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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3 Reviewing Disciplinary Sanctions in Sports*

3.1 INTRODUCTION

International and national sports federations[1] create, apply and enforce rules in order to regulate their sports. Associated athletes and clubs are required to comply with these rules, which are laid down in the federations' regulations. If they do not abide by the rules, a disciplinary sanction can be imposed. These sanctions can range from a fine to the exclusion of participation in certain matches, and in extreme cases even to exclusion from the federation.[2]

The creation and enforcement of the rules that athletes and clubs need to adhere to take place on different levels. From the outset it is the national or international sports federation that creates its own regulations and enforces them through an internal – and thus private – sanctioning system. Special disciplinary bodies or internal courts are tasked with imposing disciplinary sanctions upon those who have breached the rules. If a club or athlete disagrees with an imposed sanction, they can start a procedure to have the decision legally reviewed. Notwithstanding the private nature of the internal disciplinary process, rules of national law take up a prominent place in the review of the sanction.

The review of a federation's decision to impose a disciplinary sanction is conducted either by a national court or in arbitration – a form of private dispute resolution. If the sanction is reviewed in arbitration, the arbitral award – the goal of which is to reach a final decision – can in turn also be challenged before a national court. In the review of disciplinary sanctions different legal frameworks – the private rules of sports federations and national law – thus cross each other's paths. The aim of this chapter is to map out the interrelation between these frameworks by analysing the two different paths that exist for the review of a disciplinary sanction imposed by a sports federation.

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1 A national sports federation is the governing body for its sport(s) in a certain country. An international federation governs the sport on the global level and exercises a monopoly position.

2 See for an overview Chapter 2.

This chapter is structured as follows. Section 3.2 focuses on the review performed by national courts. When athletes or clubs face a disciplinary sanction from their sports federation, this decision can be reviewed in court. In this review, the private regulations of the sports federation, or at least their concrete application, are tested against rules of national law. The scope of review that is applied in these cases is discussed per country. This is followed by an overview of the review of disciplinary sanctions in arbitration. The regulations of a sports federation can provide that the federation's decisions, including disciplinary sanctions, are to be reviewed by arbitration instead of by a national court. Although this review technically stays in the private sphere, arbitration proceedings are governed by national private law. The first part of Section 3.3 analyses the requirements set by national law in regard to this arbitration procedure. The second part of Section 3.3 discusses the option of a challenge of the arbitral award by a national court. The analysis includes the requirements and issues related to overturning arbitral awards in general, and awards by the Court of Arbitration for Sport (CAS) specifically. Finally, the different interrelations found between private rules of sports federations and national law will be summarised in Section 3.4.

3.2 THE SCOPE OF REVIEW OF DISCIPLINARY SANCTIONS BEFORE NATIONAL COURTS

In principle, whenever a sports federation imposes a sanction, this decision can be challenged before a national court. The primary jurisdiction of the courts can only be ousted when a valid arbitration agreement exists. This situation is discussed in Section 3.3.

When disciplinary sanctions are reviewed by national courts, the private regulations of sports federations, or at least their concrete application, are tested against rules of national law. This section provides an overview of the scope of this review. In other words, how and under what circumstances can the courts intervene in the decision-making of the federations? The goal is to explore how the interrelation between national law and the enforcement of sports federations' regulations compares between the different legal frameworks.

3.2.1 The Netherlands

In the Netherlands, most cases in which the review of a disciplinary sanction is at issue are brought before the judge in preliminary relief proceedings (*voorzieningenrechter*) of one of the district courts. Generally, these decisions

are not appealed.[3] The legal basis upon which the review is founded is ambivalent as two different approaches can be discerned. Nevertheless, both approaches require that the claimant has exhausted all available internal appeal measures that the sports federation provides.[4] An example of such a measure is found in the regulations of the Royal Dutch Football Association (*KNVB*), which after a sanction is imposed by the disciplinary commission provides for an internal appeal before the appeals commission.[5]

The first approach has its basis in legal entity law. Based on articles 2:14 and 2:15 of the BW a resolution (*besluit*) of an association's organ 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 imposed by article 2:8 BW.[6] The second approach, which seems to prevail in practice, is to regard the decisions of disciplinary bodies of associations as a binding opinion (*bindend advies*).[7] Under Dutch law, the binding opinion is a decision on an uncertainty or dispute taken by a third party.[8] This legal figure falls under the scope of the contract of settlement, which is governed by art. 7:900-910 BW. A binding opinion can be challenged solely on the ground that 'it would be unacceptable for a party to be bound to it, in connection with the content or the manner of its establishment in the given circumstances, according to standards of reasonableness and fairness'.[9] It should be noted that this formula is almost identical to that in art. 2:8 BW, which requires the legal entity and those involved in its organisation to act according to standards

3 R.J.J Eshuis, N.E. de Heer-de Lange & B.J. Diephuis (eds.), *Rechtspleging Civiel en Bestuur 2010,* 2011, p. 98, <http://www.cbs.nl> [accessed: 14 December 2014].

4 P.L. Dijk & T. J. van der Ploeg, *Van vereniging en stichting, coöperatie en onderlinge waarborgmaatschappij,* Deventer: Kluwer 2007, p. 150; H.J. Snijders, C.J.M. Klaassen & G.J. Meier, *Nederlands burgerlijk procesrecht*, Deventer: Kluwer 2011, no. 87.

5 *Reglement Tuchtrechtspraak Betaald Voetbal*, art. 13-17, <www.knvb.nl> [accessed: 14 December 2014].

6 Art. 2:14 BW only states that a resolution is null and void when it is contrary to the law or the articles of incorporation. However, in the parliamentary debate it has been argued that the norm of art. 3:40 BW – the general provision concerning juridical acts that are contrary to the law, public policy or good morals – also applies to resolutions of associations. See, C.J. van Zeben, *Parlementaire geschiedenis van het nieuw BW. Boek 2. Rechtspersonen*, 1962, p. 152.

7 Rb. Utrecht 14.041978, LJN: AC3512, *NJ* 1978, 496; Rb Arnhem 11.09.1985, LJN: AH0828, *KG* 1985, 296; Rb. Arnhem 17.05.1990, LJN: AH3134, *KG* 1990, 193; Rb. Utrecht 09.07.1996, LJN: AH5649 *KG* 1996, 259; Rb. Utrecht 26.07.2006, LJN: AY5200; Rb. Utrecht 21.03 2007, LJN: BA1595; Rb. Zutphen 21.07.2010, LJN: BN1808; Rb. Utrecht 18.05.2011, LJN: BQ6349; Rb. Zwolle 16.11.2011, LJN: BU4893, *RN* 2012, 19.

8 A.C. van Schaick, *Mr. C. Asser's handleiding tot de beoefening van het Nederlands burgerlijk recht, 7-VIII*, Bijzondere overeenkomsten*, Deveter: Kluwer 2012, no. 170.

9 Article 7:904 BW, which codified the case law rule from the Hoge Raad (Dutch Supreme Court) HR 29.01.1931, *NJ* 1931, 1317.

of reasonableness and fairness in all their relations.[10] Regardless of the approach taken,[11] the ability of the reviewing body is marginal as it is limited to the assessment of whether the deciding body could reasonably have come to the decision.[12]

3.2.2 England

According to English law, the jurisdiction of disciplinary bodies of sports associations is generally based on contract. Disciplinary sanctions are therefore to be controlled by the ordinary remedies for breach of contract.[13] The remedies available depend on the nature of the right invoked by the claimant and are generally open after internal remedies are exhausted.[14] Traditionally, in common law there is a primacy of damages. However, in most sports cases damages will not be a suitable solution as disciplinary sanctions often have an effect on the eligibility of an athlete or club to participate in competition. Therefore an injunction, a court order that requires a party to perform or refrain from performing a particular act, is often a more suitable remedy.

Despite the undisputed contractual basis of the relationship between athletes, clubs and sports federations,[15] there has been a long-standing debate about whether sports federations are subject to the public-law remedy of judicial review, under which the legality of the decision-making process of a body exercising a public function is reviewed, instead of the merits.[16] This

10 For an overview of the differences and their consequences in Dutch law, see R.H.C. van Kleef, 'Samenloop bij de rechterlijke toetsing van tuchtrechtelijke sancties in de sport' in *WPNR* 2013/6965 , pp. 161-67.

11 In case law regarding disciplinary sanctions in sports it is not unusual to see the appeal based on both grounds: Rb. Utrecht 21.03.2007, LJN: BA1595; Rb. Zutphen 21.07.2010, LJN: BN1808; Rb. Zwolle 16.11.2011, LJN: BU4893 *RN* 2012, 19.

12 HR 02.12.1983, *NJ* 1984, 583.

13 William Wade and C.F. Forsyth, *Administrative Law (10th edn.)*, Oxford University Press 2009, p. 538-39.

14 Adam Lewis and Jonathan Taylor, *Sport: law and practice*, Haywards Heath, West Sussex: Tottel 2008, p. 292-93.

15 See R.H.C. van Kleef, 'The legal status of disciplinary regulations in sport'in *The International Sports Law Journal* 2013, published online 18 December 2013, DOI 10.1007/s40318-013-0035-z, para 4.

16 Historically, the remedies of administrative law were reserved to authorities whose powers were granted for governmental purposes but over time have been extended to other bodies. However, despite the creation of a broader 'public function test' (in *R v Panel on Take-overs and Mergers, ex parte Datafin Plc* [1987] QB 815) the English courts have held consistently that challenges to actions of sports governing bodies should be brought in private-law proceedings and not by way of judicial review. (Landmark decision: *R v Jockey Club ex p Aga Kahn* [1993] 1 WLR 909. See also *R v Football Association of Wales ex p Flint Town United Football Club* [1991] COD 44; *R v Disciplinary Committee of the Jockey Club ex p Massingberd-Mundy* [1993] 2 All ER 207*; R v Jockey Club ex p RAM Racecourses Ltd* [1993] 2 All ER 225; *R v Football Association Ltd ex p Football League* [1993] 2 All ER 833. The contractual

debate has been settled in *Bradley v. Jockey Club*. Graham Bradley was a successful steeplechase jockey who was charged with breaching the 'Racing Rules' for allegedly passing racing information to a gambler. The Jockey Club Disciplinary Committee imposed multiple sanctions, including disqualification for a period of eight years. The court developed a so-called private-law supervisory jurisdiction.

> "The function of the court is not to take the primary decision but to ensure that the primary decision-maker has operated within lawful limits. It is a review function, very similar to that of the court on judicial review. Indeed, given the difficulties that sometimes arise in drawing the precise boundary between the two, I would consider it surprising and unsatisfactory if a private law claim in relation to the decision of a domestic body required the court to adopt a materially different approach from a judicial review claim in relation to the decision of a public body. In each case the essential concern should be with the lawfulness of the decision taken: whether the procedure was fair, whether there was any error of law, whether any exercise of judgment or discretion fell within the limits open to the decision-maker, and so forth."[17]

Nevertheless, as in the judicial review procedure the court's assessment is largely restricted to procedural elements.

> "The court's role, in the exercise of its supervisory jurisdiction, is to determine whether the decision reached falls within the limits of the decision-maker's discretionary area of judgment. If it does, the penalty is lawful; if it does not, the penalty is unlawful. It is not the role of the court to stand in the shoes of the primary decision-maker, strike the balance for itself and determine on that basis what it considers the right penalty should be."[18]

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relationship between a sports federation and its members stands in the way of this remedy. Existing criticism on this case law is mainly based on the fact that the virtually monopolistic powers of national sports federations result in the situation that a person who wishes to practise a certain sport cannot avoid submitting to its jurisdiction. (See Michael J. Beloff and Tim Kerr, 'Why Aga Kahn was wrong,' *Judicial Review* (1) 1996, pp. 30-33; and David Pannick QC, 'Judicial Review of Sports Bodies', *Judicial Review* (2) 1997, pp. 150-153, p. 153.) According to Gardiner *et al.*, 'the monopoly position held by many bodies is acknowledged as being reason enough to supervise their activities' (Simon Gardiner *et al.*, *Sports Law*, Routledge 2012, p. 134). Accordingly, the courts have intervened on multiple occasions to ensure disciplinary bodies apply the minimal standards of natural justice. (*Davis v Carew-Pole* [1956] WLR 883; *Lee v Showmen's Guild of Great Britain* [1952] 2 QB 329; *Modahl v British Athletic Federation Ltd* [2002] 1 WLR 1192. See also P. McCutcheon, 'Sports Discipline, Natural Justice and Strict Liability', *Anglo-American Law Review* 1999/28, pp. 37-72, p. 39; Adam Lewis and Jonathan Taylor, *Sport: law and practice*, Haywards Heath, West Sussex: Tottel 2008, p. 171.)

17 *Bradley v Jockey Club* [2004] EWHC Civ 2164 (QB), per Richards J at para. 37.

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

Since *Bradley* it can be argued that sports governing bodies owe broadly the same obligations as a matter of private law as they would if their decisions were susceptible to the public-law remedy of judicial review.[19] The court only assesses the legal aspects of a decision and not the content of policy choices. In other words: a court cannot interfere when an association's decision is 'reasonably arrived at'.[20] This approach stems from the idea that sports associations, similarly to public bodies, have great autonomy in decision-making as long as they observe the law.[21]

3.2.3 Germany

In Germany, there is no discussion that a disciplinary sanction imposed by a sports federation is anything other than an association's decision. The review of disciplinary sanctions, however, has been a constant theme of debate in German legal doctrine since the first review under the new *BGB* took place in 1902.[22] Historically, the review of associations' decisions has been restricted to a limited test in recognition of the autonomy of an association.[23] This autonomy notwithstanding, associations cannot escape external control of their decisions as the exclusion of such a review is ineffective.[24] As to the types of decisions that are susceptible to review somewhat of a distinction can be made.

First, it is voiced that factual decisions taken by referees on the field generally should not be reviewed.[25] In the words of Pfister 'courts ought to apply

19 Compare J. Anderson, 'An Accident of History: Why the Decisions of Sports Governing Bodies are not Amenable to Judicial Review', *Common Law World Review* 2006/35, pp. 173-196, p. 189. Lewis and Taylor have even suggested that the distinction between the private-law and public-law process has now become irrelevant. Adam Lewis and Jonathan Taylor, *Sport: law and practice*, Haywards Heath, West Sussex: Tottel 2008, p. 164.

20 Per Lord Denning in *Lee v Showmen's Guild of Great Britain* [1952] 2 QB 329, 333.

21 Compare *Dawkins v Antrobus* [1881] L.R. 17 Ch. D. 615; *Lee v Showmen's Guild of Great Britain* [1952] 2 QB 329.

22 Walther Hadding and Frank van Look, 'Zur Ausschließung aus Vereinen des bürgerlichen Rechts', *Zeitschrift für Unternehmens und Gesellschaftsrecht*, 2/1988, pp. 270-280, p. 271. Compare K. Vieweg, *The Appeal of Sports Law*, 2010, <http://www.irut.jura.uni-erlangen.de/Forschung/Veroeffentlichungen/OnlineVersionFaszinationSportrecht/FaszinationSportrechtEnglisch.pdf> [accessed: 14 December 2014], who calls the extent of judicial review a classic problem.

23 BGH 27.02.1954 – II ZR 17/53, BGHZ 13, 5; BGH 20.04.1967 – II ZR 142/65, BGHZ 47, 381.

24 BGH 26.02.1959 – II ZR 137/57, BGHZ 29, 352, 354; BGH 28.11.1994 – II ZR 11/94, BGHZ 128, 93, 109.

25 Steffen Krieger, *Vereinsstrafen im deutschen, englischen, französischen und schweizerischen Recht. Inbesondere im Hinblick auf die Sanktionsbefugnisse von Sportverbänden*, Berlin: Duncker & Humblot GmbH 2003, p. 133-138; B. Pfister, 'Sportregeln vor staatlichen Gerichten', *Zeitschrift für Sport und Recht* 1998, pp. 221-225; J. Räker, *Grundrechtliche Beziehungen juristischer Personen im Berufssport* (diss. Köln), Berlin: Duncker & Humblot 2008, pp. 121-123.

legal rules only'.[26] However, disciplinary sanctions are always susceptible to review. A review is generally only permitted after the internal appeal remedies have been exhausted. The *BGH* has given two reasons for this approach; pending the final decision of the competent bodies of the association, it must be avoided that (1) the courts are unnecessarily called upon and (2) prematurely intervene in the autonomy of the association.[27] Over time, the scope of the review has been developed in case law and now extends to whether the measure imposed has a legal basis in the articles of association, whether the prescribed disciplinary procedure has been complied with, whether the respective regulations are consistent with state law and good morals and whether the sanction imposed is not grossly unreasonable or arbitrary.[28] Additionally, in order to prevent associations from basing their decisions on underlying facts that, according to the law, could not have been objectively determined, the establishment of facts is also subjected to review.[29]

Another important development with regard to sports is the further extension of the scope of review of decisions taken by associations holding a monopoly position.[30] Despite the view that the disciplinary sanction is based upon the free subordination of the members, the *BGH* has acknowledged that there are numerous situations in which this freedom is actually a fiction, including in the case of regional and national sports federations.[31] In order to tackle this issue the *BGH* ruled that, in cases where an association holds a preponderance of power in a specific economic or social field and the member is dependent on the membership, decisions and/or sanctions do not only have to be in accordance with good faith (§ 242 BGB) but also have to be justified by objective reasons.[32]

26 B. Pfister, 'Sportregeln vor staatlichen Gerichten', *SpuRt* 1998, pp. 221-225, p. 222.

27 BGH 27.02.1954 – II ZR 17/53, 13 BGHZ 13, 5, 16; BGH 06.03.1967 – II ZR 231/64, BGHZ 47, 172, 174; OLG Köln 23.09.2005 – 19 U 19/05, via: <http://www.justiz.nrw.de>.

28 BGH 30.05.1983 – II ZR 138/82, BGZH 87, 337, 343; BGH 27.02.1954 – II ZR 17/53, BGHZ 13, 5; BGH 04.10.1956 – I ZR 121/55, BGHZ 21, 370; BGH 26.02.1959 – II ZR 137/57, 29 BGHZ 29, 352; BGH 06.03.1967 – II ZR 231/64, BGHZ 47, 172; BGH 20.04.1967 – II ZR 142/65, BGHZ 47, 381.

29 BGH 30.05.1983 – II ZR 138/82, BGZH 87, 337.

30 Specifically named in Staudinger Kommentar as one of the issues in association law: G. Weick, *J. von Staudingers Kommentar zum BGB. Buch 1. Allgemeiner Teil, Neubearbeitung*, 2005, Vorbem zu § 21ff. and § 21, Rn. 5.

31 BGH 30.05.1983 – II ZR 138/82, BGZH 87, 337, 344; BGH 23.11.1998 – II ZR 54/98, BGHZ 140, 74.

32 BGH 19.10.1987 – II ZR 43/87, BGHZ 102, 265; BGH 24.10.1988 – II ZR 311/87, BGHZ 105, 306; see also OLG Frankfurt 18.05.2000 – 13 W 29/00; Lg Freiburg 15.05.2012 – 14 O 46/12.

3.2.4 Switzerland

In Switzerland the main remedy against a decision or sanction taken by a sports organisation is a complaint based on article 75 of the Swiss Civil Code.[33] According to this provision, decisions that breach the law or the articles of association can be challenged by each member who did not consent within a month. This right of action is by law and replaces certain legal effects if the appeal is successful.[34] However, the reviewing body can only quash the decision and not amend it. As in Germany and France, decisions made on the field of play are generally beyond review.[35] In addition, as in all other jurisdictions, this action is only open after internal appeal remedies have been exhausted.[36]

The purpose of article 75 CC is to protect members and otherwise adhered athletes and clubs[37] from abuse of the autonomy that is granted to associations.[38] In this light, the scope of the review is limited to the test whether the decision breaches the law or the articles of association. Hereto, the court first reviews whether the sanction has a legal basis in the articles of association and whether the prescribed disciplinary procedure has been complied with.[39] Regarding the merits of the decision, doctrinal opinion states that the court can only review whether the sanction is *rechtsmisbrauchlich*, i.e. whether there is a manifest abuse of a right.[40] There is a manifest abuse if an association acts contrary to general principles of law, such as equal treatment or proportionality.

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33 This provision is a *lex specialis* of the general provision art. 20 CO, according to which a contract is null and void if against the law or immoral. Legal action can be based on art. 20 CO independently of art. 75 CC. See: Hans Michael Riemer, *Die Vereine, Berner Kommentar, Band I/3, 2er Teilband*, Bern: Verlag Stämpfli & Cie AG 1990, art. 75, Rn. 113.

34 Henk Fenners, *Der Ausschluss der staatlichen Gerichtsbarkeit im organisierten Sport* (diss. Freiburg), Schulthess Juristische Medien 2006, p. 65; Denis Oswald, *Associations, Fondations, et autres formes de personnes morales au service du sport*, Bern: Peter Lang 2010, p. 113ff.

35 BGE/ATF 118 II 12. See also Denis Oswald, *Associations, Fondations, et autres formes de personnes morales au service du sport*, Bern: Peter Lang 2010, p. 151-154.

36 BGE/ATF 118 II 12, cons. 3.

37 In the *Gundel* case, the Swiss Federal Supreme Court held that this remedy is also open to so-called indirect members, i.e. an athlete or club who is a member of the national, but not the international federation. BGE/ATF 119 II 271 (Gundel), cons. 3b. See also Henk Fenners, *Der Ausschluss der staatlichen Gerichtsbarkeit im organisierten Sport* (diss. Freiburg), Schulthess Juristische Medien 2006, pp. 71-73. See for indirect membership, Chapter 2.5 above.

38 Compare Denis Oswald, *Associations, Fondations, et autres formes de personnes morales au service du sport*, Bern: Peter Lang 2010, p. 114.

39 Hans Michael Riemer, *Die Vereine, Berner Kommentar, Band I/3, 2er Teilband*, Bern: Verlag Stämpfli & Cie AG 1990, art. 75, Rn. 96ff.

40 Hans Michael Riemer, *Die Vereine, Berner Kommentar, Band I/3, 2er Teilband*, Bern: Verlag Stämpfli & Cie AG 1990, art. 75, Rn. 25. See also Christoph Fuchs, *Rechtsfragen der Vereinsstrafe. Unter besondere Berücksichtigung der Verhältnisse in Sportverbänden* (diss. Zürich), Zürich: Schulthess Polygraphischer Verlag AG 1999, p. 144 and authors cited there.

Independently from the remedy of article 75 CC, a sanction can be challenged if it breaches certain other legal provisions, most notably article 27 and 28 CC. On the basis of these provisions, a member can take legal action if the sanction wrongfully infringes his personality rights. In general, a disciplinary sanction that suspends an athlete, for breaching doping regulations for example, infringes his personality rights. 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.[41] However, a violation of personality rights is only sanctioned if the violation is unlawful. A violation is deemed legal if the breach is justified by the consent of the victim, a predominant private or public interest or by the law. In the sports context, the fight against doping has been considered to be such a predominant interest that justifies the violation of the personality rights of an athlete through a sanction.[42]

3.2.5 France

Unlike in the other countries researched, in France a disciplinary sanction imposed by a national federation is qualified as an administrative act and can therefore only be reviewed by the administrative courts. Traditionally, this review has been quite restrained; the courts only review whether the associations' rules are not unreasonably applied.[43] However, before the court proceeds to the review of the sanction, a number of formal requirements is applied in a rigorous manner. First, the person submitting the request for review has to have a sufficient interest. Naturally, the person sanctioned will meet this requirement. However, in some cases a disciplinary sanction imposed can seriously affect third parties such as an athlete's club or the league. Nevertheless, the *Conseil d'État* has limited the circle of appellants to the person subjected to the sanction.[44] In addition, also in France the courts will not review referees' field of play decisions.[45] Like all administrative acts, the decision to impose a disciplinary sanction must also be taken by the competent body and meet the applicable procedural and formal requirements.[46] Finally, French

41 A. Büchler & M. Frei, *ZGB Kommentar,* Basel: Schulthess Verlag 2011, art. 28, no. 3ff.
42 BGE/ATF 134 III 193, cons. 4.6.3.2.2.
43 J.-P. Karaquillo, 'Le pouvoir disciplinaire dans l'association sportive', *Recueil Dalloz* 1980 pp. 115-124, p. 122.
44 CE 03.04.1987, n°80239, via: <www.conseildetat.fr>. See also Gérald Simon, *Puissance sportive et ordre juridique étatique* (diss. Bourgogne), L.G.D.J. 1990, p 284.
45 CE 13.06.1984, n°44648 (Mantes-la-Ville).
46 CE 19.12.1980, n°11320, (Hechter). See also Gérald Simon, *Puissance sportive et ordre juridique étatique* (diss. Bourgogne), L.G.D.J. 1990, pp. 287-289, Steffen Krieger, *Vereinsstrafen im deut-*

administrative courts will only proceed to a review after the internal appeal remedies have been exhausted.[47] Part of this internal appeal remedy is conciliation by the *Comité national olympique et sportif français* (CNOSF).[48]

The merits of the decision are reviewed in a somewhat stricter manner than in the other jurisdictions. Under French law, the scope of review does not only include the facts underlying the sanction (*contrôle de l'appréciation des faits*), but also the adequacy of the measure taken.[49] In cases where a sanction is based on a so-called *faute sportive* the court only verifies the facts and whether the sanction complies with the law.[50] However, in cases where the sanction is based on actions that are deemed contrary to a sport's ethics or the interest of the association, the court's review extends further as it has to interpret the facts for itself. With regard to the adequacy of the measures taken, the court reviews whether these are not manifestly disproportionate or excessive in relation to the goals pursued.[51] For example, in a case where a young judoka had been sanctioned with a life-time ban to join a judo club after sexually assaulting two other minors, the *Conseil d'État* held that considering the age of the athlete at the time of his crime and the severity of the penalty, the sanction was disproportionate.[52] In addition, as administrative acts, disciplinary sanctions are reviewed against the general norms and principles of administrative law, including *abus de droit* and *détournement de pouvoir*.

3.2.6 Summarising remarks

The scope of review of disciplinary sanctions in sports is similarly limited in all five countries. Sports organisations – whether governed by private law or public law – are permitted a large margin of appreciation in the application of their regulations. The specific wordings differ across the jurisdictions, but

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schen, englischen, französischen und schweizerischen Recht. Inbesondere im Hinblick auf die Sanktionsbefugnisse von Sportverbänden, Berlin: Duncker & Humblot GmbH 2003, pp. 124-127.

47 Landmark decision, CE 13.06.1984, n°42454 (Association Hand-ball club de Cysoing), *Recueil Dalloz* I.R. 1985, 142, note Morange. See also, CE 25.06.2001, n°234363 (*Toulouse Football Club*); CE 28.11.2007, n°294916, *Les Cahiers de Droit du Sport* 2008/11, pp. 154-166, notes F Colin; J-M Duval.

48 Art. R.141-5 *Code du Sport* (France): 'La saisine du comité à fin de conciliation constitue un préalable obligatoire à tout recours contentieux, lorsque le conflit résulte d'une décision, susceptible ou non de recours interne, prise par une fédération dans l'exercice de prérogatives de puissance publique ou en application de ses statuts.'

49 Gérald Simon, *Puissance sportive et ordre juridique étatique* (diss. Bourgogne), L.G.D.J. 1990, p. 291.

50 CE 16.01.1985, n°52654, via: <www.conseildetat.fr>.

51 Gérald Simon, *Puissance sportive et ordre juridique étatique* (diss. Bourgogne), L.G.D.J. 1990, p. 296.

52 CE 28.11.2007, n°294916, *Les Cahiers de Droit du Sport* 2008/11, pp. 154-66, notes: F Colin and J-M Duval.

decisions that are reasonably arrived at and not contrary to the law, which includes good morals, good faith etc., seem to be virtually untouchable. Even in Germany, where monopoly organisations such as national sports federations are controlled in a stricter manner, the test remains marginal. Only in France, perhaps, does the scope of the review extend a little further as it also tests against general principles of administrative law and interpretation of the facts. However, whether these seemingly stricter tests would lead to different results in concrete cases than in the other countries is very difficult to foretell.[53]

When a sanction is reviewed by a national court, the interrelation between national law and the private enforcement of the regulations of sports organisations has proved to be subtle. Nevertheless, the rules of national law form a safeguard for athletes and clubs against arbitrary and unlawful application of sports federations' regulations and ensure that fundamental principles of law are applied.

3.3 ARBITRATION OF DISPUTES RELATING TO DISCIPLINARY SANCTIONS IN SPORTS

Although review before a national court is a logical default option for an athlete or club to challenge a disciplinary sanction, practice shows it is often necessary to follow another route. Many national sport federations and virtually all international sport federations provide that disputes are to be settled by arbitration. The first part of this section therefore analyses the requirements for arbitration in sports-related matters. In 'international' cases – where the sanction is imposed by the international sports federation – it is generally the CAS that reviews the sanction. The goal of arbitration is to render a final decision. However, in order to supervise this form of private dispute resolution, national laws provide that an arbitral award can be challenged before a national court. The second part of this section discusses the circumstances under which arbitral awards – CAS awards in particular – can be overturned by a national court.

3.3.1 Requirements for arbitration in sports-related matters

Arbitration is a complex legal concept, which is exemplified by the lack of a single definition. There is, however, consensus more or less about what arbitration constitutes; 'a process by which parties consensually submit a dispute to a non-governmental decision-maker, selected by or for the parties,

53 Krieger made an attempt at such an analysis on the basis of the Modahl case. Steffen Krieger, *Vereinsstrafen im deutschen, englischen, französischen und schweizerischen Recht. Inbesondere im Hinblick auf die Sanktionsbefugnisse von Sportverbänden*, Berlin: Duncker & Humblot GmbH 2003, pp. 173-175.

to render a binding decision resolving a dispute in accordance with neutral, adjudicatory procedures affording each party an opportunity to present its case'.[54] The following will focus on the various requirements that national law poses for the review of sports disciplinary sanctions in arbitration.[55]

3.3.1.1 The arbitration law

An arbitration procedure is governed by national private law in the form of the applicable arbitration law, which is not to be confused with the substantive law that governs the dispute. Although virtually every state has its own arbitration law, they generally all govern the same issues, including the validity of the arbitration agreement, the arbitration procedure and the award.[56]

The question which arbitration law applies usually does not arise when the dispute is between parties in the same jurisdiction. For example, an arbitration between a German football club and the German football association DFB will be governed by the German arbitration law, which is laid down in Book 10 of the German Code of Civil Procedure (ZPO). With regard to international arbitration procedures, the applicable arbitration law is virtually always the law of the seat of the arbitration.[57] The seat is the geographical location to which the arbitration is tied and is often specified in the arbitration clause, e.g. 'this arbitration will be governed by Dutch law'.

When a sanction is imposed by an international sports federation the regulations of those organisations generally provide that the decision can be reviewed by the CAS. The CAS is an independent institution that resolves legal disputes in the field of sport through arbitration or mediation. It was originally conceived to deal with disputes arising during the Olympics and was established as part of the IOC in 1984. After the impartiality and independence of the CAS were disputed in the famous *Gundel* case, the CAS was reformed to become an independent institution.[58] Its jurisdiction is limited to rule solely

54 G.B. Born, *International Arbitration: Law and Practice*, Kluwer Law International 2012, p. 3.

55 See for in-depth studies of arbitration of sports-related disputes in general: F. Oschütz, *Sportschiedsgerichtsbarkeit. Die Schiedsverfahren des Tribunal Arbitral du Sport vor dem Hintergrund des schweizerischen un deutschen Schiedsverfahrensrecht* (diss. Erlangen-Nürnberg), Berlin: Duncker & Humblot 2005; Antonio Rigozzi, *L'arbitrage international en matière de sport* (diss. Genève), Basel: Helbing & Lichtenhahn 2005.

56 G.B. Born, *International Commercial Arbitration: Commentary and Materials (2nd edn.)*, Kluwer Law International 2001, pp. 26-28; Antonio Rigozzi, *L'arbitrage international en matière de sport* (diss. Genève), Basel: Helbing & Lichtenhahn 2005, p. 193.

57 G. Kaufmann-Kohler and A. Rigozzi, *Arbitrage international. Droit et pratique à la lumière de la LDIP*, Bern: Editions Weblaw 2010, p. 45. G.B. Born, *International Arbitration: Law and Practice*, Kluwer Law International 2012, p. 112. See also F. Russell, J. Gill & D. St. John Sutton, *Russell on Arbitration (22nd edn.)*, London: Sweet & Maxwell Limited 2003, no. 2-099.

58 BGE/ATF 119 II 271 (Gundel). The Swiss Federal Supreme Court recognised the CAS as a true court of arbitration, noting that the CAS was not a body of the Federation that had imposed the sanction at issue and that it did not receive instructions from this federation.

on disputes connected with sport, which can be of a disciplinary or commercial nature. In disciplinary cases it acts as an appeal body whereas in commercial disputes it acts a court of sole instance.[59] Without exceptions, the seat of the CAS and each arbitration panel is Lausanne, Switzerland.[60] This results in the applicability of the Swiss arbitration law, art. 176-194 of the Swiss Private International Law Act (PILA), to all cases that are brought before the CAS.

3.3.1.2 The arbitration agreement

The legal foundation for arbitration is formed by a contract: the arbitration agreement. Such an agreement expresses the will of the parties to arbitrate their current or future disputes while at the same time renounces the right to bring the case before a state court. This latter function is very important as the constitutional right of effective access to the courts has to be relinquished voluntarily.[61] Arbitration agreements are often formed by a separate provision or clause in a contract. In organised sports the arbitration agreement ordinarily takes on the form of an arbitration clause in the regulations of the sports organisation. Many national and almost all international sports federations impose such arbitration clauses upon their adhered clubs and athletes who are bound through their membership or a licence. The validity of such a clause must be reviewed under the applicable arbitration law. Naturally, this test is influenced by the prevailing views on general concepts of law in each country.

Generally, the validity of arbitration clauses in the regulations of sports federations is accepted in four of the five jurisdictions researched.[62] This is in line with European case law and the dominating view in literature, according to which adherence to an association (or other legal entity) implies the acceptance of an arbitration clause incorporated into the regulations of said entity.[63] In France, however, a disciplinary sanction imposed by a national

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However, the court noted that due to the strong links between the CAS and the IOC, the independence of the CAS could be questioned in cases were the IOC would be one of the parties.

59 Art. R27 CAS Code.

60 Art. R28 CAS Code.

61 Art. 6 ECHR; Art. 17 Grondwet (Netherlands Constitution). See also H.J. Snijders, *Groene Serie Burgerlijke Rechtsvordering. Boek IV,* Kluwer 2011, aant. 1.

62 England: *Stretford v Football Association Ltd*, [2007] EWCA Civ 238. Germany: § 1066 ZPO; G. Weick, *J. von Staudingers Kommentar zum BGB. Buch 1. Allgemeiner Teil, Neubearbeitung*, 2005, § 25, Rn. 24. Lg Dortmund 16.10.2008 – 13 O 113/08 Kart., via: <http://www.justiz.nrw.de>. Netherlands: Dutch Code of Civil Procedure (Rv), art. 1020 (5); H.J. Snijders, *Groene Serie Burgerlijke Rechtsvordering. Boek IV,* Kluwer 2011, art. 1020, aant. 8-9. Switzerland: Antonio Rigozzi, *L'arbitrage international en matière de sport* (diss. Genève), Basel: Helbing & Lichtenhahn 2005, p. 414.

63 ECJ 10.03.1992, C-214/89, (Powell Duffryn). See also G. Kaufmann-Kohler and A. Rigozzi, *Arbitrage international. Droit et pratique à la lumière de la LDIP*, Bern: Editions Weblaw 2010, p. 117, Jochen Kotzenberg, *Die Bindung des Sportlers an private Dopingregeln und private Schiedsgerichte* (diss. Marburg), Baden-Baden: Nomos 2007, pp. 128-129.

sports federation is qualified as an administrative act, which cannot be reviewed in an arbitration procedure.

However, the validity of these agreements between sports organisations and their adhered athletes and clubs can potentially be affected by two issues. The first issue is caused by the situation that in many cases clubs and/or athletes are not directly subordinated to the regulations of their international federation.[64] As a result, the arbitration clause is often part of the regulations of the international federation that the club or national federation only refers to. This raises the question whether the written form requirement of the arbitration agreement – which applies in all countries – has been met. In England, the law expressly provides that a reference to a written document containing an arbitration clause constitutes an arbitration agreement.[65] Current case law seems to suggest, however, that a general reference without expressly mentioning the arbitration clause is not sufficient, unless special circumstances exist. Such circumstances can, however, be formed through industrial use of standard documents.[66] It can be assumed that arbitration clauses in sports regulations constitute such industrial use.[67] Similarly, German law, too, does not always require a specific reference; for instance when parties are conscious of the arbitration clause in the referenced document.[68] In the Netherlands, this issue has yet to be addressed[69] while in Switzerland consistent case law of the Federal Supreme Court holds that a global reference to an arbitration clause contained in the regulations of a sports federation suffices to create a valid arbitration agreement.[70] Nevertheless, many international sports federations seated in Switzerland now make use of competition entry forms and licences that include an arbitration clause. This practice further safeguards

64 See Chapter 2.5.

65 S. 6 (2) Arbitration Act 1996.

66 See F. Russell, J. Gill & D. St. John Sutton, *Russell on Arbitration (22nd edn.)*, London: Sweet & Maxwell Limited 2003, no. 2/059-2/061 and the cases cited.

67 Compare for instance Sir A Clarke MR who stated: 'An arbitration clause has become standard in the rules of sporting organisations like The FA.' *Stretford v Football Association Ltd*, [2007] EWCA Civ 238, no. 49.

68 In case the referenced document is considered to contain general terms (AGB), a separate document is nevertheless needed. See BGH 03.12.1992 – III ZR 30/91, *NJW* 1993, 1798; F. Oschütz, *Sportschiedsgerichtsbarkeit. Die Schiedsverfahren des Tribunal Arbitral du Sport vor dem Hintergrund des schweizerischen un deutschen Schiedsverfahrensrecht* (diss. Erlangen-Nürnberg), Berlin: Duncker & Humblot 2005, pp. 194-195.

69 However, with regard to an arbitration clause in a collective labour agreement (CAO), the Dutch Supreme Court ruled that an untied employee was bound to this clause as it was agreed that the CAO rules were applicable to his individual contract. No express consent was necessary. HR 17.01.2003, *NJ* 2004, 280 (ABN AMRO/Teisman).

70 Swiss Federal Supreme Court 31.10.1996, 4C.44/1996 (Nagel v FEI); Swiss Federal Supreme Court 07.02.2001, 4P.230/2000 (Roberts v FIBA). However, a reference to a document containing an arbitration clause in a competition entry form does not extend to disputes outside this specific competition: Swiss Federal Supreme Court 06.11.2009, 4A_358/2009 (A v WADA).

the risk of a foreign court declaring itself competent to settle the dispute because it considers the arbitration agreement void for not meeting the written form requirement.[71] This holds especially for courts outside Europe as, in light of the legal systems discussed above, it seems unlikely that a European court would declare itself competent on the basis of this ground.

The second issue, which has been debated extensively in literature, is whether arbitration agreements incorporated into regulations or competition entry forms still qualify as consensual.[72] Or in other words, whether so-called 'forced' arbitration (or in German: S*chiedszwang*) is not contrary to the law. As mentioned above, the concept of arbitration traditionally involves an agreement between parties to have disputes decided by a third person. However, modern arbitration has evolved beyond this notion and there are now many forms of arbitration where there is prominent inequality between the parties, for instance in labour and consumer matters. With regard to clubs and athletes, they are generally bound through a subordinate – membership or other – relationship and not by contract.[73] Nevertheless, with regard to the arbitration agreement between an athlete or club and their governing bodies, it can be argued that the consent stems from the *pacte social* with the sports organisation that is formed when one chooses to become affiliated.[74]

In the Netherlands, no sport-specific case law on this issue exists. Nevertheless, Meijer has suggested that the act of accession to an association implies the acceptance of the arbitration clause.[75] In English case law it was considered that '[such]clauses have to be agreed to by anyone who wishes to have a players' licence, but it does not follow that the arbitration agreement contained in them was required by law or compulsory'.[76] The same view can be found in Swiss literature, where it is maintained that the practice of incorporated arbitration clauses is in principle not an obstacle to the voluntary nature of arbitration. According to both Baddeley and Rigozzi, 'l'objet de la relation sociale étant, en règle général, un droit à la disposition des parties, il s'ensuit qu'il peut être soumis à l'arbitrage'.[77] According to German case law, an arbitration agreement laid down in an organisation's regulations is

71 Antonio Rigozzi, *L'arbitrage international en matière de sport* (diss. Genève), Basel: Helbing & Lichtenhahn 2005, p. 420.

72 See for an overview on this debate, Antonio Rigozzi, *L'arbitrage international en matière de sport* (diss. Genève), Basel: Helbing & Lichtenhahn 2005, p. 422ff and references cited.

73 Only in England is the relationship between sports organisations and their members qualified as contractual. However, it has been suggested that this contract is in reality a fiction, as there is no choice but to enter into it (see further: Chapter 2.4. above. In addition, there are situations where an athlete or club is bound by a (competition) licence contract.

74 Compare Antonio Rigozzi, *L'arbitrage international en matière de sport* (diss. Genève), Basel: Helbing & Lichtenhahn 2005, p. 426.

75 G.J. Meijer, *Overeenkomst tot arbitrage* (diss. Rotterdam), Deventer: Kluwer 2011, p. 503.

76 *Stretford v Football Association Ltd*, [2007] EWCA Civ 238, no. 49.

77 Antonio Rigozzi, *L'arbitrage international en matière de sport* (diss. Genève), Basel: Helbing & Lichtenhahn 2005, p. 367 (citing M. Baddeley).

considered binding as all members are subordinate to them.[78] Moreover, the acceptance of this practice in German literature is founded on the reasoning that it does not obstruct the members' right to end their membership.[79] Furthermore, in the commentary on the bill that modernised the arbitration chapter in the ZPO, it is argued that inequality of the parties is not by itself reason enough to deem an arbitration agreement void.[80]

However, in two recent decisions of the courts in Munich on a claim for damages resulting from a doping ban, the arbitration agreements between German speed skater Claudia Pechstein and the national and international skating federation were found invalid due to the structural imbalance (*strukturelles Ungleichgewicht*) between the athlete and the federations which formed a monopoly. It is considered that without signing the agreements the athlete would have been unable to pursue her career and the agreements were thus not entered into voluntarily.[81] However, the Court of Appeal also considers that an arbitration clause imposed by a sports federation does not necessarily constitute a violation of competition law as there are good reasons – for example the uniform application of anti-doping rules – to have one single instance for the resolution of disputes between athletes and sports federations.[82] In the end, the court deems the institutional structure of CAS insufficient to guarantee impartiality given CAS's rules regarding the selection and appointment of arbitrators. Given the institutional changes CAS has undergone in the meantime, it remains to be seen whether this decision will have any significant impact upon sports arbitration.[83]

3.3.1.3 Arbitrability

There are disputes that involve such sensitive public policy issues that it is felt that they should only be dealt with by state courts.[84] A dispute can be deemed 'non-arbitrable' because of its perceived public importance or a felt need for formal judicial procedures and protections. For example, various

78 Landmark decision BGH 29.03.1996 – II ZR 124/95, BGHZ 132, 278, pp. 284-285 (cons. 5). See also OLG Düsseldorf 14.11.2003 – I-16 U 95/98.

79 Horst Hilpert, *Das Fußballstrafrecht des Deutschen Fußball-Bundes (DFB)*, Berlin: De Gruyter 2009, p. 253 (citing Haas in E. Reschke, U. Haas & T. Haug (eds), *Handbuch des Sportrechts* B II, Rn. 186).

80 German parliamentary documentation, BT Drucksache 13/5274, p. 34.

81 Lg München 26.02.2014 – 37 O 28331/12; OLG München 15.01.2015 – U 1110/14 Kart., via: <dejure.org>, cons. 71ff.

82 OLG München 15.01.2015 – U 1110/14 Kart., via: <dejure.org>, cons. 88ff.

83 For example, the system of the closed list of arbitrators, one of the main concerns of the court, has been abolished.

84 L.A. Mistelis, 'Part I Fundamental Observations and Applicable Law, Chapter 1 – Is Arbitrability a National or an International Law Issue?', in: L.A. Mistelis & S.L. Brekoulakis (eds.), *Arbitrability: International and Comparative Perspectives*, Kluwer Law International 2009, pp. 1-18, p. 3.

countries refuse to allow arbitration of disputes concerning employment, intellectual property, real estate or family law.[85]

Like the assessment of the validity of the arbitration agreement, the question whether disciplinary sanctions can be the subject of an arbitration procedure is answered according to the applicable arbitration law. The provisions in the arbitration laws of the four countries provide no clear answer, however. In Germany, the Netherlands and Switzerland, the respective provisions are formulated in very general terms.[86] The English Arbitration Act lacks a provision on this subject altogether and the English courts approach issues of arbitrability case by case, considering whether 'the matters in dispute engage third party rights or represent an attempt to delegate to the arbitrators what is a matter of public interest which cannot be determined within the limitations of a private contractual process'.[87] However, there are no disputes that will automatically fall outside this scope.

In literature, the arbitrability of the review of disciplinary sanctions has mainly been debated in Switzerland.[88] Opponents argue that these disputes are in principal contrary to public policy as a result of the monopoly position of sports organisations which unilaterally enforce their rules.[89] Nevertheless, case law, legal literature and practice show that the review of disciplinary sanctions imposed by sports federations upon their members or otherwise affiliated clubs or athletes by means of arbitration is generally accepted in Switzerland, as well as in England and Germany.[90] In the Netherlands, it remains unclear whether disciplinary sanctions of sports organisations can be reviewed by arbitration since the Dutch Supreme Court ruled that a claim

85 G.B. Born, *International Commercial Arbitration: Commentary and Materials (2nd edn.)*, Kluwer Law International 2001, p. 244.

86 England: s. 1 (b) Arbitration Act 1996; Germany: § 1030 ZPO. Netherlands: art. 1020 Rv; Switzerland: art. 354 CPC (for national arbitrations) and art. 177 Swiss PILA (for international arbitrations).

87 *Fulham Football Club Ltd. v. Richards* [2011] EWCA Civ 855 no. 40.

88 See for an extensive overview of the debate, Antonio Rigozzi, *L'arbitrage international en matière de sport* (diss. Genève), Basel: Helbing & Lichtenhahn 2005, p. 367ff.

89 P. Meier & C. Aguet, 'L'arbitrabilité du recours contre la suspension prononcée par une fédération sportive international', *Journal des tribunaux* 2002 I, pp. 55-84.

90 England: *Stretford v Football Association Ltd* [2007] EWCA Civ 238, cons. 49-54. Germany: Jochen Kotzenberg, *Die Bindung des Sportlers an private Dopingregeln und private Schiedsgerichte* (diss. Marburg), Baden-Baden: Nomos 2007, pp. 114-122; F. Oschütz, *Sportschiedsgerichtsbarkeit. Die Schiedsverfahren des Tribunal Arbitral du Sport vor dem Hintergrund des schweizerischen un deutschen Schiedsverfahrensrecht* (diss. Erlangen-Nürnberg), Berlin: Duncker & Humblot 2005, p. 155. Switzerland: Margareta Baddeley, *L'association sportive face au droit. Les limites de son autonomie* (diss. Genève), Basel: Helbing & Lichtenhahn 1994, p. 261; Henk Fenners, *Der Ausschluss der staatlichen Gerichtsbarkeit im organisierten Sport* (diss. Freiburg), Schulthess Juristische Medien 2006, pp. 187-197; Antonio Rigozzi, *L'arbitrage international en matière de sport* (diss. Genève), Basel: Helbing & Lichtenhahn 2005, pp. 367, 382. Another indication of this acceptance is provided by the various sports arbitration tribunals that have been set up in the respective countries.

to void a legal entity's resolution cannot be decided by arbitrators.[91] This case dealt with very specific circumstances and the general wording of the court, effectively applying this rule to all legal entities, including (sports) associations, has been scrutinised in literature.[92] Regardless of this ruling, the regulations of most national sports federations in the Netherlands completely lack provisions on how to appeal to disciplinary sanctions, automatically leaving jurisdiction to the ordinary courts.[93]

3.3.1.4 Applicable procedural rules

National arbitration laws impose hardly any specific procedural requirements on the arbitral proceedings.[94] Therefore, in most cases the parties are entirely autonomous in deciding the procedural rules that apply. Sometimes, however, procedural rules are imposed. For example when parties opt for institutional arbitration – such as before the CAS – the procedural rules are often imposed by the institution. In the absence of agreement between the parties regarding the applicable procedural rules, national arbitration laws provide the arbitrators with the discretion to establish these.[95] When an arbitration procedure takes place before the CAS, it is the Code of Sports-related Arbitration (hereafter: the Code) that provides the applicable procedural rules. The Code was first enacted in 1994. With its first revision in 2004 certain long-established principles of CAS case law and practices consistently followed by the arbitrators and the Court Office were incorporated.[96]

3.3.1.5 Applicable substantive rules

To settle the dispute, the arbitrators will generally decide according to the law chosen by the parties, or in the absence hereof in accordance with the laws of that country to which the subject matter of the proceedings has the closest

91 HR 10.11.2006, *NJ* 2007, 561 (Groenselect) note H.J. Snijders.

92 See H.M. de Mol van Otterloo, 'Arbitrabiliteit van vennootschapsrechtelijke geschillen; het Groenselect-arrest', *Ondernemingsrecht* 2010/3; E.R. Meerdink & S. Vermeulen, 'Arbitrage over besluiten van organen van de vennootschap: hoog tijd voor wetgeving', *Tijdschrift voor Arbitrage* 2012/59.

93 M. van Koolwijk, H. van Egdom & B. Dubois-van Kleef, *Tuchtrecht bij sportbonden: inventarisatie, ambitie en aanbevelingen,* 2013 <http://www.nocnsf.nl/stream/07.b.-rapportage-tuchtrecht-bij-sportbonden.pdf> [accessed: 14 December 2014]. Only with regard to doping offences, some Dutch federations provide for an appeal to the CAS.

94 G.B. Born, *International Arbitration: Law and Practice*, Kluwer Law International 2012, p. 147. England: s. 34 Arbitration Act 1996. Germany: § 1042 (3) ZPO. Netherlands: art. 1036 Rv. Switzerland: art. 373 (1) CPC; art. 182 (1) Swiss PILA.

95 England: s. 34 Arbitration Act 1996. Germany: § 1042 (4) ZPO. Netherlands: art. 1036 Rv. Switzerland: art. 373 (2) CPC; art. 182 (2) Swiss PILA.

96 The latest version of the Code of Sports-related Arbitration entered into force on 1 March 2013.

connection.[97] In many jurisdictions parties are also allowed to agree that their disputes will be settled according to fairness or equity. However, in CAS cases arbitrators are not allowed to rule according to fairness or equity, even though the Swiss PILA provides for this option.[98]

In cases where the sanction is imposed by a national sports organisation and no choice of law has been made, the applicable law will generally be the law of the country where the organisation is seated, as it will have the closest ties to the dispute, in addition to the applicable regulations. In contrast to the review before a national court, an arbitration tribunal can be given the power to review the decision of the federation in full if this follows from the arbitration agreement.

In cases regarding disciplinary sanctions before the CAS, the position of national law is different as art. R58 of the Code emphasises the primary application of sports regulations rather than national law.

> "The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision."

The formulation of this provision in the old edition of the Code, which lacked the now added 'subsidarily', led Hascher and Loquin to promote the idea that these regulations can be applied exclusively from any national law.[99] This view is supported by certain CAS rulings in which the respective panels decided that in the case at hand they did not need national law to come to their decision.

> "Si les parties n'ont pas déterminé un droit national applicable, elles sont, en revanche, soumises aux statuts et règlements de la FIBA (…). Le droit fédératif adopté par la FIBA constitue une réglementation de droit privé, ayant une vocation internationale, voire mondiale, à s'appliquer dans le domaine des règles de sport régissant le basketball. Pour résoudre le présent litige, le tribunal arbitral appliquera

97 Germany: § 1051 ZPO. Netherlands: art. 1054 Rv. Switzerland: art. 381 (2) CPC (the laws that a court would have applied) and art. 187 Swiss PILA. In England the wording of Arbitration Act 1996 s 46 is a little different, but in conjunction with art. 4 of the Rome I Regulation, comes to a similar result. See also: J.D.M. Lew *et al.* (eds), *Arbitration in England,* Alphen aan den Rijn: Kluwer Law International 2013, no. 11-11.

98 See art. 187 (2) Swiss PILA and art. R.45 CAS Code *a contrario*. Contrary to disciplinary cases, arbitrators are allowed upon the parties' wish to decide according to equity and fairness in commercial cases that are brought before the CAS.

99 D. Hascher & E- Loquin, 'Tribunal Arbitral du Sport (TAS). Chronique des sentences arbitrales', *Journal du droit international* 2004, pp. 289- 340, p. 312.

donc ce droit fédératif, sans recourir à l'application de telle ou telle loi nationale au fond. "[100]

However, according to Rigozzi the suggestion that sports regulations prevail over the parallel applicable national law is difficult to reconcile with the text of the provision. In order for regulations to be exclusively applicable, a supplementary choice of law in favour of these regulations would be needed.[101] Art. R58 of the Code also bears the important consequence that in the absence of a choice of law, it is Swiss substantive law that will be applied. As the large majority of international sports organisations is seated in Switzerland, Swiss law is applicable in a majority of cases.

With regard to the applicability of EU law, it must be noted that EU rules that have a direct effect are part of the law of EU member states and must be applied by the CAS if the chosen law is the law of one of these countries. In sporting matters such rules include internal market rules and competition law prohibitions.[102] When the applicable law is Swiss law, in principal EU law does not need to be considered since Switzerland is not a member of the European Union. However, in case an award is to be executed in an EU member state or if it affects the EU market, EU law does play a role considering that the execution of an arbitral award can be stopped if it is contrary to public policy.[103] Arbitrators have the obligation to ensure an enforceable award. As a result there is a strong rationale for applying those rules of EU law that constitute rules of public policy in any case in which an award may be required to be enforced in an EU member state.[104] In addition, according to the Swiss Federal Supreme Court, 'it is generally recognised that Swiss civil courts and arbitrators should examine the validity of a contractual agreement affecting the EU market in the light of EU law, even if the parties have contractually agreed to apply Swiss law'.[105]

100 CAS 2002/A/417 (IAAF v. CADA and Witteveen), § 82-83; and repeated in CAS 2011/A/2433 (Amadou Diakite v. FIFA), § 14.

101 Antonio Rigozzi, *L'arbitrage international en matière de sport* (diss. Genève), Basel: Helbing & Lichtenhahn 2005, p. 609.

102 ECJ 12.12.1974, C-36-74 (Walrave/Koch); ECJ 15.12.1993, C-415/93 (UEFA/Bosman); ECJ 18.07.2006, C-519/04 (Meca-Medina).

103 Art. V (2) (b) New York Convention.

104 ECJ 01.06.1999, C-126/97 (Eco Swiss v Benetton).

105 Swiss Federal Supreme Court 13.11.1998, 4P.119/1998, *ASA Bulletin* 1999, 529 (Benetton), cons. 1a. See also M. Coccia, 'Applicable law in CAS proceedings: what to do with EU law?', in: M. Bernasconi, A. Rigozzi (eds.), *Sport Governance, Football Disputes, Doping and CAS Arbitration*, Bern: editions Weblaw 2009, pp. 69-93, p. 88; A Rigozzi, 'Arbitrage, Ordre public et droit communautaire de la concurrence', *ASA Bulletin* 1999, pp. 455-487, at pp. 464-465.

3.3.1.6 The scope of review in CAS cases and the arbitral precedent

In cases where disciplinary sanctions are reviewed before the CAS, the scope of review is not limited. The CAS performs a full review, which is not only based on the applicable regulations and substantive law, but also on arbitral precedent. This notion is paradoxical, given that arbitration generally lacks a doctrine of precedent or *stare decisis*.[106] Each arbitrator or arbitration panel decides cases autonomously and is not bound by previous decisions from other panels. Nevertheless, the approach in sports arbitration is different; CAS arbitration panels have demonstrated a consistent practice of referring to earlier CAS decisions.[107]

This practice already commenced in the early days of the CAS. In 1996 a panel considered that, 'although we are not obliged to follow the reasoning of a previous Tribunal (especially where it was not essential to the decision which they reached), we are disposed to do so, both out of a sense of comity and because of the desirability of consistent decisions of the CAS, unless there were a compelling reason, in the interest of justice, not to do so.'[108] In another case the respective arbitration panel stated: '[I]n arbitration there is no *stare decisis*. Nevertheless, the Panel feels that CAS rulings form a valuable body of case law and can contribute to strengthen legal predictability in international sports law. Therefore, although not binding, previous CAS decisions can, and should, be taken into attentive consideration by subsequent CAS panels, in order to help developing legitimate expectations among sports bodies and athletes.'[109] Since 2003, nearly every award contains one or more references to earlier awards.[110] This has resulted in the situation that even though there is no such thing as formal 'CAS case law', practice shows that earlier decisions are carefully studied and can therefore influence later cases.

As a result, a virtually coherent body of law seems to have emerged, which various authors have labelled as *lex sportiva*.[111] Although the definitions vary

106 G. Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse? The 2006 Freshfields Lecture', *Arbitration International* 2007 vol. 23/3, pp. 357-378, p. 357.

107 L. Casini, 'The making of a Lex Sportiva by the Court of Arbitration for Sport', *German Law Journal* (vol.12 no. 5) 2011, pp. 1317-1340, p. 1331. As well as to advisory opinions, for instance in CAS 96/149 (A.C. v FINA), p. 8, no. 28.

108 CAS 96/149 (A.C. v FINA), p. 7, no. 19.

109 CAS 97/176 (UCI v Jogert & NCF), para 40. See for similar wording: CAS 2004/A/628 (IAAF v USA Track & Field and Jerome Young), no. 73.

110 G. Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse? The 2006 Freshfields Lecture', *Arbitration International* 2007 vol. 23/3, pp. 357-378, p. 365.

111 E. Loquin, 'L'utilisation par les arbitres du TAS des principes généraux du droit et le développement d'une lex sportiva' in A. Rigozzi & M. Bernasconi (eds), *The Proceedings before the Court of Arbitration for Sport*, 2007, pp. 85-108, p. 99; see also K. Foster, 'Lex Sportiva and Lex Ludica: the Court of Arbitration for Sport's Jurisprudence,' in: I. Blackshaw *et al*. (eds.), *The Court of Arbitration for Sport 1984–2004*, The Hague: T.M.C. Asser Press 2006, pp. 420-440, p. 420; J.A.R. Nafziger, 'Lex Sportiva', *International Sports Law Journal* 2004 1-2,

in scope,[112] *lex sportiva* seems to cover 'anational' rules and general principles of law that fill in the lacunas that the sports regulations leave and which often have a specific connotation in sports law cases. The most significant rule of the so-called *lex sportiva* is arguably the strict liability rule for doping offences. This rule entails that a doping offence occurs whenever a prohibited substance is found in an athlete's body, irrespective of the athlete's intention or negligence in ingesting the banned substance, for example through a contaminated supplement. Moreover, the application of this rule is so consistent, that the difference with *stare decisis* has become trivial. The strict application of certain *lex sportiva* rules results from the need for a uniform and coherent application of the regulatory framework of sports.

As a result of this consistent rule of precedent, the CAS exercises a strong influence on the rules and regulations of sports organisations, most notably on doping regulations but also on rules regarding player transfers and eligibility for international competitions. Furthermore, aside from this – perhaps more implicit – influence on regulations through its awards, the CAS also does not seem to hesitate to give explicit 'advice' on regulations it deems unsatisfactory. For example, in *A.C. v. FINA* the CAS noted, 'it would clearly be desirable if the FINA Medical Rules were revised so as to attach a flexible sanction to a failure to comply with an important and mandatory obligation of this character'.[113] Nevertheless, in their reasoning the CAS arbitrators have to take into account that their award – like all arbitral awards – runs the risk of being challenged in court.

3.3.2 Challenging the arbitral award

The purpose of arbitration is to obtain a final and binding decision. Nevertheless, most national arbitration laws provide the option to challenge or annul an arbitral award in court.[114] National law thus interferes with the completely

pp. 3-8, p. 3; J. Adolphsen, 'Eine lex sportiva für den internationalen Sport?', *Die Privatisierung des Privatrechts – rechtliche Gestaltung ohne staatlichen Zwang*, 2002, pp. 281-301, p. 281; Antonio Rigozzi, *L'arbitrage international en matière de sport* (diss. Genève), Basel: Helbing & Lichtenhahn 2005, p. 628; L. Casini, 'The making of a Lex Sportiva by the Court of Arbitration for Sport', *German Law Journal* (vol.12 no. 5) 2011, pp. 1317-1340, p. 1317.

112 From including only those principles that are developed by the CAS, according to Nafziger, to 'l'ensemble des règles de droit anational qu'il convient d'appliquer pour affranchir le droit applicable au fond dans les litiges sportifs de tout emprise des différents droits nationaux', according to Rigozzi. J.A.R. Nafziger, 'Lex Sportiva and CAS', in: I.S. Blackshaw, R.C.R. Siekmann and J. Soek (eds.), *The Court of Arbitration for Sport, 1984-2004*, The Hague: T.M.C. Asser Press 2006, pp. 409-419.

113 CAS 96/149 (A.C. v. FINA), p. 6, no. 9.

114 Some arbitration laws provide for the possibility to opt out of the possibility to challenge the award. For instance in England: s. 69 Arbitration Act 1996. In Switzerland the appeal can be excluded only if both parties are non-Swiss: art. 192 (1) Swiss PILA.

private regulatory framework of sports organisations when an arbitral award, in which the disciplinary sanction is confirmed or quashed, is being reviewed by a national court. The following discusses the rules according to which an arbitral award can be overturned, showing the limits of the review of private regulations in the private atmosphere. At the same time, it becomes apparent that on an abstract level the review of arbitral awards bears close similarity to the marginal review of disciplinary sanctions by national courts.

3.3.2.1 Grounds for overturning an arbitral award

When an award is annulled or set aside, the case will generally be referred back to either the arbitration tribunal or, if the arbitration tribunal lacked jurisdiction, to the national court that should have reviewed the sanction in the first place. Unlike the arbitration laws in England, Germany and the Netherlands, the Swiss PILA provides only one body to challenge the award: the Swiss Federal Supreme Court.[115] The available grounds upon which an award can be challenged logically depend on the applicable arbitration law. In most countries, arbitral awards can only be reversed by a national court if they are fundamentally flawed.[116] Such fundamental flaws are mainly flaws of a procedural nature and are similar across the laws of the four jurisdictions.

First, an arbitration award may be annulled if there is no valid arbitration agreement or if the tribunal wrongly assumed jurisdiction to decide on the matter.[117] A second ground for appeal is if the constitution of the arbitral tribunal was irregular.[118]

For example if circumstances raise doubt about the independence of one of the arbitrators. A third ground for appeal common to all jurisdictions is if the tribunal ruled on matters beyond the claims submitted by the parties or if it failed to rule on one of the claims.[119] Finally, all four jurisdictions include one general or multiple specific grounds regarding the arbitration procedure. For example, both Swiss arbitration laws include a reason for appeal if the equality of the parties or their right to be heard in an adversarial procedure was not respected. In the Netherlands a separate ground is if the award has not been signed or motivated.[120] And in England, the failure to comply

115 Since in France disciplinary sanctions by sports federations cannot be reviewed in arbitration, the overturning of arbitral awards according to French law will not be discussed.

116 G.B. Born, *International Arbitration: Law and Practice*, Kluwer Law International 2012, p. 302.

117 England: s. 67 Arbitration Act 1996; Germany: § 1059 (2) sub 1, a ZPO; Netherlands: art. 1065 (1) a Rv; Switzerland: art. 190 (2) b Swiss PILA; art. 393 (b) CPC.

118 Germany: § 1059 (2) sub 1, d ZPO; Netherlands: art. 1065 (1) b Rv; Switzerland: art. 190 (2) a Swiss PILA; art. 393 (a) CPC. In England, irregular constitution of the tribunal can be challenged under the lack of substantive jurisdiction provision in s. 67 Arbitration Act 1996.

119 England: s. 68 (2) b, d, Arbitration Act 1996; Germany: § 1059 (2) sub 1, c ZPO; Netherlands: art. 1065 (1) c Rv; Switzerland: art. 190 (2) c Swiss PILA; CPC, art. 393 (c).

120 Art. 1065 (1) d Rv.

with the formal requirements of the award is mentioned as one kind of serious irregularity.[121]

3.3.2.2 A restrictive review of the merits of the award

In three of the four jurisdictions the sole substantive ground to overturn an arbitration award is when the award or its results are contrary to public policy.[122] Only the English Arbitration Act allows for a wider appeal on the merits on points of English law.[123] However, such an appeal is only admissible with the agreement of all other parties to the arbitration proceedings or by leave of the court.[124] Often the parties opt out of this possibility to appeal in the arbitration agreement.[125]

The notion of public policy (or in French: *ordre public*) is both abstract and complex. In the context of this chapter it suffices to mention that public policy entails the most fundamental principles – both formal and substantive – of a legal order.[126] For example, fundamental breaches of due process, which most notably include the right to be heard, are generally esteemed contrary to public policy.[127] Other fundamental principles of public policy include *pacta sunt servanda*, rules of good faith and prohibition of discriminatory measures.[128]

In European member states, public policy also includes the fundamental provisions of EU community law. In a case where EU competition rules were at issue, the ECJ started by considering that it is in the interest of efficient arbitration proceedings that, in particular, annulment of an award should be possible only in exceptional circumstances. It then stressed, however, that article 101 (formerly 85) constitutes a fundamental provision of community law which, as such, must be regarded as a matter of public policy. As a result, 'where its domestic rules of procedure require a national court to grant an

121 S. 68 (2) h Arbitration Act 1996.

122 England: s. 68 (2) g Arbitration Act 1996. Germany: § 1059 (2) b ZPO. Netherlands: art. 1065 (1) e Rv. Switzerland: art. 190 (2) e Swiss PILA. However, art. 393 CPC instead speaks of 'manifest error of law or equity'.

123 S. 69, 82 Arbitration Act 1996.

124 S. 69 Arbitration Act 1996.

125 For example when the parties agree to submit disputes to ICC arbitration whose Rules exclude an appeal on a question of law; see art. 34 (6) ICC Rules, art. 34 (6).

126 See on the definition of public policy, H. Arfazadeh, *Ordre public et arbitrage international à l'épreuve de la mondialisation*, Geneva/Zurich/Basel: Schultess Juristische Medien SA 2006, pp. 263-273.

127 Netherlands: H.J. Snijders, *Groene Serie Burgerlijke Rechtsvordering. Boek IV*, Kluwer 2011, art. 1065, aant. 7; Germany: S.M. Kröll & P Kraft, 'Part II – Commentary on the German Arbitration Law, § 1059, nr 42', in: K-H Böckstiegel, S.M. Kröll *et al.* (eds.), *Arbitration in Germany: The Model Law in Practice*, Kluwer Law International 2007. Switzerland: BGE/ATF 132 III 389, cons. 2.2.

128 G. Kaufmann-Kohler and A. Rigozzi, *Arbitrage international. Droit et pratique à la lumière de la LDIP*, Bern: Editions Weblaw 2010, pp. 534-535.

application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with the prohibition laid down in Article 85 (1) of the Treaty'.[129] In short, this entails that when national law provides for annulment of an award because of its contrariness to public policy, the notion of public policy includes article 105 (formerly 85). According to doctrinal opinion, it can be assumed that this case law is not limited to EU competition law and, on the contrary, entails that all fundamental rules of European community law are part of the public policy of the member states.[130] Thus, if an arbitral award results in a situation that is contrary to a fundamental provision of European law the award could be annulled in court based on the violation of public policy.[131]

In comparison, according to Swiss law the concept of public policy with regard to appeals against arbitral awards is even narrower. The Swiss Federal Supreme Court considers that an award is contrary to public policy, 'si elle méconnaît les valeurs essentielles et largement reconnues qui, selon les conceptions prévalant en Suisse, devraient constituer le fondement de tout ordre juridique'.[132] In other words, public policy covers only those fundamental principles that are widely recognised and that should, according to the prevailing conceptions in Switzerland, be the foundation of any system of law. In contrast to the view of the ECJ, according to the Swiss Federal Supreme Court these fundamental principles do not include provisions of competition law, whether European or Swiss.[133]

This restrictive review of the merits of an arbitral award seems similar to the – also – marginal review that national courts apply when they perform the review of a disciplinary sanction. Both the sports federation and arbitral tribunal are allowed a lot of room to decide what they see fit as long as they stay within the fundamental boundaries of the law.

3.3.2.3 The Swiss Federal Supreme Court: the final instance in CAS cases

Article 191 of the Swiss PILA provides that an arbitral award rendered in Switzerland can be challenged solely before the Swiss Federal Supreme Court. As a result, CAS awards are only subjected to a single test before a national court. According to the Swiss PILA an arbitration award can be attacked, a)

129 ECJ 01.06.1999, C-126/97 (Eco Swiss v Benetton), cons. 37.

130 H.J. Snijders, *Groene Serie Burgerlijke Rechtsvordering. Boek IV*, Kluwer 2011, opschrift, aant. 8; F. de Ly, case note in *Tijdschrift voor Arbitrage* 1999, pp. 100-108, no. 17; A.P. Komninos, case note in *Common Market Law Review* vol. 37 2000, pp. 459–478, at pp. 473-475.

131 See on the debate whether rules of competition law should fall under the scope of public policy Natalya Shelkoplyas, *The application of EC law in arbitration proceedings*, Europa Law Publishing 2003, pp. 368-369.

132 BGE/ATF 132 III 389, cons. 2.2.3.

133 BGE/ATF 132 III 389.

if a sole arbitrator was designated irregularly or the arbitral tribunal was constituted irregularly; b) if the arbitral tribunal erroneously held that it had or did not have jurisdiction; c) if the arbitral tribunal ruled on matters beyond the claims submitted to it or failed to rule on one of the claims; d) if the equality of the parties or their right to be heard in an adversarial proceeding was not respected; or, e) if the award is incompatible with Swiss public policy. Blackshaw stated that ground (d) is probably the most important, 'seeing that the CAS bends over backwards in each case to ensure that the parties are properly heard and receive a fair hearing'.[134] The opportunity of appeal notwithstanding, the number of appeals against CAS awards remains limited.

The reticence to appeal is not unlikely to result from the fact that appeals to annul arbitral awards are very rarely accepted when based on the – sole substantive – ground of infringement of public policy.[135] In the early days of the CAS, some awards were annulled due to procedural errors. However, as the CAS nowadays pays great attention to its procedure, practically the only ground left to challenge an award is contrariness with public policy. As mentioned above, in order for an award to be deemed contrary to public policy, it must breach a fundamental principle that is deemed to be part of the foundation of the system of law. This is a very high standard to meet and so far only two appeals have ever been successful on this ground, one of which was based on substantial public policy grounds.[136]

In the *Matuzalem* case, football player Matuzalem and his club Real Zaragoza were ordered to pay 12 million euro compensation to the player's former club Shaktar Donetks for breach of contract after the player's transfer to Real.[137] After both parties failed to pay in time, the player was banned from any activity in connection with football until the compensation was paid. The Swiss Federal Supreme Court held that such an open-ended playing ban constitutes a severe infringement on the player's personality rights as laid down in article 27 (2) of the Swiss Civil Code.[138] In the absence of legitimate interests by which this infringement could be justified, a breach of public policy was recognised. The case has had extensive response from scholars who, among other things, discussed whether *Matuzalem* has opened the door for more annulments of CAS awards. The majority agrees, however, that it seems

134 I.S. Blackshaw, *Sport, Mediation and Arbitration*, The Hague: T.M.C. Asser Press 2009, p. 174.

135 G. Kaufmann-Kohler and A. Rigozzi, *Arbitrage international. Droit et pratique à la lumière de la LDIP*, Bern: Editions Weblaw 2010, p. 523. See for a statistical overview F. Dasser, 'International Arbitration and Setting Aside Proceedings in Switzerland: A statistical Analysis', *ASA Bulletin* 2007, pp. 444-472

136 In BGE/ATF 136 III 346 (Benfica Lisbon v. Atlético Madrid), the award was set aside based on procedural public policy grounds. The CAS violated the principle of *res judicata* when disregarding the binding effect of an earlier decision of the Commercial Court of the Canton of Zurich.

137 BGE/ATF 138 III 322 (Matuzalem).

138 According to this provision, 'no person may relinquish his freedom or restrict the use of it to a degree which is contrary to law or morals'.

unlikely that such a door has been opened in light of the exceptional circumstances of this case.[139] Subsequent case law from the Swiss Federal Supreme Court where a sports director's five-year ban from any football activities following match fixing was not deemed a breach of public policy, further reinforces this view.[140] Nevertheless, the CAS has been reminded that the legitimacy of arbitration requires that the most fundamental principles of the legal order be respected at all times.

3.3.3 Summarising remarks

Arbitration is often the mandatory path for athletes or clubs to have a disciplinary sanction legally reviewed. The review itself technically stays in the private atmosphere, but the proceedings are governed by national law in the form of the arbitration law. Except for France, the national laws of the countries studied allow disciplinary sanctions to be reviewed by arbitration. With regard to the application of national concepts of private law, such as the validity of the arbitration agreement and the question of arbitrability of the disciplinary sanction, there are no significant differences across the jurisdictions. Disciplinary sanctions can be subjected to arbitration and an agreement between athletes or clubs and sports federations, even if forced, is generally valid. Nevertheless, it must be noted that recent developments in Germany could signify a shift in appreciation of such arbitration agreements if confirmed on appeal or in subsequent cases. The arbitration law also provides according to which regulations and substantive law an arbitration tribunal ought to decide. In CAS cases a full review is being performed, not only on the basis of the applicable regulations but also on the basis of so-called arbitral precedents from earlier CAS decisions.

Even when a disciplinary sanction is being reviewed through private dispute resolution, there is still a possibility of involving public justice. National arbitration laws provide for the option to challenge or annul an arbitral award in court. However, it has become clear that this is not an easy feat. In all countries grounds for appeal are limited with the merits of the award only being tested against rules of public policy; a very high standard to meet. Finally, in CAS cases, there is only one chance to have the arbitral award reviewed by Switzerland's highest court. However, considering the restrictive grounds for review, the CAS is left with ample room to decide as

139 R. Levy, 'Swiss Federal Tribunal overrules CAS award in a landmark decision: FIFA vs Matuzalem', *The International Sports Law Journal* 2012/1-2, pp. 36-38; L. Burger, 'For the first time, the Supreme Court sets aside an arbitral award on grounds of substantive public policy', *ASA Bulletin* 2012/3, pp. 603-610.

140 Swiss Federal Supreme Court 27.03.2014, 4A_362/2013.

long as it stays within the boundaries of the fundamental principles of the law.

3.4 Concluding remarks

The creation and enforcement of disciplinary rules in sports take place on different levels. Although a sports federation can autonomously create its own regulations and enforce them through a private sanctioning system, this application of the rules – in the form of a sanction – can be tested either before a national court or in arbitration. Upon a closer look at this specific context it has become apparent that in the review of disciplinary sanctions different legal frameworks – of both private rules of sports federations and national law – are connected and interrelate in many ways.

When a disciplinary sanction is imposed, there are two ways to have an external body review the sanction. Unless an arbitration agreement exists, this review is performed by a national court. In this review, the sanction is tested against the regulations and the applicable national substantive law. The scope of the review is limited in all the countries researched and generally only allows for checking whether decisions are reasonably arrived at and not contrary to the law. Only in France, perhaps, does the scope of the review extend a little further. In general however, sports federations are allowed a large margin of appreciation to make decisions.

The alternative is to have the sanction reviewed by arbitration, which is often the mandatory path imposed by the regulations of the sport federation. Although arbitration is a form of private dispute resolution, the proceedings are almost completely governed by rules of national law. This entails the applicability of national concepts of private law, for example regarding the validity of the arbitration agreement and the question of arbitrability of the disciplinary sanction. In addition, the arbitration law prescribes how to determine the procedural and substantive rules that the arbitration tribunal ought to apply when it reviews the sanction. In contrast to national courts, the arbitration tribunal can be given the power to do a full review, which for example is the case when a disciplinary sanction is brought before the CAS.

The arbitral award is, however, not the final stop in the process; it can be challenged before a national court. However, grounds for appeal are limited in all countries researched. The restrictions to this review turned out to bear close similarity to the review of national courts when they perform the review of the disciplinary sanction in cases where arbitration is excluded. When an arbitral award is challenged, further interrelations between national law and the regulations of sports federations become apparent. Rules of national law can influence the regulations of sports federations. For example, when an arbitral award is overturned there might be a need to adapt the regulations. In this regard, the significance of the Swiss Federal Supreme Court in the

regulation of international sport is undeniable. It the only institution in the position to exercise direct influence on the CAS through its case law. This observation is reinforced by the fact that the CAS has indeed seemed willing to comply and to act on criticism from the Court – most importantly by improving procedural safeguards.[141]

Finally, this chapter made it clear that the legal protection against disciplinary sanctions in sport is approached in much the same manner in the European legal systems that were included in this exercise. In the Netherlands, England, Germany and Switzerland the dual system of review of disciplinary sanctions takes the same shape. Furthermore, the connection between the frameworks of national law and the regulations of sports federations proves to be virtually identical in these countries. France remains the exception where, unlike in the other countries, disciplinary sanctions in sport cannot be reviewed by arbitration. However, French law is not so different as regards the scope of review. After all, in France, too, sports federations are allowed considerable discretion to make their own decisions, including decisions in disciplinary matters.

141 See Rigozzi *et al*., who note that one of the amendments to the Code seems to be the result of a critical remark from the Court. (A. Rigozzi, E. Hasler & B. Quinn, 'The 2011, 2012 and 2013 revisions to the Code of Sports-related Arbitration', *Jusletter* 3 Juin 2013, p. 16).