

## LEX SPORTIVA: PRESENT AND FUTURE PERSPECTIVES

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**Abstract:** *When we deal with lex sportiva, we have to face with a complex question. First of all, it has a controversial definition. At the same time, it could be useful in order to realize a set of uniform rules.*

*Lex sportiva can be considered a way to enforce sports system autonomy and, at the same time, can be considered a target for the harmonization of rules. In this sense, lex sportiva is perfectly fitted into the global legal pluralism panorama.*

*Just as lex mercatoria, lex sportiva is a set of rules and a method of judging too.*

*Because of the complexity of sports organization, having a hierarchical structure and a multilayered character of its governance structure, we can assume that the Italian sports organization has a reticular structure.*

*As a consequence, Court of arbitration for sport has a fundamental role for rationalization and integration of sports rules.*

*In this sense, for what concerns Italian sports system, the hope of a fully functional lex sportiva is related to a fully functional Court of arbitration for sport that could be able to coordinate national rules and to realize a judicial cooperation.*

*It is a matter that must be investigate in practical terms.*

**Keywords:** *Lex Sportiva - Global legal pluralism - Court of arbitration for sport*

When we deal with *lex sportiva*, we must face with a complex question, because of its controversial definition. *Lex sportiva* realizes a set of uniform rules, used for the resolution of transnational disputes and it can be considered an independent legal entity based both on a specific regulation and on decisions of Court of arbitration for sport.

Nevertheless, some critical issues emerge. Hence it may be said that the goal of the universal management of sport is also a target to be reached, but not yet attained.

Bearing in mind this high goal, at the end of '90, General Secretary of CAS coined the phrase *lex sportiva*, claiming for sports organizations the same recognition given to the *lex mercatoria*<sup>1</sup>. We must remember that referring to *lex*

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1. Mc Laren R.H. (2001), "The Court of Arbitration for Sport: an Independent Arena for the World's Sports Disputes", in: Valparaíso University Law Review, vol. 35, n. 2, p. 381; Carbone S.M. (2005), "Il contributo della *lex mercatoria* alla precisazione della *lex sportiva*", in: Greppi

*mercatoria*, in 1958 the New York Convention, intervening in the execution of arbitration awards, obliged all contracting states to ensure compliance with the provision of international arbitral courts (“*exequatur*”).

In '90 sports organizations had already a set of rules aimed at all sports subjects all over the world. But different regulations within national laws caused many problems: CAS could not apply *lex sportiva* through the application of a particular national law - as could be the case with *lex mercatoria* - because national laws usually have not incorporated *lex sportiva*. And yet CAS had the exclusive jurisdiction on sports disputes and had established a system of sanctions and bindings jurisdiction like national domestic laws and Community law in terms of efficiency and application.

Moreover, an internationalization process and a spread of the athletes' movement started. So, sport commercialization grows up. As a consequence, sports panorama changed causing a lot of transnational disputes.

That said, in spite of the theoretical discussions on *lex sportiva*, hoping its full achievement and therefore staying positive on its present and future<sup>2</sup>, we must start from the analysis of the concrete situation in order to identify possible paths for its future full achievement, but also in order to consider the difficulties that may arise.

Full achievement of *lex sportiva* still clashes with the policies of National states. With regard to the international sports organization, national states adopt different approaches depending on the cultural and political areas they belong to. There is no uniformity in the legislation concerning sports and there is no uniformity in the provisions of civil law impacting on sports organizations. (For

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E, Vellano M. (eds.), *Diritto internazionale dello sport*, Giappichelli: Torino; Röthel A. (2007), “Lex mercatoria, lex sportiva, lex technical, Private Rechtsetzung jenseits des Nationalstaats?“, in: *Juristen Zeitung*, vol. 62 pp. 755; Kolev B. (2008), “Lex Sportiva and Lex Mercatoria”, in: *The International Sport Law Journal*, vol. 1-2; Oliveira L. de (2017), “Lex sportiva as the Contractual governing Law”, in: *International Sports Law Journal*, vol. 17, n. 1-2, pp. 101-116; Panagiotopoulos D. P. (2016), “Arbitral Jurisdiction in Sports Activities”, in: *e-Lex Sportiva Journal*, vol. IV: 1-2, pp. 20-34; Id., (2013), “Aspects of Sports Law & Lex Sportiva”, in: *Revista de Derecho del Deporte*, 25-4-2013; Id. (2013), “Lex Sportiva - Lex Olympica and International Sports law”, in: *Sports Law: Structures, Practice, and Justice - Sports Science and Studies* [Dimitrios P. Panagiotopoulos, Wang Xiaoping (Eds)], EKEAD, Beijing-Athens, pp 20-31; Id. (2013), “Clauses for a legitimizing base of regulatory competence” in: *International sports activities “A Lex Sportiva & Lex Olympica Constitutional Charter”*, in: *Proceedings 17th International Association of Sports Law*, Moscow 27-30, Sept. 2011, Russia, and in: *International Sports Law Review Pandektis (ISLR/Pand)*, Vol. 10, issues ½, pp. 15-24. We must remember that *E-lex sportiva Journal* aims “the development and the promotion of the Sports Law Science worldwide and of Lex Sportiva theory”.

2. Davis T. (2001), “What is sports law?”, in: *Sports Law Review*. See also Latty F. (2007), *La lex sportiva. Recherche sur le droit transnational*, Nijhoff Pub., Boston; Blackshaw J. (2011), “Towards a ‘Lex Sportiva’”, in: *International Sports Journal*, n. 1-2, pp. 140.

instance, we may remember the different existing rules in citizenship that gave rise to multiple CAS interventions especially with regard to the participation of athletes in the Olympic Games<sup>3</sup>

Full achievement of *lex sportiva* clashes also with the existence of many differences related to the characteristics of various sports and with the statutes of National Sports Federations dealing with national regulations (let just remind different regulations related to professional sports).

Due to the complexity and variability of sports regulations, the nature of the rules governing transnational disputes is hard to define. In addition, we must remember that the implementation of rules of sports law is achieved not only by legal aspects, but also by political and social ones.

In contemporary judicial experience there is a proliferation of jurisdictions. We can observe an overlapping of national judicial systems and a stratification of forms of justice, placed at different levels. The same case may be referred to courts of different origin and cultures, required to apply a mixture of state, ultrastatual and international law. So, judges are law makers. And so judicial regulation creates a *soft law* always *in itinere*. *Lex sportiva*, created by *Court of Arbitration for sport* is fully integrated in this experience. In this respect, it is perfectly in line with the evolution of the role of courts towards a regulatory function. Therefore, we can say that it is a *soft law* that presents itself as a *lex specialis*, but also as a *lex ferenda*<sup>4</sup>.

Sports legal order puts content items imposed by CIO, international Federations, Olympic Committees and National Federations in a hierarchical order - but this order is not always homogeneous - together with a 'judge-made law' created by *Court of Arbitration for sport* which "continues to develop independently by setting out general legal principles that are of application even if they are not anchored in the rules and regulations of the sports Federations"<sup>5</sup>.

That said, *lex sportiva* is perfectly fitted into the global legal pluralism panorama<sup>6</sup>, and it constitutes a *sui generis* sports law legal order imposed in the sports

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3. See Nafziger J.A.R., "National Identity in sports Tourism", in: Sports Law. Present and future, edited by Kee-young Yeun (ed.) (2018), *Sports Law. Present and future*, Chaek Yearn, pp. 427 ss.

4. Gardiner S. (2001), *Sports Law*, Routledge, London-Sidney.

5. Casini L. (2011), "The Making of Lex Sportiva by the Court of Arbitration for Sport", in: German Law Journal, 2011, vol. 6, n. 3-4, p. 1319. See also Kane K. (2003), "Twenty Years on: an Evaluation of the Court of Arbitration for Sport", in: Melbourne Journal of International Law, n. 4, pp. 611 ss.; Mitten M. (2014), "The Court of Arbitration for Sport and its Global Jurisprudence: International Legal Pluralism in a World Without National Boundaries", in: Ohio State Journal on dispute Resolution, vol. 30, n. 1, pp. 1-44; Lindholm J. (2019), *The Court of Arbitration for Sport and its Jurisprudence An Empirical Inquiry into Lex Sportiva*, TMC Asser Press, The Hague;

6. See Serra M.F. (2018), "Considerazioni sul global legal pluralism", in: Nomos. Le attualità nel

world in a heteronomous way, through international sports organizations. The legal order of sport shall be presented as reports and as coordination already available but also to be implemented between different existing legal systems.

Perhaps, this is the most important element if we must consider the future of *lex sportiva*. It must coordinate varying regulatory regimes, it must standardize disparate national legislations through a work of jurisdiction which is creation of principles (legal certainty, *contra proferentem* rule, fairness, equality, proportionality). Hence one of the ways to develop *lex sportiva* is combining standards and principles. In that direction, *Court of Arbitration for sport* shows that, combining civil and common law legal systems, a wide variety of complex, time-sensitive disputes between parties of different nationalities can be solved producing global respected adjudications of Olympic and international sports disputes.

The Court of Arbitration for sport generates a right aimed at satisfying the needs of sports competitions and it is based on its functional nature.

CAS is an institution for settlement of civil law disputes, and it is not an administrative nor a constitutional court. Although CAS has a lot of common characteristics with international court, it is not a court. CAS is a private arbitral tribunal rather than a 'court' established by agreement of sovereign countries: it is a new form of international legal pluralism that is developing into - and functioning as - a *de facto* common law legal system for what concerns sport organization.

Sports organizations is complex, and its governance has a hierarchical structure but, at the same time, a multilayered character; sports system has a reticular structure, characterized by the coexistence of many interinstitutional relations, both horizontal and vertical. As a result, there are problematic aspects that the Court of Arbitration for sport resolves focusing on fundamental principles and increasingly organized procedurally.

Full achievement of *lex sportiva* requires a meeting point between monism and pluralism, between horizontality and transversality, on one side, and verticality and unit, on the other side. This is a very difficult task because it faces also with the enforceability of rights. Fragmentation of global law and jurisdictions results in different outcomes according to the jurisdictions addressed.

Nevertheless, even if *Court of arbitration for sport* plays a fundamental role for rationalization and integration of sports rules, the sole reference to principles and procedures is not enough. It is also important the collaboration of the various jurisdictions and of the various national states as well as the unit of the sportspeople themselves.

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diritto, 2018, n. 1; Frydman B. (2012), "Comment penser le droit global?", Working Papers du Centre Perelman de Philosophie du Droit", 1, in: <http://www.philodroit.be>; Klabbers J., Piiparinen T. (2013), *Normative Pluralism and International Law. Exploring Global Governance*, Cambridge University Press, Cambridge; Benyekhlef K. (2016), *Vers un droit global*, Editions Thémis: Montreal.

The future of *lex sportiva* depends also on Courts ability to ensure the expectation that it will dissolve the tension between the diverse range of legal mechanism for conflict resolution and provide a source of law that is the same all over the world.

The question is how sport can create this kind of uniform sports law, and if it would be recognized by the various individual national legal systems and courts and by sports people. It is a question of legitimization and, of course, it has many implications. Furthermore, it is a matter that must be investigate in practical terms and considering functional nature of Courts jurisprudence.

The future of *lex sportiva* also depends on the cooperation of National states. In fact, *lex sportiva* must be based on the capacity to bring together, as we have said, content and principles, monism and pluralism. It requires additional and more complex foundations which also consider the same association organization typical of sport.

One of the problems concerns the sporting associations. *Lex sportiva* must complete an endogenous regulatory order born on a particular and *sui generis* associative contractual basis. This varied and variously regulated associative system in sports organizations creates some difficulties related to the transformation of sport that has lost its playful characteristics forcing to review its traditional autonomy, based on Olympic spirit.

A possible way for the full achievement of *lex sportiva* is the reticular configuration of sports organizations which imposes a relational vision, therefore collaborative, between the various organs of the sporting system but also between the sports system and the state systems.

The hope of a fully functional *lex sportiva* is related to political decisions of national Legislators and to a fully functional *Court of arbitration for sport* that could be able to coordinate national rules and could be able to realize a judicial cooperation. In concrete terms, it is a relationship of forces involving legal, political, and social aspects.

Let me consider Italian situation. Like other national organizations it involves legal, political, and social aspects too.

With regard to legal aspects, in Italy the complex issue of sports justice refers to L. 280/2003 and to CONI regulations. Remembering that *Court of Arbitration for sport* is an arbitral and mandatory tribunal, a first difficulty arises just from the configuration of the arbitration in the Italian legal system. Italian legislation on arbitration focuses on the voluntary choice which is indirect in sports system<sup>7</sup>.

Since the early days, Constitutional Court admitted the possibility to re-

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7. Bonato G. (2012), "Profili di diritto comparato: la natura e gli effetti del lodo arbitrale in Francia, Belgio, Spagna e Brasile", in: Id., *La natura e gli effetti del lodo arbitrale. Studi di diritto italiano e comparato*, pp. 67 ss., Jovene: Napoli. See also Baoging L. (2018), "The jurisdiction

nounce the state jurisdiction in favor of arbitration, whose foundation lies in the free choice of the parties because only the choice of subjects (understood as one of the possible ways to dispose, also in negative sense, of the right referred to in art. 24, first paragraph, Cost.) may derogate from the precept contained in art. 102, first paragraph, Cost. that corresponds to the constitutional guarantee of the autonomy of individuals that, for situations of compromising advantage.

As regards the CAS Award, it could be recognized and can obtain *exequatur* by the ordinary court in accordance with the usual rules of foreign arbitration with reference to the 1958 New York Convention. But according to Italian law, if dispute is irrelevant to the legal order of the State, the declaration of enforceability by the judicial authority cannot be asked, nor any action can be taken before it for its annulment. But, in the event that the dispute is relevant to the legal system as it affects subjective rights, arbitration can take full effect in the law of the State and judges are allowed to intervene. However, this contrasts with the aspiration of the Olympic movement and the international federations to achieve a harmonized and homogeneous standard valid at a global level for all sports activities, implies that any conflict between national law and sports law should be settled in favor of the latter which reflects this transnational legal order.

Another problem arises. Moreover, although Court of Arbitration for sport is autonomous from the IOC, its neutrality is questionable and at least susceptible to criticism since the arbitrators are mainly determined by the top sporting bodies and sportspeople is obliged to ask the Court and don't have the right to choose referees outside the CAS' list.

It is true that, in this regard, the European Union considered that the Court of Arbitration for Sport is an independent body. So the devolution of sports disciplinary disputes to it cannot constitute an infringement of art .6.1 (right to a fair trial) of the European Convention on Human Rights.

It is also true that the autonomy of sports federations to create their own *lex sportiva* is restricted by both European and national law. European law is directly applicable to the rules and regulations of sports federations insofar as sportsmen engage in economic activities. Thus, in the event of conflict, European law supersedes *lex sportiva*.

However, the Court of justice takes the specificity of sport into account and classifies the rules and the regulations of sports federations as conforming to European law if they observe the principle of proportionality. This is a point that cannot be solved only on a theoretical level. It involves the relations between national courts (and, as far as Europe is concerned, also the Court of Justice) and the *Court of Arbitration for Sport*. The latter has helped to confirm the existence of transnational regulation of sports disputes, in which many of the rules created

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Expansion of Arbitration of Court of Arbitration for sport", in: *Sports Law. Present and future*, edited by Kee-Young Yeun, cit., pp. 375 ss.



by sports federations are used. But above all, it refers to general legal principles including proportionality.

Generally, national courts accept the determinations of the Court of arbitration and the regulations of the national federations, if they respect the principles of proportionality, equality and fundamental rights and public order. In this case, national courts generally allow non-state rules to supersede state law, facilitating the application of an internationally uniform law to similar cases at least those appearing before the Court of Arbitration for sport.

If *lex sportiva* is a private system of transnational law such a pluralistic notion of law allows us to see private arbitration as a non-state arrangement not created by governments but existing as a self-reflexive legal order, which is juridicated in its own practice. This juridification, with institutionalized forms of rule creation and a forum for dispute settlement that respects substantive and procedural justice, is the reason why national courts will respect its exclusive jurisdiction. Judges apply the rules deciding on the basis of principles.

If we consider the problem from the political point of view it is clear the difficulty of creating a collaborative network without the political will of national systems.

In Italian system some doubts arise about the possibility to realize relationality between the sports organizations and the legislator. Last provisions crumble on the political level the collaboration between sports organizations and national legislation. The measure provides for a downsizing of CONI by amplifying the problems in relation to the already delicate issue of sports justice.

Reference to principles allows creating a harmonious treatment of sports law in an international sphere. It is conceivable that the Court could implement some form of collaboration between different jurisdictions, since the national courts make restrictive interpretation of the legislation by reference to principles.

The choice that sportspeople make of which court they refer to is fundamental. They undertake, through membership of the federations, to recognize the CAS as a unique and valid arbitration system, but very often they apply to national courts.

If we consider the social plan, the global legal order is based on the existence of community of subjects who are social actors and who intervene in the global world expressing in various ways their regulatory and managerial capacity. On the contrary, the legal order of sport is characterized by the existence of an association whose regulatory and managerial capacity does not belong directly to the community and therefore does not realize the cultural and economic identity which can be transformed, through acts of will, into an institutional identity and can generate a sense of belonging.

In this sense the future of a universally valid *lex sportiva* could also depend on the realization of a real community based on participation and sense of belonging.

Sport could find a new foundation for its autonomy in this direction.

A fundamental question in sports organization is about the absence of a good and democratic governance and of a homogeneous international organization which can give credibility and fairness to sport regulations and defend the idea for full autonomy of sport.

In this context it can only be assumed that the future of *lex sportiva* depends on the capacity that the Court of Arbitration for Sport will have to strengthen and regulate in even more democratic terms its organizational structure and consequently overcome some critical aspects of its jurisdictional work.

The mandatory reference to arbitration of players and clubs imposed through the by-laws of their federations, could threaten the recognition of Court of Arbitration for sport as a valid arbitration system and could not contribute to the idea of an objective, transparent, self-integrated and universally accepted international sports law or *lex sportiva* in any manner.

*Lex sportiva* might apply to relations in sport as an autonomous body of law, as a global forum and as a global constitutive body which must be recognized by national laws, but this is still not the case. *Lex sportiva* has some way to go before these three criteria are fulfilled. Nowadays the regulations of sport associations are often scrutinized on the basis of national laws. Until clubs and sportsmen consider that their interests are adequately safeguarded through their participation in the decision-making process especially as regards matters of primary concern for them, the incentive to refer their cases to the courts as well as their mistrust and suspicion to the federations will remain present.

And yet the Court of Arbitration for sport while being confronted with the many obstacles of which we have spoken and thanks to the functional nature of its jurisprudence, is starting to create a process of consolidation of global sport organization.

One of the conditions for full implementation of the universally valid *lex sportiva* is its capacity to realize a real sport community based on its functionality and on the interaction between sports law and legal systems, thanks to its ability to use principles in order to create comprehensive standards.

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