAS 98/211; Digest Vol.2 p. 255) there was an allegation of bias. The Court of Arbitration for Sport said of the internal appeals body that 36

> 'it is always inadvisable, specifically because of the potential to create misunderstanding or confusion in the mind of the public, for members of a judicial or quasi-judicial body to discuss publicly their findings, in particular by way of media interviews' (CAS 98/211; Digest Vol.2 p.255; para 11. p. 264).

The importance of procedural fairness before a federation's own bodies is diminished by the practice that the Court of Arbitration for Sport hears cases anew – '*de novo*'. By giving the athlete a full hearing, any previous procedural defects are superseded. As the panel in this award put it, 'issues relating to the fairness of the hearing before the tribunal of first instance fade to the periphery.' (CAS 98/211; Digest Vol.2 p.255; para 8. p. 264). 37

However, the majority of these statements have been made in awards that denied the athlete any review of the sporting federation's decision but merely confirmed it. It is much harder to find awards where these reasons have been used to overturn the decision of a sporting federation. The cynic might conclude that the role of the Court of Arbitration for Sport has been to ensure, by example and authority, that sporting federations follow minimum standards of fair procedure. Given the historic flippancy of many sports administrators towards even basic notions of natural justice and due process in their disciplinary hearings, this is a not unworthy aspiration and achievement. It is nevertheless no more that any legal system would have insisted upon in disciplinary proceedings, at least where there was some evidence of damage to the reputation of, or economic loss to, the athlete. 38

HARMONISATION OF STANDARDS

Consistency

The Court of Arbitration for Sport clearly sees its role, where appropriate, to harmonise standards across different sports, especially in relation to doping offences. By doing so, it sets consistent norms that can be used by other federations. In *Union Cycliste Internationale (UCI) v M. & Federazione Ciclistica Italiana (FCI)* (CAS 98/212; Digest Vol.2 p. 274), the panel discussed the problem of suspensions of less than a year, which cover a 'dead period' or close season and so have little effect as a punishment. It concluded that the 'discussion could be avoided if the UCI would harmonise its sanctions with other sport federations and provide for minimum suspensions of at least twelve months' (CAS 98/212; Digest Vol.2 p.274: para. 23). 39

Primacy of international sporting federations

One important principle that has been established by the Court of Arbitration for Sport is that international sporting federations have the power to review and to revise the sanctions that have been imposed initially by national sporting federations. Such powers are normally expressly taken by international sporting federations in their rules, but the Court of Arbitration for Sport has been prepared to imply it as an overriding principle. This allows the process of harmonisation of the rules and their interpretation to be advanced by the international sporting federation. It also addresses the very real danger in doping cases that a national federation will be too lenient in its treatment of athletes that have tested positive. In *B. v International Judo Federation (IJF)* the panel declared 40

> '[I]t is imperative that that international sporting federations should have the opportunity to review decisions by national federations in doping cases. One of the purposes of the power thus vested in the international federation is to avoid the risk that international competition is distorted in the event that a national federation fails to sanction, or inadequately sanctions, one of its members so as to enable him to participate in an important competition' (CAS 98/214; Digest Vol.2 p. 308; para. 8).

A leading example of this principle was *Union Cycliste Internationale (UCI) v S., Danmarks Cykle Union (DCU) & Danmarks Idraets-Forbund (DIF)* (CAS 98/192. Digest Vol.2 p. 205). This essentially was a dispute over who had the power to sanction a Danish cyclist who had tested positive for drugs. The Danish National Olympic Committee imposed a two-year ban. This applied to all races within Denmark. 41

The international federation, UCI, who only had jurisdiction over international races, imposed a one-year ban. One of the questions before the Court of Arbitration for Sport was whether the National Olympic Committee had the power to ban the cyclist from international races for a longer period than the international federation had. The Court of Arbitration for Sport ruled that, under the Olympic Charter, National Olympic Committees had to follow the rules of the international sporting federation and could not insist that the national cycling federation apply the two-year ban. National Olympic Committees could not claim a jurisdictional monopoly over their national athletes in international sport. The rules of the international sporting federation, therefore, prevailed.

An extension of this principle seems to occur during the Olympic Games. Then, sporting federations appear to accept the overriding jurisdiction of the IOC, even if they would not otherwise do so outside the Games. Federations accept the IOC's jurisdiction by competing in the Games. So in *Baumann v International Olympic Committee (IOC) & International Amateur Athletic Federation (IAAF)* (CAS OG Sydney 2000/006; Digest Vol.2 p. 633), during the Sydney Olympics, the IAAF were deemed to have subscribed impliedly to the arbitration clause in the Olympic Charter because of their participation in the Games and their commitment to the Olympic Movement. This was followed in the later case of *Melinte v International Amateur Athletic Federation (IAAF)* (CAS OG Sydney 2000/015; Digest Vol.2 p. 691) where an athlete was provisionally suspended by the IAAF after she failed a drug test, but allowed to enter the Olympic Games pending any appeal. The IOC refused to allow her to compete. The IAAF took the position that her eligibility to compete was their right under their rules, and that these rules contained no provision for an appeal to the Court of Arbitration for Sport. Despite this, the panel took the same view as in the *Baumann* case and held the IAAF subject to the IOC's authority and thus the Court of Arbitration for Sport's jurisdiction. A similar result was reached in the 2002 Commonwealth Games in Manchester. In *Guest v Commonwealth Games Canada (CGC) & Triathlon Canada(TC)* (CAS CG 02/001), when the first respondent tried to argue that they were not covered by the arbitration agreement, the panel reasoned that 'the concept of a dispute resolution mechanism which may bind only one party to a dispute would seem to us not only to be unusual, but also unfair' (CAS CG 02/001; para. 5.6). 42

However in *Prusis & Latvian Olympic Committee v International Olympic Committee (IOC) & International Bobsleigh and Tobogganing Federation (FIBT)* (CAS OG Salt Lake City 02/001), the applicant, whose ban for doping expired during the 2002 Winter Olympics, was excluded from them by the IOC. The IOC argued that they had sole jurisdiction over the question of entry and that such decisions were administrative decisions. However, this arbitration panel asserted the autonomy of the international federation, and thus the length of their ban, and overturned the IOC's exclusion. They decided that 'the IOC cannot take any action with regard to a specific sport which could be regarded as prejudicial to the independence and autonomy of the International Federation administering that sport.'(CAS OG Salt Lake City 02/001; para. 30). This case is distinguishable from *Melinda's* case because the athlete had served his punishment and the IOC's exclusion was an unwarranted additional punishment. 43

Best practice

A side result of the Court of Arbitration for Sport's principle of harmonisation has been its willingness to perform an educating role for sporting federations, by suggesting additions or amendments to existing rulebooks. One example is *Federation Italian Nuoto (FIN) v Federation Internationale de Natation (FINA)* (CAS 96/157), the water-polo case discussed above. One of the reasons for a collective team punishment was that the federation's rules did not provide for individual punishments. Doubtless the historic reason for this apparently strange absence was that it is very difficult to see underwater fouls clearly in water-polo. Nevertheless, the panel regretted the absence of such a rule and added that 'the national federation should review their rules to determine whether provisions may not be adopted, on the individual level, to punish individual players for aggressive and violent conduct during play' (CAS 96/157; para. 24). In *Union Cycliste Internationale (UCI) v C. & Federazione Ciclistica Italiana (FCI)* (CAS 98/213; Digest Vol.2 p. 283) discussing when a suspension should start, the panel said the regulations 'could theoretically lead to a suspension even before the athlete was granted the right to be heard....As a consequence, the Panel recommends to review the wording of the provision' (CAS 98/213; Digest Vol.2 p.283 para.17 p. 289). 44

An extreme example of this function to suggest amendments occurred in the 2002 Winter Olympics. In two cases athletes challenged their exclusion from the Games (*Canadian Olympic Association (CAO) v Federation Internationale de Ski* (FIS) (CAS OG Salt Lake City 02/002) and *Bassani-Antivari v International Olympic Committee* (IOC) (CAS OG Salt Lake City 02/003). The Court of Arbitration for Sport interpreted its own rules for the Games as not giving it any jurisdiction in such cases, because the athletes could not have the advantage of the arbitration clause as they had not signed the entry form containing it. As this could create hardship and unfairness to the athletes, in *Billington v International Bobsleigh and Tobogganing Federation (FIBT)* (CAS OG Salt Lake City 02/005) the panel recommended a review of the clause in the IOC's rules. The other closely related function has been the readiness of some panels of the Court of Arbitration for Sport to issue guidelines as to best practice. The absence of any rules to cover the situation that arose in *Canadian Olympic Association (CAO) v Federation Internationale de Ski (FIS)* (CAS OG Salt Lake City 02/002) was commented upon by the panel. They said that the FIS 45

should adopt rules to avoid the problem in future.

FAIRNESS AND EQUITABLE TREATMENT

Fixed penalties

The Court of Arbitration for Sport has shown an increasing dislike for fixed sentences - even for doping offences. The policy of many federations was to have mandatory sentences in their rulebooks. This sanction combined with a policy of strict liability meant that different cases were being treated in the same way, and that individuals were being treated unfairly in that mitigating circumstances were ignored. For example, FINA used to have a mandatory sentence of four years for a first doping offence. This was criticised by the Court of Arbitration for Sport in several awards. In *P. & others v Federation Internationale de Natation (FINA)* they said that such a sentence 'is of dubious justification in view of the fact that it may be disproportionate in some cases' (CAS 97/180 Digest Vol.2 p.184; para. 8). 46

In the later award *B. v International Judo Federation (IJF)* the panel said that 47

> 'these regulations leave no discretion for the disciplinary authority to order the period of suspension to reflect all the circumstances. The case law of the CAS has had occasion to clarify this matter....According to this case law, it is undesirable to have a fixed tariff system governing the sanctions in doping cases, a more flexible system being preferred, that makes allowances for suspensions for periods whose ranges vary as a function of the athlete's culpability. The CAS has even held that the doping control regulations of an international federation, laying down a system of fixed penalties, could be amended to take account of the specific circumstances of each case provided that such amendment was the subject of a specific reasoned opinion' (CAS 98/214 Digest Vol.2 p.308; para. 21).

Proportionality

The Court of Arbitration for Sport's dislike of fixed penalties can also be seen as an example of the doctrine of proportionality which has been applied in many awards. The general principle is that punishments should fit the crime. However, proportionality can be used in other contexts. In *AEK Athens & SK Slavia Prague v Union of European Football Associations (UEFA) ,* there was a long discussion of the question as to whether, to preserve the integrity of football and to allay the suspicion of match fixing, it was necessary to have a rule that clubs in the same ownership could not compete against each other in European competitions. The panel considered other proposed less restrictive alternatives before concluding that the measure adopted - a total ban - was not disproportionate (98/200; Digest, Vol. 2 p.38; paras 124-136 pp. 90-7). 48

Sanctions - seasonality

An interesting example of the Court of Arbitration for Sport ensuring that sanctions for disciplinary offences 'fit the crime' is the concept of seasonality. In most sports, there is a close season in which there is no serious competition. Thus a ban of less than a year can have different sporting and economic consequences depending on which period it covers. A similar problem can occur in those sports where the four- yearly Olympics are the sporting peak, for which all athletes aim, so that even a short ban at the wrong time can have disproportionate effects. Equally, in professional sports, like football, a year's ban can have much greater effect than in other sports. 49

The Court of Arbitration for Sport has occasionally modified bans to reflect this seasonality. In *Union Cycliste Internationale (UCI) v C. & Federazione Ciclistica Italiana (FCI),* a cyclist's ban was raised from six months to nine months. (CAS 98/212; Digest Vol.2 p. 274). The six months ran from September to March and covered - to a considerable degree - the 'dead period' when the cyclist would not be competing. In effect, the ban would be for only three months during the season, below the minimum sanction provided. This was considered by the panel to be inadequate and it imposed a nine-month ban so that six months of the competition were covered by the ban. Conversely, in *W. v International Equestrian Federation (FEI)* (CAS 99/A/246 Digest Vol.2 p. 505), an equestrian rider's ban for abusing horses was reduced from eight months to six months so that the rider would be able to compete in the qualifying event for the Olympics. This reduction was expressly justified because 'the suspension would have, in practice, an effect extending well beyond eight months' (CAS 99/A/246 Digest Vol.2 p.505; para. 32(c)). 50

Legitimate expectation and estoppel

As a general legal principle, penalties should not be imposed upon a person unless there is a clear rule that defines the offence and the punishment. Where a clear formal rule is consistently and unambiguously applied, this is not a problem. Difficulties arise, however, if the disciplinary authority does not always apply the rule consistently. Then, there will arise a discrepancy between the formal rule and the actual practice of its interpretation and application. So, if the penalty for a doping infraction, for example, is not always applied and mitigating circumstances are successfully pleaded, then athletes may have a legitimate expectation that, in future, the penalties will be applied in the same manner and that the policy 51

will not change overnight. If the disciplinary authority wants to alter its policy, it must publicly announce its change of policy for the future, so that athletes will not be disadvantaged. The change must be public; disseminated fully to all those who are likely to be subject to the rule; and not applied retrospectively.

A related doctrine is that of estoppel, as understood by the common law. This doctrine prevents a person from asserting one thing and then subsequently denying it. By extension, it allows anyone prejudiced by relying on the original assertion to claim relief. A good example of estoppel occurred in *New Zealand Olympic Committee (NZOC) v Salt Lake Organising Committee (SLOC) & Federation Internationale de Ski (FIS) & International Olympic Committee (IOC)* (CAS OG Salt Lake City 02/006) over the entry of two skiers to events in the 2002 Winter Olympics. The disputed interpretation turned on whether skiers ranked in the top 500 in any one discipline of downhill skiing could compete in any of the other three disciplines. The New Zealand Olympic Committee had entered their skiers in two events when they ranked in the top 500 in only one discipline and this was initially accepted by the Salt Lake Organising Committee. The Salt Lake Organising Committee, however, tried to refuse their entries at the Games, arguing that a qualification in the top 500 was needed in each discipline entered. The panel ruled that the Salt Lake Organising Committee was estopped from changing their interpretation. The athletes had relied on their entry and spent time and money preparing for the Games on the assumption that their original entry was accepted. In *International Amateur Athletic Federation (IAAF) v United States Track and Field (USATF)*(CAS 02/A/401) the Court of Arbitration for Sport decided that, although there was an obligation under the IAAF's rules to disclose the results of domestic doping tests to the international federation, nevertheless on the facts an estoppel operated. The panel decided that the IAAF had led the USATF to believe that it had the discretion to promise athletes that the results of their tests would be confidential. 52

WHAT ARE THE COURT OF ARBITRATION FOR SPORT'S FUNCTIONS?

WHAT LAW?

These principles of the jurisprudence of the Court of Arbitration for Sport can now be summarised. I outlined the jurisprudence and organised it into five categories. 53

- The *lex ludica* is a concept that is employed to signify that there are sporting matters that are outside legal intervention, and as such are simply not suitable for arbitration by the Court. It is a zone of autonomy for match officials and federations in so far as they are dealing with the rules of the game, a *lex ludica* that is defined by its non-application by the Court of Arbitration for Sport.
- The issues of good governance where the Court of Arbitration for Sport's role is to set standards, both retrospectively and prospectively, which federations will be expected to observe on pain of the Court rendering administrative decisions invalid.
- Procedural fairness using established general legal principles as to what constitutes minimum standards of fairness within private associations when exercising disciplinary power. These are general principles of law as applied to international sport and the Court will ensure that they are met.
- The harmonisation of standards, and with it the primacy of international federations over their national members, suggests that global standards for regulating sport are being formulated by the Court of Arbitration for Sport. This represents a *lex sportiva*, properly so called, because it is a transnational process arising from international arbitration and these principles could not easily be formulated in any other forum of dispute resolution in international sport.
- The assertion of fairness and equity entails an attempt to dispense individual justice within a highly regulated 'internal law' of sport. The basis of a true arbitration system is that it results from contract - from an agreement to arbitrate. However, what the Court of Arbitration for Sport is providing when using these principles is a final appeal, or a rehearing of the original case, in disciplinary matters against athletes. To this extent, it is much closer to the final stage of an internal grievance procedure operated by an employer than to a commercial arbitration between two enterprises.

WHAT ROLE?

There are a number of possible models of adjudication that could fit the Court of Arbitration for Sport: 54

- Court: Despite its name, the Court of Arbitration for Sport is not a court. It is not a fully-fledged judicial procedure that replaces national courts. Neither is it an international court, such as the International Criminal Court, because that would need national governments to have established it by treaty. Nevertheless, it does have characteristics that can make it seem as if it is trying to approximate itself to a court. One is the increasing attempts by its champions to claim exclusive jurisdiction for it over international sporting disputes. This is now achieved principally by sporting federations using express clauses that make arbitration both compulsory and exclusive upon

athletes and member federations. Another is the increasing juridification of the court as its awards become longer, more closely argued, dependent on precedent and increasingly formalistic. Morris and Spink (2000) have said that 'the CAS more closely resembles a court than an arbitral model in terms of its attitude towards precedent.'

- Arbitration: The most obvious model is that the Court of Arbitration for Sport is what it claims to be, a private arbitration system. It is formally established as such and it relies on the formal agreement of the parties to take their dispute to arbitration for resolution. It has been recognised as an independent and impartial arbitration system by the Swiss courts. In a judgment of June 2003, the Swiss Federal Tribunal dismissed the appeal lodged by two Russian skiers against awards pronounced by the Court of Arbitration for Sport. (*A & B v IOC,* judgment of 27 May 2003, 1st Civil Chamber, Swiss Federal Tribunal). The skiers had been disqualified, and had their medals removed, by the IOC after the Winter Games in Salt Lake City for doping. Their federation also banned them for two years. Their appeals to the Court of Arbitration for Sport were rejected. The Federal Tribunal also rejected all the arguments of the athletes, and accepted that the Court of Arbitration for Sport offered the guarantees of independence and impartiality necessary for recognition as a valid arbitration system. It noted particularly that the Court of Arbitration for Sport had been accepted by the international sporting community as the final appeal body under the new Anti-Doping Code; this showed that the Court of Arbitration for Sport was trusted and accepted as impartial. The Tribunal did have minor criticisms about the incestuous nature of personnel (advocates in one case becoming arbitrators in other cases) and of the lack of transparency as to which constituency arbitrators represent. The Tribunal, however, also suggested that, as a matter of good faith, they would have ruled against the skiers anyway, because they had impliedly accepted the impartiality of the Court of Arbitration for Sport by taking their case to it. So athletes are tied by a compulsory clause, when entering the Olympics, which denies them the right to go to national courts and submits then to binding arbitration; when they do so, they will be denied any challenge to the impartiality or legal correctness of that arbitration. An agreement to arbitrate is increasingly imposed upon athletes and their federations as a pre-condition of competition. For some commentators this is an example of mandatory arbitration, which can be defined as binding arbitration imposed by the stronger party in a relationship on the weaker party by an adhesive contract clause. Mandatory arbitration has been criticised as disguised self-regulation (Foster 2003) and as lawlessness (McConnaughay 1999).
- IOC organ: Despite the apparent independence of the Court of Arbitration for Sport from the IOC, it can nevertheless be suggested that it has a function on behalf of the IOC. It can be seen as an independent but integrated part of the system of harmonisation of standards. The IOC increasingly acts a global legislator in international sport, setting common standards. The Court of Arbitration for Sport can thus be seen as the global forum for resolving those disputes that arise out of the IOC's legislation. This aspect of the work of the Court of Arbitration for Sport is especially evident in its ad hoc decisions during the Olympic Games, where, as shown above, it has confirmed the primacy of the IOC even over federations that do not otherwise accept its jurisdiction. The weakness of this function is that major sports, such as motor racing and baseball, do not accept the Court of Arbitration for Sport's jurisdiction.
- Final review body: One view is that the Court of Arbitration for Sport is simply a review body for the decisions of the sporting federations. A strong example of this approach was *Australian Olympic Committee (AOC)* (CAS 2000/C/267; Digest Vol.2 p. 725), where the approach of the arbitrator was to ask whether he had any jurisdiction to review the decision made by the federation. The key question asked in this advisory opinion was whether FINA had the final authority to decide whether the swimsuits were an illegal device under the rules or not. FINA argued in part that they were the sole and final arbiter of their rules. The arbitrator took a very formalistic approach, treating FINA as purely a 'domestic tribunal' and then listing the very limited procedural circumstances in which such decisions could be legally challenged. This is an odd and restrictive decision. It leaves little scope for intervention and avoids tackling the substantive issues.
- Ombudsman: An ombudsman corrects poor administrative practice. By dealing with individual applications on their merits, by stressing concepts of fairness and equity, and by insisting that international sporting federations follow good practice standards, it can be argued that the Court of Arbitration for Sport is following a dispute settlement model akin to that of an ombudsman. Such a model would see a high degree of emphasis on athletes' rights and the requirement of good governance by international sporting federations.
- *Lex ludica*: On this model, the Court of Arbitration for Sport is an instrument of self-regulation. It defends the autonomy of sporting bodies. It defines what sporting matters are legally immune because they form part of the *lex ludica*. As Beloff has argued, the function of the *lex sportiva* is to demarcate realms of authority in the sporting context. He said that that the foundation principle, the 'cornerstone' of *lex sportiva*, is to allow 'autonomy for decision making bodies in sport' and to establish a 'constitutional equilibrium' between courts and sports federations (Beloff

1999 p.4). The respect for the autonomy of sporting federations shown by the Court of Arbitration for Sport is part of a legal tradition that interferes only in a limited way with decision-making by powerful bodies. The principles are very similar to the public law principles of common law jurisdictions that will refuse to intervene in the decision made by public authorities except in very well defined circumstances. Similarly, these principles are akin to the attitude of the English courts to the managerial decisions of employers over disciplinary and dismissal cases, as articulated in unfair dismissal cases. In other words, there is no challenge to the substance of decision-making; there is an emphasis on fair procedure and formal powers; and high standards of illegality are needed to justify intervention

Combining the categorisation of the jurisprudence with the different models of adjudication allows the table: 55

Jurisprudential Category	***Legal Model***	***Role of CAS***
Lex ludica	autonomy of private bodies	non-intervention
good governance	public law review	ombudsman
procedural fairness	natural justice	final review
harmonisation	*lex sportiva*	IOC organ; supreme court
fairness & equity	individual & human rights	arbitration

CONCLUSIONS

The Court of Arbitration for Sport applies general legal principles to sport when it is dealing with good governance and procedural fairness; it sets minimum standards, if for no other reason than to forestall litigation before national courts. In this function, it is a form of alternative dispute resolution. But its distinct jurisprudence is its application of *lex sportiva* and *lex ludica*. The danger for the Court of Arbitration for Sport is that the use of '*lex sportiva*' as a concept leads to the position that its principal function as a 'supreme court of world sport' excludes or modifies the other functions that it performs. 56

Arbitration systems ultimately get their legitimacy from the contractual agreement of the parties. When the issues before the Court of Arbitration for Sport are appeals against the exercise of disciplinary powers over athletes, who are forced to agree to its jurisdiction, then a contractual model is inoperative. Mandatory arbitration has many dangers. The power differential between athletes and the federations is obvious. The procedure for choosing arbitrators remains opaque. There are specialised counsels, who are themselves often past arbitrators, and as such have an advantage when they represent federations. Awards are still not universally published, thereby giving the repeat players additional advantages. 57

If the approach of the Court of Arbitration for Sport is non-interventionist as against international sporting federations, then it appears only to be a private regulatory power. But the Court of Arbitration for Sport needs to be interventionist in all of its functions and to limit the zone of *lex ludica*. It can continue to act as the supreme court for the interpretation of *lex sportiva*, but its primary role must be to ensure individual justice and rights for athletes; this is what will reinforce its legitimacy and protect its own institutional autonomy and independence. 58

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