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Theorie und Praxis des Unternehmensrechts

Festschrift zu Ehren von Lukas Handschin

Herausgegeben von

Peter Jung
Frédéric Krauskopf
Conradin Cramer



Schulthess 

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Schulthess § 2020

Bibliografische Information der Deutschen Nationalbibliothek

Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über <http://dnb.d-nb.de> abrufbar.

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ISBN 978-3-7255-7962-4

www.schulthess.com

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The legal regime applicable to disciplinary measures by sports associations – one size does not fit all

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I. Introduction

The internal organisation of sports associations finds its cornerstone in the constitutionally guaranteed freedom of association, more specifically in the autonomy of sport.¹ This freedom of internal organisation empowers sports associations to impose and enforce rules and regulations upon their direct and indirect members.² Athletes submit themselves to the regulations of sports associations through membership contracts, employment contracts or so-called athlete's agreements/license agreements. All persons that have submitted to the associations' rules must necessarily comply with them. Any violation of statutes, rules and regulations can trigger disciplinary responses by the sports associations. It is within the autonomy of the respective sports association to define any behaviour that constitutes a breach of its rules. In addition, it is for the sports organisation to decide on the consequences of such breach. Disciplinary consequences may range from reprimands, fines, temporary or

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¹ See, e.g. Article 23 (1) of the Swiss Constitution, Article 9 (1) of the German Constitution and Article 11 of the European Convention on Human Rights ("ECHR").

² The term "indirect members" refers to third parties who have contractually submitted themselves to the rules and regulations of a sports organisation, cf. HAAS/MARTENS, *Eine Einführung in die Praxis*, 2011, p. 66 et seq.; VAN KLEEF, *The legal status of disciplinary regulations in sport*, in: *Int Sports Law J*, 2015, 14, 24, 35 et seq.

provisional suspension from association life or competitions to definite exclusion from membership or participation in organised sport.³

It is undisputed that – e.g. under Swiss law – there are limits to the disciplinary autonomy of sports associations. In general, the following limitations are referred to: the individual must have (contractually) submitted to the regulatory and disciplinary power of the association.⁴ The disciplinary measures need a clear statutory basis.⁵ CAS (Court of Arbitration of Sport) Panels have repeatedly referred to the latter requirement and demanded that disciplinary measures comply with the principle of predictability and legal certainty (“Bestimmtheitsgrundsatz”). For example, in the *Mutko*⁶ decision the CAS Panel stated that “CAS awards have consistently held that sports organizations cannot impose sanctions without a proper legal or regulatory basis and that such sanctions must be predictable. In other words, offences and sanctions must be provided by clear rules enacted beforehand.”⁷ Similarly, the CAS Panel in CAS 2011/A/2612⁸ stated that:

“According to Swiss association law a federation may base a disciplinary measure against a (direct or indirect) member only on provisions that provide a clear and unambiguous authority to do so (cf. BSK-ZGB/Heini/Scherrer, 4th ed. 2010, Art. 70 no. 22; Scherrer/Ludwig, Sportrecht, 2. Aufl. 2010, S. 303; see also BK-ZGB/Riemer, 1990, Art. 70 no. 210; Heini/Portmann/Seemann, Grundriss Vereinsrecht, 2009, no. 265). This principle is also part of general considerations of sports law that have been taken into account by CAS Panels in the past irrespective of the (subsidiarily) applicable laws to the merits ... In particular in CAS 94/129 (no. 30, 34) the Panel stated as follows:

‘Any legal regime should seek to enable its subjects to assess the consequences of their actions ...’. Furthermore the Panel stated that while ‘the fight against doping is arduous, and ... may require strict rules, ... the rule-makers and the rule-appliers must begin by being strict with themselves’.”

A further prerequisite is that disciplinary measures comply with higher-ranking norms, in particular with the personality rights of the person against whom the measure is directed and/or with the principle of proportionality.⁹ In addition, the competent body must establish

³ DE MARCO, *Football and the Law*, 2018, no. 23.2; see, e.g. Article 6 of the FIFA Disciplinary Code (2019 edition); BADDELEY, *The extraordinary autonomy of sports bodies under Swiss law: lessons to be drawn*, in: *Int Sports Law J* (online), December 20, 2019, <https://doi.org/10.1007/s40318-019-00163-6> [Accessed March 5, 2020].

⁴ BSK ZGB I-SCHERRER/BRÄGGER, 6th ed. 2018, Art. 70 no 18 et seq.; see also BELOFF, in: Kerr/Demetriou/Beloff (eds.), *Sports Law*, 2nd ed. 2012, no. 7.03.

⁵ Federal Supreme Court Decision 5A_787/2014 (4.5.2015) consid. 5.3; BSK ZGB-I-SCHERRER/BRÄGGER, 6th ed. 2018, Art. 70 no. 22.

⁶ CAS 2017/A/5498, *Vitaly Mutko v. International Olympic Committee (IOC)*.

⁷ *Ibid.*, no. 50 and 60.

⁸ CAS 2011/A/2612, *Liao Hui v. International Weightlifting Federation (IWF)*, no. 103.

⁹ Federal Supreme Court Decision 134 III 193, consid. 4.4. et seq.; BSK ZGB I-SCHERRER/BRÄGGER, 6th ed. 2018, Art. 70 no. 23; VALLONI/PACHMANN, *Sportrecht in a nutshell*, 2012, p. 18.

that the individual effectively breached the rule before issuing a disciplinary measure. Finally, the imposition of disciplinary measures requires, in principle, that the individual was at fault when committing the respective breach.¹⁰

II. Evading the regulatory limits by reframing

There are plenty of examples where a sports organisation has tried to evade the above restrictions by reframing their disciplinary measures and qualifying them as eligibility rules. Eligibility rules regulate under what conditions an individual may participate in the life of an association. It is, in principle, within the association's autonomy and, thus, its discretion to decide who shall take part in its association life. Consequently, an individual has, in principle, no claim that he or she be accepted as a member of an association or to take part in its internal affairs.¹¹ Eligibility rules may appear in different forms and under different names. In some instances they are also referred to as nomination rules designed to select specific athletes for national and international competitions based on sporting performance or other criteria.

Obviously, there are limits to the autonomy of a sports organisation to select its members or participants, particularly in case the association enjoys a monopoly position.¹² In such circumstance, rejecting an application must comply with general considerations of statutory law, in particular with competition law and/or the personality rights of the applicant.¹³ However, the mere fact that an association has a monopoly position does not award an unconditional claim to the applicant to be admitted to the association life. Instead, the Swiss Federal Supreme Court only qualifies the rejection of the applicant as illicit, if the association did not act in conformity with its rules or if the interest of the individual to become a member outweigh the interests of the association not to admit the applicant.¹⁴

Sometimes it is not easy to distinguish between eligibility rules (and their enforcement) and disciplinary measures. There is abundant CAS jurisprudence on this question. In order to determine the legal nature of a measure (and, thus, the legal framework applicable to it), CAS Panels do not look at the label of the rule (or the respective measure), but at its pursued objective. Even though this starting point is uncontested,¹⁵ CAS Panels in the past have struggled with where to draw the dividing line between disciplinary and eligibility rules (in particular in the context of anti-doping).¹⁶ Mostly, Panels have made the respective qualification of the rule based on its "nature", or its "effect". In CAS 2011/O/2422 (the so-called Osaka case), the Panel held as follows:¹⁷

¹⁰ BSK ZGB I-SCHERRER/BRÄGGER, 6th ed. 2018, Art. 70 no. 21; FRITZWEILER, in: Pfister/Summerer (eds.), *Praxishandbuch Sportrecht*, 3rd ed. 2014, part. 2 no. 352; for exceptions to this rule see below.

¹¹ BSK ZGB I-SCHERRER/BRÄGGER, 6th ed. 2018, Art. 70 no. 37.

¹² BSK ZGB I-SCHERRER/BRÄGGER, 6th ed. 2018, Art. 70 no. 38.

¹³ Federal Supreme Court Decision 4A_21/2011 (4.4.2011) consid. 5.2.1.3.

¹⁴ Federal Supreme Court Decision 4A_21/2011 (4.4.2011) consid. 5.5.

¹⁵ Cf. CAS 2012/A/3055, *Riis Cycling A/S v. the Licence Commission of the Union Cycliste Internationale (UCI)*, no. 8.21.

¹⁶ HAAS, *Ex-Doper willkommen?*, in: Jusletter vom 2. April 2012, no. 16 et seq.

¹⁷ CAS 2011/O/2422, *United States Olympic Committee (USOC) v. International Olympic Committee (IOC)*, no. 33 et seq.; see also CAS 2007/O/1381, *Real Federación Española de Ciclismo (RFEC) &*

“[...] qualifying or eligibility rules are those that serve to facilitate the organization of an event and to ensure that the athlete meets the performance ability requirement for the type of competition in question [...]. [A] common point in qualifying (eligibility) rules is that they do not sanction undesirable behaviour by athletes. Qualifying rules define certain attributes required of athletes desiring to be eligible to compete and certain formalities that must be met in order to compete [...]. In contrast to qualifying rules are the rules that bar an athlete from participating and taking part in a competition due to prior undesirable behaviour on the part of the athlete. Such a rule, whose objective is to sanction the athlete’s prior behaviour by barring participation in the event because of that behaviour, imposes a sanction. A ban on taking part in a competition can be one of the possible disciplinary measures sanctioning the breach of a rule of behaviour.”

The above approach has also been followed in the *Mutko* case, where the Panel found that *“a rule, whose objective is to sanction the athlete’s prior behaviour by barring participation in the event because of that behaviour, imposes a sanction. A ban on taking part in a competition can be one of the possible disciplinary measures sanctioning the breach of a rule of behaviour [...]”*.¹⁸ Thus, the decision of a sports organisation to declare 46 XY DSD (‘Disorders of Sexual Development’) female athletes or male-to-female transgender athletes ineligible from participating in female sports competitions if a certain (natural) testosterone level is exceeded, was rightly qualified by a CAS Panel as an eligibility rule and not as a disciplinary measure.¹⁹ The consequence provided for in this rule (non-participation) is not tied to any undesirable behaviour of the athlete and does not seek to punish the athlete. Consequently, the enforcement of such a provision does not fall within the legal regime applicable to sanctions.

Another example where CAS Panels have struggled to properly qualify the respective rules relates to the licensing system of the Union of European Football Associations (UEFA) in relation to its club competitions (UEFA Champions League and the UEFA Europa League). One of the prerequisites for obtaining a license for UEFA club competitions is compliance with Article 50(3) of the UEFA Statutes (2018 edition) which provides that any club involved in any form of manipulation of sports competitions shall not be admitted to competitions of the UEFA.²⁰ Further conditions to participate in UEFA competitions are set forth

Alejandro Valverde v. Union Cycliste Internationale (UCI), no. 75 et seq. ; CAS 2012/A/3055, *Riis Cycling A/S v. the Licence Commission of the Union Cycliste Internationale (UCI)*, no. 8.21 et seq.; CAS 2017/A/5498, *Vitaly Mutko v. International Olympic Committee (IOC)*, no. 50; contra CAS OG 18/03, *Alexander Legkov, Maxim Vylegzhanin, Evgeniy Belov, Alexander Bessmertnykh, Evgenia Shapovalova, Natalia Matveeva, Aleksandr Tretiakov, Elena Nikitina, Maria Orlova, Olga Fatkulina, Alexander Rumyantsev, Artem Kuznetsov, Tatyana Ivanova, Albert Demchenko, Sergei Chudinov v. International Olympic Committee (IOC)*, no. 7.3 et seq.

¹⁸ CAS 2017/A/5498, *Vitaly Mutko v. International Olympic Committee (IOC)*, no. 50.

¹⁹ Cf. CAS 2018/O/5794 & 5798, *Mokgadi Caster Semenya v. International Associations of Athletics Federations (IAAF) & Athletics South Africa v. International Associations of Athletics Federations (IAAF)*; FLETCHER, UCI halves testosterone threshold for transgender riders, cyclingnews (online), <https://www.cyclingnews.com/news/uci-halves-testosterone-threshold-for-transgender-riders> [Accessed March 5, 2020].

²⁰ Article 50 (3) of the UEFA Statutes (2018 edition): *“The admission to a UEFA competition of a Member Association or club directly or indirectly involved in any activity aimed at arranging or influencing the outcome of a match at national or international level can be refused with immediate effect, without prejudice to any possible disciplinary measures.”*

in Article 4 of the Regulations of the UEFA Champions League (2019/20 season; “UCLR”). Articles 4.02 and 4.03 of the UCLR read as follows:

“4.02 If, on the basis of all the factual circumstances and information available to UEFA, UEFA concludes to its comfortable satisfaction that a club has been directly and/or indirectly involved, since the entry into force of Article 50(3) of the UEFA Statutes, i.e. 27 April 2007, in any activity aimed at arranging or influencing the outcome of a match at national or international level, UEFA will declare such club ineligible to participate in the competition. Such ineligibility is effective only for one football season. When taking its decision, UEFA can rely on, but is not bound by, a decision of a national or international sporting body, arbitral tribunal or state court. UEFA can refrain from declaring a club ineligible to participate in the competition, if UEFA is comfortably satisfied that the impact of a decision taken in connection with the same factual circumstances by a national or international sporting body, arbitral tribunal or state court has already had the effect of preventing that club from participating in a UEFA club competition.

4.03 In addition to the administrative measure of declaring a club ineligible as provided for in Paragraph 4.02, the UEFA Organs for the Administration of Justice can, if the circumstances so justify, also take disciplinary measures in accordance with the UEFA Disciplinary Regulations.”

The above provisions establish a so-called “two-stage process” in case a club is alleged to have been involved in the manipulation of sports competitions.²¹ Article 4.03 of the UCLR expressly distinguishes between an “administrative measure” that prevents the club from participating in the next edition of the competition and other “disciplinary measures” (“in addition to”). The question is which legal framework shall apply to the “administrative measure”. If one were to apply the Osaka-criteria, it is rather obvious that – independently of how UEFA labels its rules – Article 4.02 of the UCLR must be qualified as a disciplinary measure, because the consequences imposed by it are tied to an undesirable behaviour of the club, i.e. to be (directly or indirectly) involved in match manipulations. Despite of this, some CAS Panels have qualified Article 4.02 of the UCLR as an eligibility rule. In CAS 2013/A/3258²² the Panel held as follows:

“The Panel considers that Art. ... [4.02 UCLR] above is a regulatory provision whose main purpose is to establish the eligibility criteria and the conditions of participation in UEFA competitions and not to punish a club. In the Panel’s view even if the application of Art. ... [4.02 UCLR] may have the effect to exclude a club from a UEFA competition, the relevant provision is not of a sanctionatory nature. This is also confirmed by the wording of Art. 50 (3) UEFA-Statutes which reads as follows: ‘3 The admission to a UEFA competition of a Member Association or club directly or indirectly involved in any activity aimed at arranging or influencing the outcome of a match at national or international level can be refused with immediate effect,

²¹ See for the evolution of the regulatory framework, GARCIA, The match-fixing eligibility criteria in UEFA competitions: an overview of CAS case law, CAS Bulletin 2018/01, p. 6 et seq.

²² CAS 2013/A/3258, *Besiktas Jimnastik Kulübü v. UEFA*, no. 127; cf. also CAS 2014/A/3625, *Sivasspor Kulübü v. UEFA*, no. 102 et seq. and 122 et seq.; CAS 2014/A/3628, *Eskisehirspor Kulübü v. UEFA*, no. 102 et seq.; CAS 2016/A/4650, *Klubi Sportiv Skenderbeu v. UEFA*, no. 47 et seq.

without prejudice to any possible disciplinary measures’, implicitly excluding its sanctionatory nature.”.

Qualifying the exclusion from UEFA’s club competitions for one season (according to Article 4.02 of the UCLR) as “not of sanctionatory nature” is – in view of the effects and purpose of the rule – clearly wrong. The measure is also not “hybrid” in nature,²³ but unambiguously disciplinary.

A further example that illustrates the difficulties when differentiating between eligibility and disciplinary rules is the case *CAS 2016/O/4684*.²⁴ The respective CAS Panel had to decide upon the legal nature of a provision in the IAAF (International Association of Athletics Federations) statutes according to which athletes associated with a national federation that has been suspended for a breach of the IAAF anti-doping rules are – in principle – ineligible to compete in IAAF competitions. In the case at hand the IAAF had suspended the membership of the Russian Athletics Federation (“RusAF”) and thereby excluded the Russian athletes associated with RusAF. The question arose whether the rule excluding athletes from competition whose national federation’s membership has been suspended constituted a disciplinary measure vis-à-vis the athletes. The CAS Panel – rightly – qualified the provision as an eligibility rule, since “[t]he athletes ... were ineligible because RusAF has been sanctioned, and accepted that sanction, not because of what the athletes have done.”²⁵ Consequently, indirect consequences affecting third parties stemming from disciplinary measures may not be qualified automatically as disciplinary in nature vis-à-vis those third parties.

III. The need to differentiate between various types of sanctions

Once a Panel has established the disciplinary nature of a rule, it must apply the legal framework applicable to such measure. At first sight one might be tempted to apply the identical legal regime to all disciplinary measures. However, a closer look at the legal literature and the jurisprudence demonstrates that the limits to the disciplinary authority vary greatly depending on the type of disciplinary measure in question.

1. Field of Play decisions

The most obvious example that not all disciplinary measures are treated the same relates to so-called “field of play” decisions. The latter constitute an exception from the well-established principle that there must be unrestricted access to justice against any disciplinary measure imposed by a sports organisation. Contrary to “normal” disciplinary measures where access to justice is undisputed, only a very limited external review is permitted in relation to field of play decisions. Thus, the limits to the disciplinary authority are very different when comparing field of play decisions (e.g. a yellow card in football) and other disciplinary measures. The key objective of the field of play doctrine is to immunise the

²³ CAS 2016/A/4650, *Klubi Sportiv Skenderbeu v. UEFA*, no. 48.

²⁴ CAS 2016/O/4684, *Russian Olympic Committee (ROC), Lyukman Adams et al. v. International Association of Athletics Federations (IAAF)*.

²⁵ CAS 2016/O/4684, *Russian Olympic Committee (ROC), Lyukman Adams et al. v. International Association of Athletics Federations (IAAF)*, no. 121.

field of play from the reach of the law, to create in other words a field of autonomy within which the application of legal principles shall not trespass.²⁶ The “field of play” doctrine is well established in CAS jurisprudence.²⁷ In CAS OG 00/13²⁸ e.g. the Panel stated that “CAS arbitrators do not review the determinations made on the playing field by judges, referees, umpires, or other officials who are charged with applying what is sometimes called “rules of the games” (one exception among others would be if such rules have been applied in bad faith, e.g. as a consequence of corruption). If they happen to have been present at the relevant event, CAS arbitrators were mere spectators with no official role. Moreover, they are not, unlike on-field judges, selected for their expertise in officiating the particular sport.” Similarly, a CAS Panel held in CAS OG 02/007 that “embark[ing] on a review of a purely technical “field of play” decision [...] would be an illegitimate exercise, absent some evidence of bad faith in the making of the decision... (It) is not open to a player to complain about a “field of play” decision simply because he or she disagrees with that decision.”²⁹ The reason for treating field of play decisions differently – even if they are clearly disciplinary in nature – follows from a balancing of the interests involved. The underlying idea for limited immunity is that the organs of the respective federation are, in principle, in a better position to adjudicate the field of play issues than a court or a CAS Panel examining the issues ex post.³⁰ There are, thus, good reasons of administration of justice to limit the scope of review in such circumstances. Of course, it is not always easy to determine whether a disciplinary measure constitutes a field of play decision or not. In principle, the doctrine only applies, if the disciplinary measure was made on the playing field by judges, referees, umpires and other officials,³¹ the effects of such decision are limited to the playing field and if the officials of the federation truly have a better expertise to finally adjudicate the matter.³²

2. Disqualifications

It is widely accepted that a special legal regime also applies to disciplinary measures in the form of disqualification. The purpose of a disqualification is to (retroactively) withdraw eligibility for the competition in which the breach occurred. While it is uncontested that in order to inflict a (final) period of ineligibility the respective person must have breached the relevant rules with fault (negligently or intentionally), a disqualification may be imposed

²⁶ BELOFF/NETZLE/HAAS, in: Lewis/Taylor (eds.), Sport: Law and Practice, 3rd ed. 2014, marg. no. E.125.

²⁷ See for a detailed analysis, BELOFF/NETZLE/HAAS, in: Lewis/Taylor (eds.), Sport: Law and Practice, 3rd ed. 2014, marg. no. E.126 et seq.

²⁸ CAS OG 00/13, *Bernardo Segura v. International Amateur Athletic Federation (IAAF)*, no. 17 et seq.

²⁹ For further examples, cf. CAS 2017/A/5373, *Japan Triathlon Union (JTU) v. International Triathlon Union (ITU)*, no. 49 et seq.; CAS 2009/A/1860, *Biaggi & Aprilia Racing Srl v. Fédération Internationale de Motocyclisme (FIM)*, no. 53 et seq.; CAS 2008/A/1641, *Netherlands Antilles Olympic Committee v. International Association of Athletics Federation (IAAF) & United States Olympic Committee (USOC)*, no. 80 et seq.

³⁰ CAS 2018/A/5808, *AC Milan v. UEFA*, no. 133; CAS 2017/A/5373, *Japan Triathlon Union (JTU) v. International Triathlon Union (ITU)*, no. 50; BELOFF/NETZLE/HAAS, in: Lewis/Taylor (eds.), Sport: Law and Practice, 3rd ed. 2014, marg. no. E.125.

³¹ CAS 2017/A/5373, *Japan Triathlon Union (JTU) v. International Triathlon Union (ITU)*, no. 50.

³² CAS 2013/A/3274, *Mr. Mads Glasner v. Fédération Internationale de Natation (FINA)*, no. 8.1.

even absent any element of fault, i.e. on purely objective grounds.³³ Evidence of this nuanced approach can be found – e.g. – in the World Anti-Doping Code (WADC). Under Art. 10 it is a mandatory requirement when imposing a period of ineligibility that the person acted with fault, whereas no such requirement exists in the context of disqualifications. Instead, with respect to the latter the WADC follows the principle of strict liability (Art. 9). According thereto, an athlete in breach of the anti-doping rules will be disqualified from competition irrespective of whether or not he or she acted with fault. The reason for applying different standards in both instances is the result of a balancing interests test. As a CAS Panel has put it, “*the interests of the athlete concerned in not being punished without being guilty must give way to the fundamental principle of sport that all competitors must have equal chances.*”³⁴ In addition, disqualifications impact the individual’s legal sphere to a far lesser extent than periods of ineligibility. Disqualifications are – in principle – limited to rectifying a disruption of the level playing field in a specific competition. A (presumed) irregular advantage of an athlete that made him or her ineligible to compete is eliminated by excluding the athlete *ex post* from competition.³⁵ Because of their different purpose, disqualifications and periods of ineligibility can be cumulatively imposed.

3. Provisional suspensions

Another well-accepted example that differing standards apply to different types of sanctions are provisional suspensions. The latter are frequently encountered in anti-doping. The WADC – e.g. – provides for provisional suspensions (i.e. provisional periods of ineligibility) in case an athlete has tested positive for specific substances (Art. 7.4 WADC). Provisional suspensions are disciplinary measures that are imposed even though the infraction has not yet been conclusively confirmed. In cases of provisional suspensions, the breach is merely alleged, i.e. likely to have occurred. According to a CAS Panel the “*provisional suspension occupies a space in which [a breach of the rules] is asserted, but not yet proven*”.³⁶ Unlike with (final) periods of ineligibility under Article 10 WADC, the competent body does not need to be comfortably satisfied in the context of a provisional suspension that all objective and subjective prerequisites for imposing a sanction are fulfilled. Instead, it suffices that there is suspicion, i.e. a certain likelihood that the respective conditions for imposing a sanction are met.³⁷ Provisional suspensions have a necessarily preliminary character. The standard of proof and the legal thresholds applicable in the context of a judicial review must reflect the provisional nature of the measure.³⁸ Consequently, the strictures applicable to final periods of ineligibility cannot apply to provisional suspensions.

³³ Cf. Comment to Article 2.1.1 in the World Anti-Doping Code (WADC); cf. also Federal Supreme Court Decision 4P.105/2006 (4.8.2006), *consid.* 8.2; CAS 2002/A/376, *Baxter v. International Olympic Committee (IOC)*, no. 7; ADOLPHSEN, *Internationale Dopingstrafen*, 2003, p. 336.

³⁴ CAS 2001/A/317, *A. v. Fédération Internationale de Lutttes Associées (FILA)*, no. 24.

³⁵ Cf. ADOLPHSEN, *Internationale Dopingstrafen*, 2003, p. 39; see also FLINT/LEWIS/TAYLOR, in: Lewis/Taylor (eds.), *Sport: Law and Practice*, 3rd ed. 2014, C2.162; CAS 2017/AJ4927, *Misha Aloyan v. International Olympic Committee (IOC)*, no. 75; LG Münster SpuRt, 2003, 205, 206.

³⁶ CAS 2017/A/4968, *Alexander Legkov v. International Ski Federation*, no. 157 et seq.

³⁷ Applying an even lower standard of proof, CAS 2017/A/4968, *Alexander Legkov v. International Ski Federation*, no. 168, 175 et seq; provisional suspension only needs to be overturned if it has “no reasonable prospect of being upheld ... *This standard ... is necessarily weaker than the test of ‘comfortable satisfaction’.*”

³⁸ CAS 2017/A/4968, *Alexander Legkov v. International Ski Federation*, no. 158.

However, the interests of the sports organisation in protecting the integrity of future competitions must outweigh the individual's interests in a fair proceeding, in particular being advised of the charged breach and being able to defend his or her cause.³⁹ The balancing will only tip in favour of the sports organisation, if the alleged breach is sufficiently severe and the suspicion that the individual committed the breach is sufficiently strong. In particular, the suspicion must be substantiated by evidence and, hence, not rely on mere speculation.⁴⁰

Because (final) periods of ineligibility and provisional suspensions pursue different purposes, they can be imposed cumulatively. In particular, a provisional suspension imposed at the first level, does not hinder the competent authority from issuing a (final) period of ineligibility once it has concluded its investigations. Obviously, the principle of proportionality demands that the competent authority takes the provisional suspension into account when determining the final period of ineligibility. In light of the above it becomes rather obvious that UEFA's "two-stage process" in the context of its club competitions (see supra) is nothing else than a provisional suspension ("administrative measure") coupled with a main disciplinary procedure (i.e. "disciplinary measure"). If UEFA suspects a club of being involved in match fixing, it provisionally suspends the club for the next edition of the competition in order to safeguard the integrity of the ongoing competition (first step). In a next step, UEFA conducts and finalises its investigations into the matter (second step) and will issue a final period of ineligibility in case it establishes that the club was effectively involved in match-fixing (taking account of the period already served under the provisional suspension).

Since a (later) finding of the sports organisation that there was no breach will not retroactively invalidate the provisional suspension, it is important to prevent any misuse of this particular disciplinary measure. In particular, it must be ensured that sports organisations do not disguise a final decision by labelling it a provisional measure in order to benefit from a more favourable legal regime (in particular a lower standard of proof). Thus, provisional suspension must be limited in time, i.e. they must be temporal in scope and therefore shorter than the final period of ineligibility applicable to the alleged breach in question. This finding has been expressly backed by a CAS Panel in a case relating to the investigations into the so-called Russian doping scandal:⁴¹

"At the same time the Panel is sensitive to the concern of the Appellant who stands under the shadow of a suspension undefined in length (which must be balanced, inter alia, against the legitimate interest of other athletes not to find themselves competing against athletes who may well be cheaters). Competitions cannot be repeated; the form and motivation of athletes wax and wane. Occupying in principle the space between suspicion and conviction, suspensions gradually lose their essential interim character with the passage of time. What conclusions the Oswald Disciplinary Commission may draw is necessarily open to question but the Panel believes it must and will one way or the other draw such conclusions. The Federation estimated a completion to Mr. Oswald's work by the upcoming winter skiing season (the IOC has also since publicly announced that the report is expected to be delivered in October

³⁹ Cf. ADOLPHSEN, *Internationale Dopingstrafen*, 2003, p. 39 et seq.

⁴⁰ CAS 2017/A/4968, *Alexander Legkov v. International Ski Federation*, no. 189.

⁴¹ CAS 2017/A/4968, *Alexander Legkov v. International Ski Federation*, no. 238.

2017) and its counsel explicitly accepted the Panel's ability to introduce a temporal condition to the appealed suspension's maintenance. The Panel appreciates the unusual magnitude and complexity of cases awaiting Mr. Oswald's attention. It cannot however endorse an indefinite and indeterminable suspension as proportionate. Noting the Appellant's reasonable entitlement to legal certainty, the Panel accordingly deems it appropriate and just that the current provisional suspension expire after 31 October 2017, at which time it will be for FIS to consider whether or not to seek a further suspension justified by new developments and within the framework of the FIS ADR. This approach is entirely in accord with Article 7.9.3.2, particularly point (c), as in the Panel's view to impose a longer suspension in all the present circumstances would be clearly unfair."

4. Interim Conclusion

It follows from all of the above that the mere qualification of a measure as "disciplinary" in nature is only a first step in determining the legal regime applicable to it. The various disciplinary measures are far too different to be treated uniformly. Therefore, one needs in a second step to look at the individual disciplinary measure in question in order to assess and determine its precise legal limits.

IV. The need for a clear basis in the statutes

The CAS Panels have – as pointed out before – constantly held that disciplinary measures need a clear basis in the rules and regulations of the sports organisation in order to be valid. We subscribe to this jurisprudence in principle, but raise the question whether there are also exceptions to this rule depending on the disciplinary measure in question. It appears to us that exceptions must be made in those cases, where disciplinary measures can be based on statutory provisions. In such circumstances it does not appear necessary to demand a further legal basis in the rules and regulations of the sports organisation. An example of a statutory basis for issuing a disciplinary measure is the domiciliary right of the owner of the respective premise. According to Article 641 (2) of the Swiss Civil Code ("CC") the owner has the right to reclaim his or her property from anyone withholding it and to protect such property against any unwarranted interference. Most legal regimes will have similar provisions. Based on such provisions, an owner is entitled to ask any person who interferes with his or her property right to leave the premises or to stop to unduly interfere with the property. Such a decision would doubtlessly be disciplinary in nature, because it is tied to an unwanted behaviour of the "trespasser". However, it appears obvious that such disciplinary measure does not need any (additional) basis in the rules and regulations of the sports organisation in order to be validly exercised.

A further example where statutory law provides for a disciplinary measure is Article 72 CC. The provision states that an association may state the grounds upon which a member may be expelled from the association in its statutes. However, if the statutes do not provide for such grounds, Article 72 (3) CC applies by default. The provision states as follows: "*Unless the articles of association provide otherwise, exclusion requires a resolution by the members and good cause.*" It follows from this provision that the disciplinary measure of excluding an individual from membership in an association is possible, irrespective of whether or not there is a "precise legal basis" in the statutes of said association. Article 72

(3) CC is only an expression of a more general legal principle according to which long-term legal relationships may be terminated based on good cause. Article 72 (3) CC concretises this principle for membership in an association and awards the competence to terminate the relationship to the general assembly.

Another example that constitutes an exception to the above rule are boycotts. The intention of a boycott, in essence, is to isolate and shame an individual based on its past (mis-)behaviour. At the same time a boycott may also pursue economic goals and/or have financial effects. A boycott exercised by a sports organisation is clearly disciplinary in nature. By boycotting an individual a sports organisation expresses its intent not to engage with such individual, in particular not to admit him or her into its “family”. Disciplinary measures and boycotts are similar in terms of their effects. The purpose of both measures is to inflict an evil onto the addressee. In the context of a boycott, the prejudice consists in not engaging with the boycotted individual in any way whatsoever. Of course, there are also differences between a classic disciplinary measure and a boycott. While the former is only addressed inwards, i.e. to individuals who already take part in the association life, a boycott is primarily aimed outwards, i.e. at non-members with the purpose of keeping them (permanently or temporarily) out of the association life. However, a boycott may also be Janus-faced insofar as it is directed to members by imposing upon them the obligation to help to enforce the boycott. Whether boycott measures need a clear basis in the rules and regulation of a sports organisation is unclear. A recent CAS decision appears to request such a legal basis in the statutes of the sports organisation:

The decision concerned the former Russian Minister of Sport Vitaly Mutko. The International Olympic Committee (IOC) Executive Board had decided to “exclude” him “*from any participation in all future Olympic Games*”⁴². Mr. Mutko was not associated in any capacity whatsoever with the IOC. Thus, the IOC decision was not directed to a member or a person taking part in the IOC’s association life. Instead, the measure targeted a person outside the IOC’s regulatory sphere and, therefore, constituted a boycott. The motive behind the IOC’s boycott decision was Mr. Mutko’s alleged leading role in the so-called Russian doping scandal. On appeal against the IOC decision, the CAS Panel found as follows:⁴³

According to CAS jurisprudence, a rule that bars an individual from participating in an event due to prior undesirable behaviour qualifies as a sanction [...]. With that CAS jurisprudence in mind, the Panel finds that the Appealed Decision did sanction the Appellant. Read in its full context, the Appealed Decision unequivocally bars the Appellant’s participation in all future Olympic Games due to his position as Minister of Sports and, thus, his functional responsibility in relation to the alleged Russian doping scheme. [...]. A proper reading of the Appealed Decision in light of the recommendations of the Schmid Report, on which it was explicitly based, leads the Panel to conclude that the Appealed Decision unequivocally imposed a lifetime ban from the Olympic Games on the Appellant. The Panel has thus no hesitation in holding that the Appealed Decision must be legally characterized as a disciplinary sanction. The Panel’s conclusion that the Appealed Decision is disciplinary in nature holds true even if [...] the term “exclusion” [used in the IOC Decision] simply meant that [the IOC] would “not invite” the Appellant to all future Olympic Games and

⁴² CAS 2017/A/5498, *Vitaly Mutko v. International Olympic Committee (IOC)*, no. 12.

⁴³ CAS 2017/A/5498, *Vitaly Mutko v. International Olympic Committee (IOC)*, no. 50 et seq.

reject any application for his participation therein. In that letter, the Respondent declared that “any type of accreditation incorporated in an OIAC would be denied” if an application for his participation were submitted in the future, and that “it cannot imagine any foreseeable reason which could allow the IOC Executive Board to reconsider the issue of [his] participation... in the Olympic Games and come to a different decision” (see letter of 16 July 2018). In the Panel’s view, this has the same effect of disbarring or banning the Appellant for life from participating in the Olympic Games in whatever capacity. [...]. The Panel notes that, according to well-established CAS jurisprudence: ‘the ‘principle of legality’ (‘principe de légalité’ in French), requir[es] that the offences and the sanctions be clearly and previously defined by the law and preclud[es] the ‘adjustment’ of existing rules to apply them to situations or behaviours that the legislator did not clearly intend to penalize. [...]. In light of the foregoing, the Panel must set aside the Appealed Decision for lack of a legal basis.”

We cannot follow the above reasoning. The power to issue a boycott does not need a legal basis in the rules and regulations of an association. Such power simply follows from the individual freedom of action guaranteed by most constitutions. The power to contractually engage or not engage with other individuals is part of the contractual freedom of every person and, therefore, does not depend on an additional basis in the association’s statutes. If one were to decide otherwise, comparable boycotts in commercial life would always be unlawful because of lack of a sufficient legal basis.⁴⁴ This is not to say that there are no legal limits to a boycott. A call for boycott infringes – according to Swiss law – upon the personality rights of other actors and, therefore, is only admissible if the interests of the person calling for the boycott outweigh the interests of the boycottee and if the pursued objective and the means used are legitimate and proportionate.⁴⁵ However, whether or not a call for a boycott has a legal basis in the rules and regulations of the sports organisation is completely immaterial. This is all the more true considering that such legal basis would not serve any purpose. The purpose of a clear legal basis for disciplinary measure in the statutes of an association is to protect the association’s members. They must be able to understand the contents of their legal relationship with the sports association by reading the statutes. By examining the rules and regulations of the sports organisation they will be able to understand the obligations they have submitted to and how these obligations will be enforced against them. Non-members do not need comparable protection, since they are not submitted to the rules of the sports association from the very outset. Thus, providing a regulatory basis for a boycott in the rules and regulations of the sports organisation is devoid of any sense, since the legal relationship between the sports organisation and non-members is only and exclusively regulated by statutory provisions, the basis and contents of which are sufficiently clear.

⁴⁴ Federal Supreme Court Decision 85 II 525 consid. 12; HAAS, in: Haas/Haug/Reschke (eds.), *Handbuch des Sportrechts*, chapter D no. 90.

⁴⁵ Federal Supreme Court Decision 85 II 525 consid. 12; cf. also BSK ZGB I-MEILI, 6th ed. 2018, Art. 28 no. 31.

V. Summary

There is a wide range of disciplinary measures available to a sports organisation. The legal regime applicable to disciplinary measures must be distinguished from other administrative matters such as eligibility rules.

Qualifying a measure as disciplinary in nature is only a first step in determining the applicable legal regime. It is important to understand that the limits to the disciplinary autonomy of a sports organisation vary considerably depending on the disciplinary measure in question.

With respect to the applicable regime, one must distinguish at least between the different disciplinary measures consisting of final periods of ineligibility, field of play decisions, disqualifications, provisional suspensions, or boycotts. The legal requirements applicable to these various disciplinary measures are similar, but by far not identical.