



**SPORTS GLOBAL LAW – RACING AGAINST THE
CLOCK, COMPETING FOR A
COMPREHENSIVE UNDERSTANDING**

**DIREITO DO DESPORTO GLOBAL - CORRENDO
CONTRA O RELÓGIO, COMPETINDO POR UMA
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Summary: Sports Global Law – Explaining a legal Phenomenon. A. Introduction I. Global Law 1. International Administrative Law. 2. Administrative Law of International Organizations. 3. Law of International Administration. 4. Transnational Administrative Law. 5. International Private Law. 6. Comparative Law. 7. International Economic Law. 8. Lex Mercatoria. II. Conclusion and definition. B. The global character of sports law. I. The Olympic Movement. II. The World Anti Doping Agency. 1. Construction of the WADA. 2. The WADA Code. III. The Court of Arbitration for Sports 1. Uprising of the CAS 2. Organization and structure of ICAS and CAS. a) The International Council of Arbitration for Sports. b) The Court of Arbitration for Sports. c) Types of disputes submitted to the CAS. d) Decentralized CAS offices and ad hoc divisions. 3. The role of the CAS in “Lex Sportiva”. IV. Conclusion C. Sports Law: International Regime, Network, System? I. Institutional Network. II. Administrative tasks and procedural mechanisms. III. Key role of judicial bodies. D. Sports Global Law as Global Administrative Law. E. Summary, conclusion and comment

Abstract: From a globalized world emerges the requirement for global administration and global regulation. There is a tendency of re-thinking the character of law in order to create systems that suit the requirements of our connected world and one system of this kind is Sports Global Law - A phenomenon that covers all the definitions of “international sports law” and “lex sportiva” in order to describe the regulatory system developed by sport institutions, may they be of private nature(like the Olympic Movement) or hybrid-public-private (like the World Anti Doping Regime).

The underlying objective of this article is to portray the general nature of global law and to deliver a comprehensive explanation of in how far sports global law can be an example for global administration.

Key-words: sports global law, global administrative law, globalization, hybrid public-private systems, comprehensive approach.

Palavras-chave: Direito Desportivo global, direito administrativo global, globalização, sistemas público-privados híbridas, abordagem abrangente.

Sports Global Law – Explaining A Legal Phenomenon

A. Introduction

Sport is a part of all of our lives. It provides us health, fun, distraction, vitality and socialization when performed on an amateur basis. On a professional basis sports is entertainment for us, it gives us the chance to escape from the grey world of everyday, it binds us on a social level, it touches us emotionally in victory and joy, such as in failure and grief. But it is much more than this. Professional Sports has over the last century evolved to an international phenomenon that is socio-economically relevant. International sport generates billions of Dollars. Contracts with athletes, sponsors, clubs, television broadcasters and many other parties have been made. Trainers, doctors, lawyers, consultants and other fields of jobs have been involved. It has been tried to betray the sports system with doping or other manipulation. And last but not least the diversity and intensity that professional sport is performed with have dramatically increased.

All these developments have required a huge administrative and regulatory system that has over the years emerged to a global legal phenomenon, today often referred to as Sports Global Law. Sports Global Law as complex of all regulatory norms in international sports is a highly heterogeneous collection of Laws. It consists of non-governmental Law (such as the rules of the International Olympic Committee¹), hybrid-public-private Law (such as the World Anti Doping Code) and Law of International Organizations² (such as the United Nations Educational Scientific and Cultural Organization's³ Convention Against Doping in Sport). It is regulatory, harmonizing and binding. It affects international (such as the IOC, International Sports Federations⁴ and the World Anti Doping Association⁵), national (such as National Anti Doping Associations⁶ and National Olympic Committees⁷) and individual levels (such as Athletes). Above all it represents an autonomous legal order that emerges separation of power, namely judicial power to the Court of Arbitration for Sport⁸ and develops procedural principles such as fairness and due to process. It is a global legal order that is made up with private regulatory regimes, such as the IOC and with hybrid-public-private regimes, such as the WADA.

In addition to this the formula of global law covers the private as well as the hybrid-public-private norms and also legal phenomena such as the “lex sportiva” and classical “international sports law”.

Therefore it is not only international but “true global law.” The phrase of global

1. Hereinafter „IOC“.
2. Hereinafter „IOs“.
3. Hereinafter „UNESCO“.
4. Hereinafter „IFs“.
5. Hereinafter „WADA“.
6. Hereinafter „NADAs“.
7. Hereinafter „NOCs“.
8. Hereinafter „CAS“.

law requires a general definition. In order to understand the global nature of sports law, I will take a look at global law as a general global legal phenomenon first.

I. Global Law

Global law is a relatively new notion and overlaps with other forms of law, especially law applied by International Organizations. That is why the best approach to define what is global law is to first define what it is not.

Global law covers issues in common with different types of law in different branches. In this definition I want to take a look at the similarities and differences between global administrative law on the one hand and international administrative law, administrative law of international organizations, law of international administration and transnational administrative law on the other hand. But I also want to make a differentiation between global law on the one hand and international public law, international private law, comparative law, international trade law and the “*lex mercatoria*” on the other hand.

1. International Administrative Law

International Administrative Law is a branch of law that is operating in the field of the substantive and procedural regulation of administrative-judicial situations. It is traditionally defined as the set of rules and norms governing the relations between governments and state entities.⁹

In this matter it builds a complex of norms and principles extracted from international sources to be able to deal with questions of international, transnational or simply state-internal matter.¹⁰

Global Administrative Law on the other hand is addressing not only governments but also and especially Non-Governmental Organizations¹¹ and individual citizens. It is covering a wider range of international activities than international public law.

2. Administrative Law of International Organizations

As the name indicates, Administrative Law of International Organizations is regulating an organization and the administrative acts as well as the administrative procedure of public legal persons of international kind. The differences to global law are lying first in the usually public nature of the actors in International Organizations and second in the coverage of the law. While Administrative Law of International Organizations usually only covers the particular Organization and

9. See *Michael Schweitzer*, *Staatsrecht III: Staatsrecht, Völkerrecht, Europarecht* 3, § 7 (1986).

10. See *Miguel Prata Roque*, *A Dimensão Transnacional do Direito Administrativo*, p. 515 (2014).

11. Hereinafter „NGOs“.

binds the public authorities acting, Global Administrative Law is a framework of general principles that is aimed to cover all International Organizations as well as private entities.¹²

3. Law of International Administration

The Law of International Administration integrates the norms of mostly state-sources that regulate the cooperation of international administration and the extraterritorial administrative acts of the public services of each state. It also regulates national participation in internationalized structure.¹³

4. Transnational Administrative Law

Transnational Administrative Law is a branch of law that is centered to state-internal processes but has international competence. It is emerging transnational delimitation and its basic task is the acknowledgement of sentences and acts of foreign administrations inside a state. Problems in Transnational Administrative Law arise from the emergence of situations with extraneous elements, since TAL does not conceive solutions regarding the choice of applicable regulatory criteria, the determination of competent international organs or the production of effects on the state based sentences or administrative actions originally adopted in a foreign state.¹⁴

5. International Private Law

Generally International Private Law serves the purpose of establishing rules for the selection of the law applicable for an international situation or contract on the one hand and rules for the selection of the court competent to rule over an international dispute on the other hand.¹⁵

These two fields are without any doubt essential to international economy but in the end they lead to national law and are in consequence substantially not really subsequent to the definition of International Law.¹⁶

Global Law on the other hand has the ambition to cover much more than just the selection of the correct applicable national law or court. Its source is more international and is not meant to lead back to national rules.

6. Comparative Law

Comparative Law is the field of international law that compares the legal system

12. See *Benedict Kingsbury and Lorenzo Casini*, Global Administrative Law Dimensions of International Organizations Law, in: *International Organizations Law Review* 6, pp. 319-358, 333 (2009).

13. See *Miguel Prata Roque*, A Dimensão Transnacional do Direito Administrativo, pp. 514, 515 (2014).

14. More about the nature and issue of transnational administrative law in: *Miguel Prata Roque*, A Dimensão Transnacional do Direito Administrativo, pp. 506-517 (2014).

15. See *Bernard Audit*, *Droit International Privé* 4-19 (1997).

16. More about the autonomy of International Private Law in: See *Miguel Prata Roque*, A Dimensão Transnacional do Direito Administrativo, pp. 540-556 (2014).

of different countries (for instance Germany and Portugal) or different groups of legal systems (for instance civil law and common law).

Global law is required to identify differences and similarities between different states. Therefore it is essential for the harmonization of different legal systems. In other words it is a necessary tool for creating global law but has no global character itself.

Global Law is not a tool, it is the end product of harmonization and creation of unified legal concepts.¹⁷

7. International Economic Law

International economic law is the collection of norms regulating the organization of international economic relations, mainly at macro-economic level.¹⁸

Most essential part of international economic law is the law of the World Trade Organization¹⁹. But not only the frameworks regulating cross-border trade are amongst international economic law but also for instance law regulating investments such as the International Centre for Settlement of Investment Disputes²⁰ Convention, which sets up an international center for the settlement of investment disputes between states and nationals of other states.

Even with this broad extent of covered fields of economy, international economic law does not regulate all aspects emerging from or accompanying international economy. For instance the environmental effects of trades are not contemplated in international economic law but in global law. Therefore global law is considered broader than international economic law.

8. Lex Mercatoria

The *lex mercatoria* is the collection of transnational legal principles, which derive from international contract practice and are especially suited to meet the needs of international commercial transactions.²¹

It is questionable and argued if the *lex mercatoria* really exists or not²², but providing that it does, it covers much of the contents that global law deals with, namingly the rules and principles converging around common practices in the field of international commercial transactions.

17. *Pierrick Le Goff*, *Global Law: A Legal Phenomenon Emerging from the Process of Globalization*, *Indiana Journal of Global Legal Studies* pp. 119-147, p. 124.

18. See *Dominique Carreau & Patrick Juillard*, *Droit International Économique* 2-3 (2005).

19. Hereinafter „WTO“.

20. Hereinafter „ICSID“.

21. See *Bertold Goldman*, *La Lex Mercatoria dans les contrats et l'arbitrage internationaux: realite et perspectives*, 106 *journal du droit international* 475, 475 (1979).

22. See e.g. *Stein*, *Lex Mercatoria: Realität und Theorie*, at 5; *Berger*, *The Creeping Codification of the New Lex Mercatoria*, at 211.

Global law on the other hand is not restricted to commercial contracts and is therefore wider than the *lex mercatoria*.

II. Conclusion and definition

As shown in the previous points, Global Law covers fields of different frameworks and overlaps with them but is not as limited as they are. Especially in the field of Global Administrative Law, it brings together the different frameworks and systems in a reciprocal convergence of national and international administrations on a global level. It is a multicultural, multinational and multidisciplinary phenomenon. The notion Legal phenomenon and not legal system is correct in this matter because it has not yet the standing and formal character of a legal system but is tending to become just that. On the other hand it is exactly this non-formal character that separates global law from all other forms of law. It is non-governmental and not applied by International Organizations or national governments. It is applied by private entities with global character and power. This is what enables global law to be much wider, much more universal and at the same time much more centered to the individual than other forms of international law.²³

The question is now, in which way the Sports Global Law lives up to the attempted definition.

B. The Global Character Of Sports Law

In 1995 the decision of the European Court of Justice on the “Bosman Case”²⁴ marked a milestone for international sports law. The decision concerned the free movement of football players within the European Community and limited the autonomy of international sports orders, affirmed the supremacy of European Community Law over sports rules and cast serious doubts on the legal theories thus far applied to the sports context.²⁵

The in this decision stated impotence of sports law lead to an enormously increased interaction between sports law, international law and national legal systems. Nowadays they are interacting on regulatory, institutional, procedural and judicial level and in fields of law from anti-trust regulation to commercialization of radio and television broadcasting rights, from labor disputes to the protection of human rights.

National laws are making reference to the law of the Olympic Charter, which is

23. *Rafael Domingo*, The Crisis of International Law, *Vanderbilt Journal of Transnational Law*, p. 1543-1593, p.1543.

24. ECJ, Case C-415/93, *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others* and *Union des associations européennes de football (UEFA) v Jean-Marc Bosman*.

25. See *S. Gardiner, R. Parrish and R.C.R. Siekmann* (eds.), *EU, Sport, Law and Policy. Regulation, Re-Regulation and Representation*, The Hague, 2009.

more or less embodying the IOC's own "constitution", and in which for instance the "Fundamental Principles of Olympism" are regulated proclaiming that "the practice of sport is a human right".²⁶ Laws of the Olympic Charter are even adopted in some cases directly into national law.²⁷ In case of the Anti-Doping fight, the national shape the national regulations of doping-related matters on the basis of the WADA Code.

Sports law has become genuine global law that reaches around the world and involves international such as national law and directly affects individuals. This is what differentiates sports law from all other forms of law. It does not only involve classical international or national law but also non-governmental law, applied by private entities.

Sport has thus generated a set of institutions and rules that amounts to an autonomous legal corpus, which legal scholarship has varyingly referred to as "International Sports Law", "Global Sports Law" and "lex sportiva".²⁸

In the following part I will introduce the structure and construction of some of the most important entities of Sports Global Law, starting with the biggest and most powerful, the Olympic Movement.

I. The Olympic Movement

Since the 19th century the Olympic Movement has developed a complex organizational structure. On the top is standing the IOC that is governing all lower entities. Below the IOC stand the IFs, of that exist one per sport and NFs, of that exist one per nation related to the IF on the one side. On the other side there are the NOCs, of which as well exist one per nation. This structure is called double-pyramid, one describing the relation of NOCs and the IOC and the other one the relation between NFs and the IFs.²⁹

In fact it is more a network of pyramids rather than a double-pyramid, since in addition to the pyramid of IOC and NOCs, there are as many pyramids as international-level federations and furthermore each pyramid is connected to the rest by multiple organizational relationships, of both vertical and horizontal relation.

After the end of the Cold War the Olympic Movement made a big jump of de-

26. See *Lorenzo Casini*, Hybrid Public-Private Bodies within Global Private Regimes: The World Anti-Doping Agency (WADA), in „Global Administrative Law – Cases, Material, Issues“ (org. Sabino Cassese), 2nd edition, ILLJ, New York University School of Law, 2008, pp. 37-44 (p. 37).

27. As happened in Turkey, with the Parliamentary Act no. 3796 of 1992, the so-called "Turkish Olympic Law" (see *A.M. Mestre*, *The Law of the Olympic Games*, The Hague, 2009, p. 21).

28. On these issues, see now *R.C.R. Siekmann and J. Soek* (eds.), *Lex Sportiva: What is Sports Law* (2012), and *J.A.R. Nafziger and S.F. Ross* (ed. by), *Handbook on International Sports Law*, Cheltenham, 2011.

29. *M.R. Will*, 'Les structures du sport international', in *P. Cendon* (ed.), *Scritti in onore di Rodolfo Sacco*, Milano, 1994, p. 1211 et seq.

velopment, also due to the economic and financial success of sponsorships and the cooperation between international legal sports order and the States became even much closer. The institutional effects of this closer collaboration included a multiplied number of sport organizations, and what leads us to the next points, the creation of international level public/private agencies such as the WADA and also the establishment of an international sports court, the CAS.³⁰

II. The World Anti Doping Agency

The WADA has evolved from a long tradition of Anti Doping Fight in world's sports.

In 1928 the International Association of Athletics Federations³¹ was the first IF to ban doping. At that time the restrictions were ineffective because no tests were performed yet.

The first IFs with Doping Tests were the Union Cycliste³² and the Fédération Internationale de Football Association³³ in 1966. In the following decades the Anti Doping fight evolved more and more but had no inter-disciplinary code.

In 1998 a police raid during the Tour de France resulted in a massive Doping found and spotlighted the demand for united efforts against Doping. As a result of the World Conference on Doping in Sport and initiated by the IOC, the WADA was established in November 1999.

The WADA is an international independent agency and a foundation of Swiss private law. It is supported and participated by intergovernmental organizations, national governments, public authorities and other private and public bodies. Furthermore it is composed equally by representatives from the Olympic Movement and public authorities and funded equally by the sport movement and governments of the world. Therefore it is a hybrid-private-public entity but in the end it is an entity of Swiss private law with main quarter in Canada, which makes it a non-governmental source of law.

The mentioned law is the World Anti Doping Code. Its appliance, development and monitoring are the most important key activities of the WADA. Other key activities are public functions such as promotion and coordination of the international fight against Doping in sports, encouraging, supporting, coordinating and, where necessary, the actual undertaking of unannounced out-of-competition testing, devising and developing Anti-Doping education and promoting and coordinating research in the field of international Anti-Doping fight.³⁴

30. *Lorenzo Casini*, Sports Law: A Global Legal Order?, Law & Society Forum – Honolulu, HI, p. 4.

31. Hereinafter „IAAF“.

32. Hereinafter „UCI“.

33. Hereinafter „FIFA“.

34. *Lorenzo Casini*, Hybrid Public-Private Bodies within Global Private Regimes: The World Anti-Doping Agency (WADA), in „Global Administrative Law – Cases, Material, Issu-

1. Construction of the WADA

The WADA's governance is composed of the foundation board, the executive committee and several other committees.

The 38-member foundation board is the supreme decision-making body. It is composed equally of representatives from the Olympic Movement and national governments. Among its tasks are the delegation of the actual management and the running of the agency, including performance of activities and the administration of assets, to the executive committee.

The above-mentioned 12-member executive committee is the ultimate policy-making body. It is as well composed equally of representatives of the Olympic Movement and national governments. It is performing the actual activities of the WADA and administers the assets.

The WADA does not execute the actual Anti-Doping work itself but delegates it to the stakeholders.

The IOC is the highest stakeholder and responsible for the testing process and the sanctioning of those who commit violations.

The IFs don't have work responsibilities but must undertake three steps to comply with the code: they must agree to the tenets of the WADA Code in order to ensure Acceptance; they must amend their rules to include the WADA Code's mandatory articles and principles in order to ensure Implementation; and they must enforce the amended rules in accordance with the WADA Code in order to ensure Enforcement.

The national governments have the broadest field of responsibilities in the Anti-Doping work. They are responsible for facilitating the doping controls, supporting national testing programs, economic support for Anti-Doping initiatives, sentences for Doping supports and funding Anti-Doping education and research.

To align their domestic policies with the WADA Code they had to adopt the UNESCO International Convention against Doping in Sport, since they could not directly align their policies to non-governmental law.³⁵

Finally they are represented in the WADA according to the Olympic Regions: Africa three members, Americas five members, Asia four members, Europe six members and Oceania two members. By this broad involvedness in all processes and levels of the WADA they produce a high degree of publicness in the Agency

es" (org. Sabino Cassese), 2nd edition, ILLJ, New York University School of Law, 2008, pp. 37-44 (p. 41).

35. See *Lorenzo Casini*, Global hybrid public-private bodies: The World Anti-Doping Agency, Draft Paper, Global Administrative Law Conference, Genève, March 20-21, 2009, p. 12.

itself and its Code.³⁶

The NOCs must agree to implement the Code and must assure Code-compliance and enforcement.

The National Anti Doping Organizations³⁷ and Regional Anti Doping Organizations³⁸ are responsible for testing the national athletes and international athletes who are competing in the nation's borders.

The Athletes and their entourage are the main addressees of the Code and must therefore comply with the Code. Further on they must provide information about their whereabouts at any time.

The Laboratories must achieve accreditation from the WADA in order to ensure a uniform standard of testing procedure around the world.

Above the delegating construction of the WADA stands the CAS. It provides as independent court for services to facilitate the settlement of sport-related disputes.

2. The WADA Code

The World Anti Doping Code is a document that harmonizes Anti-Doping policies, rules and regulations within sport organizations and among public authorities around the world. It works in conjunction with five international standards. These are Testing, Laboratories, Therapeutic exemptions, List of prohibited substances and methods, as well as Protection of privacy and personal information.³⁹

The WADA Code is meant to solve problems from disjointed and uncoordinated Anti-Doping efforts. Before the establishment of the Code, some violations of the Anti-Doping principle were sentenced with outright differences between different countries and regions. Some violations were not sentenced at all in some regions.

These and other problems are now solved, since nearly every sports organization in the world accepts the WADA Code.

As mentioned before, the Code is applied by the WADA and is therefore a non-governmental Code, even though parts of governments and other public entities are deeply involved in the law making and monitoring. In addition to this

36. See *Lorenzo Casini*, Global hybrid public-private bodies: The World Anti-Doping Agency, Draft Paper, Global Administrative Law Conference, Genève, March 20-21, 2009, p. 18.

37. Hereinafter „NADOs“.

38. Hereinafter „RADOs“.

39. See details in *Lorenzo Casini*, Global hybrid public-private bodies: The World Anti-Doping Agency, Draft Paper, Global Administrative Law Conference, Genève, March 20-21, 2009, p. 13.

the UNESCO Convention against Doping in sport refers explicitly to the WADA and its Code. Its rules and standards have gradually been accepted as binding by States.⁴⁰

In order to ensure the relevance of the Code, it is constantly in progress and reworking.

III. The Court of Arbitration for Sports

The Court of Arbitration for Sports is the judicial organ in the world of sports. It is sometimes called the “Supreme Court of Sports”.⁴¹

The CAS is an institution independent from any sports organization. This independence makes the CAS essential part of the division of powers in sports governmental system.

It is responsible for the settlement of sport-related disputes through arbitration and mediation. The WADA has the right to appeal to the CAS for doping cases under the jurisdiction of organizations that have implemented the Code.⁴²

1. Uprising of the CAS

The CAS was established after the idea of IOC President H. E. Juan Antonio Samaranch of a sports-specific jurisdiction in 1981. Samaranch’s idea was to resolve disputes directly or indirectly related to sport by a specialized authority capable of settling international disputes in a flexible, quick and inexpensive way.

The CAS was fully ratified by the IOC in 1983 and became operational in 1984. It was composed of 60 members appointed by the IOC, the IFs, the NOCs and the IOC President by 15 each. The CAS was monitored and fully financed by the IOC. Furthermore the IOC was the only entity able to change the CAS statutes.

The CAS had only one type of contentious proceedings no matter for what kind of case.

In February 1992 the “Elmar Gundel case” brought massive change in the construction of the CAS.

Horse rider Elmar Gundel had been sentenced due to a horse doping crime from

40. See *Lorenzo Casini*, Hybrid Public-Private Bodies within Global Private Regimes: The World Anti-Doping Agency (WADA), in „Global Administrative Law – Cases, Material, Issues“ (org. Sabino Cassese), 2nd edition, ILLJ, New York University School of Law, 2008, pp. 37-44 (p. 42).

41. According to *K. Mbaye*, this formula comes directly from Juan Antonio Samaranch, and it is reported in the Swiss Federal Court decision *A. et B. contre Comité International Olympique, Fédération Internationale de Ski et Tribunal Arbitral du Sport*, 4P.267/2002, 27 May 2003, in BGE 129 III 445 S. 462.

42 See wada-ama.org.

the International Equestrian Federation.⁴³ Against the FEI's award Gundel appealed to the CAS. The CAS decided partly in favor of the horse rider but did not completely deny the sentence.⁴⁴ Gundel was unhappy with the CAS' decision too and filed another appeal with the Swiss Federal Tribunal, stating that the CAS would not be impartial and independent.

In the judgment from the 15th March 1993, the Swiss Federal Tribunal stated that the CAS would be independent from the FEI but if the IOC instead of the FEI would have been party in the process, the result would have been questionable due to the major links between IOC and CAS.⁴⁵

This judgment led to a major reform of the CAS construction. Biggest change was the creation of the International Council of Arbitration for Sport⁴⁶ which is ever since looking after the running and financing of the CAS and therefore replaced the IOC.

Another major change was the creation of two arbitration divisions, the ordinary arbitration division and the appeal arbitration division in order to make a clear distinction between cases of sole instance and those arising from the decision of a sports body.

After the reform again the Swiss Federal Tribunal dealt with the question of the CAS' independence in 2003 and now unreservedly confirmed the independence and necessity of the CAS.

2. Organization and structure of ICAS and CAS

Since November 1994 the Code of Sports-Related Arbitration has governed the organization and arbitration procedures of the CAS.

The Code is in constant progress and was revised on 2003 in order to incorporate certain long-established principles of CAS case law. The latest version of the Code is from 2010 and contains 70 articles that are broadly divided into statutes of bodies working for the sports-related dispute settlement on the one hand and procedural rules on the other hand.

Furthermore the Code features mediation rules that are offering the non-binding informal procedure of mediation.

The distinct procedures featured in the Code are the ordinary arbitration procedure for sole instance cases, the appeals arbitration procedure for cases concerning decisions of a sports body, advisory procedure, which is non-contentious and gives sports bodies the opportunity to seek advisory opinions from the CAS and

43. Hereinafter „FEI“.

44. See arbitration CAS 92/63 G. v/ FEI

45. Published in the Recueil Officiel des Arrêts du Tribunal Fédéral 119 II 271.

46. Hereinafter „ICAS“.

the mediation procedure for non-binding informal mediation.

The classic phases of arbitration procedure are the written procedure on the one hand where written statements are exchanged and the oral procedure on the other hand where the parties are heard by the arbitrators. The parties have the right to decide on the pattern of the procedure. In case of a failed agreement of the parties, the CAS mediator takes the decision.

a) The International Council of Arbitration for Sports

The ICAS is the supreme organ of the CAS and has replaced the IOC in this function after the Elmar Gundel case.

It's main task is to safeguard the independence of the CAS and the rights of the parties. Furthermore it is responsible for looking after the administration and financing of the CAS.

It is composed of 20 members of whom all must be high-level jurists who are experts in arbitration and sports law. The 20 ICAS members are declaring before taking their work into action their total objectivity and independence. In consequence can none of their members ever appear before the CAS no matter on which side.

The functions of the ICAS can be performed by the whole body or an intermediary that consists of the President, his two Vice-Presidents and the two Presidents of the CAS Arbitration Divisions.

Some functions cannot be performed by the intermediary. In case of most of these functions, 50% of the ICAS members must be present and the decision must be taken with an ordinary majority.

In case of a change of the Code of Sports-Related Arbitration, a full meeting of the ICAS members is required and the decision must be taken with a two-third majority.

The ICAS elects its own President, who is the President of the CAS in one person. Furthermore it elects the two Vice-Presidents, the President of the Ordinary Arbitration Division of the CAs, the President of the Appeals Arbitration Division of the CAS such as the deputies of those two divisions. Finally it elects the CAS arbitrators and approves the budget and account.

b) The Court of Arbitration for Sports

The CAS performs its function through the intermediary of arbitrators. The court office that is headed by the secretary general assists the minimum of 150 arbitrators.

As mentioned above, there are two divisions of arbitrations. The Ordinary Ar-

bitration Division and the Appeals Arbitration Division. A President that takes charge of the first arbitration before the panels of arbitrators are appointed heads each division. Once nominated the arbitrators subsequently take charge of the procedure.

The currently 275 arbitrators of the CAS are elected by the ICAS every four years. For the selection are applying subsequently the same measures like for the ICAS members. All arbitrators must act with total objectivity and independence from any sports organization and must act “with a view to safeguarding the interests of the Athletes”.⁴⁷ They are proposed by the IOC, IFs, and NOCs and elected by the ICAS. The arbitrators are not attached to a particular division and can therefore sit in panels of the Ordinary Arbitration Division and the Appeals Arbitration Division.

The CAS panels are composed of one or three arbitrators and are bound by the principles of confidentiality and secrecy.

c) Types of disputes submitted to the CAS

In general only cases concerning parties that agreed on specified recourse of arbitration to the CAS can be submitted. According to the Code for Sports-Related Arbitration only disputes connected to sports can be submitted as well.⁴⁸ There are broadly two types of disputes, that the CAS deals with. On the one hand there are commercial cases, which take into account for example cases concerning sponsorship, delegation of television broadcasting rights, player transfers, such as civil liability. In commercial cases the CAS usually acts in sole-instance manner.

On the other hand there are the disciplinary cases. Those are mainly Doping-related cases but also violence on the field or other misbehaviors are being dealt with. In case of the disciplinary cases the CAS is acting as last instance and only comes into action in case of an appeal after a decision of the responsible sports authority.

d) Decentralized CAS offices and ad hoc divisions

In 1996 the CAS opened decentralized offices in Sydney, Australia and Denver, USA. In 1999 the office was moved from Denver to New York. The decentralized offices are competent to receive and notify any procedural act. They provide easier access of the Oceanian and American parties to the CAS.

Another important creation in 1996 was the ad hoc division of the CAS. It was meant to settle disputes during the Olympic Games in Atlanta in a 24-hours-limit. The specially created procedure was simple, flexible and free of charge and was a big success. It was adopted to the UEFA European Championship in 2000

47. Code of Sports-Related Arbitration Art. S14.

48. See Code of Sports-Related Arbitration Art. R27.

and the FIFA World Cup 2006 and other major sports events and repeated every time after that.

The ad hoc division massively increased the international recognition of the CAS among Athletes and media and made the CAS jurisdiction stand out from any other jurisdiction in the world.⁴⁹

3. The role of the CAS in “Lex Sportiva”

Lex sportiva is a phrase based on well-known theories like the lex mercatoria. It is mostly used to describe the whole global sports legal order⁵⁰ and in this function not universally accepted (for example the 2001 decision of the Oberlandesgericht Frankfurt denied the existence of a global lex sportiva).

In the case of this work I will consider the lex sportiva as set of principles and ruled created by the influence of the CAS.⁵¹

The influence of the CAS on international lawmaking is basically split into three spheres.

The first one is the interpretation of international sports law. The CAS is the highest instance of world sports legal order and therefore responsible for solving disputes of all kinds of sports laws, be it the commercial law cases of player-transfers or the sanction law cases of anti-doping rule violations. In their function of interpreter of law, the CAS has introduced principles mainly from public law, such as the due to process, fairness of trial and the duty to give reason. By adopting these principles the CAS has influenced legal Codes of international sports law, such as the World Anti Doping Code, which explicitly refers to the CAS awards in case due process principles and makes it therefore fundamental rights of the parties before the courts of sports law. This reference is only possible because of the strong acceptance of the CAS and the system of reference of different panels of the CAS amongst each other. For this reference there is no formal rule but it is effectively practiced and working well.

The second sphere is the creation of sports-exclusive principles, also called “Principia Sportiva”⁵² like the principles of “fair play” in all sports competitions and “strict liability” in doping matters.

Especially the example of the principle of strict liability has massively influenced the World Anti Doping Regime and the World Anti Doping Code. The strict liability principle means that any procedural mistake that an Athlete or a member of the entourage makes signifies a violation of the anti-doping rules.

49. See <http://www.tas-cas.org/en/general-information/history-of-the-cas.html>.

50. *F. Latty*, *La lex sportiva*. Recherche sur le droit transnational, above, p. 31 ss.

51. Referred to *J.A.R. Nafziger*, *Lex Sportiva and CAS* (2004), above, p. 409 et seq.

52. See e.g. *ex plurimis*, CAS 98/200 AEK Athens and SK Slavia Prague / Union of European Football Associations (UEFA), above, para. 158.

This strict liability has been subject of great controversies between sports organizations and athletes but is in the end a necessary factor of assuring a clean sport.

The last scale is the harmonization of multilevel sports law. The decisions of the CAS have massively supported the harmonization process of national and international sports laws and especially supported the WADA's process of harmonizing diverging anti-doping laws. A major role in the harmonization of laws is the function of the CAS as Supreme Court, that is the last instance addressee of appeals from lower courts. The international sports court system consists hereby from a two- respectively three level system, where the national court (in some cases there is no), then the international court and finally the CAS is responsible. In this function the CAS does not only build a harmonized jurisdiction but also assures an impartial jurisdiction. This is the case because some national and international sports courts are still not independent from the sports institutions. The CAS on the other hand is – as shown in the previous paragraphs - completely independent from any sports association.

Another harmonizing effect is the advisory function that the CAS contains. The sports institutions are allowed to take advice from the arbitrators of the CAS and even though the advices are of no binding nature, they are able to influence the law making on a harmonizing level.

Combining these three scales, the CAS has a massive influence on international sports law-making.⁵³

IV. Conclusion

As shown in the previous paragraphs, the global legal order of sports law covers a wide range of different laws (applied by private, hybrid-public-private entities and public entities) and institutions. Furthermore it has emerged a quasi-division of powers and has strong connections in all categorizes of acquiescence, reciprocal influences, conflict and cooperation⁵⁴ to classic international and national law. It is composed of a huge network of different institutions, entities and regulators with participation and collaboration of public and private players on different levels and has developed an own jurisdiction with the CAS on the head. All these aspects elucidate that the international legal order of sports is global law indeed. It is even more than just that because it covers different systems, some of them true global law, some classic international law and everything is connected. Having reached this point, the question remains, how to define and designate the Sports Global Law.

53. *Lorenzo Casini*, The Making of a Lex Sportiva, Draft paper for the Max Planck Institute International Conference on „Beyond Dispute: International Judicial Institutions as Law-Makers“, Heidelberg, June 14-15, 2010 pp.10-17.

54. See details in *Lorenzo Casini*, Hybrid Public-Private Bodies within Global Private Regimes: The World Anti-Doping Agency (WADA), in „Global Administrative Law – Cases, Material, Issues“ (org. Sabino Cassese), 2nd edition, ILLJ, New York University School of Law, 2008, pp. 37-44 (pp. 38-39).

C. Sports Law: International Regime, Network, System?

Sports Global Law has emerged to a legal phenomenon that displays an extremely close link between international sports legal order and States. States are not only involved in the work of international sports entities as collaborators but are also integrated in the administrative construction of hybrid-public-private organizations, such as the WADA. The complex structure that has arisen out of the development of international sports legal order can be described as “International Regime”, a notion developed by political scientists. It can be defined as “set of mutual expectations, rules and regulations, plans, organizational energies and financial commitments, which have been accepted by a group of States.”⁵⁵ In case of the sports legal orders it can be compared to the international private regimes. These are voluntarily and therefore non-governmentally formed and concerning their concept being beyond the mechanisms typically arising in international law.⁵⁶

Common to all kinds of these private regimes is their foundation upon one or more international organizations. In case of the Sports Global Law, the WADA’s legislative activities are covered by this definition.

Even though the private regimes are as their name indicates private, international and national public authorities have emerging influence on them. In case of the Sports Global Law, the creation of hybrid-public-private organizations like the WADA is expression of this growing influence. In the WADA international and national authorities are both, represented in the executive and legislative administration of the organization and terminals of actual execution of the WADA Code and the Anti-Doping fight.

Another example is the organization of the Olympic Games, which is regulated by the IOC and the Olympic Movement but performed by special national bodies appointed by domestic public authorities.

The different regimes in Sports Global Law have generated a global “Network”.⁵⁷ The structure that Sports Global Law has developed is based on soft norms, which means not norms made by classical international law measures, and is characterized by a huge number of institutional relationships.

The notions “international regime” and “international network” are useful in understanding the legal relationships between sporting institutions among each other and to international and national public bodies but they cannot exhaustively display the full extent of the legal and institutional development. Strongest

55. See *J.G. Ruggie*, *International responses to technology: concepts and trends* (1975) 29 *International Organization* 557, p. 570.

56. *G. Teubner*, ‘Global Private Regimes: Neo-Spontaneous Law and Dual Constitution of Autonomous Sector?’, in K.H. Ladeur (ed.), *Public Governance in the Age of Globalization*, Aldershot, 2004, p. 71 et seq.

57. See e.g. *M. Amstutz e G. Teubner* (eds.), *Networks. Legal Issues of Multilateral Cooperation*, Oxford, 2009, focused on “private” and “contractual” networks.

example here is the by the Sports Global Law developed separation of powers, namingly with the creation of an independent jurisdiction headed by the CAS.

The full legal dimension of sports law can be broke down to on the one hand the massive increasing of proceduralization which displays for example in the selection of Olympic Games' host cities, which follows detailed procedures. On the other hand there is the sophisticated system of dispute resolution, which is forming a system of truly global sport justice.⁵⁸

The concept of a legal "system"⁵⁹ can be describing the development of the inter-relationship between international sport regimes together with a multi-level network even more advanced. The notions of regime, network and system are closely connected but the structural elements of the detailed regulations and Codes are pointing at a systematic shape of Sports Global Law. In fact the system displays three main features: the institutional network, the amount of administrative tasks and procedural mechanisms and the key role of judicial bodies.

I. Institutional Network

The first main feature is the institutional network.

The many enormously many institutions of sports are all connected on multi-level relationships and are forming different regimes of which each has a superior body on an international level. In addition to this the regimes are delegating the tasks to domestic terminals, which are executing the tasks on a national level. Furthermore on the national level there are institutional solution influenced by public law in both, the organizational structure and the rules governing national sports bodies. This development is constantly spreading and is building a bigger and bigger system of administrative and regulatory interconnection.

Even though cases differ between different countries and their traditional systems, all of them have some features in common, like the conferral of public law nature to national anti-doping entities.

II. Administrative tasks and procedural mechanisms

The second main feature is the increasing administrative tasks and procedural mechanisms.

The increasing socio-economical and political significance of sports institutions and their increasing power and influence have been resulting in the demand of a number of functions and procedures. Regimes like the Sports Global law regimes have, despite their origin from private law, emerged to an extent of rele-

58. *Lorenzo Casini*, Sports Law: A Global Legal Order?, Law & Society Forum – Honolulu, HI, p. 7.

59. See e.g. *J. Raz*, The Concept of a Legal System. An Introduction to the Theory of Legal System (1970; 1973).

vance that is similar to regimes deriving from public law.⁶⁰

In particular the relevance emanates itself on the one hand in the effect of decisions made by sports institutions that concern public interest such as individual rights. Examples are the anti-doping, such as the anti-rust decisions.

On the other hand the issues of legitimacy and accountability of sports institutions have massively increased, which resulted into improved procedural mechanisms that assure participation of parties and the review of actions of sports institutions. Even well-known principles like the due to process or the right to be heard have been taken from classic national legal systems into sports legal order.⁶¹

Significant example of the mentioned features of sports' legal order is the decision of the CAS concerning the appeal of Pistorius v/ IAAF, in which the CAS stated, the decision of the IAAF would have been "procedurally unsound".⁶²

Even long time before this decision the CAS highlighted the governmental character of sports-governing bodies "with all their role and functions as regulatory, administrative and sanctioning entities".⁶³

Very clear example for this dimension of Sports Global Law is again the world-anti-doping regime, which is consisting of regulatory and administrative WADA and the delegated domestic sanctioning entities, in which procedural safeguards and fair hearings are applied.

III. Key role of judicial bodies

Global Sports has emerged to a huge complex with diverging interests and many kinds of disputes of contractually, administrative and sanctionary nature. This requires a system of dispute settlement bodies. Sports Legal Order on the other hand has emerged a massive power over athletes, clubs and other sports-related bodies, which requires detailed review mechanisms in order to secure legal certainty, participation and proportionality. Therefore the global sports system has developed judicial bodies, that take care of sports-related disputes and appeals. This system is headed by the CAS that can be viewed as the supreme court of sports.

Especially in the anti-doping-regime this system is inevitable. If a NF or an IF has decided on a penalty on an Athlete for violating the Anti-Doping rules there

60. A. Riles, 'The Anti-Network: Private Global Governance, Legal Knowledge, and the Legitimacy of the State' (2008) 56.

61. See Lorenzo Casini, Towards Global Administrative Systems: the case of sport, in „Global Administrative Law: an italian perspective“, RSCA Policy Paper 2012/04, Robert Schuman Centre for Advanced Studies, 2012, pp. 69-79 (p. 75).

62. CAS 2008/A/1480, especially para. 56 et seq.

63. CAS 98/2000, AEK Atene & S.K. Slavia Praga v. UEFA , award of 20 August 1999, par. 58.

has to be a uniform Code, that can be relied on (the WADA Code) and a court that has the legitimation to review the decision of the first-instance body (the CAS).

The principles applied in arbitration proceedings in the case of the Sports Global Law are in a huge amount similar to the principles of classic public law, more precisely principles of criminal and administrative law. This separates the sports system from other regimes deriving from private law, such as the *lex mercatoria*, whose principles are very similar to private law principles.

An issue in this matter yet undefined is the feasibility of judicial review of the activities of international sport institutions.⁶⁴

D. Sports Global Law As Global Administrative Law

As stated in the previous paragraphs Sports Global Law is a network of Regimes that consist of complex relationships of institutions and forms - regarding their institutional network, the amount of administrative tasks and procedural mechanisms and the key role of judicial bodies - a system of legal orders.

But Sports Global Law is even more than that.

There are strong analogies between acts of international sports organizations and public authorities. Furthermore states are directly involved in the system of sports law-making and administration, naming in the WADA, which does not only involve the states in their administrative construction but also on a lower level as public bodies that execute the delegated tasks. In addition to this international sports organizations also rely on public law solutions. Viewing the Sports Global Law from this administrative point does not only interact with theories of international law and law of international organizations but also with projects like the Informal International Lawmaking.⁶⁵ The theory of IN-LAW is imagining “(c)ross-border cooperation between public authorities, with or without the participation of private actors and/or IOs, in a forum other than a traditional IO (process informality), and/or as between actors other than traditional diplomatic actors (such as regulators or agencies) (actor informality), and/or which does not result in a formal treaty or other traditional source of international law (output informality)”.⁶⁶ Sports Global Law is partially matching on this definition of IN-LAW as well, as the cooperation between international sports institutions and public authorities is mainly not happening on a classical IO forum and is not resulting in classical international law but in transnational soft-law (such as the WADA Code).

64. See Lorenzo Casini, *Towards Global Administrative Systems: the case of sport*, in „Global Administrative Law: an italian perspective“, RSCA Policy Paper 2012/04, Robert Schuman Centre for Advanced Studies, 2012, pp. 69-79 (p. 75).

65. Hereinafter „IN-LAW“.

66. *J. Pauwelyn*, „Informal International Lawmaking: Framing the Concept and Research Questions“, *J. Pauwelyn, R. Wessel, and J. Wouters* (eds.), *Informal International Lawmaking* (OUP, Oxford, 2012).

Moreover the development of Sports Global Law is pointing out that it is not only a system of legal orders, but one united global order of transnational nature. This kind of transnational legal order requires three points.

The first point is that the legal order's norms and rules are produced by an institution above the level of a nation-state.

The second point is that the legal order's norms and rules must be directed to legal institutes inside nation-states.

The third and final point is that the legal order's norms and rules are produced in recognizable legal forms, to the extent that a sophisticated judicial system is required to enforce these norms.⁶⁷

All three points match with the Sports Global Law as described above.

The only problem about stating that Sports Global Law is a global legal order is, that this notion is laying stress on the "sovereignty" of the legal order, meaning the independence from classical public authorities, which is not correctly characterizing the relationship between Sports Global Law and the national and international formal law.

As consequence from this strong connection of law originated from private autonomy, namely e.g. the Olympic Charter, law made by hybrid-public-private institutions like the WADA (the World Anti Doping Code) and classical international and national law and the interacting between all those entities on an administrative law paradigm is suggesting to consider Sports Global Law to be Global Administrative Law.

Reason for this administrative law character of Sports Global Law is it's growing socio-economic relevance, which manifests itself in the relevance of Sports legal order in the protection of health, the protection of human rights and other fundamental rights of athletes.

A problem constantly argued on this behalf is the protection of Athletes' privacy. Namely the World Anti Doping regime - manifested in the World Anti Doping Code - is demanding providing information about their whereabouts at any time.⁶⁸ The Athletes must be available for unannounced doping controls at any time and must therefore provide information about their whereabouts not only in contest and training sessions but also in free time and vacations. This constitutes a major cut in the right of privacy of athletes and is therefore argued on a multi-law level. Sports Law, Labor law and Fundamental Rights Law is involved and a detailed administrative law system is required to exhaustively deal with this matter.

The example of the protection of Athletes' right to privacy shows that the ad-

⁶⁷. *T. Halliday and Gregory Shaffer*, Transnational Legal Orders, Project Framing paper.

⁶⁸. See Art. 14.3 World Anti Doping Code.

ministrative character of Sports Global Law is not only theory but reality. It is an ongoing process of conceptualizing Sports Global Law as administrative system on a global level.

The global character in this matter manifests itself in the existence of Sports Law with administrative law mechanisms beyond states on a global scale but at the same time the involvement of domestic levels, private entities and individuals and the direct application of norms and decisions without intermediation on part of States.

The administrative character manifests itself in the collaboration of private autonomy and public order, the operation of states within the system and the applied models, procedures and review mechanisms, which are similar to or even directly subject to administrative law.⁶⁹

E. Summary, conclusion and comment

In the previous paragraphs I have rendered the basic theory of global law and its differences to other legal systems. I came to the result that global law is covering many fields in common with different legal systems but is overall much broader and at the same time more direct and individualized than other forms of law.

As next step I have introduced the major entities of Sports Global Law and their connection amongst each other in order to explain the global character of Sports Global Law. Here I laid stress on the Olympic Movement that is heading the international sports administration with its governing organ the IOC. Furthermore I introduced the WADA that is a hybrid-public-private institution heading the Anti Doping regime and that played a huge role in harmonizing and globalizing sports law. In the end I introduced the CAS that is the heading judicial institution of Sports Global Law, plays a key role in making Sports Global Law a sophisticated system with its own separation of powers and is essential in international sports law-making and harmonizing.

In the end I tried to conceptualize and define the global phenomenon of sports law and build a bridge to the general concept of global law. I came to the conclusion that Sports Global Law is everything at once; it is a system made of networks of complex relationships between many regimes that are composed of thousands of institutions that govern legal orders. It is of both natures, private and public and it is broader than any classical form of international law. Above all it is on the way to become global administrative law and therefore a united global legal order. In general the example of Sports Global Law is showing that the relevance and acceptance of legal systems originating from private autonomy is massively increasing and the relevance of classical concepts of international law is diminishing. At the same time the collaboration between private actors and public authorities is increasing and the system of private autonomy law that

⁶⁹. *Lorenzo Casini*, Sports Law: A Global Legal Order?, *Law & Society Forum* – Honolulu, HI, pp. 11-17.

once had to be protected against interference of classical law is now growing together with it. It is beyond any doubt a positive development that is resulting in such welcome values like the ad hoc divisions of the CAS that are surpassing judicial inertia and are able to solve disputes in a 24-hours limit. Furthermore it is imaging a trend that international law making is drifting away from state-centered orientation to the orientation on the Individual. On this behalf it is suiting our globalized world that is growing together more and more better than any classical system of law. Furthermore it can be an example that might also be applicable to others fields of global administrative law such as environmental law or health regulation. The future is yet to show in how far this trend can be expanded.
