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Seamstress of Transnational Law

How the Court of Arbitration for Sport Weaves the *Lex Sportiva*

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Lex mercatoria, *lex petrolea*, *lex electronica* and *lex sportiva* have gradually entered the mainstream vocabulary of legal scholarship as phenomena highlighting the functionalization and privatization of law in a globalizing world.[1] They embody what are often qualified as distinct legal orders or systems arising out of transnational communities segregated along functional lines.[2] This chapter aims to show that the work of the Court of Arbitration for Sport (CAS), which is often identified as the institutional centre of the *lex sportiva*,[3] can be understood as that of a seamstress weaving a plurality of legal inputs into authoritative awards. In other words, the CAS panels are assembling legal material to produce (almost) final decisions that, alongside the administrative practices of sports governing bodies (SGBs), govern international sports. It is argued that, instead of purity and autonomy, the CAS's judicial practice is best characterized by assemblage and hybridity. This argument will be supported by an empirical study of the use of different legal materials, in particular pertaining to Swiss law, EU law and the European Convention

[1] Gunther Teubner has been a precursor in charting this transformation, see G. Teubner, 'Global Bukowina: Legal Pluralism in the World-Society', in G. Teubner (ed.), *Global Law without a State* (Dartmouth, 1996), pp. 3–28 and G. Teubner, 'Breaking Frames: Economic Globalization and the Emergence of Lex Mercatoria' (2002) 5 *European Journal of Social Theory* 199–217. For a general overview of the by now extremely vast literature, see R. Michaels, 'Global Legal Pluralism' (2009) 5 *Annual Review of Law and Social Science* 243–62.

[2] Specifically, on the role of transnational communities, see R. Cotterrell, 'Transnational Communities and the Concept of Law' (2008) 21 *Ratio Juris* 1–18.

[3] See F. Latty, *La lex sportiva: Recherche sur le droit transnational* (Brill, Nijhof, 2007) and L. Casini, 'The Making of a Lex Sportiva by the Court of Arbitration for Sport' (2011) 12 *German Law Journal* 1317–40.

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on Human Rights (ECHR), within the case law of the CAS. The view advanced here should not be confused with one arguing that the CAS is fully integrated into the Swiss legal order, the EU legal order or into a monistic international legal order. Its main claim is that the judicial practice of the CAS can be captured as the work of a seamstress weaving 'different bodies of norms with one another'[4] and that *lex sportiva* can 'no longer be understood without an account of the ways in which its different parts are entangled'.[5]

The CAS plays a central role in the governance of international sports as the main judicial body to which athletes, clubs or federations can turn to challenge the decisions of international SGBs.[6] Its core function in global sports governance is to act as a review mechanism through its appeal procedure which is regulated by the Code of Sports-Related Arbitration (CAS Code).[7] Thus, the CAS is dealing with almost all the high-profile disputes that occupy the sports pages (and sometimes beyond) of our newspapers. It decided whether Caster Semenya or Oscar Pistorius can participate in athletics competitions,[8] it determined whether Michel Platini or Sepp Blatter can be banned from football for violating FIFA's (Fédération Internationale de Football Association) ethics rules[9] and it assessed whether Maria Sharapova or Alejandro Valverde have committed a violation of the World Anti-Doping Code (WADC).[10] In short, very few of the fundamental decisions that shape the way we experience international sports escape the CAS. While there is no doubt that international sports are being ruled by a transnational

[4] See Chapter 1.
[5] Ibid.
[6] The latest CAS statistics available indicate that 458 appeals procedures were initiated in 2016. See www.tas-cas.org/fileadmin/user_upload/CAS_statistics_2016_.pdf.
[7] On the appeal procedure, see Articles R47 to R59 of the CAS, *Code of Sports-Related Arbitration 2019* (entered into force 1 January 2019) ('CAS Code'). For a detailed commentary of these provisions, see A. Rigozzi and E. Hasler, 'Commentary on the CAS Procedural Rules', in M. Arroyo (ed.), *Arbitration in Switzerland: The Practitioner's Guide* (Kluwer Law International, 2013), pp. 982–1060.
[8] CAS 2018/O/5794, *Mokgadi Caster Semenya* v. *International Association of Athletics Federations*, award of 30 April 2019 and CAS 2008/A/1480 *Pistorius* v. *IAAF*, award of 16 May 2008.
[9] TAS 2016/A/4474, *Michel Platini* v. *FIFA*, award of 9 May 2016 and CAS 2016/A/4501 *Joseph S. Blatter* v. *FIFA*, award of 5 December 2016.
[10] CAS 2016/A/4643, *Maria Sharapova* v. *International Tennis Federation (ITF)*, award of 30 September 2016 and CAS 2009/A/1879 *Alejandro Valverde Belmonte* v. *Comitato Olimpico Nazionale Italiano*, award of 16 March 2010.

regime in which private associations play a fundamental role and dispose of considerable regulatory powers, this regime also provides an interesting terrain to study transnational legal entanglements.[11]

To this end, I focus on the way the CAS produces its awards. I aim to show that the *lex sportiva* is not an isolated set of norms produced by an autonomous community but results from the blending of different laws assembled through discursive weaving by CAS panels. In this regard, not all national laws are equal at the CAS and, as we will see in Section 10.1, Swiss law is more equal than the others. In practice, the CAS panels draw heavily on Swiss law, its actors, doctrines, rules and decisions.[12] Despite being a global court, the CAS remains anchored (physically, sociologically and legally) in a local context. In addition to Swiss law, Sections 10.2 and 10.3 highlight how CAS arbitrators are also weaving references to EU law and the ECHR into their awards. This chapter is a first attempt at looking at the hermeneutic practice of the CAS from the perspective of a transnational legal pluralism that goes beyond the identification of a plurality of autonomous orders to turn its sights towards the enmeshment and entanglement characterizing contemporary legal practice.[13]

10.1 The Ubiquity of Swiss Law in CAS Awards

In its awards, the CAS refers to many different national laws. However, one is clearly more present than the others: Swiss law.[14] The centrality of Swiss law at the CAS can be linked to three factors: the sociology of the CAS practitioners, the shadow of the Swiss Federal Tribunal (SFT) and the localization of the seats of the SGBs. To start with the last of these, the majority of the international SGBs, which are the primary purveyors of CAS appeals, are located in Switzerland. This means that in most appeal

[11] For another attempt, see A. Duval, 'What Lex Sportiva Tells You about Transnational Law', in P. Zumbansen (ed.), *The Many Lives of Transnational Law: Critical Engagements with Jessup's Bold Proposal* (Cambridge University Press 2019), pp. 269–93.

[12] A. Rigozzi, 'L'importance du droit suisse de l'arbitrage dans la résolution des litiges sportifs internationaux' (2013) 1 *ZSR* 301–25.

[13] See P. Zumbansen, 'Transnational Legal Pluralism' (2010) 1 *Transnational Legal Theory* 141–89 and J. Klabbers and G. Palombella (eds), *The Challenge of Inter-Legality* (Cambridge University Press, 2019).

[14] A full text search (in the CAS appeal awards) of 'Swiss law' in the CAS database yields hits in 1031 CAS awards (out of 1,636 appeal awards included in the database). A comparable search of 'German law', 'Italian law' and 'French law' yields exactly the same number of awards: nineteen. These searches were all conducted on the same date (11 December 2019).

cases Swiss law will be subsidiarily applicable under R58 CAS Code which determines the applicable law and acts very much as a 'reception norm' in the sense outlined in Chapter 1.[15] Furthermore, the appeals are often based on CAS arbitration clauses enshrined in the statutes of the SGBs which can expressly provide for the application of Swiss law.[16] Second, the legal seat of the CAS is Lausanne. Hence, its awards can only be appealed at the SFT where they are reviewed, relatively leniently, on the basis of Article 190(2) of the Swiss Private International Law Act.[17] The CAS panels are naturally aware of the need for their awards to pass this (relatively low) bar and therefore pay specific attention to Swiss law in their decisions. Finally, arbitrators, lawyers or administrators active at the CAS often have a Swiss background.[18] In this section, I aim to substantiate the depth of the entanglement between Swiss law and CAS awards through a case study focused specifically on appeals against FIFA decisions.

10.1.1 Swiss Law as Applicable Law in FIFA Cases

Appeals against FIFA decisions constitute an important share of the caseload of the CAS appeal division. In particular, cases involving transfer disputes and the application of the FIFA Regulations on the Status and Transfer of Players (FIFA RSTP) are numerous and CAS panels have repeatedly been asked to determine the law applicable in these cases. In principle, as FIFA is seated in Zürich, Swiss law is subsidiarily applicable in the absence of any other choice of law as provided under R58 CAS Code. Moreover, CAS panels have regularly pointed out that the parties are, at least indirectly, affiliated to FIFA (i.e. 'members of the FIFA

[15] R58 CAS Code (2019 version) provides: The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.

[16] See, for example, the Article 57(2) FIFA Statutes 2019 discussed further in Section 10.1.1.

[17] On the limited scope of this review, see A. Rigozzi, 'Challenging Awards of the Court of Arbitration for Sport' (2010) 1 *Journal of International Dispute Settlement* 217–65.

[18] Lindholm in a recent empirical study of the CAS identified a high number of Swiss parties and arbitrators active at the CAS, see J. Lindholm, *The Court of Arbitration for Sport and Its Jurisprudence: An Empirical Inquiry into Lex Sportiva* (T.M.C. Asser Press, 2019), pp. 270–4.

family')[19] and therefore bound by the choice of Swiss law enshrined in Article 57(2) FIFA Statutes 2019.[20]

Yet, the applicability of Swiss law is not only justified by the parties' contractual choice but also on functional grounds, that is, in order to 'level the playing the field' in football disputes. For example, a CAS panel concluded in 2005 that the 'indispensable need for the uniform and coherent application worldwide of the rules regulating international football' is secured '[o]nly if the same terms and conditions apply to everyone who participates in organized sport'.[21] Similarly, another panel concluded, 'if the desired uniformity is to be achieved, also the interpretation of the FIFA rules and regulations cannot be affected by the peculiarities of the domestic legal system in which they are called to apply'.[22] Thus, appeals against FIFA decisions will necessarily trigger the application of Swiss law 'for all the questions that are not directly regulated by the FIFA Regulations'.[23] In this context, 'there is no place for the application of the rules of another national law, except in the case where these rules would have to be considered as mandatory according to the law of the seat of the arbitration, i.e. Swiss law'.[24]

Nevertheless, based on the wording of R58 CAS Code, Swiss law should not prevail over the express choice of law of the parties.[25] Even

[19] CAS 2013/A/3165, *FC Volyn* v. *Issa Ndoye*, award of 14 January 2014, para. 68.

[20] CAS 2008/A/1517, *Ionikos FC* v. *C.*, award of 23 February 2009, paras 7 and 17; CAS 2006/A/1180, *Galatasaray SK* v. *Frank Ribéry* and *Olympique de Marseille*, award of 24 April 2007, para. 13. See also CAS 2008/A/1482, *Genoa Cricket and Football Club S.p. A.* v. *Club Deportivo Maldonado*, award of 9 February 2009, para. 18.

[21] TAS 2005/A/983 and 984, *Club Atlético Peñarol* v. *Carlos Heber Bueno Suarez, Cristian Gabriel Rodriguez Barrotti and Paris Saint-Germain*, award of 12 July 2006, para. 24. See also in CAS 2006/A/1180, para. 13; CAS 2006/A/1123, *Al-Gharafa Sports Club* v. *Paulo Cesar Wanchope Watson* and CAS 2006/A/1124, *Paulo Cesar Wanchope Watson* v. *Al-Gharafa Sports Club*, award of 18 December 2006, para. 12; CAS 2008/A/1517; CAS 2011/A/2375, *FK Dac 1904 a.s.* v. *Zoltan Vasas*, award of 31 October 2011; CAS 2013/A/3165, para. 67; TAS 2014/A/3505, *Al Khor SC* v. *C.*, award of 3 December 2014, para. 85; CAS 2014/A/3742, *US Città di Palermo S.p.A.* v. *Goran Veljkovic*, award of 7 April 2015, para. 47.

[22] CAS 2006/A/1123, para. 13. Similarly, see CAS 2013/A/3383–3385, *Volga Nizhniy Novgorod* v. *Levan Silagadze*, award of 13 November 2014, para. 48 and TAS 2016/A/4569, *Abdelkarim Elmorabet* v. *Olympic Club Safi and Fédération Royale Marocaine de Football (FRMF)*, award of 20 September 2016, para. 5.8.

[23] CAS 2005/A/871, *FC Rodopa* v. *Markovitch*, award of 19 September 2006, para. 4.15. Or 'if there is a gap in the FIFA regulations', CAS 2013/A/3165, para. 69.

[24] CAS 2009/A/1956, *Club Tofta Itróttarfelag, B68* v. *R.*, award of 16 February 2010, para. 15.

[25] CAS 2006/A/1024, *FC Metallurg Donetsk* v. *Leo Lerinc*, para. 27.

then, recent awards determined that such cases give 'rise to a co-existence of the applicable regulations, Swiss law and the law chosen by the Parties', in which 'Swiss law is confined to ensuring uniform application of the [FIFA] Regulations'.[26] In other words, in order to protect the uniform interpretation of FIFA Regulations, Swiss law is deemed to supersede the parties' choice of law.[27] This view, first advanced by Professor Ulrich Haas, was subsequently endorsed as the 'Haas doctrine' by a series of CAS panels.[28] Finally, if FIFA Regulations are considered sufficiently clear and comprehensive by the CAS panels, Swiss law does not come into play, as it 'does not supersede or supplant all aspects of the regulations of FIFA'.[29] Yet in practice, as Section 10.1.2 shows, the FIFA Regulations are often ambiguous and in need of interpretation.

10.1.2 How Swiss Law Shapes CAS Awards in FIFA Cases

The recognition of the (exclusive) applicability of Swiss law to interpretative questions related to the FIFA Regulations would, however, remain meaningless if it were not relied upon in practice. While it is in theory possible to construct the FIFA Regulations as sufficiently clear and comprehensive, in practice Swiss law plays a crucial interpretative role in CAS appeals against FIFA decisions. Indeed, many concepts that are at the heart of the FIFA Regulations have been defined and concretized with references to Swiss law, Swiss doctrine and Swiss precedents. This includes questions related to:

[26] CAS 2016/A/4605, *Al-Arabi Sports Club Co. For Football* v. *Matthew Spiranovic*, award of 22 February 2017, para. 5.6. See also CAS 2017/A/5341, *CJSC Football Club Lokomotiv* v. *Slaven Bilic*, para. 59.

[27] See CAS 2010/A/2316, *Stoke City FC* v. *Brescia Calcio S.p.A.*, award of 6 December 2011, para. 20.

[28] See U. Haas, 'Applicable Law in Football-Related Disputes: The Relationship between the CAS Code, the FIFA Statutes and the Agreement of the Parties on the Application of National Law' (2015) *Bulletin TAS/CAS Bulletin* 7. CAS 2016/A/4605, para. 5.6; CAS 2017/A/5341, paras 57 and 59; CAS 2017/A/5465, *Békéscsaba 1912 Futball* v. *George Koroudjiev*, award of 20 September 2018, paras 74 and 76; CAS 2017/A/5402, *Club Al-Taawoun* v. *Darije Kalezic*, award of 7 June 2018, para. 89; CAS 2016/A/4471, *Abel Aguilar Tapias* v. *Hércules de Alicante FC*, award of 2 February 2017, paras 69–70; CAS 2016/A/4859, *Hong Kong Pegasus FC* v. *Niko Tokic*, award of 30 June 2017, paras 60–1; TAS 2016/A/4569, paras 5.8 and 5.9.

[29] CAS 2012/A/2919, *FC Seoul* v. *Newcastle Jets FC*, award of 24 September 2013. In other words, FIFA regulations apply in 'priority', TAS 2005/A/983 and 984, para. 49.

- the method to be followed to interpret the FIFA Regulations;[30]
- the applicability of mandatory rules, such as EU law;[31]
- whether a party has standing to sue or to be sued;[32]
- who bears the burden of proof;[33]
- the calculation of time limits;[34]
- whether there is a contract or an offer 'in writing';[35]
- whether an offer has been received;[36]
- whether there is 'just cause' for one of the parties to terminate an employment contract between a player and a club;[37]

[30] CAS 2008/A/1521, *VfB Admira Wacker Modling* v. *A.C. Pistoiese s.p.A.*, award of 12 December 2008; CAS 2010/A/2316; CAS 2013/A/3365, *Juventus Football Club S.p.A.* v. *Chelsea Football Club Ltd* and CAS 2013/A/3366, *A.S. Livorno Calcio* v. *Chelsea Football Club Ltd*, award of 21 January 2015.

[31] CAS 2008/A/1485, *FC Midtjylland A/S* v. *Fédération Internationale de Football Association (FIFA)*, award of 6 March 2009 and TAS 2016/A/4490, *RFC Seraing* v. *Fédération Internationale de Football Association (FIFA)*, award of 9 March 2017.

[32] CAS 2006/A/1206, *Milan Zivadinovic* v. *Iraqi Football Association (IFA)*, award of 2 April 2007; CAS 2006/A/1192, *Chelsea Football Club Limited* v. *Adrian Mutu*, award of 21 May 2007; CAS 2007/A/1329, *Chiapas F.C.* v. *Cricuma Esporte Clube* and CAS 2007/A/1330, *Chiapas F.C.* v. *R.*, awards of 5 December 2007; CAS 2008/A/1518, *Ionikos FC* v. *L.*, award of 23 February 2009; CAS 2012/A/2906, *Alain Geiger* v. *Egyptian Football Association (EFA) and Al Masry Club*, award of 12 February 2013; TAS 2013/A/3351, *Fédération de Football de la République Islamique de Mauritanie (FFRIM) and ASAC Concorde* v. *CS Hammam-Lif and Fédération Tunisienne de Football (FTF) and Fédération Internationale de Football Association (FIFA)*, award of 24 January 2014; CAS 2013/A/3278, *Maritimo de Madeira – Futebol SAD* v. *Desportivo Brasil Participacoes LTDA*, award of 2 June 2014; CAS 2017/A/5227, *Sporting Clube de Braga* v. *Club Dynamo Kyiv and Gerson Alencar de Lima Junior*, award of 8 March 2018; CAS 2017/A/5352, *FK Sileks* v. *GFK Dubočica Leskovac*, award of 24 April 2018.

[33] CAS 2009/A/1909, *RCD Mallorca SAD and A.* v. *Fédération Internationale de Football Association (FIFA) and UMM Salal SC*, award of 25 January 2010; CAS 2009/A/1956; CAS 2013/A/3444, *S.C. FC Brasov S.A* v. *Renato Ferreira Da Silva Alberto*, award of 29 October 2015.

[34] CAS 2011/A/2354, *E.* v. *Fédération Internationale de Football Association (FIFA)*, award of 24 August 2011; CAS 2015/A/3883, *Al Nassr Saudi Club* v. *Jaimen Javier Ayovi Corozo*, award of 26 August 2015.

[35] CAS 2008/A/1521; CAS 2010/A/2316; CAS 2013/A/3207, *Tout Puissant Mazembe* v. *Alain Kaluyituka Dioko and Al Ahli SC*, award of 31 March 2014.

[36] CAS 2016/A/4720, *Royal Standard de Liège* v. *FC Porto (Player T.)*, award of 19 May 2017 and CAS 2016/A/4721, *Royal Standard de Liège* v. *FC Porto (Player C.)*, award of 19 May 2017.

[37] CAS 2006/A/1100, *E.* v. *Club Gaziantepspor*, award of 15 November 2006; CAS 2007/A/1210, *Ittihad Club* v. *Sergio Dario Herrera*, award of 3 July 2007; TAS 2007/A/1233, *FC Universitatea Craiova* v. *Marcos Honorio Da Silva* and TAS 2007/A/1234, *FC Universitatea Craiova* v. *Eduardo Magri*, awards of 19 December 2007; CAS 2008/A/1447, *E.*

- the amount of damages that a party is entitled to in case of a contractual breach;[38]
- the conditions that must be met for a renunciation by a player of his outstanding wage to be valid;[39]
- the validity and amount of a penalty clause;[40]
- the validity of a waiver to the right to receive a training compensation;[41]
- the validity of a dual pricing method for a transfer fee;[42] and
- the interest rate applicable in case of payment default.[43]

These examples are a large but certainly incomplete sample of the many instances in which Swiss law has been relied on to support a specific interpretation of the FIFA Regulations. These interpretative decisions are not trivial. They affect, for example, whether a party will have standing to appeal a decision before the CAS, whether a party will be deemed to have broken an employment contract or the amount of damages a party will be able to obtain in case of breach. For each of these questions, the CAS panels have leaned on Swiss law to justify their interpretative (and therefore distributive) choices. This use of Swiss law is not limited to

v. *Diyarbakirspor*, award of 29 August 2008; CAS 2008/A/1518; CAS 2009/A/1956; CAS 2013/A/3216, *Anorthosis Famagusta FC* v. *Sinisa Dobrasinovic*, award of 14 May 2014; CAS 2013/A/3407, *Green Gully Soccer Club* v. *Pedro Henrique Coelho de Oliveira*, award of 20 June 2014; CAS 2014/A/3626, *Carmelo Enrique Valencia Chaverra* v. *Ulsan Hyundai Football Club*, award of 23 April 2015; TAS 2016/A/4569; CAS 2016/A/4588, *FC Internazionale Milano* v. *Sunderland AFC* and CAS 2016/A/4589, *Sunderland AFC* v. *FC Internazionale Milano*, awards of 15 June 2017; CAS 2017/A/5242, *Esteghlal Football Club* v. *Pero Pejic*, award of 16 April 2018; CAS 2017/A/5465.

[38] TAS 2005/A/902, *Mexès and AS Roma* v. *AJ Auxerre* and TAS 2005/A/903, *AJ Auxerre* v. *Mexès and AS Roma*, awards of 5 December 2005; CAS 2006/A/1024; CAS 2006/A/1100; TAS 2007/A/1315, *Hassan El Mouataz and Sporting Lokeren Oost-Vlaanderen* v. *Association Sportive des Forces Armées Royales (ASFAR)*, awards of 31 January 2008; CAS 2008/A/1447; CAS 2008/A/1518; TAS 2014/A/3505; CAS 2013/A/3216; CAS 2014/A/3626; TAS 2016/A/4569; CAS 2016/A/4588; CAS 2017/A/5242.

[39] TAS 2018/A/5896, *Yves Diba Ilunga* v. *Al Shoullah Club*, award of 15 April 2019.

[40] CAS 2012/A/2847, *Hammarby Fotboll AB* v. *Besiktas Futbol Yatirimlari Sanayi ve Ticaret A.S.*, award of 22 March 2013; CAS 2014/A/3555, *FC Vojvodina* v. *Almami Samori Da Silva Moreira*, award of 18 December 2014; CAS 2017/A/5242.

[41] CAS 2017/A/5277, *FK Sarajevo* v. *KVC Westerlo*, award of 16 April 2018.

[42] CAS 2006/A/1196, *Sociedade Esportiva Palmeiras* v. *Clube Desportivo Nacional*, award of 19 July 2007.

[43] CAS 2008/A/1482; CAS 2013/A/3443, *Ginés Carvajal Seller* v. *FC Dnipro Dnipropetrovsk*, award of 6 October 2014; CAS 2016/A/4567, *Al Jazira FSC* v. *FC Lokomotiv*, award of 9 November 2016; TAS 2016/A/4569; CAS 2017/A/5374, *Jaroslaw Kolakowski* v. *Daniel Quintana Sosa*, award of 10 April 2018.

cases involving FIFA decisions. It is relevant to a majority of appeals against the decisions rendered by international SGBs. It shows that the CAS is not engaging in the production of denationalized awards with little connection to state law. Instead, it is weaving the local and the global, as the transnational private rules of the SGBs are being entangled with norms, case law and doctrinal authorities grounded in Swiss law. What might, from a distance, appear like a sort of global law without a state is actually intimately linked to, and reliant on, the law of the Swiss state.

The fact that Swiss law has a prominent position at the CAS is not an original claim. Scholars and practitioners had emphasized it before.[44] Yet, it raises interesting questions connected to the theme of this volume, which have so far been widely ignored. How are the CAS panels applying Swiss law? What is the purpose and effect of this entanglement between Swiss law and the private regulations of the SGBs? What is the responsibility of Switzerland with regard to the shape of the transnational sporting regime? How can Swiss law be leveraged to change the shape of this regime in one way or another? These questions can become relevant only once we perceive the *lex sportiva* as a transnational assemblage and see the fundamental role of Swiss law in it. This intertwining of normative material at the CAS extends, in much more limited fashion, to other types of legal filaments, such as EU law or the ECHR.

10.2 The Limited Entanglement of EU Law in CAS Awards

EU law and the private regulations of the SGBs have a long history of 'war and peace'.[45] The famous *Bosman*[46] ruling of the Court of Justice of the European Union (CJEU) constitutes the high point, in terms of public visibility, of this encounter. Despite the intense relationship between the private regulations of the SGBs and EU law, the latter was

[44] A. Rigozzi, 'L'importance du droit suisse de l'arbitrage'.

[45] A. Duval, 'La Lex Sportiva face au droit de l'Union européenne: guerre et paix dans l'espace juridique transnational', PhD thesis, EUI (2015). On the interaction between EU law and sport, see S. Weatherill, *Principles and Practice in EU Sports Law* (Oxford University Press, 2017).

[46] 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* [1995] ECR I-04921.

until recently quite absent from the CAS.[47] Nevertheless, in an important award dating back to 1999, a CAS panel already recognized the applicability of EU law. It found:

> With regard to EC competition law, the Panel holds that, even if the parties had not validly agreed on its applicability to this case, it should be taken into account anyway. Indeed, in accordance with Article 19 of the LDIP, an arbitration tribunal sitting in Switzerland must take into consideration also foreign mandatory rules, even of a law different from the one determined through the choice-of-law process, provided that three conditions are met:
>
> (a) such rules must belong to that special category of norms which need to be applied irrespective of the law applicable to the merits of the case (so-called lois d'application immédiate);
> (b) there must be a close connection between the subject matter of the dispute and the territory where the mandatory rules are in force;
> (c) from the point of view of Swiss legal theory and practice, the mandatory rules must aim to protect legitimate interests and crucial values and their application must allow an appropriate decision.[48]

Thus, arguments grounded in Swiss private international law played a pivotal role in opening the possibility for the application and entanglement of EU law at the CAS. Yet, before 2010, only a few (published) CAS awards referred to EU law and even fewer were engaging with it in detail.[49] This has changed in recent years, with a couple of awards

[47] A. Duval, 'The Court of Arbitration for Sport and EU Law: Chronicle of an Encounter' (2015) 22 *Maastricht Journal of European and Comparative Law* 224–55.

[48] CAS 98/200, *AEK Athens and SK Slavia Prague* v. *Union of European Football Associations (UEFA)*, award of 20 August 1999, para. 10.

[49] Before 2010, we find mentions of EU law in the following CAS awards publicly available in the CAS database (on 1 September 2019): TAS 92/80, *B.* v. *Fédération Internationale de Basketball (FIBA)*, award of 25 March 1993; CAS 98/200; TAS 2000/A/290, *Abel Xavier and Everton FC* v. *Union des Associations Européennes de Football (UEFA)*, award of 2 February 2001; TAS 2002/A/423, *PSV Eindhoven* v. *Union des Associations Européennes de Football (UEFA)*, award of 3 June 2003; TAS 2004/A/708, *Philippe Mexès* v. *Fédération Internationale de Football Association (FIFA)* and TAS 2004/A/709, *AS Roma* v. *FIFA* and TAS 2004/A/713, *AJ Auxerre* c. *AS Roma and Philippe Mexès*, awards of 11 March 2005; CAS 2005/A/951, *Guillermo Cañas* v. *ATP Tour*, revised award of 23 May 2007; CAS 2006/A/1125, *Hertha BSC Berlin* v. *Stade Lavallois Mayenne FC*, award of 1 December 2006; CAS 2007/A/1272, *Cork City FC* v. *FIFA (Healy)*, award of 15 October 2007; CAS 2007/A/1287, *Danubio FC* v. *Fédération Internationale de Football Association (FIFA) and FC Internazionale Milano S.p.A.*, award of 28 November 2007; CAS 2008/A/1485; CAS 2008/A/1644, *M.* v. *Chelsea Football Club Ltd.*, award of 31 July 2009; CAS 2009/A/

addressing at length EU law questions.[50] Such a development is potentially related to the greater sensitivity of legal counsels to EU law and to the arbitrators' growing awareness of the considerable risk that the cases would *in fine* reach the European Commission or the CJEU. In general, EU law has found two main applications at the CAS: it has been mobilized to challenge the legality (even constitutionality) of the SGBs' regulations and it has been constructed as part and parcel of the SGBs' regulations.

10.2.1 EU Law as Constitutional Check at the CAS

EU law does not regulate transnational sports through the imposition of detailed primary rules. Instead, it imposes a duty of justification on the SGBs.[51] EU law forces, through the strength of its internal market rules, the SGBs to advance legitimate objectives for their regulations and to argue why their rules or decisions are to be deemed proportionate means to attain the set objectives. In other words, it functions analogously to a constitutional review of the rules and decisions of the SGBs. This duty of justification has been formally imported in a number of cases submitted to the CAS, in which the panels have conducted proportionality assessments of the rules and decisions challenged. In many cases, the CAS does not conduct a deep appraisal of the proportionality of a disputed measure.[52] It has, for example, regularly considered that the fact that the FIFA RSTP are based on an agreement with the European Commission suffices to guarantee their compatibility with EU law.[53] Nevertheless, in a range

1757, *MTK Budapest* v. *FC Internazionale Milano S.p.A.*, award of 30 July 2009; CAS 2009/A/1788, *UMMC Ekaterinburg* v. *FIBA Europe e. V.*, award of 29 October 2009.

[50] For deep engagements with EU law, see, for example: TAS 2016/A/4490 and CAS 2016/A/4492, *Galatasaray* v. *UEFA*, award of 3 October 2016.

[51] The centrality of the idea of justification in the European integration process has been theorised by J. Neyer, *The Justification of Europe: A Political Theory of Supranational Integration* (Oxford University Press, 2012).

[52] See TAS 2000/A/290, para. 17.7; CAS 2005/A/951, para. 29; CAS 2008/A/1644, para. 44.

[53] CAS 2007/A/1272, para. 32; CAS 2007/A/1287, paras 37–40; CAS 2009/A/1757, paras 29–30; CAS 2009/A/1810 and 1811, *SV Wilhelmshaven* v. *Club Atlético Excursionistas and Club Atlético River Plate*, award of 5 October 2009, paras 48–9; CAS 2009/A/1957, *Fédération Française de Natation (FFN)* v. *Ligue Européenne de Natation (LEN),* award of 5 July 2010, paras 37–40; CAS 2013/A/3119, *Dundee United FC* v. *Club Atlético Vélez Sarsfield*, award of 20 November 2013, paras 70–1; CAS 2014/A/3710, *Bologna FC 1909 S.p.A.* v. *FC Barcelona*, award of 22 April 2015, para. 81.

of recent cases, the CAS panels quite comprehensively engaged in a proportionality assessment of the reviewed regulations.[54]

More precisely, in the *Galatasaray*[55] and *Seraing*[56] awards, delivered in 2016 and 2017, the CAS was asked to review the compatibility of two controversial rules introduced respectively by the Union of European Football Associations (UEFA) and FIFA. It is interesting to note that Jean-Louis Dupont, who represented Jean-Marc Bosman, was acting for the claimants in both cases. The *Galatasaray* case involved the UEFA Club Licensing and Financial Fair Play Regulations (UEFA FFP Regulations) and their compatibility with EU law. It is not the right place to revisit the debate on the compatibility of the UEFA FFP Regulations with EU law, but it is interesting to note that the CAS panel decided to conduct a comprehensive proportionality analysis relatively similar to the one that would have been conducted by the European Commission or the CJEU if they were asked a similar question. Likewise, the *Seraing* case, in which the Belgian club was challenging the validity under EU law of FIFA's 2015 ban on third-party ownership, also led to the integration of a proportionality analysis grounded in EU law into the CAS award.[57] In both cases, the CAS concluded that the regulations were pursuing a legitimate objective and represented necessary and proportionate means to attain that objective.

It is uncertain whether the CJEU or the European Commission would reach the same conclusion, but the above awards highlight that the two CAS panels were in the position of decentralized EU law enforcers, not unlike national courts but without the obligation or capacity to refer a preliminary question to the CJEU. The question whether the CAS is applying EU law properly, for example as the CJEU would, is almost impossible to settle until a case reaches Luxembourg. A review of the CAS awards involving EU law shows that the SGBs' regulations are very

[54] CAS 98/200; CAS 2009/A/1788, paras 22–47; CAS 2012/A/2852, *S.C.S. Fotbal Club CFR 1907 Cluj S.A. and Manuel Ferreira de Sousa Ricardo and Mario Jorge Quintas Felgueiras* v. *Romanian Football Federation (FRF)*, award of 28 June 2013; CAS 2014/A/3561 and 3614, *International Association of Athletics Federation (IAAF) and World Anti-Doping Agency (WADA)* v. *Marta Domínguez Azpeleta and Real Federación Española de Atletismo (RFEA)*, award of 19 November 2015, paras 172–91; TAS 2016/A/4490; CAS 2016/A/4492.

[55] CAS 2016/A/4492. See my commentary in A. Duval, 'CAS 2016/A/4492, Galatasaray v. UEFA, Award of 3 October 2016', in A. Duval and A. Rigozzi (eds), *Yearbook of International Sports Arbitration 2016* (T.M.C. Asser Press, 2017), pp. 377–91.

[56] TAS 2016/A/4490.

[57] TAS 2016/A/4490, paras 90–144.

rarely deemed in contravention of EU law. In fact, there is only one example in which a CAS panel struck down an SGB regulation on this basis.[58] It involved the Romanian Football Federation (FRF) and its home-grown players regulations, which imposed a fixed quota of locally trained players in the teams of Romanian clubs participating in national competitions. The panel was not convinced that the FRF had demonstrated that its regulations were necessary and proportionate. In any event, the use of EU law as a vehicle to conduct a constitutional check of the SGBs' regulations constitutes another (rare) form of legal entanglement at the CAS. Additionally, beyond this constitutional role, EU law is also directly interwoven in the genome of the FIFA RSTP.

10.2.2 Interpreting the FIFA RSTP with a Little Help from EU Law

After the Bosman ruling, FIFA devised a new transfer system regulating the transnational movement of football players between clubs.[59] This new system, however, was quickly challenged at the European Commission on the basis of EU competition law and a protracted negotiation started between the European Commission, FIFA, the players' union FIFPro, the European Club Association and UEFA.[60] It concluded with the adoption of the general principles upon which the FIFA RSTP is officially grounded.[61] This peculiar transnational genealogy of the RSTP became relevant at the CAS because panels have considered that, insofar as the statutes of large entities are concerned, 'it may be more appropriate to have recourse to the method of interpretation applicable to the law' and therefore adopt a 'contextual approach' that entails reviewing the legislative history and purpose.[62]

[58] See CAS 2012/A/2852.

[59] On the FIFA RSTP and its interpretation by the FIFA Dispute Resolution Chamber in general, see F. De Weger, *The Jurisprudence of the FIFA Dispute Resolution Chamber* (T.M.C. Asser Press, 2016).

[60] For a detailed history of this episode of transnational law-making, see A. Duval, 'The FIFA Regulations on the Status and Transfer of Players: Transnational Law-Making in the Shadow of Bosman', in A. Duval and B. Van Rompuy (eds), *The Legacy of Bosman: Revisiting the Relationship Between EU Law and Sport* (T.M.C. Asser Press, 2016), pp. 81–116.

[61] European Commission, 'Outcome of Discussions between the Commission and FIFA/UEFA on FIFA Regulations on International Football Transfers' (press release IP/01/314, 5 March 2001).

[62] CAS 2013/A/3365 and 3366, para. 143.

The first case involving an interpretive use of EU law was the *Mexès* case which concerned the interpretation of Articles 21(1) and 23(1) FIFA RSTP 2001 edition.[63] The key question was whether the prolongation of the contract of a professional football player would trigger an extension of the stability period – a period during which the player could not leave the club without risking a sporting sanction. To answer this question, the Panel analysed the question in light of EU law as it decided to go back to the *ratio legis* of the provisions to determine their concrete meaning.[64] The text of the award refers to the *Bosman* ruling as well as to the decision of the European Commission in the competition law case opened against FIFA.[65] Hence, to support its decision, the CAS panel felt that it had to grapple with EU law requirements, although whether it did so in an orthodox fashion is another matter. This first example of recourse to EU law as part of the relevant context for a proper interpretation of the RSTP was endorsed in following awards.[66] Most prominently, in a case pitching the Italian football clubs Juventus F.C. and A.S. Livorno Calcio against the English club Chelsea F.C., the CAS provided an extensive analysis of this interpretive link between EU law and the RSTP.[67] The case was related to the legal saga surrounding Chelsea's 2005 dismissal of Adrian Mutu over his consumption of cocaine. The CAS panel considered it necessary to do an in-depth review of the legislative history of the FIFA RSTP in order to determine whether Article 14(3) FIFA RSTP 2001 edition applied, and therefore whether Juventus and Livorno jointly owed a considerable transfer fee to Chelsea. In doing so, it carefully scrutinized the case law of the CJEU and the decisions of the European Commission.[68] This led the arbitrators to reject the interpretation advanced by Chelsea as contrary to the EU law

[63] TAS 2004/A/708 and 709 and 713.
[64] Ibid., paras 24–30.
[65] Ibid., paras 25–6.
[66] See CAS 2006/A/1125, paras 43–7; CAS 2010/A/2316, para. 37; CAS 2016/A/4903, *Club Atlético Vélez Sarsfield* v. *The Football Association Ltd., Manchester City FC and Fédération Internationale de Football Association (FIFA)*, award of 16 April 2018, paras 91–105.
[67] CAS 2013/A/3365 and 3366. See A. Duval, 'CAS 2013/A/3365 Juventus FC v. Chelsea FC and CAS 2013/A/3366 A.S. Livorno Calcio S.p.A. v. Chelsea FC, Award of 21 January 2015', in A. Duval and A. Rigozzi (eds), *Yearbook of International Sports Arbitration 2015* (T.M.C. Asser Press, 2016), pp. 155–68.
[68] CAS 2013/A/3365 and 3366, paras 149–57.

foundations of the RSTP and to conclude that Livorno and Juventus were free to recruit Adrian Mutu without compensation after his dismissal.[69]

As demonstrated, EU law finds its relatively narrow way at the CAS. This limited enmeshing of EU law in CAS awards is most likely driven by external challenges to the SGBs' regulations and decisions in national courts or before EU institutions. In fact, EU law's capacity to disrupt the authority of CAS is certainly a (rational) pathway to drive the entanglement of EU law into its awards.[70] However, by harnessing EU law, the CAS panels might also be betraying it. The CAS is not referring questions to the CJEU and CAS awards are, for reasons of costs and time, rarely challenged in national courts on EU law basis. In the absence of systematic control of CAS awards, the panels' approach to EU law escapes the possibility of direct oversight by EU institutions. In other words, CAS might be speaking an EU law dialect that is primarily fitted to the needs and power structure of its social context, while at the same time formally proximate to and at a substantial distance from the EU law of the EU institutions.[71]

10.3 The Influential Use of the ECHR in CAS Awards

While EU law has been dancing a slow-moving tango with the SGBs' regulations since the 1970s, the ECHR was, until very recently, almost entirely foreign to the world of sport.[72] The European Court of Human Rights (ECtHR) only started to indirectly scrutinize the practice of the CAS and the world anti-doping regime in 2018 and has done so in a relatively restrained fashion.[73] In spite of this, the ECHR has been

[69] Ibid., paras 161–3.

[70] Most recently in the ISU decision of the European Commission, see Case AT.40208 – International Skating Union's Eligibility rules, 8 December 2017.

[71] On the dialectic between proximity and distance in the context of legal entanglements, see Chapter 1, Section 1.4.3.

[72] For a general summary of the ECtHR cases applying to sport, see ECtHR, 'Sport and the European Convention on Human Rights, Factsheet' (October 2019), www.echr.coe.int/Documents/FS_Sport_ENG.pdf. However, few of the cases mentioned are directly related to the regulations or decisions of SGBs.

[73] See *Mutu and Pechstein* v. *Switzerland*, app. no. 40575/10 and 67474/10, judgment of 2 October 2018; *Fédération Nationale des Syndicats Sportifs (FNASS) and Others* v. *France*, app. no. 48151/11 and 77769/13, judgment of 18 January 2018; *Platini* v. *Switzerland*, app. no. 526/18, judgment of 11 February 2020.

regularly mentioned in CAS awards.[74] Even though some panels expressed 'serious doubts'[75] regarding the applicability of the ECHR to the SGBs' private regulations or even sometimes squarely denied it,[76] when confronted with claimants invoking the ECHR most CAS awards at least considered its application. This inconsistency can be traced back to the unstable composition of CAS panels and non-binding nature of CAS precedents. In any event, most panels at least emphasized the need to respect the procedural rights enshrined in Article 6(1) ECHR.[77] Indeed, a panel 'should nevertheless account for their [the provisions of the ECHR] content within the framework of procedural public policy'.[78] In a more direct language, a sole arbitrator found 'rather obvious' that 'a federation cannot opt out from an interpretation of its rules and regulations in light of principles of "human rights" just by omitting any references in its rules and regulations to human rights'.[79] In this latter version, the ECHR seems to be even assimilated to an 'overarching norm'.[80]

10.3.1 CAS Jurisdiction and the ECHR

Among the many legal questions that have triggered references to the ECHR, some are connected to the jurisdiction of the CAS. For example, the CAS faced a case in which an athlete was challenging the validity of

[74] See for a general overview U. Haas, 'Role and Application of Article 6 of the European Convention on Human Rights in CAS Procedures' (2012) 3 *International Sports Law Review* 43–60.

[75] CAS 2008/A/1513, *Emil Hoch* v. *Fédération Internationale de Ski (FIS) and International Olympic Committee (IOC)*, award of 29 January 2009, para. 9.

[76] See CAS 2009/A/1957, para. 14; TAS 2011/A/2433, *Amadou Diakite* v. *Fédération Internationale de Football Association (FIFA)*, award of 8 March 2012, para. 23; TAS 2012/A/2862, *FC Girondins de Bordeaux* v. *Fédération Internationale de Football Association (FIFA)*, award of 11 January 2013, paras 106–7.

[77] The first award in this regard is TAS 2000/A/290, para. 10. The ECHR is seen as 'indirectly applicable' (TAS 2011/A/2433, para. 24) and CAS Panels as 'indirectly bound' (CAS 2015/A/4304, *Tatyana Andrianova* v. *All Russia Athletic Federation (ARAF)*, award of 14 April 2016, para. 46). See also CAS 2013/A/3139, *Fenerbahçe SK* v. *Union des Associations Européennes de Football (UEFA)*, award of 5 December 2013, para. 93.

[78] CAS 2011/A/2384, *Union Cycliste Internationale (UCI)* v. *Alberto Contador Velasco and Real Federación Española de Ciclismo (RFEC)* and CAS 2011/A/2386, *World AntiDoping Agency (WADA)* v. *Alberto Contador Velasco and RFEC*, award of 6 February 2012, para. 22.

[79] CAS 2015/A/4304, para. 45.

[80] See Chapter 1.

the arbitration clause on the basis of the ECHR.[81] In order to allow the case to proceed, the CAS had to determine whether the clause was compatible with the ECHR. The main argument advanced by the claimant was that the unequal bargaining power between the parties to the arbitration (i.e. the athlete and the SGB) threatened the validity of the arbitration agreement. The panel considered that '[i]f – according to this jurisprudence of the ECtHR – the right of access to the courts enshrined in Art. 6.1 ECHR can be subject to a weighing up in the event that arbitral jurisdiction is prescribed by statute, then the same must apply also in a case of unequal bargaining power'.[82] Therefore, it concluded: 'only if there were no reasons in terms of "good administration of justice" in favour of arbitration a violation of article 6.1 ECHR could be acknowledged'.[83] As the panel, maybe unsurprisingly, identified some reasons which justified that CAS arbitration was linked to the 'good administration of justice', it decided that the arbitration agreement was valid under the ECHR.[84]

Furthermore, the CAS jurisdiction in appeal cases is dependent on the conditions enshrined in statutory arbitration clauses enshrined in the SGBs' regulations. This has led in particular to challenges, on the basis of the ECHR, against a ten-day time limit to request a decision from FIFA's dispute resolution bodies in order to lodge a CAS appeal. While the CAS panel recognized 'that the time limit of ten days is short', it concluded: 'the provision serves a legitimate purpose i.e. to cope with the heavy caseload of FIFA and contributes to the goal of an efficient administration of justice'.[85] To support this conclusion, the panel invoked the fact that 'even' the ECtHR 'has all along allowed the right of access to the

[81] CAS 2010/A/2311 and 2312, *Stichting Anti-Doping Autoriteit Nederland (NADO) and the Koninklijke Nederlandsche Schaatsenrijders Bond (KNSB)* v. *W*, awards of 22 August 2011, paras 14–18.

[82] Ibid., para. 18, referring to *Lithgow and others* v. *The United Kingdom*, app. nos. 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81, 9405/81, judgment of 8 July 1986.

[83] Ibid.

[84] Ibid., para. 19. For a more sceptical view, see J. Lukomski, 'Arbitration Clauses in Sport Governing Bodies' Statutes: Consent or Constraint? Analysis from the Perspective of Article 6(1) of the European Convention on Human Rights' (2013) 13 *The International Sports Law Journal* 60–70.

[85] CAS 2008/A/1708, *Football Federation Islamic Republic of Iran (IRIFF)* v. *Fédération Internationale de Football Association (FIFA)*, award of 4 November 2009, para. 21; CAS 2008/A/1705, *Neue Grasshopper Fussball AG Zurich* v. *Club Alianza de Lima*, award of 18 June 2009, para. 23; see also CAS 2011/A/2439, *Football Association of Thailand* v. *Fédération Internationale de Football Association (FIFA)*, award of 17 June 2011, para. 16.

courts to be limited "in the interests of the good administration of justice"'.[86] However, this does not extend automatically to any other statutory limitation to the scope of the review of the CAS.[87] Indeed, the CAS also invoked the ECHR to remind that '[r]estrictions to the fundamental right of access to justice should not be accepted easily, but only where such restrictions are justified both in the interest of good administration of justice and proportionality'.[88] In this latter case, the sole arbitrator failed 'to see why a restriction of his mandate – contrary to the clear wording of the Art. R57 of the CAS Code – would be in the interest of good administration of justice'.[89]

As one can gather from these examples, the ECHR and its interpretations by the ECtHR are used by CAS panels to justify fundamental choices regarding their scope of jurisdiction. The entanglement is complex as the ECHR is both used against an athlete, who is challenging the validity of a CAS arbitration clause, and SGBs, who are trying to reduce the scope of the CAS review of their decisions. It highlights the importance of references to the ECHR as legitimating devices to support the CAS's interpretation of its jurisdictional space.

10.3.2 Challenging the Compatibility of the SGBs' Regulations with the ECHR

Like EU law, the ECHR can also be used to impose a form of constitutional review upon the rules and decisions of the international SGBs. In that framework, it operates as a kind of cosmopolitan constitution that would extend beyond the state parties to private entities engaging in transnational regulation. Yet, in practice, such a use of the ECHR as a constitutional check remains relatively rare at the CAS.

10.3.2.1 The ECHR Compatibility of the WADC

One of the vexing questions of international sports law is whether the current world anti-doping regime based on the WADC is infringing on the human rights of athletes subjected to it.[90] Many commentators have

[86] CAS 2011/A/2439.
[87] CAS 2013/A/3274, *Mads Glasner* v. *Fédération Internationale de Natation (FINA)*, award of 31 January 2014, para. 65.
[88] Ibid.
[89] Ibid.
[90] J. Soek, *The Strict Liability Principle and the Human Rights of the Athlete in Doping Cases* (T.M.C. Asser Press, 2006). See also C. Tamburrini, 'WADA's Anti-doping Policy and

raised this issue and it is therefore unsurprising to see the validity of the WADC being tested on the basis of the ECHR.[91] As a consequence, the World Anti-Doping Agency (WADA) has along the years requested a number of opinions from respected scholars and practitioners to certify the compatibility of the WADC with human rights, and the ECHR in particular.[92] Numerous CAS panels have religiously invoked these opinions as authoritative material supporting the compatibility of the WADC with the ECHR.[93] Jean-Paul Costa, the former president of the ECtHR, concluded in his 2013 expert opinion that the WADC is 'in harmony'

Athletes' Right to Privacy' (2013) 1 *Revista de Filosofía, Ética y Derecho del Deporte* 84–96; A. J. Schneider, 'Privacy, Confidentiality and Human Rights in Sport' (2004) 7 *Sport in Society* 438–56; M. Hard, 'Caught in the Net: Athletes' Rights and the World Anti-Doping Agency' (2010) 19 *Southern California Interdisciplinary Law Journal* 533–64.

[91] The ECtHR has recently decided two cases related to anti-doping, see *Fédération Nationale des Syndicats Sportifs (FNASS) and Others* v. *France* and *Bakker* v. *Switzerland*, app. no. 7198/07, judgment of 3 September 2019.

[92] G. Kaufmann-Kohler, G. Malinverni and A. Rigozzi, 'Conformity of Certain Provisions of the Draft WADC with Commonly Accepted Principles of International Law' (February 2003), www.wada-ama.org/en/resources/legal/conformity-with-international-law; G. Kaufmann-Kohler and A. Rigozzi, 'Conformity of Art. 10.6 with Fundamental Rights of Athletes' (November 2007), www.wada-ama.org/en/resources/world-anti-doping-program/conformity-with-fundamental-rights-of-athletes; J.-P. Costa, 'Legal Opinion Regarding the Draft World Anti-doping Code' (June 2013), www.wada-ama.org/en/resources/legal/legal-opinion-on-the-draft-2015-world-anti-doping-code; and J-P. Costa, 'Legal Opinion on the 2021 Code' (October 2019), www.wada-ama.org/en/resources/the-code/legal-opinion-on-the-2021-code-by-judge-jean-paul-costa.

[93] The opinion by G. Kaufmann-Kohler, G. Malinverni and A. Rigozzi is cited in CAS 2004/A/690, *H.* v. *Association of Tennis Professionals (ATP)*, award of 24 March 2005, para. 54; CAS 2005/A/830, *S.* v. *FINA*, award of 15 July 2005, para. 41; CAS 2006/A/1025, *Mariano Puerta* v. *International Tennis Federation (ITF)*, award of 12 July 2006, para. 78; CAS 2009/A/2012, *Doping Authority Netherlands* v. *Mr Nick Zuijkerbuijk*, award of 11 June 2010, para. 50; CAS 2009/A/1915, *World Anti-Doping Agency (WADA)* v. *Polish Wrestling Federation (PWF), Kamil Blonski and Wojciech Zieziulewicz*, award of 12 August 2010, para. 17; CAS 2010/A/2307, *WADA* v. *Jobson Leandro Pereira de Oliveira, CBF and STJD*, award of 14 September 2011, paras 45 and 99. While the Costa opinion is referred to in CAS 2016/A/4534, *Maurico Fiol Villanueva* v. *Fédération Internationale de Natation (FINA)*, award of 16 March 2017, para. 52; CAS 2017/A/4927, *Misha Aloyan* v. *International Olympic Committee (IOC)*, award of 16 June 2017, para. 82; CAS 2017/A/5099, *Artur Taymazov* v. *International Olympic Committee (IOC)*, award of 4 December 2017, para. 82; CAS 2018/A/5546, *José Paolo Guerrero* v. *FIFA* and CAS 2018/A/5571, *WADA* v. *FIFA and José Paolo Guerrero*, awards of 30 July 2018, para. 87; CAS 2018/A/5581, *Filip Radojevic* v. *Fédération Internationale de Natation (FINA)*, award of 10 July 2018, para. 85; and CAS 2018/A/5739, *Levi Cadogan* v. *National Anti-Doping Commission of Barbados (NADCB)*, award of 20 February 2019, para. 81.

with 'the accepted principles of international law and human rights'.[94] Based on this conclusion, one Panel noted that 'the previous President of the European Court of Human Rights' had 'vouched for' the proportionality of the WADC.[95] More broadly, with regard to the fixed minimum sanctions in doping cases, a CAS panel concluded 'that legal scholars, CAS panels and the Swiss Federal Tribunal seem to concur that the current sanctioning system based on the WADA Code does not conflict with fundamental human rights'.[96] Finally, an award endorsed the compatibility with Article 8 ECHR of the long-term storage of samples (for up to eight years).[97] In all these cases, the panels did not engage in deep proportionality assessments of the compatibility of the WADC with the ECHR but merely invoked the (scholarly or professional) authority of expert opinions to reject the challenges.

10.3.2.2 The ECHR Compatibility of Other Disciplinary Rules and Decisions of the SGBs

The ECHR could naturally also find an application with regard to other types of disciplinary proceedings in the sporting context. In fact, CAS panels have recognized that SGBs must comply with the *nulla poena sine lege* principle enshrined in Article 7 ECHR.[98] In other words, 'before a person can be found guilty of a disciplinary offence, the relevant disciplinary code must proscribe the misconduct with which he is charged'.[99] However, challenges on the basis of Article 6(2) ECHR to the widespread use of strict liability in sports regulations have not been successful.[100] More specifically, clubs and athletes argued that strict liability runs contrary to the presumption of innocence guaranteed in Article 6(2)

[94] CAS 2017/A/4927, para. 82 and CAS 2017/A/5099, para. 82.
[95] CAS 2018/A/5546 and 5571, para. 87 and CAS 2018/A/5739, para. 81.
[96] CAS 2015/A/4184, *Jobson Leandro Pereira de Oliveira* v. *Fédération Internationale de Football Association (FIFA)*, award of 25 April 2016 (operative part of 24 March 2016), para. 188. Or that 'CAS case law and various legal opinions confirm that the WADC mechanisms are not contrary to human rights legislation' in CAS 2009/A/2012, para. 47.
[97] TAS 2009/A/1879, para. 81.
[98] CAS 2014/A/3516, *George Yerolimpos* v. *World Karate Federation*, award of 6 October 2014, para. 104 and CAS 2016/A/4921 and 4922, *Maria Dzhumadzuk, Irina Shulga and Equestrian Federation of Ukraine* v. *Federation Equestre Internationale (FEI)*, award of 30 May 2017, para. 62.
[99] CAS 2014/A/3516, para. 104.
[100] Strict liability foresees that a disciplinary violation, such as a violation of anti-doping rules, can be constituted even without fault of the accused. See CAS 2013/A/3139 above and CAS 2014/A/3628, *Eskişehirspor Kulübü* v. *Union of European Football Association (UEFA)*, award of 2 September 2014 (operative part of 7 July 2014).

ECHR. One award referred to ECtHR case law to support the claim that the recourse to strict liability is not per se contrary to the ECHR.[101] In another more recent case, the panel rejected Article 6(2)'s applicability to the disciplinary sanctions of SGBs 'as Article 6(2) is only applicable to criminal proceedings and the present proceedings are not of a criminal nature'.[102] Furthermore, the CAS also touched upon whether disciplinary proceedings run counter to the privilege against self-incrimination recognized by the ECtHR,[103] rejected on the basis of the ECHR the retroactive application of a longer statute of limitation to a case that was already time-barred at the time of the entry into force of the new provision[104] and invoked the *lex mitior* principle and its interpretation by the ECtHR.[105] In short, while disciplinary sanctions have a direct and profound effect on those subjected to them, the CAS has been quite reluctant to engage in a constitutional review of the SGBs' decisions on the basis of the ECHR.

10.3.3 The CAS and the Procedural Guarantees of Article 6(1) ECHR

The procedural rights guaranteed by Article 6(1) ECHR, and in particular their interpretation by the ECtHR, are more present in CAS awards. The ECtHR's case law plays a fundamental role in defining the intensity of procedural review exercised by the CAS with regard to the decisions of the SGBs, as well as in justifying the key procedural constraints applicable to the CAS itself.

10.3.3.1 The ECHR and Due Process Inside the SGBs

The internal disciplinary bodies of the international SGBs are taking most of the disciplinary decisions affecting international sports. *In fine*,

[101] See CAS 2009/A/1768, *Hansen* v. *Fédération Equestre Internationale (FEI)*, award of 4 December 2009, para. 21 referring to *Salabiaku* v. *France*, app. no. 10519/83, judgment of 7 October 1988, paras 28–9.

[102] CAS 2013/A/3139, para. 91.

[103] CAS 2018/A/5769, *Worawi Makudi* v. *Fédération Internationale de Football Association (FIFA)*, award of 11 February 2019, paras 135–6.

[104] CAS 2015/A/4304, para. 48. Referencing decision dated *Oleksandr Volkov* v. *Ukraine*, app. no. 21722/11, judgment of 9 January 2013, marg. no. 137.

[105] The reference to the ECtHR decision *Scoppola* v. *Italy*, app. no. 10249/03, judgment of 17 September 2009 is found in CAS 2012/A/2817, *Fenerbahçe Spor Kulübü* v. *Fédération Internationale de Football Association (FIFA) and Roberto Carlos Da Silva Rocha*, award of 21 June 2013, para. 122 and CAS 2010/A/2083, *UCI* v. *Jan Ullrich and Swiss Olympic*, award of 9 February 2012, para. 63.

only a small share of these decisions is subsequently appealed at the CAS. Yet, the CAS has consistently refused to assess the compatibility of these first instance proceedings with Article 6(1) ECHR, relying instead on the curative quality of an appeal before the CAS.

Sometimes awards simply exclude the applicability of the ECHR to internal proceedings of the SGBs, such as when a panel noted that it 'does not see any reason in the present case to depart from the line established in earlier jurisprudence, namely that the ECHR is not applicable to disciplinary proceedings before a Sport association's jurisdictional bodies'.[106] In other words, 'procedural fundamental rights protect citizens against violations of such rights by the State and its organs and are therefore only applicable to a jurisdiction established by a State and not to legal relationships between private entities such as associations and their members'.[107] The panel would only consider otherwise if the SGB had 'inserted into its Constitutional Rules and Regulations procedural rights based on the ECHR or if it had referred to the ECHR as applicable to disciplinary proceedings before its jurisdictional bodies'.[108]

Many panels, however, do not share this view. Contrariwise, another panel recognized that 'there are more and more authorities in legal literature advocating that the ECHR also applies directly to sports associations'.[109] Yet, CAS panels have also long held that 'if the hearing in a given case was insufficient in the first instance [. . .] the fact is that, as long as there is a possibility of full appeal to the Court of Arbitration for Sport, the deficiency may be cured'.[110] This curative ability has been supported with references to the case law of the ECtHR.[111] Awards claim

[106] CAS 2009/A/1957, para. 14. In particular, the award referenced previous decisions such as CAS 2000/A/290 above and CAS 2005/A/895, *Al-Hilal Al-Saudi Club* v. *Fédération Internationale de Football Association (FIFA)*, order of 12 December 2008.

[107] Ibid., para. 15.

[108] Ibid., para. 20.

[109] CAS 2008/A/1513, para. 9.

[110] CAS 94/129, *USA Shooting and Q.* v. *Union Internationale de Tir (UIT)*, award of 23 May 1995 para. 59. For similar conclusions, see CAS 2009/A/1957, para. 21; CAS 2009/A/1985, *Franchon Crews* v. *International Boxing Association (AIBA)*, award of 10 June 2010; para. 24. For a hint of a different direction, see CAS 2015/A/4095, *Bernardo Rezende and Mario da Silva Pedreira Junior* v. *Fédération International de Volleyball (FIVB)*, award of 6 October 2015, paras 74–7.

[111] The *Wickramsinghe* v. *The United Kingdom*, app. no. 31503/96, decision of 9 December 1997 is referenced in CAS 2007/A/1396 and 1402, *World Anti-Doping Agency (WADA) and Union Cycliste Internationale (UCI)* v. *Alejandro Valverde and Real Federación Española de Ciclismo (RFEC)*, award of 31 May 2010, para. 43; CAS 2009/A/1920, *FK Pobeda, Aleksandar Zabrcanec, Nikolce Zdraveski* v. *UEFA*, award of 15 April 2010,

that this jurisprudence is 'in line'[112] with the *Bryan* v. *The United Kingdom* ruling of the ECtHR and the *Wickramsinghe* decision of the European Commission of Human Rights. The latter held, citing the former, that 'even where an adjudicatory body determining disputes over civil rights and obligations does not comply with Article 6(1) [ECHR] in some respect, no violation of the Convention will be found if the proceedings before that body are subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 (1)'.[113]

This position of the CAS has fundamental consequences for those going through the internal judicial systems of the SGBs, as it basically endorses, with the (alleged) blessing of the ECtHR, any type of procedural wrongs at the level of the internal adjudicative bodies of the SGBs.

10.3.3.2 The ECHR and Evidence at the CAS

The CAS has also leveraged references to the ECtHR case law to justify allowing certain types of evidence in CAS proceedings. First, the CAS has had to decide whether recourse to anonymous witnesses infringes the right to be heard under Article 6(1) ECHR.[114] In particular, the CAS referred to the jurisprudence of the SFT drawing on the case law of the ECtHR which allowed the recourse to anonymous witnesses if necessary for the personal safety of the witness.[115] Nevertheless, the Panel also relied on the ECtHR's jurisprudence to nuance this conclusion by

para. 28; CAS 2009/A/1985, para. 24; CAS 2011/A/2430, *Football Club Apollonia* v. *Albanian Football Federation (AFF) and Sulejman Hoxha*, award of 18 October 2012, para. 9.24; CAS 2013/A/3262, *Joel Melchor Sánchez Alegría* v. *Fédération Internationale de Football Association (FIFA)*, award of 30 September 2014 (operative part of 18 June 2014), para. 83; CAS 2016/A/4871, *Vladimir Sakotic* v. *FIDE World Chess Federation (FIDE)*, award of 2 August 2017, para. 120. The ECtHR's *A. Menarini Diagnostics S.r.l.* v. *Italy*, app. no. 43509/08, judgment of 27 September 2011, paras 58–9 is cited in CAS 2011/A/2362, *Mohammad Asif* v. *International Cricket Council*, award of 17 April 2013, para. 41. Finally, the *Bryan* v. *The United Kingdom*, app. no. 19178/91, judgment of 22 November 1995 is referred to in CAS 2008/A/1513, para. 9.

[112] CAS 2009/A/1985, para. 24; CAS 2011/A/2430, para. 9.24; CAS 2013/A/3262, para. 83.

[113] *Wickramsinghe* v. *The United Kingdom*, para. 41.

[114] CAS 2009/A/1920, para. 13. See as well CAS 2011/A/2384 and 2386, paras 167–86.

[115] Ibid. However, in CAS 2011/A/2384 and 2386, para. 184, the CAS refused to allow a witness to testify anonymously because the Panel considered that 'it was insufficiently demonstrated that the interests of the witness worthy of protection were threatened to an extent that could justify a complete protection of the witness' identity from disclosure to the Respondents'.

highlighting that the right to be heard must be guaranteed by other means such as 'by cross examination through "audiovisual protection" and by an in-depth check of the identity and the reputation of the anonymous witness by the court'.[116]

Second, the CAS has had to decide whether the use of illegally obtained evidence in disciplinary proceedings is contrary to the ECHR.[117] For example, a panel refused to draw an analogy between the *Texeira de Castro* decision of the ECtHR, which found that Portugal contravened the ECHR in a case in which the police had gathered evidence through illegal means, and the reliance by FIFA on evidence gathered illegally by an English newspaper.[118] This led the arbitrators to deny the claimant the right to rely on the ECtHR's case law to challenge the admissibility of evidence obtained indirectly through unlawful wiretapping by the press. In support of this conclusion, the panel referenced the ECtHR's case law on freedom of expression insofar as it protects the intrusion of the press in a person's private life.[119] In a subsequent award, the CAS panel went further by invoking the ECtHR's finding that 'the courts shall balance the interest in protecting the right that was infringed by obtaining the evidence against the interest in establishing the truth'.[120] While another panel concluded that 'the interest underlying the fight against doping can be preponderant over the individual's interest, whether an athlete or athlete support personnel, in not having an illicitly obtained evidence admitted in an arbitral procedure concerning an alleged anti-doping rule violation'.[121] The arbitrators insisted that this balancing test is 'in line'[122] with the jurisprudence of the ECtHR.

[116] CAS 2009/A/1920.

[117] TAS 2011/A/2433. On the use of the secret recordings that led to the recent Russian anti-doping scandal, see CAS 2016/A/4480, *International Association of Athletics Federations (IAAF)* v. *All Russia Athletics Federation (ARAF) and Vladimir Kazarin*, award of 7 April 2017, paras 76–7; CAS 2016/A/4486, *International Association of Athletics Federations (IAAF)* v. *Ekaterina Poistogova*, award of 7 April 2017, paras 104–6; and CAS 2016/A/4487, *International Association of Athletics Federations (IAAF)* v. *Alexey Melnikov*, award of 7 April 2017, paras 104–6.

[118] Ibid., para. 27. Referring to *Teixeira de Castro* v. *Portugal*, app. no. 25829/94, judgment of 9 June 1998.

[119] Ibid., paras 31–2.

[120] CAS 2016/A/4480, para. 76.

[121] CAS 2016/A/4486, para. 105.

[122] Ibid., para. 106. In particular the award refers to *K.S and M.S* v. *Germany*, app. no. 33969/11, judgment of 6 October 2016.

The question of the admissibility of evidence is crucial in determining the outcome of any judicial process. Instead of relying on self-made principles, it is interesting to note that the CAS has borrowed from the ECtHR's jurisprudence to support its relatively liberal view regarding the admissibility of evidence. The latter can be traced back to the difficult position in which SGBs are placed when enforcing their regulations, as they do not enjoy the police powers (or the capacity) to conduct typical investigatory measures and are mostly reliant on indirectly (and often illegally) obtained information.

10.3.3.3 The ECHR and Due Process at the CAS

Lastly, one case has led the CAS to evaluate the compliance of its own procedures with Article 6(1) ECHR, with the panel concluding, perhaps unsurprisingly, that the CAS Code was compliant.[123] Based on a number of ECtHR decisions, the panel held that 'in compliance with the constant jurisprudence of the ECtHR' the athlete had freely consented to the jurisdiction of the CAS and that, therefore, 'the guarantees required by Article 6 para. 1 ECHR do not have to be fulfilled by the CAS'.[124] In spite of this preliminary conclusion, the CAS Panel went on to argue that, in any case, it was fully compliant with Article 6(1) ECHR.[125] In particular, the need for both parties to agree for a hearing to be held in public was deemed to 'not constitute a violation of Article 6 para. 1 of the ECHR as this provision allows, in its second sentence, restrictions with regards to the publicity of the hearing'.[126] More precisely, it held that disputes 'relating to doping controls very often give rise to numerous questions concerning, on the one hand, the private life of the parties involved and, on the other hand, sophisticated technical mechanisms and data especially developed in order to establish anti-doping rule offences', and, therefore, it found that 'publicity of the hearing would have prejudiced the interests of justice'.[127] In addition, it insisted that 'confidentiality of hearings is very common in private arbitration and no judicial precedent has to date stated that such confidentiality would violate Article 6 para.1 ECHR'.[128] Ironically, a few years later, the ECtHR itself would reach the

[123] CAS 2014/A/3561 and 3614.
[124] CAS 2014/A/3561 and 3614, para. 196.
[125] Ibid., para. 197–207.
[126] Ibid., para. 207.
[127] Ibid.
[128] Ibid.

exact opposite conclusion on both the free consent of athletes to CAS arbitration and the need for the publicity of CAS hearings in doping cases.[129] This fundamental divergence highlights the potential gap between the CAS's application of the ECHR (or Swiss law and EU law) and the ECtHR's own interpretation (or the SFT's and the CJEU's interpretation). This situation of interpretive pluralism is not dissimilar to the interaction between national courts and the CJEU or the ECtHR. Thus, this entanglement opens up a field of dialectical play between textual proximity and interpretative distance which will never be entirely bridged.

In different ways, and for different purposes, CAS arbitrators have weaved the ECHR into their judicial reasoning. Such intertwinement is never anodyne, however. It supports important substantial and procedural choices with clear distributive consequences for the parties to CAS arbitration.

10.4 Conclusion

The CAS is a special place. It is not really an arbitral tribunal, nor is it a proper international court, but it stands as a living embodiment of the 'unidentified legal objects'[130] that proliferate in transnational legal practice. It is often presented as necessary to the transnational governance (and mere existence) of international sports. Important CAS decisions, such as the recent *Semenya* award, are subjected to global attention and intense scrutiny. This chapter portrays the CAS as a judicial site where awards are being produced through a process of legal weaving that enmeshes different types of legal material. Its practice is not a solipsistic work based only on the denationalized law of an autonomous transnational community but rather an artistic mélange of styles producing a textual assemblage that is tailored to each case. In the context of the *lex*

[129] *Mutu and Pechstein* v. *Switzerland* above. See A. Duval, 'Time to Go Public? Transparency at the Court of Arbitration for Sport after the Pechstein Decision of the European Court of Human Rights', in A. Duval and A. Rigozzi (eds), *Yearbook of International Sports Arbitration 2017* (T.M.C. Asser Press, 2020), pp. 3–28.

[130] In reference to what Benoît Frydman calls 'objets juridiques non ou mal identifiés', in B. Frydman, 'Comment penser le droit global?' (2012) *Working Papers du Centre Perelman de Philosophie du Droit*, www.philodroit.be/IMG/pdf/comment_penser_le_droit_global_2011.pdf, p. 5.

sportiva, entanglement is undoubtedly the 'normal state of the law'[131] and the CAS represents a striving 'Inter-Legality Hub'.[132]

Nevertheless, it is true that not all legal texts are equally present in CAS awards. As we have seen, Swiss law is much more present than, say, French law (or any other national law for that matter). Similarly, EU law and the ECHR are regularly invoked while there are very few mentions of other sources of international law. One should not lose sight of the fact that the CAS is not an a-national construct hovering above our heads, but is embedded (like many international SGBs) in the territorial and legal context of Switzerland. Furthermore, entanglements cannot be severed from the actors.[133] Many of the professionals active before the CAS as arbitrators or lawyers are Europeans or even Swiss. Finally, the main avenue to challenge CAS awards is the SFT (and, to a much lesser extent, other European courts and administrative bodies). It is thus quite logical that when CAS panels are called to assemble an award, they draw on both what they know and what they want to assuage. Thus, the CAS works not so much as an autarkic judicial machinery reliant on its own supply of power and inputs but rather as a transnational legal assembly line importing various parts of its awards from different suppliers on a case-by-case basis. Hence, the judicial practice of the CAS can help us move beyond the billiard ball model of autonomous transnational legal orders or systems in order to perceive the hybridity of transnational legal practice.[134] At the CAS, Swiss law, EU law and the ECHR are not so much clashing with the *lex sportiva* as they are entangled within it. They become an integral part of the *lex sportiva*. This conclusion does not imply that the ECtHR or the CJEU should defer to the CAS, to the contrary. It means that they should scrutinize closely the way it speaks 'their' language, like they assess the way national courts are speaking it. In a world where nobody is in a position to impose top down a single set of global rules applied in a uniform way, transnational legal practice is bound to be the result of strange loops and contextual assemblages.

The complex beauty of these rhetorical entanglements should not hide the fact that the CAS is taking distributive decisions which are very hard (i.e. costly) to challenge. This chapter has not focused on the politics

[131] Chapter 1.
[132] Y. Shany, 'International Courts as Inter-legality Hubs', in J. Klabbers and G. Palombella (eds), *The Challenge of Inter-legality* (Cambridge University Press, 2019), pp. 319–38.
[133] Chapter 1, Section 1.4.1.
[134] See A. Duval, 'What Lex Sportiva Tells You about Transnational Law'.

lurking behind these entanglements. In other words, what are their underlying drivers or unspoken purposes? In order to answer this question, one would need to carefully investigate who does the entangling and why. There is no reason to believe that these entanglements are per se fair or just. Therefore, the ethics of those producing legal entanglements must be subjected to strict scrutiny.[135] In fact, the dark face of the ubiquity of transnational legal entanglements might be that ultimate political accountability becomes difficult to locate as decisions are enmeshed in a plurality of political and legal contexts. Who should be blamed for a particular interpretation of the FIFA RSTP? Is it the responsibility of FIFA, the European Commission, the CAS or the SFT? Where can we ask to change it and how? The risk is that entanglements lead to a form of organized irresponsibility, as if the legal assemblages of the CAS were not the result of deliberate choices but natural reflections of what a patchwork of laws say. Hence, the age of entanglements calls for a relentless critique of the politics lurking behind the textual assemblages. If legislators are found simultaneously in multiple places and levels, inside the SGBs, at the Swiss parliament or in Brussels, we need to think about how to recreate a transnational democratic space (and process) adapted to this multiplicity. Similarly, if the CAS is in a position to assemble its awards relatively freely, in light of the extremely limited control exercised by the SFT and the high costs of challenging a CAS award elsewhere, then we must seriously consider those who are doing the assembling. Who are they? How is their legitimacy and authority justified? Are they sufficiently impartial and independent from the SGBs? How are they selected? What are the mechanisms in place to prevent the rise of conflicts of interests? Once we recognize that the assembling or entangling of transnational law is the new normal, we must urgently grapple with these questions. The hybridization and pluralization of transnational legal practice might be a necessary consequence of the liquefaction of our transnational lives, but it raises fundamental problems for the way in which political agency is exercised and decision-makers are held accountable. One answer to this conundrum could be to move towards entangling our politics and accountability mechanisms, meaning that the citizenry has to exercise agency at multiple levels (e.g. through social movements, consumer boycotts or simply voting at the European Parliament elections) and to move strategically between different accountability fora (e.g. the

[135] J. Klabbers, 'Judging Inter-legality', in J. Klabbers and G. Palombella (eds), *The Challenge of Inter-legality* (Cambridge University Press, 2019), pp. 339–62.

European Commission, national competition authorities, national courts, Organisation for Economic Co-operation and Development contact points or the ECtHR).[136] In the context of the CAS and the *lex sportiva*, Claudia Pechstein has shown the way, even though it came at great personal costs,[137] by challenging her doping ban before the SFT, the German courts and the ECtHR. To initiate these critical shifts in the way we engage in politics and law, it is first essential to grasp the ubiquity of legal entanglements in the operation of transnational law. The aim of this chapter was to contribute to this *prise de conscience* by exposing how the CAS transforms transnational sporting disputes into legal gold: authoritative awards.

[136] This shift in the exercise of power is theorised by U. Beck, *Power in the Global Age* (Polity, 2005).

[137] 'Pleite zwingt Pechstein zu dramatischem Hilferuf' *Die Welt* (1 July 2015), www.welt.de/sport/article143390802/Pleite-zwingt-Pechstein-zu-dramatischem-Hilferuf.html.