Liability of football clubs for supporters' misconduct. A study into the interaction between disciplinary regulations of sports organisations and civil law

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FIRST HALF

Disciplinary regulations in sport and their connections to civil law

2 The Legal Status of Disciplinary Regulations in Sports*

2.1 INTRODUCTION

International sports organisations, such as the International Olympic Committee, UEFA and FIFA, have created extensive regulatory frameworks in order to govern their activities. In these frameworks, a prominent place is reserved for disciplinary regulations; rules regarding the behaviour of the different actors involved. Disciplinary regulations in sports started with regulating the game.[1] Over time, however, more and more aspects have become the subject of regulation, including doping, player transfers, stadium safety and, connected with the last-mentioned item, the liability of clubs for their supporters' conduct. If athletes or clubs do not comply with the rules, a disciplinary sanction can be imposed.

However, regulating sports is not an easy exercise. Due to the many different actors involved, legal issues are numerous and complex. This point is illustrated by the following situation. A football player is a member of his local club. Both the player and the club are members of the national football federation, which in turn is a member of both UEFA and FIFA. In what way are the player and the club bound by the regulations of the different organisations? Both have a legal relationship with the national federation, but not with UEFA or FIFA. Are the player and the club nevertheless directly bound by UEFA's and FIFA's rules, even if there is no direct relationship? Furthermore, the national federation's regulations contain a provision which obliges its adhered members to comply with the regulations of UEFA and FIFA. What happens when these rules change? Are the player and club bound to these changed rules? If they do not comply with the rules and the national federation wishes to impose a disciplinary sanction, what requirements must then be met?

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1 See on the development of rules in sports: Wray Vamplew, Playing with the Rules: Influences on the Development of Regulation in Sport, *The International Journal of the History of Sport*, Vol. 24, No. 7, 2007, pp. 843-871.

In this chapter these questions will be answered according to Dutch, English, French, German and Swiss law. In doing so, this chapter will provide a comparative and transnational overview of the main legal framework in which national and international sports organisations operate. By its nature, sport is not a national affair. The best athletes and clubs compete on an international level or aspire to do so. When a disciplinary sanction is imposed, this can have effects on international competition. Therefore, this chapter intends to determine whether a 'level playing field' exists in European organised sports with regard to the legal status of disciplinary regulations. In other words, which similarities and differences exist between the chosen jurisdictions and can common denominators be identified?

The structure of this chapter is as follows. First an outline of the legal framework in which sports organisations create and apply their rules will be provided (2), including the limitations of the regulatory power of these organisations (3). Then the focus turns to the main issue of how the different actors involved are bound by the disciplinary rules of sports organisations; the binding character of the rules upon members (4) will be followed by discussing the possibility to bind so-called indirect members (5) as well as the question of what happens when the rules change (6). Following on from there, the enforcement of disciplinary regulations in the form of a sanction (7) and the requirements for application (8) will be discussed in brief. Finally, some evaluative and concluding remarks will be made (9).

2.2 The regulatory framework of sports organisations

The Pyramid

Professional and amateur sports are organised in a pyramid structure. The local sports clubs are at the base of the pyramid. Here people come together to practise their sport, recreationally and competitively. The clubs are usually associated with a national federation[2] which is responsible for the organisation of a certain sport at the national level. In their turn, the national federations are part of the international federation which manages the sport at the international level. In certain sports a continental federation is positioned between the national and international federations, the UEFA, *Union des Associations Européennes de Football*, probably being the most renowned.

2 A federation is generally defined as an association of associations. See Peter Philipp, *Rechtliche Schranken der Vereinsautonomie und der Vertragsfreiheit im Einzelsport. Unter besonderer Berücksichtigung der Monopolstellung der Verbände* (diss. Zürich), Zürich: Schulthess Juristische Medien AG 2004, p. 8; Denis Oswald, *Associations, Fondations, et autres formes de personnes morales au service du sport*, Bern: Peter Lang 2010, p. 209.

An important feature of the pyramidal structure is the so-called *Ein-Platz-Prinzip*. This principle entails that only one federation on the national and international level can represent a certain sport.[3] It ensures the uniform development of the sport; that the game is played by the same rules and that only the strongest athletes or teams take on each other in national and international championships. The pyramidal structure thus creates a monopoly position of the international federation, allowing it to organise the sport in conformity with its own discretion. The monopoly position of national and international federations has multiple legal implications and will prove to be a recurring issue throughout this chapter.

The Association: the cornerstone of organised sports

In all five jurisdictions, the primary legal form of sports clubs and national federations is the (incorporated) association. The choice of the association as an organisational form is prompted by the relatively lenient laws regulating this legal entity. As a result, ample room is left for associations to create and enforce the rules that are deemed necessary for an adequate functioning of the sport.

In the Netherlands, most sports clubs and almost all national federations, including the Royal Dutch Football Association (KNVB), take on the form of an association (*vereniging*).[4] Association law is governed by art. 1-52 of Book 2 of the Dutch Civil Code (*Burgerlijk Wetboek;* BW).[5] An association is defined as a legal person with members aimed at pursuing a specific object.[6] It is formed by a multilateral legal act and possesses legal personality.[7] The increasingly commercialised nature of sports activities has led to certain organisations opting for the incorporation of a company. For example, in Dutch football many clubs are set up in the form of a company, e.g. a private company with limited liability (*BV*) or a company limited by shares (*NV*). However, the shares are usually owned by a foundation with no or little financial interest.[8]

Dutch association law only provides a minimal legal framework. For example, only a few provisions are mandatory for incorporation into the

3 See for application of this principle in German case law: BGH 23.11.1998 – II ZR 54/98 – BGHZ 140,74; BGH 02.12.1974 – II ZR 78/72, BGHZ 63, 282.

4 Art. 11 of the *Statuten* of the NOC*NSF (the Dutch umbrella organisation for all sports) only allows associations as ordinary members.

5 The Dutch BW is comprised of multiple Books. Book 2 governs legal entity law and precedes the general part of the law of obligations which is governed by Book 3.

6 Art. 2:26 BW.

7 Art. 2:26 BW and art. 2:3 BW.

8 Tim Verdoes, Jan Adriaanse and Niels van de Ven, 'Naar een financieel gezond betaald voetbal', *Economisch Statistische Berichten* (95) 2010, pp. 247-249, p. 248.

articles of association (*statuten*).[9] Barring the few rules of imperative law, an association is free to organise itself as it wishes.[10] It follows that whoever is given authorisation to certain acts based on the association's structure, is autonomous in the exercise of that power.[11] This autonomy is an elaboration of the freedom of association, i.e. the civil right to create and adhere to an association.[12] According to art. 2:27 (4) BW and 2:34a BW, obligations of members must have a basis in the association's articles.[13] Among these obligations fall the compliance with the behavioural rules set forth by the association – for instance to treat others with respect and refrain from verbal and physical violence[14] – and the submission to its disciplinary jurisdiction. It is generally accepted that disciplinary rules may be laid down in secondary regulations as long as these have a basis in the articles of association.[15]

In England, the unincorporated association has traditionally been the most common structure used by the majority of sports clubs and governing bodies.[16] An unincorporated association is comprised by a group of individuals that are contractually bound together by the constitution or rules of the club. As these entities are not recognised as having legal personality, the members may be personally liable for the debts of the club if these debts cannot be met from the assets of the club or under an insurance policy. For this reason, many sports organisations prefer the structure of an incorporated

9 According to art. 2:27 (4) BW, these include the name and seat of the association, its object, the obligations put on the members or the manner in which those obligations may be imposed, the manner of convening general meetings, the appointment and removal of the officers and the allocation of the surplus upon winding up.

10 W.C.L. van der Grinten en Y. Scholten, *De rechtspersoon: enkele vragen betreffende de regeling van de rechtspersoon in het nieuwe Burgerlijk Wetboek: praeadviezen ter behandeling in de algemene vergadering van de Broederschap der Candidaat-Notarissen te Valkenburg op 15 juni 1956*, pp. 25-26; F.J.W. Löwensteyn, *Wezen en bevoegdheid van het bestuur van de vereniging en de naamloze vennootschap*, (diss. Amsterdam UVA) 1959, pp. 22-23; P.A.L.M. van der Velden, *De vereniging-rechtspersoon en haar leden* (diss. Nijmegen), Deventer: Kluwer 1969, p. 56; J.M.M. Maeijer, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht, 2-II, De rechtspersoon*, Kluwer 1997, p. 10.

11 Compare: P.A.L.M. van der Velden, *De vereniging-rechtspersoon en haar leden* (diss. Nijmegen), Deventer: Kluwer 1969, p. 51.

12 This fundamental right is laid down in Art. 8 of the Dutch Constitution.

13 For the subtle difference of the notion of obligation in the two articles see: G.J.C. Rensen, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht, 2-III*, Overige rechtspersonen*, Kluwer 2012, no. 51.

14 Rule 1 of the Gedragscode (model code of conduct) of the Dutch Football Association (KNVB).

15 See F.C. Kollen, *De vereniging in de praktijk*, Deventer: Kluwer 2007, p. 210 and implicitly also G.J.C. Rensen, *Extra-verplichtingen van leden en aandeelhouders: een wetenschappelijke proeve op het gebied van de rechtsgeleerdheid* (diss. Nijmegen), Deventer: Kluwer 2005, pp. 84-85.

16 Michael J. Beloff, 'Pitch, pool, rink, … court? Judicial review in the sporting world', *Public Law* 1989, pp. 95-110, p. 96 and Simon Gardiner *et al*., *Sports Law*, Routledge 2012, p. 105.

association in the form of a company.[17] There are multiple types of companies. The governing body for football in England, the Football Association (FA), the Premier League and most professional football clubs are structured as companies limited either by shares or by guarantee. When a company is limited by shares, members invest their capital by purchasing shares. By contrast, members of a company limited by guarantee cannot buy shares; instead they give a guarantee. This means that their liability is limited to the amount the members undertake to contribute to the assets of the company in the event of its being wound up (usually of £1).[18]

The regulations for the company are laid down in the articles of association.[19] The tradition of English company law has been to give members considerable freedom regarding the internal organisation of the company. The articles of association regulate all those matters that are not subject to rules laid down in legislation or common law.[20] The Companies Act provides model articles that apply by default unless the company decides otherwise.[21] The articles of association take effect as a 'vertical' contract between the members and the company.[22] All members are bound by virtue of this contract to observe the company's rules.[23]

In Germany, the standard organisational structure is the registered association (*eingetragene Verein*) which is regulated in § 21-79 of the German *Bürgerliches Gesetzbuch* (BGB). An association whose objective is not commercial business operations, such as sport clubs and their national federations, acquires legal personality by entry in the register of associations of the competent local court (*Amtsgericht*).[24] The freedom for an association to organise itself as it wishes (*Vereinsautonomie*) derives from the constitutional right to form associations.[25] The *Vereinsautonomie* is implicitly addressed by § 25 BGB, which states that an association's constitution is determined by the articles of association. As the German BGB only provides a minimal legal framework, the articles of association can deviate from most statutory provisions given that only few are of imperative law.[26] The minimal legal requirements of the articles of

17 According to Davies a company is "an organisational form, provided by the law, through which the suppliers of the various inputs necessary to achieve a certain objective can come together and coordinate their activities". Paul Davies, *Introduction to Company Law*, Oxford University Press 2010, p. 2.

18 Section 3 Companies Act 2006. See also David Ashton and Paul Reid, *Ashton & Reid on Clubs and Associations*, Bristol: Jordan Publishing Ltd 2011, pp. 19-20.

19 Section 18 of the Companies Act 2006.

20 Paul Davies, *Introduction to Company Law*, Oxford University Press 2010, p. 14.

21 Section 20 of the Companies Act 2006 and explanatory note 70.

22 Michael J. Beloff, Tim Kerr and Marie Demetriou, *Sports Law*, Oxford: Hart Publishing 1999, p. 25, no. 2.26.

23 Section 33 Companies Act 2006 and explanatory note 108.

24 § 21 BGB.

25 Art. 9, section 1 German Basic Law.

26 § 40 BGB.

association include the object, the name and the seat of the association and the indication that the association is to be registered.[27] Furthermore, the law stipulates that the articles contain provisions regarding membership, the composition of the board and the general meeting. The relationship between the association and its members is thus governed by the applicable provisions of the BGB and the articles of association.[28] Membership obligations are varied – they include for instance administrating duties and (monetary) contributions – and must generally have a basis in the association's articles.[29] Hereto, a general provision suffices; disciplinary rules may be specified in secondary regulations.[30] Besides the primary membership obligations expressed in the articles, there is the so-called duty of loyalty (*Treuepflicht*).[31] This duty goes beyond the general principle of good faith in accordance with § 242 BGB.[32] Its content and scope depend *inter alia* on the nature of the association's object, the internal unity of the association, the degree of personal commitment and the person-centeredness of the membership relationship.[33]

In Switzerland, too, the chosen legal form of most sports organisations is the association.[34] An association is a group of natural or legal persons organised as a corporate body and is governed by art. 52-79 of the Swiss Civil Code. According to art. 60 CC, associations formed for political, religious, scientific, artistic, charitable, social or other non-economic purposes acquire legal personality as soon as their intention to exist as a corporate body is apparent from their articles of association.[35] The association is the most liberal of legal entities in Switzerland. It is subject to fewer legal requirements than the other corporations in terms of both the constitution and in the internal and external organisation. An explanation can be sought in the fact that since the possibility to exercise economic activities as a principal and important

27 § 57 BGB.

28 Dirk-Ulrich Otto and Kurt Stöber, *Handbuch zum Vereinsrecht. 10. Neu Bearbeite Auflage*, Keulen: Verlag Dr. Otto Schmidt 2012, Rn. 201.

29 E. Sauter, G. Schweyer and W. Waldner, *Der eingetragene Verein*, Verlag C.H. Beck 2010, Rn. 347. Regarding forced exclusion and other disciplinary sanctions consistent case law requires that these are regulated in the articles of association: BGHZ 13, 5; BGHZ 21, 370; BGHZ 28, 131; BGHZ 29, 352; BGHZ 36, 105; BGHZ 47, 172; BGHZ 105, 306.

30 Dieter Reuter, *Münchener Kommentar zum BGB. Band 1. Allgemeiner Teil. 6. Auflage*, 2012 § 25, Rn. 10; Günther Weick, *J. von Staudingers Kommentar zum BGB. Buch 1. Allgemeiner Teil, Neubearbeitung*, 2005, § 25, Rn. 3 and 23; Dirk-Ulrich Otto and Kurt Stöber, *Handbuch zum Vereinsrecht. 10. Neu Bearbeite Auflage*, Keulen: Verlag Dr. Otto Schmidt 2012, Rn. 984.

31 Dieter Reuter, *Münchener Kommentar zum BGB. Band 1. Allgemeiner Teil. 6. Auflage*, 2012, § 38, Rn. 44; Günther Weick, *J. von Staudingers Kommentar zum BGB. Buch 1. Allgemeiner Teil, Neubearbeitung*, 2005, § 35, Rn. 7.

32 BGH 12.03.1990 – II ZR 179/89 – *NJW* 1990, 2877.

33 E. Sauter, G. Schweyer and W. Waldner, *Der eingetragene Verein*, Verlag C.H. Beck 2010, Rn. 348. See also BGHZ 129, 136.

34 In German: 'Verein', in French: 'association'.

35 Deviation from art. 52 CC, which states that other corporate and independent bodies acquire legal personality upon being entered in the commercial register.

purpose is excluded, the legislature deemed it unnecessary to provide a more stringent structure or control mechanism to safeguard the interests of the members and third parties.[36] With regard to professional sports, the company is gaining ground as organisational structure for clubs. Nowadays, many professional teams in both ice hockey and football are organised as a company limited by shares pursuant to art. 620 – 763 of the Swiss Code of Obligations.[37] However, all national and international federations seated in Switzerland are organised as associations.[38]

One of the fundamental principles of Swiss private law is the freedom of the parties in the design of their legal relationships.[39] In association law this principle is embodied by the notion of freedom of association, or in German: *Vereinsautonomie*.[40] According to Heini, "Kerngedachte der Vereinsautonomie ist, dass die Verbandsperson in den Schranken des Gesetzes und der guten Sitten ihre Belange ohne Einmischung des Staates oder Dritten selber regeln darf".[41] This view is reflected in the provisions of Swiss association law on organisation and membership, which are predominantly dispositive and only apply when no specific rules are established in the articles of association.[42] Consequently, the right to freely organise one's association does not only entail the composition of the articles but rather the design of the entire regulatory system.[43] Furthermore, according to doctrinal views the term *Autonomie* entails

36 Hans Michael Riemer, *Die Vereine, Berner Kommentar, Band I/3, 2er Teilband,* Bern: Verlag Stämpfli & Cie AG 1990, p. 121ff; Margareta Baddeley, *L'association sportive face au droit. Les limites de son autonomie* (diss. Genève), Basel: Helbing & Lichtenhahn 1994, p. 25.

37 In French: société anonyme (S.A.): in German: Aktiengesellschaft (AG).

38 Lucien W. Valloni and Thilo Pachmann, 'Switzerland. Part I. Organization of Sport', nr 23, p. 40, in: Franck Hendrickx *et al*. (eds.), *International Encylopaedia for Sports Law*, Kluwer Law International 2010, p. 40.

39 Article 19 (1) of the Swiss Code of Obligations (CO) provides that the terms of a contract can be freely determined as long as it resides within the limits of the law. This provision is applicable by analogy to association law according to art. 7 of the Swiss Civil Code (CC), which provides: "The general provisions of the Code of Obligations concerning the formation, performance and termination of contracts also apply to other civil-law matters".

40 The term *Vereinsautonomie* is dominantly used in both case law and doctrine. See: BGE/ATF 70 II 63; BGE/ATF 73 II 2; BGE/ATF 97 II 108; August Egger, *Kommentar zum Schweizerischen Zivilgesetzbuch (Zürcher Kommentar), I. Band: Einleitung und Personenrecht, 2nd edition*, Zürich: Schulthess & Co 1930, p. 410; Henk Fenners, *Der Ausschluss der staatlichen Gerichtsbarkeit im organisierten Sport* (diss. Freiburg), Schulthess Juristische Medien 2006, p. 20; Peter Philipp, *Rechtliche Schranken der Vereinsautonomie und der Vertragsfreiheit im Einzelsport. Unter besonderer Berücksichtigung der Monopolstellung der Verbände* (diss. Zürich), Zürich: Schulthess Juristische Medien AG 2004, p. 21ff. Riemer, however, speaks of '*privatrechtliche Vereinsfreiheit*': Hans Michael Riemer, *Die Vereine, Berner Kommentar, Band I/3, 2er Teilband,* Bern: Verlag Stämpfli & Cie AG 1990, p. 102ff.

41 Anton Heini, 'Die gerichtliche Überprüfung von Vereinsstrafen', in: Peter Forstmoser and Walter R. Schlüp (eds.), *Freiheit und Verantwortung im Recht: Festschrift zum 60. Geburtstag von Arthur Meier-Hayoz,* Bern: Stämpfli Verlag SA 1982, pp. 223-234, p. 229.

42 Art. 63 (I) CC.

43 Compare Henk Fenners, *Der Ausschluss der staatlichen Gerichtsbarkeit im organisierten Sport* (diss. Freiburg), Schulthess Juristische Medien 2006, p. 21.

not only the creation of rules but also their application and enforcement.[44] The Swiss Federal Supreme Court also seems to support this outlook.[45] Another general observation is the particular form in which the principle manifests itself. Freedom of association appears through decisions, realised by a majority of votes.[46] Or in the words of Egger: "Für das korporative Leben bedeutet die Vereinsautonomie privatrechtliche Majoritätsherrschaft, die Gestaltung der Vereinsordnung und des Vereinslebens nach dem Willen der Mehrheit".[47] Under Swiss law the freedom of association thus comprises the creation, application and enforcement of rules. This broad conception of *Vereinsautonomie* and its liberal application in Swiss association law is generally considered the main reason why most international sports federations have chosen this country as their seat.[48] As a result, the practical importance of Swiss law on organised sports cannot be underestimated.

In France, the promotion and development of sport is recognised as a matter of public interest, which results in the French state taking up a much more prominent role in the organisation of sports compared to the other countries.[49] This is exemplified by article L.100-2 of the French *Code du*

44 August Egger, *Kommentar zum Schweizerischen Zivilgesetzbuch (Zürcher Kommentar), I. Band: Einleitung und Personenrecht, 2nd edition*, Zürich: Schulthess & Co 1930, p. 410; Hans Michael Riemer, *Die Vereine, Berner Kommentar, Band I/3, 2er Teilband*, Bern: Verlag Stämpfli & Cie AG 1990, p. 405; Hans Bodmer, *Vereinsstrafe und Verbandsgerichtbarkeit: dargestellt am Beispiel des Schweizerischen Fussballverbandes* (diss. St. Gallen), Bern: Verlag Paul Haupt 1989, pp. 39 and 43; Christoph Fuchs, *Rechtsfragen der Vereinsstrafe. Unter besondere Berücksichtigung der Verhältnisse in Sportverbänden* (diss. Zürich), Zürich: Schulthess Polygraphischer Verlag AG 1999, p. 38; Henk Fenners, *Der Ausschluss der staatlichen Gerichtsbarkeit im organisierten Sport* (diss. Freiburg), Schulthess Juristische Medien 2006, p. 22ff. Fenners speaks of sanctions instead of the more common doctrinal term of enforcement (*Durchsetzung*). In contrast, apart from the creation, application and enforcement of rules Philipp distinguishes also: the freedom to found, the freedom of design and content, the freedom of choice in choosing partners, the freedom to exclude members (art. 72 CC), the freedom of organisation and the freedom of dissolution: Peter Philipp, *Rechtliche Schranken der Vereinsautonomie und der Vertragsfreiheit im Einzelsport. Unter besonderer Berücksichtigung der Monopolstellung der Verbände* (diss. Zürich), Zürich: Schulthess Juristische Medien AG 2004, p. 22ff.

45 BGE/ATF 97 II 108, cons. 3: "Die Autonomie bedingt daher auch, dass die freie Willensbildung grundsätzlich gewährleistet sein muss. Es hätte keinen Sinn, dem Verein die Freiheit der innern Gestaltung zuzugestehen, gleichzeitig aber grundlegende Beschränkungen der freien Willensbildung zuzulassen".

46 Art. 67 (2) CC.

47 August Egger, *Kommentar zum Schweizerischen Zivilgesetzbuch (Zürcher Kommentar), I. Band: Einleitung und Personenrecht, 2nd edition*, Zürich: Schulthess & Co 1930, p. 410.

48 Denis Oswald, *Associations, Fondations, et autres formes de personnes morales au service du sport*, Bern: Peter Lang 2010, p. 33; Hans-Michael Riemer, 'Sportrechts-Weltmacht Schweiz Internationale Sportverbände und schweizerisches Recht', *Causa Sport* 2004, pp. 106-107, p. 106.

49 Other countries where the state plays a major role in organised sports are Italy and Spain, among others.

sport,[50] which sets out that the state, local authorities and their groups, associations, sports federations, businesses and social institutions contribute to the promotion and development of sport and physical activity. As in the other countries, the general organisational form of clubs and governing bodies is the association, governed by the French law of 1 July 1901 relating to the contract of association. However, when sports associations obtain 1.2 million in annual revenues from the organisation of paying sports events or a total of 800,000 in annual remunerations, they have the legal obligation to manage these activities in a corporation subject to the *Code de commerce*.[51] In France too, the articles of association are subject to both the freedom of contract and association and can be freely determined.[52] According to the *Cour de Cassation*, "*les statuts font la loi des parties*".[53] While the French law of 1 July 1901 relating to the contract of association contains no provisions relating to the internal organisation of associations, views in literature strongly suggest the incorporation of additional provisions regarding e.g. access to the association, its organs and their powers and member obligations.[54]

In the organisational structure of sports in France a pivotal role is played by the sports federations. As in most other jurisdictions, the federations are associations and serve to organise the practice of one or several sports disciplines.[55] The French state recognises different levels of national federations: certified federations and delegated federations.[56] Certified federations participate in the execution of a public service and therefore are eligible for state support in the form of funding or personnel. In order to be certified by the Minister for Sport, a federation must adopt certain mandatory provisions in its articles of association as well as standard disciplinary rules.[57] Delegated federations are certified federations that enjoy a monopoly position in their respective disciplines to organise competitions resulting in international, national, regional or departmental titles. Additionally, these federations carry out the selection procedures for national teams and are responsible for enacting technical rules and other regulations relating to competitions.[58] With regard

50 The *Code du Sport* entered into force in 2006 and replaced several other Acts, resulting in the consolidation of all laws and ordinances applicable to sport in a single document.

51 Art. L.122-2 of the *Code du sport* in conjunction with art. R122-2 of the decree. The company created must take one of the legal forms listed in the *Code du sport*.

52 Art. 5 French law of 1 July 1901 relating to the contract of association. Minimum legal requirements to include are the title and purpose of the association, the seat of its institutions and information on those who are responsible for its administration.

53 Cass. Civ.1 25.10.2002, *Recueil Dalloz* 2002, 2359, note Y. Chartier.

54 Frédéric Buy *et al*., *Droit du sport*, L.G.D.J. 2009, no. 389; Bernard Teyssié, *Droit civil. Les personnes*, Paris: LexisNexis, Litec 2010, no. 839 and 854.

55 Art. L.131-1 and L.131-2 of the *Code du sport*.

56 In French: *fédérations agréés* and *fédérations délégataires*.

57 Art. L.131-8ff. of the *Code du sport*. See also the landmark case CE 22.11.1974, n°89828, *RecueilDalloz* 1975, p. 739, note J.-F. Lachaume.

58 Art. L.131-15 and L.131-6 of the *Code du sport*.

to the creation and enforcement of disciplinary rules, the distinction between 'normal' associations, such as clubs on the one hand and certified and delegated federations on the other, is essential. According to French case law and doctrinal views, every association or federation by its nature enjoys disciplinary power over its members; this is inherent in the organisation of any association.[59] Moreover, certified and delegated sports federations exercise disciplinary power over their members also by virtue of the *Code du sport*, according to which they must adopt the standard disciplinary regulations.[60]

In summary, it is clear that great similarities exist in the way sport is organised and regulated in all five countries. The large majority of clubs and national governing bodies are legally organised as an association. Except for in France, where national sport federations have to adhere to additional rules, this legal entity provides the room to regulate internal matters with great autonomy.

2.3 LIMITS

Despite the high degree of discretion regarding the self-organisation of associations, there are certain limits. Associations cannot escape compliance with both national law as well as with their self-created internal regulations.

National law

In all civil-law jurisdictions, it is provided by law that the articles of association are not to violate the law, public policy and morality.[61] It must be noted that, in the jurisdictions that are member states of the European Union, 'the law' nowadays also entails provisions and regulations of European law.[62] Consistent case law of the European Court of Justice holds that sport is subject to European Union law insofar as it constitutes an economic activity.[63]

Some jurisdictions present certain additional statutory limits worth noting. For example, in Dutch law a further limitation is the statutory duty of article 2:8 BW. According to this provision the relationships between the legal entity

59 CE 19.12.1988, n°79962, *Recueil Dalloz* 1990, p. 280, obs. C. Dudognon. See also J.-P. Karaquillo, Le pouvoir disciplinaire dans l'association sportive, *Recueil Dalloz* 1980, pp. 115-124, p. 115; Frédéric Buy *et al.*, *Droit du sport*, L.G.D.J. 2009, no. 226; Gérald Simon, *Puissance sportive et ordre juridique étatique* (diss. Bourgogne), L.G.D.J. 1990, p. 256.

60 Art. L.131-8 of the *Code du sport* in conjunction with the annex to the decree n°2004-22.

61 The Netherlands: Art. 3:40 BW. France: Art. 6 CC; Germany: § 134 BGB and § 138 BGB; Switzerland: art. 19 and 20 CO in conjunction with art. 7 CC.

62 Günther Weick, *J. von Staudingers Kommentar zum BGB. Buch 1. Allgemeiner Teil, Neubearbeitung*, 2005, § 25, Rn. 19, referring to the Bosman case.

63 ECJ 12.12.1974, C-36-74 (Walrave/Koch); ECJ 15.12.1995, C-415/93 (UEFA/Bosman); ECJ 16.03.2010, C-325/08 (Olympique Lyonnais/Bernard).

and those involved in its organisation, and between the latter, are partly determined by standards of reasonableness and fairness.[64] Moreover, in Swiss law, the freedom to create and enforce rules is also limited by two provisions in the Civil Code that constitute the application of human rights between private persons. These provisions maintain the prohibition not to violate personality rights.[65]

In England, as befits a common-law country, the regulatory power of sports organisations is limited by a number of core principles that have been developed in case law.[66] First, it has been held that sports federations act unlawfully if they take into account irrelevant factors, or fail to consider relevant factors, when making decisions such as determining a sanction.[67] Second, the conduct of sports federations is subjected to the general principle of proportionality.[68] Third, in *Enderby Town Football Club Ltd v The Football Association Ltd* it was held that the decisions of sports federations are subject to the requirements of natural justice.[69] There are two main rules of natural justice: the rule against bias and the right to a fair hearing.[70] Despite being a public-law feature in origin, the principles of natural justice have infiltrated the contractual relationships of private entities, such as sports federations.[71] In the context of a sports disciplinary sanction, the right to a fair hearing includes *inter alia* prior notice of a decision, an oral hearing, legal representation and a requirement to give reasons for the decision.[72] Moreover, participants in sport can also rely upon the restraint of trade doctrine. This doctrine purports that a contract in unreasonable restraint of trade is void. In the sporting context the doctrine has been

64 Art. 2:8 BW. This specific duty to act in conformity with standards of reasonableness and fairness is also found in Dutch contract law (art. 6:2 BW and 6:248 BW) Swiss, French and German law also feature statutory obligations to act in good faith (art. 2 Swiss CC; art. 1134 CC and art. 242 BGB), although they are not specifically aimed at legal entities.

65 Art. 27 and 28 CC. The term personality rights refers to fundamental rights of an individual that are intrinsic to his being: the right to life, physical integrity, religion, privacy, honour and also to freely choose one's profession – for instance to be a professional athlete. See further section 3.2.4. and the *Matuzalem* case in 3.3.2.3.

66 Simon Gardiner *et al*., *Sports Law*, Routledge 2012, p. 117.

67 See *Bradley* in first instance and *Fallon v Horseracing Regulatory Authority* 2006 [EWHC] 2030.

68 *Bradley v Jockey Club* [2004] EWHC Civ 2164 (QB), para 43.

69 *Enderby Town Football Club Ltd v The Football Association Ltd* [1971] 1 Ch. 591, following *Russel v Duke of Norfolk* [1949] 1 All ER 109.

70 See for applications of these rules regarding sports organisations: *McInnes v Onslow-Fane* [1978] 1 WLR 1520*; Modahl v British Athletic Federation Ltd* [2002] 1 WLR 1192; *Flaherty v National Greyhound Racing Club Ltd* [2005] EWCA 1117. See for extensive overview of the rules of natural justice William Wade and C.F. Forsyth, *Administrative Law*, Oxford University Press 2009, pp. 371-470.

71 According to Morris and Little this is in order to achieve procedural fairness similar to that in public law. Philip Morris and Gavin Little, Challenging Sports Bodies' Determinations', *Civil Justice Quarterly* (17) 1998, pp. 131-132.

72 See also in more detail: Simon Gardiner, UK Sports Law. Part I. Organization of Sport, p. 49, in Franck Hendrickx *et al.* (eds.), *International Encylopaedia for Sports Law*, Kluwer Law International 2008, p. 128.

applied in roughly three areas: transfer systems, participation in competition and challenges to the reasonableness of disciplinary measures.[73] The doctrine is primarily concerned with the effect of the challenged provision upon the ability to trade and less preoccupied with the 'special position' of sports regulating bodies. The content of rules can be called into question and tested for reasonableness. However, as long as their aims and objects are legitimate and reasonable, sports federations are free to act.[74]

In France, the normative power of certified and delegated federations is supervised by the minister of sports. Any modification of the articles of association, procedural rules, the disciplinary regulations or financial regulations has to be notified. If the modifications are inconsistent with the certification granted to the federation, the minister will demand the necessary corrections.[75] Regulations and the decision taken by delegated federations are, as administrative acts, subject to the principle of administrative legality which requires compliance with all hierarchically superior rules.[76] First, these include the *Code du sport* and its regulations, including the standard disciplinary regulations. The requirement of legality was first laid down by the *Conseil d'État* and meanwhile has been adopted by the *Code du sport*.[77] For instance, art. L.131-33 of the *Code du sport* expressly prohibits federations from imposing rules regarding the *équipement sportif* that are dictated by business imperatives.[78] Besides, the law requires the set rules to be necessary for the execution of the delegation or for the application of regulations of the international federation as long as these are compatible with French law. Furthermore, the rules must be proportionate to the demands of the sport, include reasonable timeframes for compliance and have to be published in the federation's bulletin.[79] Aside from the general principles of law, French sports federations must comply with the principles of equal access to sport and equal treatment.[80]

Moreover, in all five jurisdictions, the freedom to create and enforce rules is also limited by general principles of law, which include *inter alia*: the principle of equal treatment, rights arising from the right to be heard if a member

73 Simon Gardiner, 'UK Sports Law. Part I. Organization of Sport', p. 49, in Franck Hendrickx *et al*. (eds.), *International Encylopaedia for Sports Law*, Kluwer Law International 2008, p. 49. See also: Simon Gardiner *et al*., *Sports Law*, Routledge 2012, p. 120-126.

74 Simon Gardiner *et al*., *Sports Law*, Routledge 2012, p. 126.

75 Art. R.131-8 of the Code du sport.

76 Frédéric Buy *et al*., *Droit du sport*, L.G.D.J. 2009, no. 296, citing G. Simon, 'Valeur juridique des normes sportives', *Lamy Droit du Sport,* mai 2003, n°112-10.

77 CE 20.11.2003, n°369474, *Les Cahiers de Droit du Sport* (2) 2005, p. 49, note J.-M. Duval. See also Frédéric Buy *et al*., *Droit du sport*, L.G.D.J. 2009, no. 296.

78 Such as setting the number of places and spaces used for public reception or determination devices and facilities for the sole purpose of enabling the audio-visual broadcast of competitions. Also, it is prohibited to impose the choice of a trademark for a material or a given material.

79 Art. R.131-34 of the *Code du sport.*

80 CE 16.03.1984, n°50878 (Broadie), *Recueil Dalloz* 1984, p. 317, note M. Genevois.

is concerned by a decision of the association, the principle of legality and the principle of proportionality.[81]

Internal regulations

In addition to the various limits deriving from rules of national law, an association is bound by the specific object for which it was created and by its own articles of association and secondary regulations.

Under Dutch law a provision in a regulation that is contrary to the law or the articles of association is not binding.[82] In addition, a decision (*besluit*) can be challenged if it is contrary to the law, the articles of association, an internal regulation or if it conflicts with the standards of reasonableness and fairness.[83] The association's organs thus have to adhere to the boundaries set by law and the articles of association.[84] Furthermore, legal acts transgressing the specific object for which the association was created can be voided.[85] It must be noted that only the legal entity is entitled to claim voidance on this ground. Voidance of legal acts that conflict with the object of the corporation is a rarity in practice.[86]

In England, it was first held that sports governing bodies are limited by their own regulatory framework as well as by the general object of the organisation in 1954.[87] This view was affirmed in *Davis v. Carew Pole* only two years later. The court held that "if the powers of the quasi-judicial body are set out in a code of rules to which the party aggrieved is in the circumstances subject, the quasi-judicial body is also bound by its own rules and can only mete out punishment in strict accordance with such rules".[88]

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81 Germany: Günther Weick, *J. von Staudingers Kommentar zum BGB. Buch 1. Allgemeiner Teil, Neubearbeitung*, 2005, § 25, Rn. 19; France: Frédéric Buy *et al.*, *Droit du sport*, L.G.D.J. 2009, no. 296; Switzerland: Margareta Baddeley, *L'association sportive face au droit. Les limites de son autonomie* (diss. Genève), Basel: Helbing & Lichtenhahn 1994, p. 108ff; Hans Michael Riemer, *Die Vereine, Berner Kommentar, Band I/3, 2er Teilband*, Bern: Verlag Stämpfli & Cie AG 1990, p. 402ff. and 666ff.

82 Compare: J.M.M. Maeijer, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht, 2-II, De rechtspersoon*, Kluwer 1997, no. 35 and G.J.C. Rensen, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht, 2-III*, Overige rechtspersonen*, Kluwer 2012, no. 41; F.C. Kollen, *De vereniging in de praktijk*, Deventer: Kluwer 2007, p. 123.

83 Art. 2:14 and 2:15 BW.

84 For the general assembly, this was established in case law: HR 21.01.1945, *NJ* 1959, 43 (Forumbank).

85 Art. 2:7 BW. In answering the question whether a particular act exceeds the object of the corporation all circumstances must be taken into account. The object defined in the articles of association need not be solely decisive. HR 16.10.1992, *NJ* 1993, 98 (Westland/Utrecht Hypotheekbank) with note Ma.

86 J.M.M. Maeijer, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht, 2-II, De rechtspersoon*, Kluwer 1997, no. 76.

87 *Baker v. Jones* [1954] 2 All ER 553.

88 *Davis v Carew-Pole* [1956] WLR, p. 838.

Also in French case law, it has been acknowledged that associations and federations must comply with their own regulations.[89] However, there is quite an interesting exception to this general rule. Rules set by the international federation do not have a direct effect. Decisions breaching these rules do not entail a breach of *excès de pouvoir*.[90] Furthermore as in the other jurisdictions, French associations and federations are also bound by their object.[91] The prohibition of a legal person to exceed the limits of its object as defined in the articles of association is also known as the principle of speciality.[92]

In Germany, it is postulated that the autonomy of the association inherently entails that it finds its limit in the articles of association. In the words of Sauter *et al*., "Allerdings kann die Vereinsautonomie gerade auch in der Weise ausgeübt werden, daß das Selbstverwaltungsrecht des Vereins satzungsmäßig beschränkt wird; auch eine solche Beschränkung stellt die Ausübung von Autonomie dar."[93] This dogmatic thesis has been affirmed in case law, according to which an association is not allowed to violate its articles or the object for which the association was founded.[94]

As in Dutch law, in Switzerland the law explicitly provides that a decision infringing the articles of association or regulations can be challenged.[95] Furthermore, with regard to an association's object, several authors noted that the pursuance of this object is the sole reason of existence of the association.[96] As a result, all acts and rules by the association must be covered by its object.[97]

As is the case for the regulatory framework of sports organisations in general, the rules of both national law and internal regulations that limit the power of associations are largely similar across the five countries. Except in

89 CE 12.05.1989, n°97144, *Recueil Dalloz* 1990, p. 276, note J.-F. Lachaume.

90 CE 02.02.2006, n°289701 available at:<www.conseil-etat.fr>; CE 08.11.2006, *Recueil Dalloz* 2007, p. 924, note Sophie Dion. This position is contested by Latty, who supports the direct applicability of the rules of international federations. Franck Latty, *La lex sportiva. Recherche sur le droit transnational* (diss. Parix X), Martinus Nijhoff Publishers 2007, pp. 128-130.

91 J.-P. Karaquillo, 'Le pouvoir disciplinaire dans l'association sportive', *Recueil Dalloz* 1980 pp. 115-124, p. 119; Gaylor Rabu, *L'organisation de sport par le contrat: essai sur la notion d'ordre juridique sportif* (diss. Aix-Marseille III), Presses universitaires d'Aix-Marseille 2010, p. 71.

92 Bernard Teyssié, *Droit civil. Les personnes*, Paris: LexisNexis, Litec 2010, no. 855. Alfred Légal and Jean Brethe de la Gressaye, *Le pouvoir disciplinaire dans les institutions privées*, Sirey 1938, pp. 135, 347.

93 E. Sauter, G. Schweyer and W. Waldner, *Der eingetragene Verein*, Verlag C.H. Beck 2010, no. 39a.

94 BGH 30-05.1983 – II-ZR 138/82, BGHZ 87, 337, p. 343.

95 Art. 75 CC.

96 According to some authors, the association's object is to some extent, the *causa* of the membership. Anton Heini, *Das schweizerische Vereinsrecht*, Basel/Frankfurt am Main: Helbing & Lichtenhahn 1988, p. 28; Henk Fenners, *Der Ausschluss der staatlichen Gerichtsbarkeit im organisierten Sport* (diss. Freiburg), Schulthess Juristische Medien 2006, p. 43.

97 Margareta Baddeley, *L'association sportive face au droit. Les limites de son autonomie* (diss. Genève), Basel: Helbing & Lichtenhahn 1994, p. 110.

France, where more detailed regulations exist, associations are virtually only bound by very fundamental rules of private law, including the law, their articles of association and secondary regulations, and general principles of law.

2.4 THE BINDING NATURE OF DISCIPLINARY RULES

Rules exist for a reason. It is obvious that governing a certain sport, whether at club, national or international level, would not be possible without rules and the possibility to enforce them by means of disciplinary sanctions. In all the jurisdictions researched the qualification of the relationship between members and the association they adhere to has been the subject of legal literature and sometimes of case law. The debate in Germany and Switzerland best illustrates the qualification issue. Therefore, these countries will be addressed first.

Germany and Switzerland

The binding nature of disciplinary regulations has been the subject of a long-standing debate in both German and Swiss legal literature. As the regulations have their basis in the articles of association, the debate is closely connected to the nature or qualification of the articles of association *an sich*.[98]

The *Vertragstheorie* (contractual theory), is primarily based on the contractual nature of the relationship between a member and the association, not only at the initial stage but also throughout the duration of the membership. Authors supporting this theory regard the articles of association as a: "von den Gründern des Vereins geschlossener Vertrag, das heißt ein mehrseitiges Rechtsgeschäft, das durch den wechselseitigen Zugang der übereinstimmenden Willenserklärungen zustande kommt."[99] Proponents of this theory base their argument on the particular contractual relationship between the association

98 Steffen Krieger, *Vereinsstrafen im deutschen, englischen, französischen und schweizerischen Recht. Inbesondere im Hinblick auf die Sanktionsbefugnisse von Sportverbänden*, Berlin: Duncker & Humblot GmbH 2003, p. 50.

99 Dieter Reuter, *Münchener Kommentar zum BGB. Band 1. Allgemeiner Teil. 6. Auflage*, 2012, § 25, Rn. 17; Christoph Fuchs, *Rechtsfragen der Vereinsstrafe. Unter besondere Berücksichtigung der Verhältnisse in Sportverbänden* (diss. Zürich), Zürich: Schulthess Polygraphischer Verlag AG 1999, p. 20; Walther Hadding, 'Korporationsrechtliche oder rechtsgeschäftliche Grundlagen des Vereinsrecht', in: *Festschrift für Robert Fischer*, Berlin: Walter de Gruyter 1979, pp. 165-196, p. 188ff.

and its members at the time of the founding act. With regard to new acceding members, it is argued that the members voluntarily join the association.[100]

According to the *Normentheorie*, the articles of association are an 'objective law' based on the freedom of association which the members are subjected to as of their accession.[101] The influential *Münchener Kommentar* champions this theory, arguing that the articles of association are not – unlike a contract – the result of negotiations between individuals who coordinate their interests and compromise with one another. Rather, they attempt to establish an order of social life that ensures the achievement of a super-individual purpose.[102] In connection with association law this object is generally the association's reason for existence, for example to play sports together with others or to advocate certain issues.

The prevailing view in Germany, which is adopted in case law, keeps a middle course between the two. According to the so-called *modifizierte Normentheorie*, the articles of association are of a contractual nature while the association is still being formed. As soon as the association is established, the articles lose their contractual nature and apply to the members by virtue of 'corporate law' as the members have subjected themselves to it.[103] With regard to the nature of the disciplinary sanction, the *Bundesgerichtshof* (*BGH*) took a stand in 1956. In its landmark case regarding the nature and review of a disciplinary sanction the *BGH* considered that [s]anctions provided by association law that ensure compliance with membership obligations are not contractual sanctions, because, unlike contractual sanctions, they are not based on contract, but on the submission of the members to the articles of association.[104] Despite critic-

100 Dieter Reuter, *Münchener Kommentar zum BGB. Band 1. Allgemeiner Teil. 6. Auflage*, 2012, § 25, Rn. 17; Marco Steiner, *La soumission des athlètes aux sanctions sportives. Étude d'une problématique négligée par le monde juridico-sportif* (diss. Lausanne), Lausanne 2010, p. 102, 106ff.; Walther Hadding and Frank van Look, 'Zur Ausschließung aus Vereinen des bürgerlichen Rechts', *Zeitschrift für Unternehmens und Gesellschaftsrecht* 2/1988, p. 275.

101 Dieter Reuter, *Münchener Kommentar zum BGB. Band 1. Allgemeiner Teil. 6. Auflage*, 2012, § 25, Rn. 17.

102 Dieter Reuter, *Münchener Kommentar zum BGB. Band 1. Allgemeiner Teil. 6. Auflage*, 2012, §25, Rn. 18.

103 BGH 04.10.1956 –II ZR 121/55 – BGHZ 21, 370, p. 373: "Denn sobald der nichtrechtsfähiges Verein ins Leben getreten ist, gilt seine Satzung nicht mehr als Vertrag, sondern als seine Verfassung, der sich die Mitglieder unterworfen haben und die für sie kraft Korporationsrechts gilt." See also: BGH 06.03.1967 – II ZR 231/64 – BGHZ 47, 172, p. 179.

104 BGHZ 21/370, p. 373: "Vereinsrechtlich vorgesehene Strafen, die die Einhaltung mitgliedschaftlicher Pflichten sichern, sind keine Vertragsstrafen, da sie anders als die Vertragsstrafen nicht auf Vertrag, sondern auf der Unterwerfung der Mitglieder unter die Satzung beruhen."

ism in literature,[105] the *BGH* affirmed its position in later cases and even extended its application to cooperatives.[106]

As in Germany, the majority of the Swiss doctrinal views rejects the contractual theory and qualifies the disciplinary sanction as a legal institution *sui generis* of association law.[107] The main argument cited in favour of this theory is the existence of a relationship of subordination between an association and its members, which is deemed closer to a normative relationship than to a contract. As Corbat states, 'the source of disciplinary power of the association is the free and voluntary subordination of the individual autonomy of the association to adopt a regulatory system, which includes the power of the association to provide for sanctions'.[108] Nevertheless, support for the contractual theory remains existent.[109]

The binding nature according to the Swiss Federal Supreme Court

In its early case law regarding the qualification of disciplinary sanctions, the Swiss Federal Supreme Court implicitly defined the relationship between a federation and an athlete (the same holds for clubs) as a contract, the sanction being defined as a contractual sanction.[110] Later a distinction was made between pecuniary sanctions, described as contractual and consequently subject to the Code of Obligations, and other social sanctions.[111]

However, in the *Gundel* case in 1993 the Court took a different approach. It had to decide on the appeal against a sentence of the Court of Arbitration for Sport (CAS) concerning disciplinary sanctions imposed on an athlete who was a member of a German horse riding club, but not a member of either the German or the international federation (*Fédération Équestre International*). The

105 Criticism: See Walther Hadding, 'Korporationsrechtliche oder rechtsgeschäftliche Grundlagen des Vereinsrecht', in: *Festschrift für Robert Fischer*, Berlin: Walter de Gruyter 1979, pp. 165-196.

106 BGHZ 47, 172; BGHZ 47, 381; BGH 2.12.2002 – II ZR 1/02 – published in the online database of the BGH. For a critical review of this last case see: Frank van Look, 'Vereinsstrafen in der Genossenschaft', in: Franz Haüser *et al.*, *Festschrifte für Walther Hadding zum 70. Geburtstag am 8. Mai 2004*, Berlin: De Gruyter Recht 2004, pp. 539-560.

107 Hans Bodmer, *Vereinsstrafe und Verbandsgerichtbarkeit: dargestellt am Beispiel des Schweizerischen Fussballverbandes* (diss. St. Gallen), Bern: Verlag Paul Haupt 1989, p. 78; Margareta Baddeley, *L'association sportive face au droit. Les limites de son autonomie* (diss. Genève), Basel: Helbing & Lichtenhahn 1994, p. 224; Jérôme Jaquier, *La qualification juridique des règles autonomes des organisations sportives* (diss. Lausanne), Berne: Staempfli Editions SA 2004, p. 48; Henk Fenners, *Der Ausschluss der staatlichen Gerichtsbarkeit im organisierten Sport* (diss. Freiburg), Schulthess Juristische Medien 2006, pp. 23-24.

108 Claude Corbat, *Les peines statutaires*, Fribourg: Imprimerie St-Paul 1974, pp. 60, 70ff.

109 Christoph Fuchs, *Rechtsfragen der Vereinsstrafe. Unter besondere Berücksichtigung der Verhältnisse in Sportverbänden* (diss. Zürich), Zürich: Schulthess Polygraphischer Verlag AG 1999, p. 45; Marco Steiner, *La soumission des athlètes aux sanctions sportives. Étude d'une problématique négligée par le monde juridico-sportif* (diss. Lausanne), Lausanne 2010, p. 106ff.

110 BGE/ATF 57 I 204.

111 BGE/ATF 80 II 123, cons. 3b.

Court stated that the withdrawal of cash prizes related to the disqualification as well as the suspension from international competitions imposed by the international federation, go well beyond mere sanctions to ensure the correct execution of a game and constitute *véritables peines statutaires*.[112] Regrettably, the Court omitted further explanation of this legal qualification. However, in a non-published paragraph (5a) in the Gundel judgment the Court states: "il est généralement admis que la peine statutaire représente l'une des formes de la peine conventionnelle."[113] This statement has resulted in different interpretations of the Gundel case.[114]

The Court seems to have definitely abandoned the notion of the contractual sanction in the *Grossen* case in 1995, in which it decided that a member of a regional wrestling club – the club being a member of the national federation – was not in a contractual relationship with the national federation.[115] In two more cases the court reaffirmed its view without further explanation using only a sole reference to the Gundel case.[116] It was not until 2007 before the Court mentioned the nature of the disciplinary sanction again in the *Rayo* case.

Rayo Vallencano Madrid SAD (FC Rayo), a second-division football club and a member of the Spanish Football Federation, which itself is a member of FIFA, appealed a disciplinary sanction imposed by the Disciplinary Committee of FIFA. As a result of not paying a transfer sum to a Brazilian club, FC Rayo was sentenced to a fine of CHF 25,000 and a conditional sanction of the withdrawal of points or relegation. The payment was not made within time, causing FC Rayo to lose points in the championship of the second division in Spain. After an unsuccessful appeal to the CAS, FC Rayo appealed to the Swiss Federal Supreme Court arguing that the sanctions that had been imposed had occurred in the context of a purely contractual dispute and that the disciplinary regulations of FIFA, providing fines and other coercive measures such as the withdrawal of points, contained rules of private enforcement.[117] According to the club, FIFA's actions thus contain a prerogative that is reserved to the state, making its decision contrary to public policy.[118] The Court rejected the appeal and held that the question whether a breach of the public debt enforcement

112 BGE/ATF 119 II 271.

113 Margareta Baddeley, *L'association sportive face au droit. Les limites de son autonomie* (diss. Genève), Basel: Helbing & Lichtenhahn 1994, p. 222.

114 Jérôme Jaquier, *La qualification juridique des règles autonome des organisations sportives* (diss. Lausanne), Berne: Staempfli Editions SA 2004, p. 50; Marco Steiner, *La soumission des athlètes aux sanctions sportives. Étude d'une problématique négligée par le monde juridico-sportif* (diss. Lausanne), Lausanne 2010, pp. 98-99.

115 BGE/ATF 121 III 350.

116 BGE/ATF 120 II 369 and Swiss Federal Supreme Court 31.03.1999, 5P.83/1999 (Lu Na Wang et al. v. FINA).

117 The Swiss public debt enforcement monopoly includes the prohibition of private debt enforcement.

118 The sole substantive ground to quash an arbitral award, art. 190 Swiss PILA.

monopoly was indeed enough to constitute a breach of Swiss public policy could remain unanswered since the award that was challenged did not concern debt enforcement as such but rather sanction enforcement. The connected question that thus needed answering was if a sports federation as powerful as FIFA was allowed to impose sanctions on its members. According to the Court, the sanctions against the appellant are not enforcement measures, *but sanctions based on association law*. When enacting regulations to achieve its objects and to which its members are subject, an association may validly provide for a system of sanctions intended to compel recalcitrant behaviour. This subjection to the regulatory system is considered voluntary, even if the association concerned has a dominant position. Finally, the fact that this possibility of sanctioning has similar effects to enforcement measures does not entail that these are in conflict with the public debt enforcement monopoly. This is illustrated by the fact that monetary sanctions can only be enforced with the assistance of state authorities, so that the measures provided by FIFA are contrary to the prohibition of private debt enforcement.[119] Although the Court expressly noted that sanctions are based on association law, the complex facts of the case ask for restraint when drawing conclusions from this statement. Nevertheless, even without a more explicit confirmation of the standpoint that the Court took in the *Grossen* case, there is general consensus in Switzerland that the source of disciplinary power of associations over their members is rooted in association law.[120]

The Netherlands

In the old Dutch Civil Code (BW) the association was part of contract law. The historical conception of the contractual nature of legal entity law (*rechtspersonenrecht*) was gradually replaced by the institutional doctrine by the 1950s.[121] In 1940, Scholten already advocated the idea that an association's articles are of an abstract nature comparable to the relationship between a state and its citizens and contrary to a contract, which only creates specific legal relationships.[122] The membership relationship between an association and its members is now generally qualified as an 'institutional relationship' – or relation-

119 Swiss Federal Supreme Court 5 January 2007, 4P.240/2006 (no. 4.2).

120 In the recent CAS decision in CAS 2013/A/3365 (*Juventus FC v. Chelsea FC*) and CAS 2013/A/3366 (A.S. Livorno Calcio S.p.A. v. Chelsea FC), the arbitral tribuna followed this doctrine when it considered in par. 131 that "there is no contractual relationship between an indirect member (the clubs) and a sport federation (FIFA)". See further on indirect membership Section 2.5 below.

121 J.M. de Jongh, 'Redelijkheid en billijkheid en het evenredigheidsbeginsel in de verhouding van aandeelhouder tot het bestuur', *Ondernemingsrecht* 2011/124, par. 2.2.1.; P.A.L.M. van der Velden, *De vereniging-rechtspersoon en haar leden* (diss. Nijmegen), Deventer: Kluwer 1969, p. 37.

122 Paul Scholten, *Mr. Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht, 1-II, Vertegenwoordiging en rechtspersoon*, Zwolle: Tjeenk Willink 1940, p. 135.

ship *sui generis* – as opposed to a contractual one.[123] This relationship is not governed by what parties agree, but instead by association law – comprising both internal (articles of association, regulations and decisions) and external (the law and unwritten law) norms.[124] Association law is laid down in Book 2 BW and precedes the provisions on the law of obligations, thus emphasising its institutional nature.

The legal acts of constitution of an association and accession to one are subject to the general law of obligations.[125] Accordingly, these acts can be voidable when entered into on the basis of threat, fraud or abuse of circumstances and error.[126] However, in contrast with a contract, which is constantly dependent on the will of the parties, the obligation to comply with the association's rules is independent of the member's will.[127] Through adherence to an association, a member becomes obliged to comply with the rules and regulations. If an association's resolution restricts rights or increases obligations, members are free to terminate their membership.[128]

England

The general view in English law regarding the binding nature of the rules of a club or sports federation is that it is based on contract. This does not alter the fact that submission to the rules of sports associations is mandatory. This 'adhesionary nature' – as Gardiner *et al.* call it – of the rules and regulations of sports federations has been recognised in court.[129] However, the existence of a contract was by no means uncontroversial; it has even been labelled a legal fiction:

123 J.M.M. Maeijer, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht, 2-II, De rechtspersoon*, Kluwer 1997, no. 269; G.J.C. Rensen, *Extra-verplichtingen van leden en aandeelhouders: een wetenschappelijke proeve op het gebied van de rechtsgeleerdheid* (diss. Nijmegen), Deventer: Kluwer 2005, p. 268; P.L. Dijk en T.J. van der Ploeg, *Van vereniging en stichting, coöperatie en onderlinge waarborgmaatschappij*, Deventer: Kluwer 2007, p. 131.

124 G.J.C. Rensen, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht, 2-III*, Overige rechtspersonen*, Kluwer 2012, nos. 14 and 58.

125 J.D.A. den Tonkelaar, *Vrijheid en gebondenheid in het verenigingsrecht: de gewone vereniging onder boek 2 B.W.* (diss. Leiden), Warmond: the author 1979, pp. 206-207; G.J.C. Rensen, *Extra-verplichtingen van leden en aandeelhouders: een wetenschappelijke proeve op het gebied van de rechtsgeleerdheid* (diss. Nijmegen), Deventer: Kluwer 2005, p. 268-269; C.H.C. Overes, *Groene Serie Rechtspersonen*, Kluwer 2009, art. 26 BW, aant. 3 and art. 33 BW, aant. 2. The same holds for private companies with limited liability (*BV*) and companies limited by shares (*NV*), see G. van Solinge and M. Nieuwe Weme, *Mr. Asser's Handleiding tot de beoefening van het Nederlands burgerlijk recht, 2-II*, De naamloze en besloten vennootschap*, Deventer: Kluwer 2009, no. 42.

126 Art 3:44 BW and art. 6:228 BW in conjunction with 6:216 BW.

127 Compare: P.A.L.M. van der Velden, *De vereniging-rechtspersoon en haar leden* (diss. Nijmegen), Deventer: Kluwer 1969, p. 63.

128 Art. 2:36 (3) BW.

129 Simon Gardiner *et al.*, *Sports Law*, Routledge 2012, p. 97.

> "The rules of a body like this are often said to be a contract. So they are in legal theory. But it is a fiction – a fiction created by the lawyers so as to give the courts jurisdiction. (..) Putting the fiction aside, the truth is that the rules are nothing more nor less than a legislative code – a set of regulations laid down by the governing body to be observed by all who are, or become, members of the association. Such regulations, though said to be a contract, are subject to the control of the courts."[130]

Similarly, certain authors have expressed concern stating that the relationship between a powerful global international sporting federation, exercising a monopoly over competitive opportunities in the sport, and a single athlete is so unbalanced that the legal form of the relationship should not be contractual.[131] After all, if athletes wish to continue their careers, they have no choice. As Pannick notes, in any effective system of self-regulation, the power of the regulator leaves the subject no practical choice but to comply.[132] This issue was addressed in *R v Football Association Ltd ex p Football League*. Rose J held that, despite the virtually monopolistic powers of the Football Association and the importance of its decisions to many members of the public, it is a domestic body whose powers were solely derived from private law and therefore not susceptible to judicial review.[133] Nevertheless Rose J followed Lord Denning's view in *Enderby* stating that, "the FA rules, though in contractual form, are effectively a legislative code".[134] Regardless of how powerful their licensing and disciplinary powers may be, it appears that in English law the use of contract, legal fiction or not, is regarded as the most appropriate way to regulate the relationship between sports associations and their members.[135]

130 *Enderby Town Football Club Ltd v The Football Association Ltd* [1971] Ch 591, p. 606, per Denning LJ. See also Ken Foster, 'Is There a Global Sports Law?', *Entertainment Law*. Vol. 2, No.1, 2003, pp. 1-18, p. 15.

131 Ken Foster, 'Is There a Global Sports Law?, *Entertainment Law*', Vol.2, No.1, 2003, pp. 1-18, p. 16. See also: Michael J. Beloff and Tim Kerr, 'Why Aga Kahn was wrong', *Judicial Review* (1) 1996, pp. 31-32 and David Pannick QC, 'Judicial Review of Sports Bodies', *Judicial Review* (2) 1997, pp. 150-153, p. 152.

132 David Pannick QC, 'Judicial Review of Sports Bodies', *Judicial Review* (2) 1997, pp. 150-153, p. 152.

133 *R v Football Association Ltd ex p Football League* [1993] 2 All ER 833, p. 848.

134 *R v Football Association Ltd ex p Football League* [1993] 2 All ER 833, p. 841.

135 William Wade and C.F. Forsyth, *Administrative Law*, Oxford University Press 2009, p. 573; Simon Gardiner, 'UK Sports Law. Part I. Organization of Sport', p. 49, in Franck Hendrickx *et al*. (eds.), *International Encylopaedia for Sports Law*, Kluwer Law International 2008, p. 48 (no. 42).

France

Whereas in the Netherlands and England, the binding nature of the rules is barely disputed, in France it has been debated by various scholars supporting either the institutional theory or the contractual theory.

The institutional theory was developed by the famous French constitutional lawyer Maurice Hauriou in the early 20th century.[136] According to Hauriou,

> "une institution est une idée d'œuvre ou d'entreprise qui se réalise et dure juridiquement dans un milieu social. Pour la réalisation de cette idée, un pouvoir s'organise qui lui procure des organes. D'autre part, entre les membres du groupe social intéressé à la réalisation de l'idée, il se produit des manifestations de communion dirigées par les organes du pouvoir et réglées par des procédures".[137]

In short, an institution is a group of people who have joined together to achieve a certain objective. In order to fulfil this objective and to resolve difficulties within the group, laws are enacted and power is established. An institution by definition possesses the right to *se faire justice à soi-même*.[138] It is thus the institution which is "the source of disciplinary law".[139]

The main argument posed by authors in favour of the contractual theory is that an association is founded on a contract.[140] After all, art. 1 of the French law of 1 July 1901 relating to the *contract* of association explicitly sets out that, 'the association is an agreement by which two or more people share, permanently, their knowledge or activity for an object other than sharing profits and that it is governed as to its validity by the general principles of law applicable to contracts and obligations'. A member is a party to the contract of association and thus contractually bound to the regulatory framework of the association.

However, in the assessment of the contractual theory as the basis for disciplinary power, French scholars have identified the same flaws that have

136 His theory was developed in different works, none of which exhaustive or definitive. See Eric Millard, 'Hauriou et la théorie de l'institution', *Droit et Société* 1995, pp. 381-412. See for a summary of the theory in English: Albert Broderick, "Institutional" Theory and a New Private "Club": Court Enforcement of Union Fines, *Nebraska law Review* (47) 1968, pp. 492-527.

137 Maurice Hauriou, La théorie de l'institution et de la fondation. Essai de vitalisme social (1925), reprinted in: Aux sources du droit: le pouvoir, l'ordre et la liberté, *Cahiers de la Nouvelle Journée*, n°23 1933, p. 96.

138 Alfred Légal and Jean Brethe de la Gressaye, *Le pouvoir disciplinaire dans les institutions privées*, Sirey 1938, p. 448.

139 Maurice Hauriou, 'L'institution et le droit statutaire', *Rec. de l.Acad. de legisl. de Toulouse*, 1906, pp. 134-182, p. 136.

140 Gaylor Rabu, *L'organisation de sport par le contrat: essai sur la notion d'ordre juridique sportif* (diss. Aix-Marseille III), Presses universitaires d'Aix-Marseille 2010, p. 37 (quoting Jean-Marc Duval, *Le droit public du sport*, Presses universitaires d'Aix-Marseille 2002, p. 69).

been put forward in the other jurisdictions researched. In short, the fact that an athlete or club has no choice but to accept to subordinate himself to the regulations of the sports association if he wishes to participate in competition contravenes the requirement of consent.[141] According to Simon, the contractual analysis leads to denying the institutional reality that characterises the relationships in sports.[142] Although it is recognised that an extensive notion of contract can include the *contrat d'adhésion*, among specialist authors the institutional theory seems to be prevailing as better equipped to explain the complex relationship between an association and its members.[143]

As mentioned earlier, one of the main characteristics of the organisation of sport in France is the interference of the State. This public aspect also affects the legal nature of disciplinary power of delegated federations.[144] Although delegated federations are associations, their disciplinary power is not solely rooted in private law. In contrast, it is the exercise of a public service. As a result, a disciplinary sanction imposed by a delegated federation is qualified as an administrative act.[145] Despite this legal reality, many authors have disagreed with this contention. In their view, the disciplinary power of a federation should not be qualified as the delegation of a public service.[146] The monopoly of national sports organisations to organise competitions and regulate their discipline on the national territory already existed before the French state intervened. The state in fact delegated a competence that it did not develop nor ever exercised.[147] However, in doctrine it has been argued that the state's interference is justified by the monopoly position of the federations. In the words of Simon, "although the administrative nature of disciplin-

141 Alfred Légal and Jean Brethe de la Gressaye, *Le pouvoir disciplinaire dans les institutions privées*, Sirey 1938, pp. 42-43; Mathieu Maisonneuve, *L'arbitrage des litiges sportifs* (diss. Paris I), L.G.D.J. 2011, pp. 154-160.

142 Gérald Simon, *Puissance sportive et ordre juridique étatique* (diss. Bourgogne), L.G.D.J. 1990, p. 8.

143 "Membres n'adhèrent pas à un quelconque contrat social mais à l'idée de l'institution", Mathieu Maisonneuve, *L'arbitrage des litiges sportifs* (diss. Paris I), L.G.D.J. 2011, p. 185; Franck Latty, *La lex sportiva. Recherche sur le droit transnational* (diss. Parix X), Martinus Nijhoff Publishers 2007, p. 116.

144 This does not hold for certified federations as the certification confers no monopoly position and thus constitutes no '*puissance publique*'. CE 10.12.1988, n°79962, *Recueil Dalloz* 1990, p. 280, obs. C. Dudognon.

145 Landmark case: CE 22.11.1974, n°89828, *Recueil Dalloz* 1975, p. 739, note J.-F. Lachaume; affirmed by CE 12.05.1989, *Recueil Dalloz* 1990, p. 276, note J.-F. Lachaume.

146 Instead, they defend the view that the disciplinary power derives from the right to self-regulation inherent to all institutions. J.-P. Karaquillo, 'Le pouvoir disciplinaire dans l'association sportive', *Recueil Dalloz* 1980 pp. 115-124, p. 120ff. and Jean-Pierre Karaquillo, *Le droit du sport*, Dalloz 2011, p. 127; Mathieu Maisonneuve, *L'arbitrage des litiges sportifs* (diss. Paris I), L.G.D.J. 2011, pp. 161-168. See also Rabu, who defends the application of the contractual theory. Gaylor Rabu, *L'organisation de sport par le contrat: essai sur la notion d'ordre juridique sportif* (diss. Aix-Marseille III), Presses universitaires d'Aix-Marseille 2010, pp. 80-81.

147 Mathieu Maisonneuve, *L'arbitrage des litiges sportifs* (diss. Paris I), L.G.D.J. 2011, pp. 161-168. See also Jean-Pierre Karaquillo, *Le droit du sport*, Dalloz 2011, pp. 33-34.

ary power of federation is based on the fiction that this power is held by the state, it is merited by the 'exorbitant' nature of this power".[148] Considering the similarity of this statement to that of LLJ Denning, it can be suggested that there exists an almost uniform 'European' understanding of the relationship between a sports organisation and its members.

2.5 INDIRECT MEMBERSHIP

A distinctive feature of the organisational structure of sport is the 'membership chain'. An athlete or club is only a member of an umbrella federation when its articles of association allow for this. However, in most cases an athlete is only a member of his club, in some cases also of his national federation, but not a member of the international federation. The same holds for clubs. In the above-mentioned *FC Rayo* case, the club is a member of the Royal Spanish Football Federation which in turn is a member of both UEFA and FIFA. FC Rayo is thus not a direct member of the international federation, but rather a so-called indirect member. In connection with the imposition of sanctions, the question arises how athletes or clubs are bound to the regulations of a federation of which they are not a member. After all, without membership no enforcement power exists.[149]

Generally, there are two grounds on which an indirect member can be bound. First, by means of a licence. A licence, generally granting access to competitions, is issued by the sports federation after the athlete or club agrees to the terms. Secondly, it might be possible for indirect members to be bound on the basis of the indirect legal relationship.

In the Netherlands, the subordination of indirect members of sports federations has not received much, if any, attention. Dutch authors Dijk and Van der Ploeg only noted that a federation cannot directly enforce compliance upon the members of its members. According to them, only the member-association has this power.[150] However, in other sectors it is not uncommon that rules that have been created between two parties become binding upon individuals that are members of those parties. For instance, in the Netherlands collective labour agreements are negotiated between representatives of employers'

148 Gérald Simon, *Puissance sportive et ordre juridique étatique* (diss. Bourgogne), L.G.D.J. 1990, pp. 152, 181 and 244.

149 Compare BGHZ 128/93, p. 99.

150 P.L. Dijk en T.J. van der Ploeg, *Van vereniging en stichting, coöperatie en onderlinge waarborgmaatschappij*, Deventer: Kluwer 2007, p. 299.

associations and trade unions respectively. The collective agreement becomes directly binding on all members of the contracting organisations.[151]

In England, the membership relationship is governed by contract. Indirect members might be bound by an express contract in the form of a licence.[152] Additionally, if no express contract can be identified, the indirect member might be bound by an implied contract. This last issue, whether the nature of the relationship between an athlete and her national sports federation was contractual, has been addressed in the *Modahl* case. The claim that a contract existed was based on the argument that there are three bases on which a contract can be construed or a combination of the three: 'the club basis', 'the participation basis' and 'the submission basis'. The first one was based on the athlete's membership of her athletics club, whose rules specifically required her to adhere to the rules of the governing federation. Secondly, the participation basis means that by participating in competitions overseas the athlete submitted herself to the jurisdiction of the federation, whose disciplinary function could only sensibly be exercised within the structure of a contract. Thirdly, the submission basis holds that a contract is to be implied when the athlete submitted herself to the federation's disciplinary process. There was a disagreement within the Court of Appeal over how to handle this key issue. While both Latham and Mance LLJ found that overall it was appropriate to find the existence of a contract – although arriving there in a different way – Parker LJ was not. Finally it was held that, although there was no express contract, one could be implied from the athlete's submission to the federation's rules.

> "The necessary implication from the claimant's conduct in joining a club, in competing at national and international level on the basis stated in the rules and in submitting herself to doping tests both in and out of competition was that she became party to a contract with the defendant subject to the relevant terms of the rules."[153]

A cautious conclusion from *Modahl* is that where such an indirect legal relation exists – in the form of participation in competition or submission to the rules – an implied contract is easily deemed to exist.

In France, individual athletes are tied to their national (delegated) federations by virtue of the licensing system. A sports licence is issued by a delegated

151 Art. 12 and 13 Collective Labour Agreements Act (Wet CAO). Provisions of these agreements can be further extended upon non-members by being declared generally binding by decree of the Minister of Social Affairs. Art. 2 Collective Agreements (Declaration of Universally Binding and Non-Binding Status) Act (Wet AVV).

152 Adam Lewis and Jonathan Taylor, *Sport: law and practice*, Haywards Heath, West Sussex: Tottel 2008, p. 228.

153 *Modahl v British Athletic Federation Ltd* [2002] 1 WLR 1192, p. 1193.

sports federation and entitles an athlete to participate in sports activities.[154] The relationship between a licensed athlete and the federation is quite complex. On the one hand, the licence is an administrative act granting the right to participate in competitions.[155] On the other, the licence is only granted if certain conditions are met, the most important condition being subordination to the federation's disciplinary power.[156] For this reason some equate the licence to a contract, arguing that the athlete consents to this subordination.[157] Others attribute the licence with a double nature.[158] In this view the licence is both an administrative act and a *convention d'adhésion associative*. Regardless of the academic debate regarding the nature of the licence, the acquisition of a licence can be characterised equivalent to subordination to the disciplinary regulations. So far, the possibility of subordination of athletes or clubs to the regulatory framework of an international federation other than through a licence has received no attention in case law or doctrine.[159]

In German law it is recognised that an indirect member can be bound through contractual acceptance (subordination) of the regulations which can take on the form of an individual agreement, a licence or a competition agreement; hereby extending the disciplinary power of a sports association to non-members.[160] In 1994, the famous *Reitsport* case overturned earlier case law in which the *BGH* considered the enforcement of disciplinary measures upon non-members inadmissible.[161] In order for a non-member to be bound, it is now required that he has subjected himself to the rules and regulations of the respective umbrella association. This submission can only derive from a *rechtsgeschäftlichen Einzelakt*. Apart from an individual agreement, this can be attained by participating in a competition organised by the sports association

154 Art. L.131-3 in conjunction with L.131-6 of the *Code du sport.*

155 CE 31.05.1989, n°99901, *Recueil Dalloz* 1990, p. 394, obs. J.-F. Lachaume. According to Simon, this ruling confirms the difference in nature between the licence on the one hand and adherence to an association on the other. Gérald Simon, *Puissance sportive et ordre juridique étatique* (diss. Bourgogne), L.G.D.J. 1990, p. 111.

156 Gérald Simon, *Puissance sportive et ordre juridique étatique* (diss. Bourgogne), L.G.D.J. 1990, pp. 110-112.

157 Gaylor Rabu, *L'organisation de sport par le contrat: essai sur la notion d'ordre juridique sportif* (diss. Aix-Marseille III), Presses universitaires d'Aix-Marseille 2010, p. 96.

158 Frédéric Buy *et al*., *Droit du sport*, L.G.D.J. 2009, no. 820.

159 Referring to Swiss doctrine, only Latty has argued in favour of direct application of the rules of international federations via the membership chain. Franck Latty, *La lex sportiva. Recherche sur le droit transnational* (diss. Parix X), Martinus Nijhoff Publishers 2007, p. 128.

160 BGH 28.11.1994 – II ZR 11/94 – *NJW* 1995, 583 = BGHZ 128, 93; BGH 13.07.1972 – II ZR 138/69 – *WM* 1972, 1249; Affirmed by OLG München 28.03.1996 – NJW 1996, 2382. See Dirk-Ulrich Otto and Kurt Stöber, *Handbuch zum Vereinsrecht. 10. Neu Bearbeite Auflage*, Köln: Verlag Dr. Otto Schmidt 2012, Rn: 975-976; Peter. W. Heermann, 'Die Geltung von Verbandssatzungen gegenüber mittelbaren Mitgliedern und Nichtmitgliedern', *NZG* 1999, p. 325-333; Jan. F. Orth, *Vereins- und Verbandsstrafen am Beispiel des Fußballsports* (diss. Köln), Frankfurt am Main: Peter Lang GmbH 2009, pp. 182-183.

161 BGH 26.02.1959 – II ZR 137/57, BGZH 29, 352, p. 359.

or by acquiring a general competition licence, for which one must accept and recognise the relevant rules and regulations of the association. In both situations, the non-member must have a reasonable possibility of taking cognisance of the content of these rules, i.e. they must be published.[162] According to the *BGH* this relationship is *Mitgliedschaftsähnlich*. Despite the contractual nature of the relationship between federations and non-members, the regulations of sports federations cannot be qualified as standard contract terms, resulting in the inapplicability of the provisions regarding standard contract terms (§ 305-310 BGB).[163] The Court reasoned that the judicial review (*Inhaltskontrolle)* of sanctions imposed upon non-members should be the same as when the sanction is imposed on a member, via § 242 BGB.[164] It is reasoned that the safeguards for indirect members should not lag behind those of members.[165]

In Switzerland it is agreed in both legal literature and case law that the disciplinary force of federations upon indirect members can be constructed through contractual subordination.[166] The Swiss Federal Supreme Court has ruled that an athlete or club can be subordinated to an association's regulatory framework through a 'certificate of obligation'[167] or through participating in competition.[168] In line with the German view, Fenners qualifies the relationship as *Mitgliedschaftsähnlich*.[169] However, unlike in German law, most Swiss doctrinal views argue that these contracts must be reviewed in connection with the rulings based on the principles of the standard contract terms.[170] This approach is for the most part due to the monopoly position

162 BGHZ 128, 93, p. 105. See also: Peter. W. Heermann, 'Die Geltung von Verbandssatzungen gegenüber mittelbaren Mitgliedern und Nichtmitgliedern', *NZG* 1999, p. 325-333, p. 329 and Peter W. Heermann, 'Bindung an die Satzung übergeordneter Verbände durch dynamische Verweisungsklauseln', *ZHR* 174/2010, pp. 250-292, p. 282.

163 BGHZ 128/93, pp. 101-103. See affirmative: Dirk-Ulrich Otto and Kurt Stöber, *Handbuch zum Vereinsrecht. 10. Neu Bearbeite Auflage*, Keulen: Verlag Dr. Otto Schmidt 2012, Rn. 977; Jan. F. Orth, *Vereins- und Verbandsstrafen am Beispiel des Fußballsports* (diss. Köln), Frankfurt am Main: Peter Lang GmbH 2009, pp. 185-186. See critically: Peter W. Heermann, 'Bindung an die Satzung übergeordneter Verbände durch dynamische Verweisungsklauseln', *ZHR* 174/2010, pp. 250-292, p. 283ff.

164 BGH 13.07.1972 – II ZR 138/69 – *WM* 1972, 1249; BGHZ 128, 93.

165 Peter W. Heermann, 'Bindung an die Satzung übergeordneter Verbände durch dynamische Verweisungsklauseln', *ZHR* 174/2010, p. 250-292, p. 282.

166 Margareta Baddeley, 'Unterwerfungserklärungen von Athleten – ein Anwendungsfall allgemeiner Geschäftsbedingungen', *ZBJV* 144/2008, pp. 357-391; Marco Steiner, *La soumission des athlètes aux sanctions sportives. Étude d'une problématique négligée par le monde juridico-sportif* (diss. Lausanne), Lausanne 2010, p. 146.

167 BGE/ATF 80 I 336, cons. 5.

168 BGE/ATF 134 III 193, cons. 4.2.

169 Henk Fenners, *Der Ausschluss der staatlichen Gerichtsbarkeit im organisierten Sport* (diss. Freiburg), Schulthess Juristische Medien 2006, pp. 52-53.

170 Margareta Baddeley, 'Unterwerfungserklärungen von Athleten – ein Anwendungsfall allgemeiner Geschäftsbedingungen', *ZBJV* 144/2008, pp. 357-391, p. 367; Jérôme Jaquier, *La qualification juridique des règles autonome des organisations sportives* (diss. Lausanne), Berne: Staempfli Editions SA 2004, p. 101; Peter Philipp, *Rechtliche Schranken der Vereinsautonomie*

of the governing bodies. The primary review is whether the athlete or club has had the possibility to take note of the terms. Additionally, the *Ungewöhnlichkeitsregel* entails that provisions which the consenting party did not expect and objectively did not have to expect, are not binding.[171]

Furthermore, some also acknowledge a direct enforcement power of the national federation upon indirect members.[172] According to Steiner, the acceptance of such a power is consistent with the approach taken by the Federal Supreme Court. He argues that, even though the Court has not taken the opportunity to define or develop the notion of indirect membership, its case law simply affirms that indirect members are subordinate to the disciplinary power of their federations. This approach has been firmly criticised by Aguet in his reaction to the *Rayo* case.[173] He argues that applying the regulations of the federation on this relationship (i.e. FIFA with non-members) divests art. 60ff. of the Swiss Civil Code of its purpose and constitutes "*fraude à la loi*".[174] According to Aguet, the foundation of the disciplinary sanction can only be the *contrat d'adhésion* between the member and the federation in question.[175] Nevertheless, according to the Court, it is indisputable that clubs

und der Vertragsfreiheit im Einzelsport. Unter besonderer Berücksichtigung der Monopolstellung der Verbände (diss. Zürich), Zürich: Schulthess Juristische Medien AG 2004, p. 116.

171 BGE/ATF 77 II 154, p. 156; BGE/ATF 109 II 213, cons. 2a; BGE/ATF 119 II 443, cons. 1b. With regard to doping provisions, it is noted that these are no longer to be regarded as unexpected. See Peter Philipp, *Rechtliche Schranken der Vereinsautonomie und der Vertragsfreiheit im Einzelsport. Unter besonderer Berücksichtigung der Monopolstellung der Verbände* (diss. Zürich), Zürich: Schulthess Juristische Medien AG 2004, p. 116, f.n. 502 and Marco Steiner, *La soumission des athlètes aux sanctions sportives. Étude d'une problématique négligée par le monde juridico-sportif* (diss. Lausanne), Lausanne 2010, p. 153.

172 Marco Steiner, *La soumission des athlètes aux sanctions sportives. Étude d'une problématique négligée par le monde juridico-sportif* (diss. Lausanne), Lausanne 2010, p. 142. See also Henk Fenners, *Der Ausschluss der staatlichen Gerichtsbarkeit im organisierten Sport* (diss. Freiburg), Schulthess Juristische Medien 2006, p. 18; Hans Michael Riemer, *Die Vereine, Berner Kommentar, Band I/3, 2er Teilband,* Bern: Verlag Stämpfli & Cie AG 1990, p. 221, no. 511.

173 Aguet argues that the assertion that the relationship between a club or a player and FIFA has its source in association law is fundamentally problematic as the club or the player has no real opportunity to influence the formation of social will that is imposed. Cédric Aguet, 'La sanction disciplinaire infligée par une fédération internationale à l'encontre d'un non-membre a-t-elle une source de droit de l'association? – Réflexions à la lumière de l'arrêt du Tribunal fédéral N° 4P.240/2006', *Jusletter 16 April 2007*, available at: <http://www.weblaw.ch>, no. 47.

174 Cédric Aguet, 'La sanction disciplinaire infligée par une fédération internationale à l'encontre d'un non-membre a-t-elle une source de droit de l'association? – Réflexions à la lumière de l'arrêt du Tribunal fédéral N° 4P.240/2006', *Jusletter 16 April 2007*, available at: <http://www. weblaw.ch>, no. 50.

175 Cédric Aguet, 'La sanction disciplinaire infligée par une fédération internationale à l'encontre d'un non-membre a-t-elle une source de droit de l'association? – Réflexions à la lumière de l'arrêt du Tribunal fédéral N° 4P.240/2006', *Jusletter 16 April 2007*, available at: <http://www. weblaw.ch>, no. 54.

and players are subject to all rules and decisions of FIFA, even if they are not members of the latter.[176]

To sum up, in all countries individual athletes and clubs who are not members of a federation can be bound to its regulations, either through an indirect relationship based on the 'membership chain' or through a licensing contract.

2.6 Changing rules and dynamic reference

In order to be able to implement a national or international uniform sports discipline, the respective federation relies on rules that ought to be directly enforceable at all levels. The rules must be the same everywhere. This is complicated by the fact that international federations generally have only national federations as their members. Therefore, FIFA, UEFA and many other international federations oblige their members to follow the rules set by them, but also to implement them in their own articles of association so that they are also binding on the members of the national federations.[177] This implementation can be attained in two manners. First, a club or national federation can change its own regulations every time the federation changes his. This is called static reference. Another option is dynamic reference. Dynamic reference means that a provision cited is always taken to be the provision with any amendments. In other words: it is not a certain edition of the articles of association and regulations that is in force on a specific date, but always the current version that is applicable. Changes in the federation's rules must be enforced immediately.

The practical importance of the choice between static and dynamic reference becomes eminent in the following example. In the fight against doping it is crucial to ensure that all athletes are being treated equally and comply with the same rules. If associations have to change their articles of association every time the Prohibited List is modified in order to comply with it, enforcement of the rules will be impossible. It is undesirable that in the same competition two athletes of different nationalities both test positive on the same banned substance, but only one of them suffers consequences because his or her national federation changed its regulations and the other one did not. The same holds when rules of the game are changed. If every change of competition,

176 BGE/ATF 5.01.2007, 4P.240/2006 (FC Rayo), Sachsverhalt A; BGE/ATF 9.01.2009, 4A_460/2008 (Dodo), cons. 6.2.

177 Art. 13 FIFA Statutes and Art. 7bis UEFA Statutes. See for an example art. 4 I of the Swiss Football Association's articles of association: "Die Statuten, Reglemente und Beschlüsse der FIFA und der UEFA, des Verbandes, seiner zuständigen Organe und ständigen Kommissionen sind für alle Klubs und deren Mitglieder, Spieler und Funktionäre, für alle Abteilungen, ihre Organe und anerkannte Unterorganisationen verbindlich."

selection or other rules needs to be implemented first, uniform application will be jeopardised.

The question whether or not dynamic reference is acceptable has been extensively discussed in Germany and Switzerland. By contrast, this concept has not received much attention in the other researched jurisdictions.[178] In the Netherlands, only Rensen has noted the possibility to refer to rules of a federation higher up in the pyramid. In his view, a simple reference is insufficient; an association can only oblige its members to comply with the regulations of an umbrella organisation if the provisions in question are cognisable from the association's articles.[179] Nonetheless, in other legal relations it is not uncommon to incorporate a reference to rules that are drafted by third parties. Commercial contracts for instance often refer to general contract terms drafted by trade organisations.[180] Such references can either refer to a specific edition or to the current edition of certain general contract terms (dynamic reference). In the Netherlands, references are assessed on the basis of the general rules of contract law. The civil courts mainly check whether the reference is sound and take into consideration the social circles to which the parties belong, the professionalism of the parties and the prevalence of the use of referrals in the industry.[181] Depending on a party's social circle, his profession and/or his level of knowledge about a certain subject, he will be held to a lower or higher standard by the courts. A reference to the rules of the international federation can thus be deemed invalid when an amateur athlete is concerned, but valid in the case of a professional athlete as the latter is held to a higher standard and expected to be familiar with the rules that govern his profession.

In France the *Conseil d'État* held, with regard to implementation of the rules of an international federation, that a national federation is free to replicate rules set by international federations in its own regulations as long as these stay within the boundaries set by national law.[182] However, the dogmatic construction of dynamic reference as such does not seem to be an issue in France. This might be explained by the fact that in France individual athletes are directly subordinated to the regulations of the national federations by virtue of the licensing system and perhaps also by the strong national focus of most research.[183]

178 Especially in England, dynamic reference does not seem to be an issue.

179 G.J.C. Rensen, *Extra-verplichtingen van leden en aandeelhouders: een wetenschappelijke proeve op het gebied van de rechtsgeleerdheid* (diss. Nijmegen), Deventer: Kluwer 2005, pp. 182-183.

180 In the Netherlands, especially in logistics and construction.

181 S. van Gulijk and G.J.S. van der Velden, 'Het gebruik van doorverwijzingen in algemene voorwaarden. Bouw en logistieke dienstverlening vergeleken', *Tijdschrift voor Bouwrecht* 2012, pp. 985-991.

182 CE 20.11.2003, n°369474, *Les Cahiers de droit du sport* 2005/2, p. 49, note J.-M. Duval.

183 Art. L.131-3 of the *Code du sport*. See section 5.

In Germany, a significant number of authors is of the opinion that dynamic reference is not allowed.[184] One cited argument is that dynamic reference is contrary to § 71 BGB, which requires that amendments to the articles of association are to be entered in the register of associations in order to become effective.[185] So far the debate has found little judicial resonance. In 1988 the *BGH* expressly accepted static reference but did not rule on the issue of dynamic reference.[186] In the *Reitsport* case, which concerned the subordination of indirect members to disciplinary regulations of the national federation, the *BGH* acknowledged the practical difficulty/importance for sports federations to enforce the rules on all levels. Although the court expressly referred to the majority opinion which dismisses dynamic reference, it did not take a clear position in the debate.[187] More recently the debate has shifted towards a more nuanced approach. It has been argued that dynamic reference cannot be accepted or rejected on principle; rather the admissibility depends on certain conditions. When these conditions are met, dynamic reference is in principle acceptable.[188] The reference must be clear, unambiguous and transparent. In addition, the referenced regulations must be published.[189]

Unlike in Germany, in Swiss legal doctrine dynamic reference is explicitly accepted by the majority of authors.[190] Riemer, for example, notes that

184 Dieter Reuter, *Münchener Kommentar zum BGB. Band 1. Allgemeiner Teil. 6. Auflage*, 2012, § 21, Rn. 121; Günther Weick, *J. von Staudingers Kommentar zum BGB. Buch 1. Allgemeiner Teil, Neubearbeitung*, 2005, § 25 Rn. 7; Ulrich Haas and Clemens Prokop, 'Zu den formellen Grenzen der vereinsrechtlichen Disziplinargewalt im Rahmen von Unterwerfungsvereinbarungen', *SpuRt* 1998/1, pp. 15-19, p. 17; Horst Hilpert, *Das Fußballstrafrecht des Deutschen Fußball-Bundes (DFB)*, Berlin: De Gruyter 2009, pp. 7 and 54; Dirk-Ulrich Otto and Kurt Stöber, *Handbuch zum Vereinsrecht. 10. Neu Bearbeite Auflage*, Köln: Verlag Dr. Otto Schmidt 2012, Rn. 51. See also Jan. F. Orth, *Vereins- und Verbandsstrafen am Beispiel des Fußballsports* (diss. Köln), Frankfurt am Main: Peter Lang GmbH 2009, p. 160ff. for a detailed examination of the different views.

185 See for example: Günther Weick, *J. von Staudingers Kommentar zum BGB. Buch 1. Allgemeiner Teil, Neubearbeitung*, 2005, § 25 Rn. 7 and Jochen Kotzenberg, *Die Bindung des Sportlers an private Dopingregeln und private Schiedsgerichte* (diss. Marburg), Baden-Baden: Nomos 2007, p. 41.

186 BGH 10.10.1988 – II ZR 51/81 – available at: www.jurion.de.

187 BGH 28.11.1994 – II ZR 11/94 – *NJW* 1995, 583 = BGHZ 128, 93 (cons. I.2c). This case will be discussed further below regarding indirect membership.

188 Peter W. Heermann, 'Bindung an die Satzung übergeordneter Verbände durch dynamische Verweisungsklauseln', ZHR 174/2010, pp. 250-292, pp. 260 and 264; Jan F. Orth and Patrick Pommerening, 'Zulässigkeit und Wirksamkeit dynamischer Verweisungen im Sportrecht', *SpuRt* 2010/6, pp. 222-224.

189 Jan F. Orth and Patrick Pommerening, 'Zulässigkeit und Wirksamkeit dynamischer Verweisungen im Sportrecht', *SpuRt* 2010/6, pp. 222-224, p. 224.

190 Jérôme Jaquier, *La qualification juridique des règles autonome des organisations sportives* (diss. Lausanne), Berne: Staempfli Editions SA 2004, p. 98; Peter Philipp, *Rechtliche Schranken der Vereinsautonomie und der Vertragsfreiheit im Einzelsport. Unter besonderer Berücksichtigung der Monopolstellung der Verbände* (diss. Zürich), Zürich: Schulthess Juristische Medien AG 2004, p. 113; Hans Michael Riemer, *Die Vereine, Berner Kommentar, Band I/3, 2er Teilband,* Bern: Verlag Stämpfli & Cie AG 1990, no. 508; Marco Steiner, *La soumission des athlètes aux sanctions*

changes in an umbrella federation's articles do not only apply to its own member associations but also to their members; explicit subordination to the federation's rules in the member association's articles is not a prerequisite.[191] Additionally, it has been suggested that as long as the rules are available for consultation, there is nothing against dynamic reference to a federation's articles or regulations.[192] An explanation for the relative absence of a debate can be sought in the fact that Swiss association law contains few legal constraints. As mentioned above, the relative liberal nature of Swiss association law is deemed the primary reason why most international sports federations are seated in Switzerland.[193] Unlike German law, Swiss association law does not require amendments to an association's articles to be publicly registered.[194] Unsurprisingly, the majority of Swiss authors deem the legal form of the association perfectly suitable to enforce rules on all levels.[195]

The Swiss Federal Supreme Court is not opposed to dynamic reference either. Although a principal ruling on the issue has not yet materialised, the Court accepted a dynamic reference in a cantonal statute to technical regulations in 1997.[196] Much earlier, in a case where a woman was a member of both an association and its umbrella federation, the dynamic reference in question was deemed acceptable on the ground that nothing prevents an association from constituting itself as a branch of another association and recognise its articles. According to the Court, a subsequent amendment to these articles has to be binding on the umbrella federation's members – i.e. the

sportives. Étude d'une problématique négligée par le monde juridico-sportif (diss. Lausanne), Lausanne 2010, pp. 140-141. More critical: Henk Fenners, *Der Ausschluss der staatlichen Gerichtsbarkeit im organisierten Sport* (diss. Freiburg), Schulthess Juristische Medien 2006, p. 47.

191 Hans Michael Riemer, *Die Vereine, Berner Kommentar, Band I/3, 2er Teilband,* Bern: Verlag Stämpfli & Cie AG 1990, no. 508; referring to BGE/ATF 70 II 63; see below.

192 Peter Philipp, *Rechtliche Schranken der Vereinsautonomie und der Vertragsfreiheit im Einzelsport. Unter besonderer Berücksichtigung der Monopolstellung der Verbände* (diss. Zürich), Zürich: Schulthess Juristische Medien AG 2004, p. 113.

193 Denis Oswald, *Associations, Fondations, et autres formes de personnes morales au service du sport*, Bern: Peter Lang 2010, p. 33; Hans-Michael Riemer, 'Sportrechts-Weltmacht Schweiz Internationale Sportverbände und schweizerisches Recht', *Causa Sport* 2004, pp. 106-107, p. 106.

194 See § 71 (1) German BGB. See also Peter W. Heermann, 'Bindung an die Satzung übergeordneter Verbände durch dynamische Verweisungsklauseln', *ZHR* 174/2010, pp. 250-292, p. 275.

195 Margareta Baddeley, *L'association sportive face au droit. Les limites de son autonomie* (diss. Genève), Basel: Helbing & Lichtenhahn 1994, p. 112; Raoul Dias, *Der Verein als herrschendes Unternehmen im Konzern. Unter besonderer Berücksichtigung der Sportvereine und Sportorganisationen in der Schweiz*, Zürich/St. Gallen: Dike Verlag AG 2010, p. 96; Thilo Pachmann, *Sportverbände und Corporate Governance*, Zürich/St. Gallen: Dike Verlag AG 2007, p. 120; Piermarco Zen-Ruffinen, *Droit du Sport*, Zürich/Basel/Geneva: Schultess Médias Juridiques SA 2002, p. 46.

196 BGE/ATF 123 I 112, p. 127ff.

branch associations – as well as on the members of these branch associations.[197] More recently, the Court had the chance to express its view on references in regulations of sports federations. Brazilian football player Dodo appealed an award by the CAS *inter alia* disputing its competence on the grounds that the Brazilian federation's articles did not provide an arbitration clause. An arbitration clause was, however, laid down in the FIFA statutes. The Brazilian federation's articles contained a provision which obliged its adhered athletes to comply with the FIFA regulations. The Swiss Federal Supreme Court held that in line with previous case law this global reference sufficed to establish the competence of the CAS.[198] However, no principal ruling materialised as the Court was very brief in its considerations. In addition, the global reference was not to any behavioural or disciplinary rule, but to an arbitration clause, which results in the application of many other rules. Therefore, as in the *Rayo* case, it is difficult to draw general conclusions from this case other than that the Court still seems to accept dynamic reference, albeit implicitly.

2.7 ENFORCING THE RULES: DEFINITION, PURPOSE, AND JUSTIFICATION OF THE DISCIPLINARY SANCTION

The disciplinary sanction is the instrument which sports organisations can employ to enforce their rules. As a legal notion the disciplinary sanction is not easy to define. Despite the fact that most disciplinary sanctions will be recognised as such, no single legal definition exists to describe this pheno-

197 BGE/ATF 70 II 63. ("Allein nichts hindert einen Verein, sich als Zweigverband eines anderen zu konstituieren und dessen Satzungen anzuerkennen. (..) Auch eine spätere Änderung dieser Statuten muss für die Zweigverbände nicht minder als für die diesen und dem Gesamtverbande zugleich angehörenden Mitglieder verbindlich sein.")

198 BGE/ATF 9.01.2009, 4A_460/2008 (Dodo), cons. 6.2. With references to earlier case law.

menon.[199] Still, the classification, justification and goal(s) of the sanction are discussed in similar fashion in the different jurisdictions.[200]

In the Netherlands, different definitions of disciplinary law and the disciplinary sanction have emerged in literature.[201] However, not much has been written on disciplinary law in associations in general or in sports in particular.[202] According to several authors disciplinary law bears a close resemblance to both penal law and civil law.[203] Nonetheless, it has been classified as a *sui generis* field of law.[204] In contrast, disciplinary law of associations is considered private law (*privaatrechtelijk tuchtrecht*)[205] Regarding the goals of the disciplinary sanction, De Doelder alleges that *normhandhaving*– the enforcement of standards – is the primary goal of every legal system, including disciplinary law.

In France, definitions of the disciplinary sanction vary.[206] On the one hand it has been argued that it is primarily *une mesure répressive*.[207] On the other hand, according to the more traditional approach it is primarily a sanction

199 Not even in Switzerland where one of the first authors to treat and define the subject was Corbat in 1974. "Les peines statutaires sont des désavantages que le membre d'un groupement s'engage à subir s'il n'exécute pas ou exécute imparfaitement ses devoirs envers le groupement ou les autre membres et visent toujours à maintenir l'ordre juridique interne". Claude Corbat, *Les peines statutaires*, Fribourg: Imprimerie St-Paul 1974, p. 70. Steiner's definition specifically envisages the disciplinary sanction imposed by sports associations. "La sanction sportive est une mesure répressive de droit privé prise par une fédération sportive nationale contre un athlète individuel qui vise à maintenir l'ordre social interne de la fédération auquel l'athlète est soumis en vertu d'un ou plusieurs liens statutaires et/ou contractuels". Marco Steiner, *La soumission des athlètes aux sanctions sportives. Étude d'une problématique négligée par le monde juridico-sportif* (diss. Lausanne), Lausanne 2010, p. 64. Although Steiner limits his definition to individual athletes, teams, clubs and all subordinate federations can also be subject to a disciplinary sanction. The application of disciplinary measures to the latter is governed by the same principles as the sanctioning of an individual athlete.

200 Except in England, where these questions do not seem to be a subject of concern.

201 See for an extensive overview M.J.C. Leijten, *Tuchtrecht getoetst* (diss. Tilburg), Gouda: Quint 1999, pp. 5-44.

202 In contrast, research has been mainly focused on statutory disciplinary law, which includes *inter alia* the military, medical professions and legal professions. Disciplinary law of associations is qualified as non-statutory disciplinary law.

203 H. de Doelder, *Terrein en beginselen van tuchtrecht* (diss. Tilburg), H.D. Tjeenk Willink 1981, p. 33 and the authors cited there; A.H. Santing-Wubs, 'Orde en tucht, tucht in orde?' *Ars Aequi*, 2003/7-8, pp. 552-562, p. 553.

204 See Z.D. Laclé and N.J.H. Huls, 'De rechterlijke betrokkenheid bij tuchtrecht moet transparanter' *TREMA* 2004, 6, pp. 231-237, p. 232 and J.L.S.A.W.B Roes, 'Wat is tuchtrecht?' *WPNR* 2008/6778, pp. 919-927, p. 919 both citing H. de Doelder, *Terrein en beginselen van tuchtrecht* (diss. Tilburg), H.D. Tjeenk Willink 1981, pp. 33-34.

205 M.J.C. Leijten, *Tuchtrecht getoetst* (diss. Tilburg), Gouda: Quint 1999, p. 33.

206 See on this subject Pascal Ancel and Joël Moret-Bailly (eds.), *Vers un droit commun disciplinaire?*, Publications de l'Université de Saint-Étienne 2007.

207 Frédéric Laurie, 'La constitutionnalisation du droit disciplinaire', Proceedings of the *VIe congrès français de droit constitutionnel, A.F.D.C., Montpellier, 9-11 juin 2005*, available at: <http://www.droitconstitutionnel.org/congresmtp/textes2/LAURIE.pdf>, p. 3-7.

whose effect is purely moral and preventive.[208] It is a power founded upon the idea the common objective is served by the sanctioning of members who endanger the pursuit of this objective.[209] In this view, inspired by Hauriou's institutional theory, punishment is only secondary.[210] In literature it is recognised that although the disciplinary sanctions approach the penal law regime to some extent – Simon notes for instance the strict application of the principle of *légalité des sanctions*[211] – it must be distinguished.[212] Nevertheless, as a result of the state interference, the disciplinary sanction is qualified as an administrative act.

In Germany, too, the justification of the disciplinary sanction is linked to the rationale of the association. As the possibility to create and enforce disciplinary sanctions derives from the freedom of association and is only permitted because of the voluntary subordination of the members to the associations' regulations.[213] With regard to the goal of the sanction, the *BGH* has stated that the sanction serves to penalise infringements of the membership duties.[214]

As in Germany, in Switzerland it is argued that the primary function of the disciplinary sanction is to punish. However, the sanction must also prevent and dissuade, both through the standards themselves and through its enforcement. It is deemed to encourage the sanctioned member not to reoffend and to prevent other members from similar behaviour.[215] In 1926 the Federal Supreme Court expressed its view of the nature of a disciplinary sanction. According to the Court,

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208 Alfred Légal and Jean Brethe de la Gressaye, *Le pouvoir disciplinaire dans les institutions privées*, Sirey 1938, p. 7.

209 "Un pouvoir juridique ayant pour objet d'imposer aux membres du groupe, par des sanctions déterminées, une règle de conduite en vue de les contraindre à agir conformément au but d'intérêt collectif qui est la raison d'être de ce groupe." Alfred Légal and Jean Brethe de la Gressaye, *Le pouvoir disciplinaire dans les institutions privées*, Sirey 1938, p. 152.

210 Eric Millard, Theories de l'institution et disciplines, in P. Ancel et J. Moret-Bailly (ed.), *Vers un droit commun disciplinaire?*, Publications de l'Université de Saint-Etienne 2007, pp. 29-40, p. 34.

211 Gérald Simon, *Puissance sportive et ordre juridique étatique* (diss. Bourgogne), L.G.D.J. 1990, p. 154; Frédéric Buy, 'Pas de responsabilité disciplinaire du fait d'autrui!, note sur T. adm. Paris 16.03.2007 (Paris Saint Germain)', *Les Cahiers de Droit du Sport* 2007/8, pp. 157-160, p. 159.

212 Frédéric Laurie, 'La constitutionnalisation du droit disciplinaire', Proceedings of the *VIe congrès français de droit constitutionnel, A.F.D.C., Montpellier, 9-11 juin 2005*, available at: <http://www.droitconstitutionnel.org/congresmtp/textes2/LAURIE.pdf>, pp. 3-7.

213 BGHZ 29, 352, p. 355. BGHZ 13, 5, p. 11; BGHZ 21, 371, p. 375.

214 BGHZ 21, 370, p. 376: "Eine Vereinsstrafe dient der Ahndung von Verletzungen der Vereinspflichten und hat mit Schadenersatz nichts zu tun."

215 Margareta Baddeley, *L'association sportive face au droit. Les limites de son autonomie* (diss. Genève), Basel: Helbing & Lichtenhahn 1994, p. 219; Hans Bodmer, *Vereinsstrafe und Verbandsgerichtbarkeit: dargestellt am Beispiel des Schweizerischen Fussballverbandes* (diss. St. Gallen), Bern: Verlag Paul Haupt 1989, p. 58.

> "[u]ne décision de cette nature ne peut être assimilée ni à un jugement pénal (…) ni même à une sentence arbitral, puisque celle-ci a pour objet de statuer sur le mérite d'une prétention litigieuse et qu'en matière d'amende, l'association ne devient créancière du sociétaire fautif qu'en vertu de la décision même qui la prononce. Le pouvoir d'infliger des amendes découle uniquement des statuts, autrement dit d'une convention d'ordre privé, et il suit de là nécessairement qu'en cas de contestation sur le bien-fondé de la prétention de l'association le conflit ne peut pas être tranche que par les tribunaux".[216]

Resemblances between penal law and disciplinary law have been acknowledged in literature. However, the purely private-law nature of the disciplinary sanctions is undisputed.[217]

With regard to the fixation of sanctions, it must be noted that there are many different types and forms of disciplinary sanctions. For example, FIFA has laid down 21 different sanctions in its articles of association.[218] The different sanctions can roughly be regrouped into three categories: moral sanctions, pecuniary sanctions and sanctions that take away certain benefits.[219]

Firstly, moral sanctions are disadvantages of a dishonourable nature when a member fails to perform the duties that he owes to the association, to another member or to third parties linked to the association.[220] Examples are: a warning, a reprimand and the publication of the sentence. Secondly, pecuniary sanctions can be defined as the payment of an amount of money when a member fails to perform his or her duties. Fines are an extremely frequent sanction. Often, pecuniary sanctions and other types of sanctions are cumulated. The actual amount of the fine is to be determined by the applicable regulations of the federation: it can be set within a framework or set at a maximum. Thirdly, sanctions that consist of partial or total deprivation of the benefits deriving from the membership. This deprivation can be divided in the deprivation of financial benefits and deprivation of non-financial benefits. For example: a club or an athlete can be sentenced to give back earned rewards or be excluded from participation in certain competitions or tournaments. Depending on the sport, exclusion from participation in a tournament can have

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216 BGE/ATF 52 I 75.

217 Margareta Baddeley, *L'association sportive face au droit. Les limites de son autonomie* (diss. Genève), Basel: Helbing & Lichtenhahn 1994, p. 220; Jérôme Jaquier, *La qualification juridique des règles autonomes des organisations sportives* (diss. Lausanne), Berne: Staempfli Editions SA 2004, p. 46; Anton Heini, 'Die gerichtliche Überprüfung von Vereinsstrafen', in: Peter Forstmoser and Walter R. Schlüp (eds.), *Freiheit und Verantwortung im Recht: Festschrift zum 60. Geburtstag von Arthur Meier-Hayoz*, Bern: Stämpfli Verlag SA 1982, pp. 223-234, pp. 225-226; Marco Steiner, *La soumission des athlètes aux sanctions sportives. Étude d'une problématique négligée par le monde juridico-sportif* (diss. Lausanne), Lausanne 2010, p. 64.

218 See Art. 65 FIFA Statutes (July 2012).

219 Compare Claude Corbat, *Les peines statutaires*, Fribourg: Imprimerie St-Paul 1974, p. 94; Marco Steiner, *La soumission des athlètes aux sanctions sportives. Étude d'une problématique négligée par le monde juridico-sportif* (diss. Lausanne), Lausanne 2010, p. 67.

220 Claude Corbat, *Les peines statutaires*, Fribourg: Imprimerie St-Paul 1974, p. 94.

financial consequences; i.e. missing out on a participation fee or sponsorship bonuses. However, these must be distinguished from the direct deprivation of financial benefits.

2.8 Requirements for application of a disciplinary sanction

As examined in Section 2.3, all created rules and their application are subject to overall limits set forth by the legal system. In short, these are the interdiction to breach the law, public policy, morality, the general principles of law, the articles of association and the specific object for which the association was created. In addition to these general conditions, disciplinary sanctions have to meet a few other requirements in order to be legally applied.

Express mention, equal treatment and proportionality

In three of the five jurisdictions it has been developed in case law that any decision by an association concerning a sanction is required to be based on an express provision in an association's regulatory framework.[221] This implies that if there is no such provision, no disciplinary sanction can be applied. The provision must be in force at the time of the offence.[222] To put it briefly, the imposition of a disciplinary sanction is subject to the principle of legality.

Although so far no Dutch court has decided on this matter, in literature it is assumed that a sanction can be imposed without an express provision.[223] In England, the approach is slightly different as disciplinary rules are terms of the contract between members and associations. As mentioned above, in *Davis v Carew-Pole* it was held that "the quasi-judicial body is bound by its own rules and can only mete out punishment in strict accordance with such rules".[224] It would thus seem that express terms are required. Moreover, in German and Swiss literature it is accepted that a general provision confirming the disciplinary power suffices, the specific disciplinary rules may be specified

221 France: CE 15.05.1991, n°124067 and CE 12.07.1991 (Girondins de Bordeaux) , *Revue français de Droit administratif* 1992, p. 203, note G. Simon. Germany: BGHZ 47, 172, p. 178; Günther Weick, *J. von Staudingers Kommentar zum BGB. Buch 1. Allgemeiner Teil, Neubearbeitung*, 2005, § 35, Rn. 36-38. Switzerland: BGE/ATF 52 I 75; See also: Marco Steiner, *La soumission des athlètes aux sanctions sportives. Étude d'une problématique négligée par le monde juridico-sportif* (diss. Lausanne), Lausanne 2010, pp. 120-121 and the authors cites there.

222 BGHZ 55, 381, p. 385; Günther Weick, *J. von Staudingers Kommentar zum BGB. Buch 1. Allgemeiner Teil, Neubearbeitung*, 2005, § 35, Rn. 38.

223 A.H. Santing-Wubs, 'Orde en tucht, tucht in orde?' *Ars Aequi,* 2003/7-8, pp. 552-562, p. 554; H. de Doelder, *Terrein en beginselen van tuchtrecht* (diss. Tilburg), H.D. Tjeenk Willink 1981, pp. 77-79. Soek, however, argues that with regard to doping offences, the principle of legality applies. Janwillem Soek, *The strict liability principle and the human rights of the athlete in doping cases* (diss. Rotterdam), 2006, p. 314ff., available at: <http://repub.eur.nl>, p. 314ff.

224 *Davis v Carew-Pole* [1956] WLR, p. 838.

in secondary regulations.[225] This includes references to rules of other organisations to the extent that members can peruse these regulations.[226]

The link between a certain offence and its sanction is generally only clearly established with regard to game violations. For instance article 49 of the FIFA Disciplinary Code provides that misconduct against match officials, after having received a direct red card, can be sanctioned with an overall suspension for: a) at least four matches for unsporting conduct towards a match official; b) at least six months for assaulting (elbowing, punching, kicking etc.) a match official; c) at least 12 months for spitting at a match official. Furthermore it is possible that a fine is imposed.[227] However, in cases of application that deal with other violations than violations of the game, the choice of the kind of sanctions to be adopted and its extent is at the discretion of the internal judicial bodies.

Besides the requirement of legality, the application of a disciplinary measure must also comply with the principles of equal treatment and proportionality.[228] The principle of equal treatment entails that similar situations should be treated in the same manner. The principle of proportionality is a general principle of law. It implies that all specific circumstances of a situation will be taken into consideration in its assessment of it.

Fault and strict liability

In considering the requirements for validly imposing a sanction, the question arises whether fault is such a requirement. None of the jurisdictions provide

225 Germany: Dieter Reuter, *Münchener Kommentar zum BGB. Band 1. Allgemeiner Teil. 6. Auflage*, 2012, § 25, Rn. 10; Günther Weick, *J. von Staudingers Kommentar zum BGB. Buch 1. Allgemeiner Teil, Neubearbeitung*, 2005, § 25, Rn. 3 and 23; Dirk-Ulrich Otto and Kurt Stöber, *Handbuch zum Vereinsrecht. 10. Neu Bearbeite Auflage*, Köln: Verlag Dr. Otto Schmidt 2012, Rn. 984. Switzerland: Margareta Baddeley, *L'association sportive face au droit. Les limites de son autonomie* (diss. Genève), Basel: Helbing & Lichtenhahn 1994, p. 228; Hans Bodmer, *Vereinsstrafe und Verbandsgerichtbarkeit: dargestellt am Beispiel des Schweizerischen Fussballverbandes* (diss. St. Gallen), Bern: Verlag Paul Haupt 1989, p. 102; Hans Michael Riemer, *Die Vereine, Berner Kommentar, Band I/3, 2er Teilband,* Bern: Verlag Stämpfli & Cie AG 1990, p. 847.

226 See on references section 6.

227 Art. 49 FIFA Disciplinary Code.

228 In the Netherlands case law or literature is lacking on this point. England: *Bradley v Jockey Club* [2004] EWHC Civ 2164 (QB), para 43. France: See CE 22.10.1993, *Recueil Dalloz* 1995, p. 58 obs. J.-P. Karaquillo; CE 20.10.2008, n°320111 (Paris St. Germain/FFF) and Frédéric Buy, 'Pas de responsabilité disciplinaire du fait d'autrui!, note sur T. adm. Paris 16.03.2007 (Paris Saint Germain)', *Les Cahiers de Droit du Sport* 2007/08, p. 159. Germany: Günther Weick, *J. von Staudingers Kommentar zum BGB. Buch 1. Allgemeiner Teil, Neubearbeitung*, 2005, § 35, Rn. 41. Switzerland; Christoph Fuchs, *Rechtsfragen der Vereinsstrafe. Unter besondere Berücksichtigung der Verhältnisse in Sportverbänden* (diss. Zürich), Zürich: Schulthess Polygraphischer Verlag AG 1999, pp. 111-114; Marco Steiner, *La soumission des athlètes aux sanctions sportives. Étude d'une problématique négligée par le monde juridico-sportif* (diss. Lausanne), Lausanne 2010, pp. 120-121.

a clear definitive answer to this question. In the Netherlands, this subject has not yet been a topic of discussion in case law. So far, the *Hoge Raad* has only enunciated that different standards apply in disciplinary proceedings compared to ordinary private-law proceedings.[229] In Dutch literature both sides have been argued.[230] In France, case law remains faint.[231] This is exemplified by the fact that although in 2007 the *Conseil d'État* upheld a sanction imposed on football club Lille Metropole that was based on strict liability for the behaviour of its supporters, it did not elaborate on the requirement of fault in general.[232]

Like French law, German law is characterised by contrasting views on this point. According to older case law of the *BGH*, the imposition of a disciplinary sanction does not necessarily require fault.[233] However, over time doctrinal views have developed into the direction that fault (*Verschulden*) is required.[234] Additionally, more recent case law seems to affirm this development, especially in cases where the sanction entails serious consequences or a condemnation.[235]

In Switzerland, too, it is suggested that fault is required.[236] However, this requirement is not absolute.[237] In 2007, the Swiss Federal Supreme Court considered that although strict liability infringes the personality rights of an athlete,[238] such a regulation can be justified by an overriding public interest; which in this case was the fight against doping.[239]

With regard to whether fault is required (and strict liability allowed) for the valid application of a disciplinary sanction, both case law and literature leave us with a contrasting impression. Nevertheless, it must be remarked that

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229 HR 13.10.2006, *NJ* 2008, 528 and 529 (Vie d'Or), note C.C. van Dam.

230 H. de Doelder, *Terrein en beginselen van tuchtrecht* (diss. Tilburg), H.D. Tjeenk Willink 1981, p. 106ff; T.J. van der Ploeg, 'Rafels en oude wijven in de verbindingen publiekrecht-tuchtrecht-rechtspersonenrecht-verbintenissenrecht' *TVVS* 1989, pp. 226-227; Janwillem Soek, *The strict liability principle and the human rights of the athlete in doping cases* (diss. Rotterdam), 2006, p. 314ff., available at: <http://repub.eur.nl>, pp. 191-192.

231 Mathieu Maisonneuve, 'De la faute disicplinaire en matière sportive', *Lamy Droit du Sport* n58 2008, pp. 1-3.

232 CE 29.10.2007, n°307736, *Recueil Dalloz* 2008, p. 1381, note Maisonneuve.

233 BGHZ 29, 352.

234 Horst Hilpert, *Das Fußballstrafrecht des Deutschen Fußball-Bundes (DFB)*, Berlin: De Gruyter 2009, pp. 54, 58; Jan. F. Orth, *Vereins- und Verbandsstrafen am Beispiel des Fußballsports* (diss. Köln), Frankfurt am Main: Peter Lang GmbH 2009, pp. 101-103; Dirk-Ulrich Otto and Kurt Stöber, *Handbuch zum Vereinsrecht. 10. Neu Bearbeite Auflage*, Köln: Verlag Dr. Otto Schmidt 2012, Rn. 986.

235 OLG Frankfurt am Main 18.05.2000, 13 W 29/00, E. 63, available at: <www.openjur.de>; OLG Hamm 01.04.2008, 27 U 133/07, E. 33, available at: <www.justiz.nrw.de>.

236 Urs Scherrer, *Wie gründe und leite ich einen Verein?*, Schulthess Juristische Medien AG 2009, p. 81.

237 Margareta Baddeley, *L'association sportive face au droit. Les limites de son autonomie* (diss. Genève), Basel: Helbing & Lichtenhahn 1994, p. 243.

238 Art. 28 CC.

239 BGE/ATF 134 III 193, cons. 4.6.3.2.2.

with regard to doping, where an athlete is strictly liable for any breach of the regulations, disciplinary sanctions have been imposed and upheld in most jurisdictions.[240]

Procedural safeguards

The sanctioning process must provide for procedural safeguards in order to ensure a proper procedure. In most jurisdictions, these safeguards have been developed in case law and literature. Naturally, slight differences in the specific interpretation of the various elements exist, but on the whole the following apply in all jurisdictions.[241] First, a member threatened with a penalty must be able to know his offence. Second, he must be able to defend himself, either verbally or in writing, before the penalty is being imposed. In other words, the right to be heard must be respected.[242] Third, decisions must be notified and motivated.[243] Only with respect for these safeguards will the sanction be valid. Violations of procedural rights by the associations' bodies may lead to annulment of the sanction by the civil court, even if the measure would have proved well-founded had it been imposed in a properly conducted procedure.

In comparison, in France procedural safeguards are laid down in the *Code du sport*, which imposes compliance with the standard procedures provided in the annexes.[244] These procedural rules, also affirmed by case law,[245] include: the right to an independent an impartial tribunal, a public procedure, reasonable duration, the right to defend oneself, including a fair hearing and notification and motivation of the decision.

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240 See for instance in England: *Modahl v British Athletic Federation Ltd* [2002] 1 WLR 1192, in France for a recent example: CE 25.05.2010, n°332045 and in Switzerland: Swiss Federal Supreme Court 04.08.2006, 4P.105/2006 and Swiss Federal Supreme Court 10.01.2007, 4P.148/2006.

241 England: See for instance *McInnes v Onslow-Fane* [1978] 1 WLR 1520*; Modahl v British Athletic Federation Ltd* [2002] 1 WLR 1192; *Flaherty v National Greyhound Racing Club Ltd* [2005] EWCA 1117. See more in detail: Michael J. Beloff, Tim Kerr and Marie Demetriou, *Sports Law*, Oxford: Hart Publishing 1999, p. 195ff. Germany: BGHZ 102, 265, p. 269; Günther Weick, *J. von Staudingers Kommentar zum BGB. Buch 1. Allgemeiner Teil, Neubearbeitung*, 2005, § 35, Rn. 46-51. Switzerland: BGE/ATF 52 I 75; BGE/ATF 90 II 347; Christoph Fuchs, *Rechtsfragen der Vereinsstrafe. Unter besondere Berücksichtigung der Verhältnisse in Sportverbänden* (diss. Zürich), Zürich: Schulthess Polygraphischer Verlag AG 1999, pp. 107-110.

242 An oral hearing is not always obligatory. See *Currie v. Barton*, 1988 WL 622889 and BGHZ 29, 352, p. 355.

243 Under English law there is no general duty to give reasons for decisions. However, it has been suggested that this should perhaps be part of the rules of natural justice. See William Wade and C.F. Forsyth, *Administrative Law*, Oxford University Press 2009, p. 436.

244 Article R.131-3 and R.232-86 of the *Code du sport*. See for the details Annexe I-6 art. R131-2 and R131-7.

245 See for example CE 10.04.1991, n°115482, *Recueil Dalloz* 1993, p. 345, obs. J. Morange and more recently CE 10.06.2011, n°327158; CE 26.12.2012, n°350833.

2.9 CONCLUDING REMARKS

No unbridled imagination is needed to recognise that without rules, sport could not function. After all, how would we know how to play or who the winner is? Rules of the game were only the beginning of regulations in sports. Meanwhile, however, extensive regulatory frameworks have been created in order to govern sports on different levels. The goal of this chapter was to provide an overview of the main legal framework in which national and international sports organisations operate with special regard to rules of a disciplinary nature. The comparison that has been made across five European countries showed that, in general, the legal status of disciplinary regulations in sports is strikingly similar and that many issues are approached and reviewed in the same way.

By and large, the five jurisdictions researched display similar modalities regarding the design of the regulatory framework in which sports organisations operate (2). The significant position of the association, as the preferred organisational form, and thus association law is evident in most countries. The exception is England, where associations are generally incorporated and thus subject to company law. Nevertheless, in all jurisdictions the applicable legal framework proved to be rather lenient, being limited to provisions treating only the internal organisation and membership of the association. Associations are allowed to adjust the internal organisation to their own needs. In four of the five jurisdictions, this autonomy is said to be founded on the civil right of freedom of association. This right does not just include the right of people to freely create and adhere to associations, but also to autonomously decide how to organise them internally. Still, the regulatory power of associations is limited by both national law and their self-created internal regulations (3). It may be inferred from the above that limits of both national law and internal regulations in the respective countries are similar to a large extent. Most notably, in all jurisdictions an association is bound by the specific object for which it was created and by its articles of association and secondary regulations. In France, however, due to the interference of the state, certified and delegated federations are subject to more detailed regulations.

With regard to the binding nature of disciplinary rules, it can be concluded that although certain differences remain, the jurisdictions covered reveal the development of a shared understanding (4). The binding nature of the rules set by national and international sports federations differs depending on the relationship of an individual actor with a certain federation. In the civil-law countries, the nature of the relationship between an association and its members is generally characterised as institutional. The decisive factor in favour of this standpoint is the subordinate relationship between the federation and the members. Although it has been argued that the assertion that the relationship between a club or a player and FIFA has its source in association law is

fundamentally problematic as the club or the player has no real opportunity to influence the formation of social will that is imposed,[246] this is no less problematic with regard to the contract theory. If relations between FIFA and clubs or athletes are subject to contract law, there is no form of equality between the parties either. On the one hand FIFA, as the international governing body of football, adopts and amends the rules that are imposed on all participants in the sport. On the other hand, clubs and athletes are forced to submit to these rules if they want to play the game. Consequently, it is difficult to maintain that the relationship between FIFA and a club or an athlete derives from free will. The strong subordinate relationship between the federation and its members and the members of these members (clubs and athletes) is better explained in light of association law. By contrast, the common-law approach is very different from the outset. In England, members of an incorporated association are bound by contract. However, it has been suggested that this contract is a fictional one as there is no choice but to enter into it. Nonetheless, in all countries it is recognised that as a result of the monopoly position of national and international federations the relationship between the parties is essentially totally subordinate.

Furthermore, in all countries it is accepted that individual athletes and clubs that are not members of a federation can nevertheless be bound to its regulations (5). This subordination materialises either through an indirect relationship based on the 'membership chain' or through a licensing contract. Additionally, in order to bind all actors to the same rules it is common practice to refer to regulations of organisations that are positioned higher in the pyramid (6). By means of dynamic reference it is attempted to bind all athletes and clubs to changing rules at once. Actually, in the sporting context this phenomenon has only received attention in Germany and Switzerland, where dynamic reference can in general be accepted as long as the reference is clear and cognisable. In times of the Internet the latter requirement should not be too difficult to meet.

When rules are not followed a disciplinary sanction can be imposed. The disciplinary sanction is a peculiar legal notion (7). In all countries its definition and functions are debated in a similar fashion. It has features that bear resemblance to both penal law and private law. However, the dominant view is that the disciplinary sanction is of a private-law nature. In France too, disciplinary sanctions imposed by club associations are rooted in private law. Only because the French state interfered with sports at the national level are sanctions imposed by delegated federations of an administrative nature. A variety of sanctions exists, which can more or less be regrouped in three

246 Cédric Aguet, 'La sanction disciplinaire infligée par une fédération internationale à l'encontre d'un non-membre a-t-elle une source de droit de l'association? – Réflexions à la lumière de l'arrêt du Tribunal fédéral N° 4P.240/2006', *Jusletter 16 April 2007*, available at: <http://www. weblaw.ch>, no. 47.

categories: moral sanctions, pecuniary sanctions and sanctions that take away certain benefits. However, all sanctions are aimed at ensuring the membership obligations under the association's object.

Although an association's autonomy is extensive, it cannot justify the enforcement of sanctions as it wishes (8). Across the jurisdictions the requirements for applying a sanction bear close similarities. It is recognised that sanctions must be expressly mentioned in the regulatory framework and comply with the principles of equal treatment and proportionality. Furthermore, procedural safeguards must be met. Only with regard to the question whether fault is required does the situation remain obscure. Nonetheless, the position that fault is an absolute requirement is difficult to reconcile with the fact that sanctions that were imposed without fault have been upheld in different national courts.