The Appeal of Sports Law*

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I. Introduction

Sport has become a mass phenomenon. It moves and fascinates people. But why sports law? Should the "the world's most enjoyable trifle" not remain outside the reach of lawyers? Don't fun and games go out the window where justice enters at the door? For some decades this opinion prevailed.[1] But real life calls for the law[2] to solve, defuse, and avoid conflicts. The process of commercialisation and a growing professionalism (combined with a growing media presence) have made sports more likely to spark off conflicts – conflicts, moreover, that tend to affect people beyond those actively involved. The commercialisation of sport has also led to conflicts of all shapes and sizes becoming increasingly likely to be battled out in the public eye.[3] There is hardly another area of life or law that has become as transparent to interested members of the public as the area of sports.

From a student's point of view, sports and the law constitute an interesting field of study. The discipline furthers an understanding of the many intersections between life and the law; gives an initial motivating point of access to other areas of law; familiarises the student with the many points of contact between the different areas (leading to an "aha-experience") and sharpens his or her skills in comparative judgment. Sports law is a cross-sectional matter and as such it fascinates. Compared to other disciplines, cross-sectional disciplines also offer a "home advantage" to lawyers; lawyers can bring to these disciplines their ability to systematise, their sense of perspective, and their ability to predict the outcome when conflicts have to be resolved by means of litigation.

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1 See, e.g., the remark made by FIFA chief prosecutor *Kindermann* during the 1971 so-called Bundesliga-Skandal: "Sports law takes precedence over state law", see *H.P. Westermann*, Die Verbandsstrafe und das allgemeine Recht, Bielefeld 1972, p. 52.

2 *Grunsky's* remarks in Haftungsrechtliche Probleme der Sportregeln, Karlsruhe 1979, p. 5, regarding the "growth rate of sports law" are as true now as they were in 1979.

3 A current and clear example of this development is provided by the Amerell and Kempter Affair which concerned the DFB referees Manfred Amerell and Michael Kempter who exploited the media for their own purposes. With the help of the DFB, Kempter publicly accused Amarell, a referee official, of sexual harassment, whereupon Amarell, in order to weaken the accusations, made public private e-mails and text messages which he had received from Kempter. See FAZ, 17.04.2010, p. 35.

A list of 48 keywords compiled by the author in co-operation with the Asser Institute (The Hague) for a projected common database gives a first impression of the diversity of conflicts and the wide-ranging terrain that constitutes sports law. The list will be made available to the public on completion.

An introduction to sports law is inevitably limited in scope and depth and thus, the main focus of this essay is on private law.[4] A survey of the distinguishing features of sports law (II.) is followed by a more detailed examination of its five defining characteristics: the fact of self-regulation (III.), its two-track structure (IV.) the international character of sports law (V.), the multiplicity of effects (VI.), and the fact that sports law is a cross-sectional matter (VII.). Following on from there, doping and liability issues – areas that tend to be particularly relevant in practice – are discussed in brief (VIII. and IX.), followed by a forecast for the future (X.).

II. The Distinguishing Features of Sports Law

The first, and central, feature of sports law is that it is a system of self-regulation. International and national sports associations lay claim to the right to individually regulate "their" sport; to apply and, if necessary, to enforce their rules. What is, at first sight, astonishing is the density of regulation, due in part to the function of sports rules[5], exemplified by codes running to several hundred pages each.[6] Furthermore, the values specific to sports and to associations have a formative influence on the system of self-regulation. Fair play and the ban on doping are well-known examples of this. The monopolistic structure, the so-called Ein-Platz-Prinzip (III. 1.), and the existence of sports tribunals invested with a power of final decision (III. 3.) ensure consistency in the application and, if necessary, in the enforcement of regulations.

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4 For a reference work, see *Nolte*, Sport und Recht – Ein Lehrbuch zum internationalen, europäischen und deutschen Sportrecht, Schorndorf 2004, who takes a public law approach. For a more cursory overview, see *Schimke*, Sportrecht, Frankfurt M. 1996; *Pfister/Steiner*, Sportrecht von A bis Z, Munich 1995; *Haas/Haug/Reschke*, Handbuch des Sportrechts, Neuwied (current as of: December 2009); Nolte/Horst (eds.), Handbuch Sportrecht, Schorndorf 2009; *Fritzweiler/Pfister/Summerer*, Praxishandbuch Sportrecht (PHBSportR-*Bearbeiter*), 2. edition, Munich 2007.

5 See infra III. 2. b).

6 The DFB statutes (available at http://www.dfb.de/index.php?id=11003) run to 680 pages. The UEFA (approximately 1810 pages) and FIFA (approximately 1440 pages) regulations are even more voluminous.

The second feature of sports law, and one which is particularly relevant to state law, is its "two-track structure", i.e. the coexistence of the associations' regulations with rules of national and international law. Numerous matters – for example the admission to a monopolistic association or the expulsion from a sports club, the transfer of players, the awarding of media rights (especially television) – are also dealt with by national and by European law rules.[7] As a consequence, conflicts with the sports associations' claim to final self-regulation are inevitable. What is problematic in this context is to what extent state courts are competent to review the decisions of sports associations and to arrive at different conclusions. The cases of Krabbe, Baumann, Bosman, Simutenkov, Webster and the centralised marketing of "Bundesliga" television rights[8] have brought these problems to the fore of public attention. Despite these spectacular cases, one should not lose sight of the fact that most cases are in fact settled by means of self-regulation. Thus, the output of cases by the DFB's governing bodies (including review panels of the association itself and courts of arbitration) equals that of the German labour courts.[9] These jurisdictional bodies may thus be seen as substantially easing the workload of the state

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7 On the state of European sports in general and on that of European football in particular, see the Independent European Sport Review's Executive Summary, a summary of which is available at http://www.independentsportreview.com/doc/Executive_Summary/IESR_Executive_Summary_de.pdf (last accessed September 1, 2010). In addition, the European Commission presented a white paper on sports in 2007. The paper deals with the most pressing social and economic issues relating to sports. The Commission proposes detailed steps in their action plan. The white paper and related documents are available for download at http://ec.europa.eu/sport/white-paper/index_en.htm (last accessed September 1, 2010). For further information regarding the white paper, see *Stein,* Sp*u*Rt 2008, pp. 46 et seqq.

8 The Federal Cartel Office (Bundeskartellamt), for example, prevented the conclusion of an exclusive agreement between DFL and Sirius Sport Media GmbH regarding the marketing of the television broadcasting rights for Bundesliga games in the period extending from 2009 until 2015. In the view of the Federal Cartel Office, the centralised marketing of broadcasting rights by the DFL was a cartel agreement which would only be admissible if the consumer were to have a reasonable share in the advantages of the cartel. This, in the view of the Federal Cartel Office, could only be guaranteed if a synopsis of the Bundesliga matches were to be broadcast on Saturdays before 8 p.m. on a T.V. channel which was freely available to members of the public. For these reasons, the contract between DFL and Sirius Sport Media GmbH did not come into existence. Thus, DFL was able to generate only 411 million Euro in profits from the television rights instead of a possible 500 million Euro. See FAZ, 18.08.2008, p. 31; FAZ, 17.09.2009, p. 18.

9 *Hilpert,* BayVBl 1988, p. 161 (p. 161) estimates that there are approx. 340.000 cases per year; See also *idem*, Das Fußballstrafrecht des Deutschen-Fußballbundes (DFB), Berlin 2009, S. V (preface) where Hilpert proceeds from the assumption that 400,000 cases occur every year.

courts. This, one might say vertical, "two-track structure" is complemented by a horizontal segmentation, traceable to the difference between national and international regulations. Bearing this fact in mind and taking account of the multitude of legal regimes that could potentially collide with the law set by the associations, sports law is seen as a very complex patchwork.

This leads one to a third feature of sports law: its international character. Sports law cases are alike in all legal systems. The solutions found for these cases, however, sometimes differ substantially, especially as regards the extent of judicial review and the importance accorded to constitutional law. There are efforts at harmonisation in order to mitigate this[10] – a regular exchange of views at an international level, as, for example, within the International Association of Sports Law[11] and the International Sports Lawyers Association[12] is constructive in this regard. Sports law journals with an international orientation are equally useful, especially the International Sports Law Journal and Pandektis and also the Marquette Sports Law Review, Sp*#*Rt, causa sport, and Desporto & Direito. International LL.M. programmes with a focus on sports law, for example those of Griffith University in Australia and Marquette University in USA, are also worth mentioning.

A fourth characteristic of sports law is that economically relevant regulations, originating in sports law, affect a huge number of persons and organisations, integrating them into networks of relationships. Statutory and contractual regulations often have a multitude of effects that have to be taken into account, especially when it comes to interpretation, in the case of sponsoring, for example.

The fifth and final characteristic of sports law is that it is a cross-sectional matter which calls for interdisciplinary awareness. In many cases, public, private and criminal law aspects all play a decisive role. This is evidenced by the journals referred to above and by special series dealing with sports law, such as "Recht und Sport" ("Law and Sport", 38 volumes to date), "Beiträge zum Sportrecht" (Studies in Sports Law, 34 volumes to date), "Schriftenreihe des Württembergischen Fußballverbandes ("Football Association of Baden Würt-

10 See, e.g., the World Anti-Doping Code propounded by the World Anti-Doping Agency, available at http://www.wada-ama.org/en/World-Anti-Doping-Program/Sports-and-Anti-Doping-Organizations/The-Code/ (last accessed: September 1, 2010); for more information on European initiatives, see Vieweg/Siekmann (eds.), Legal Comparison and the Harmonisation of Doping Rules, Berlin 2007.

11 http://iasl.org/

12 http://www.isla-int.com/.

temberg Sports Law Series, 46 volumes) and its successor series, "Schriften zum Sportrecht" ("Essays on Sports Law", 21 volumes to date), "Recht im Sport" ("Law in Sport", 2 volumes to date), "Schriftenreihe Causa Sport" (Series of Essays on the Subject of Sport, 2 volumes to date). Conference volumes accompanying intervarsity symposia on sports law, such as "Spektrum des Sportrechts" ("The Spectrum of Sports Law"), "Perspektiven des Sportrechts" ("Perspectives on Sports Law"), "Prisma des Sportrechts" ("The Prism of Sports Law") and "Facetten des Sportrechts" ("Facets of Sports Law") also serve to illustrate the cross-sectional character of sports law.[13]

III. Self-Regulation

1. The Organisation of Sports Associations

Outside of schools or universities, sports are usually organised by clubs and associations.[14] It is hardly astonishing, therefore, that DOSB[15] – the umbrella organisation behind German sports – has 27 million members in more than 91,000 gymnastics and sports clubs, which, for their part, are divided into a further 90 member organisations.[16]

The organisation of sports associations is marked by the pyramidal organisation of clubs and associations having the status of registered associations as defined by § 21 BGB.[17] The pyramids are structured as follows: a sports club – a group of people interested in sports – is a corporate member of both the local sports federation of the district, county, or town and of the district or county's discipline-related federation. The discipline-related federations of the districts and counties, in their turn, are members of the respective federal states' discipline-related federations. The federal states' discipline-related fed-

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13 The tables of contents for the conference volumes are available at http://www.irut.jura.uni-erlangen.de/.

14 However, sports are increasingly being practised outside of clubs. See PHBSportR-*Summerer* (fn. 4), part 2, margin number 1.

15 DOSB was founded on May 20, 2006. It represents the union of the two former umbrella organisations in German sports – DSB and NOK.

16 For a detailed account of the state of German sports clubs, see the development report 2009/2010, available for download at http://www.dosb.de/fileadmin/fm-dosb/arbeitsfelder/wiss-ges/Dateien/2010/Siegel_Bundesbericht_SEB09__end.pdf (last accessed September 1, 2010).

17 In recent times, the professional divisions of clubs are, in part, outsourced to external companies. Cf. FAZ, 25.04.2009, p. 30 regarding FSV Frankfurt 1899 Fußball GmbH.

erations for the different sports are – as are the sports clubs[18] and the local sports federations of the districts, counties, and towns themselves[19] – united in the federal states' sports federations, whose catchment areas are congruent with the borders of the federal states. In addition, the discipline-related federations of the federal states are members of their respective national umbrella organisations (for example "Deutscher Skiverband"). Finally, these organisations and the 16 sports federations of the federal states are ordinary member organisations of the DOSB.[20] The pyramidal structure is continued at international level.[21] The national discipline-related federations are united in European federations (for example UEFA) and international federations (for example FIFA, FIS). The International Olympic Committee is an association set up in accordance with Swiss law and has 143[22] personal members. It is responsible for the Olympic Games and represents world sports.

A further distinguishing feature of the system of sports associations is the so-called Ein-Platz-Prinzip[23]. According to § 4 No. 2 DOSB-Aufnahmeordnung in combination with the codes of the international umbrella organisations and the IOC only one umbrella organisation per field can be admitted to the DOSB. Similarly, the "Ein-Platz-Prinzip" is embodied in the statutes of the sports federations of the federal states. Thus, most sports associations, national and international ones alike, have a monopoly as regards both the catchment area and the respective sport[24] which helps avoid conflicts of competence – for example concerning the organisation of championships. At the same time, the monopoly excludes associations not integrated into the system from the distribution of public funds. As the total volume of public funds given away by

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18 E.g. in Bavaria, see § 4 I of the BLSV statutes.

19 E.g. in Baden-Württemberg, see § 4 I a) of the LSV Baden-Württemberg statutes.

20 § 6 I of the DOSB statutes.

21 For more details regarding the relationship between national and international associations see V.

22 Current as of April 2010. The figure does not include honorary members (currently 28) and honour members (currently 1).

23 In relation to this term, cf. also Scherrer/Ludwig (eds.), Sportrecht – Eine Begriffserläuterung, 2. edition, Zurich 2010, p. 101.

24 Although hard to imagine today, German sports were exceedingly fragmented until 1933. There were approximately 300 organisations (of all political and religious persuasions) actively competing with each other. After 1933, the clubs were collected together in an umbrella organisation (Deutscher Reichsbund für Leibesübungen). Fond memories of the prowess of a unitary organisation inspired the reconstruction of the system post-1945. See *Lohbeck*, Das Recht der Sportverbände, Marburg 1971, p. 68. On international aspects, see *Vieweg*, Normsetzung und -anwendung deutscher und internationaler Verbände, Berlin 1990, pp. 57 et seqq.

the federal government amounted to 139 million Euro in 2010, there is considerable potential for conflict in Germany.[25]

2. The Autonomy and Power of Associations

a) Legal Basis

The autonomy of clubs and associations is a consequence of the general principle of party autonomy, which describes the right of clubs and associations to regulate their internal affairs.[26] It comprises both the right to make laws, especially statutes, and the right to administer those laws by applying them to the facts of a particular case. Its legal basis is enshrined in §§ 21 et seqq. BGB. Furthermore, the autonomy of associations is an integral part of the right to free association and as such is guaranteed by Art. 9 I GG[27] and in European law, by Art. 12 I GRC.

b) The Rules of the Game – Their Function and Meaning

Participation in sports ranges from occasional leisure activities to a full-time job to earn a living. Despite a common interest in the sporting process running as smoothly as possible, there are many conflicts between the persons concerned – not only between the athletes themselves, but also between clubs and associations, officials, managers, sponsors, agents, and spectators. One need only think of doping problems or of spectacular injuries on the football pitch. A need for regulation arises from this potential for conflict.

In practice, the most important consequence of the associations' autonomy is that national and international sports associations have the legal power to enact binding sports rules, dealing, in more or less voluminous codifications, with a specific discipline; the official athletics rules[28] or the international handball

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25 See HB, 28.01.2010, p. 17. The federal budget for the promotion of top athletes has fluctuated considerably in recent years. While budgetary support stood at 133 million Euro in total in 2005, a mere 127 million Euro were available in 2006. In 2007, the available funds decreased once more by almost 20 million Euro to the sum of 108.5 million Euro. Since 2008, when the budget rose again to 127 million Euro, a marked increase has been observed.

26 Cf. Scherrer/Ludwig (fn. 23**Fehler! Textmarke nicht definiert.**), p. 45.

27 See *Steiner,* Staat, Sport und Verfassung, in: Tettinger/Vieweg (eds.), Gegenwartsfragen des Sportrechts, Berlin 2004, pp. 27 et seqq. (= DÖV 1983, pp. 173 et seqq.). *Vieweg* (fn. 24), pp. 147 et seqq.; PHBSportR-*Summerer* (fn. 4), part 2, margin number 23.

28 http://www.leichtathletik.de/.

rules[29] may serve as examples. They have different complementary functions. These rules serve to typify the specific sport by drawing up abstract general regulations concerning the venue (pitch etc.), the aim of the competition, the playing time, the number of players per team, the equipment (devices and sportswear), the moves allowed, as well as the athlete's outward appearance.[30] It is this standardisation that enables sports competitions to take place on a larger scale. Whereas children playing football can set the rules themselves in a manner that suits their individual needs, the organisation of a league or the compilation of ranking tables, calls for standardised requirements for each sport. Sports rules which lay the foundation for competitions are complemented by rules intended to achieve equal opportunities for all participants and to avoid unfair competition. Weight classes in weight lifting and boxing, the ban on performance-enhancing drugs (doping), rules on the admission of special devices and gear, as well as the outlawing of certain moves (for example the two-footed jump-off in the high jump) serve this purpose. Rules regulating the transfer of athletes from one club to another and setting transfer fees also serve to guarantee equal opportunities[31] for all competing clubs. Rules are intended to avoid disputes, or to at least ensure that the game or competition runs smoothly. Last but not least, rules are meant to protect the athletes, their opponents, and spectators from dangers typically arising in connection with sports. Regulations dealing with doping, fixing minimum and maximum ages

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29 http://www.ihf.info/TheGame/BylawsandRegulations/tabid/88/Default.aspx.

30 Thus, figure-hugging clothes (bathing suit or tank top) are required in women's volleyball to enhance television appeal (see rule 5.1.1 of FIVB).
The lawsuit concerning the one-piece jersey worn by the national team of Cameroon is also worth mentioning in this context. One-piece outfits were outlawed by FIFA during the 2004 African Cup. The action commenced by the outfitter of the Cameroon team was eventually settled out of court, see http://www.fussball24.de/fussball/4/57/58/19915-kamerun-trikots-fifa-und-puma-schliessen-vergleich (last accessed September 1, 2010). The issue of advertising on the athlete's body must also be addressed in this context.
For reasons of equal opportunities and in order to stem the downright flood of world records, FINA,also drew up new rules and regulations in relation to athletes' swimming costumes. In future, the costumes should not extend over the neck, shoulders and/or ankles; the material should not be thicker than a millimetre and the suit should have a maximum buoyancy of one Newton per 100 grammes. Costumes tailored to the individual athletes are, in general, also forbidden. See FAZ, 16.03.2009, p. 28.

31 The principle of equal opportunities is central to sports, see *Adolphsen,* Internationale Dopingstrafen, Tübingen 2003, p. 1; *Vieweg/Müller*, Gleichbehandlung im Sport – Grundlagen und Grenzen, in Mannsen/Jachmann/Gröpl (eds.), Festschrift für Udo Steiner, Stuttgart u.a. 2009, p. 889 et seqq.; *Vieweg*, Verbandsrechtliche Diskriminierungsverbote und Differenzierungsgebote, in: Württembergischer Fußballverband e.V. (ed.), Minderheitenrechte im Sport, Baden-Baden 2005, p. 71, 83 et seqq.

in boxing, outlawing the rotation technique in the javelin throw[32] – which would allow throws through the whole stadium up to the spectators' stand – and FIFA football rule No. 12 (unlawful play and unsporting behaviour) serve to illustrate this.

Codified sports rules are very important in practice because the associations' statutes declare them to be binding on everyone within the association. In some areas, rules of conduct regulate the "trivial little matter of sports" down to the tiniest detail. Anyone wanting to play football in a club in Germany, for instance, is obliged by rules of reference[33] to abide by the DFB's rules. A football player willing to join a new club is faced with an elaborate codification[34] according to which a club change can only take place if the old club agrees or a certain waiting period[35] has expired. In practice, sports rules have a substantial impact on the risk of self-injury (one need only think of the non-physiological landing required in gymnastics) and on the risk posed by team mates and opponents. More and more frequently, sports rules and regulations can be seen to have the function of increasing the attractiveness of the sport for spectators, thereby increasing its attractiveness for broadcasters and sponsors in order to increase the popularity of the sport and profits earned from television marketing measures and sponsoring. One example of this is the rule-change in volleyball, where the number of points required in order to win a set was increased from 15 to 25. However, in this case, the receiving team may win a point (Rally-Point-System). A further example is provided by the shortening of the set in table tennis from 21 to 11 winning points. Finally, certain sports rules have certain effects on the market for sports equipment and public perception. Sport rules create market preferences for products which conform to these rules and, in certain circumstances, exclude products which do not.[36]

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32 The matter of just how dangerous the javelin throw continues to be was illustrated at the Golden League in Rome in July of 2007. Long jumper Salim Sdiri was hit in the chest and badly injured by the spear of Finnish thrower Tero Pitkämäki. Despite the ban on the rotation technique, the spear had drifted out of its assigned sector. See FAZ, 16.07.2007, p. 26.

33 § 3 Nr. 1 and 2 of the DFB statutes.

34 §§ 16 et seqq. of the DFB SpielO. According to § 20, the FIFA rules are directly applicable to international transfers.

35 § 29 Nr. 6 of the DFB SpielO. Where amateurs switch clubs, the mandatory waiting period may not apply, see § 17 of the DFB rules.

36 Rule 2 of the DFB soccer rules determines size, weight, pressure, and material of the balls used in a soccer game. Only balls that are in accordance with the rule may be labelled "FIFA-approved" and sold as such. This labelling alone brings about a tremendous increase in sales compared to balls without this kind of label. On problems in respect of antitrust law, see *Tschauner,* Die rechtliche Bedeutung technischer Normen

This became evident during the 2006 Football World Cup. FIFA asked a single German firm to equip all World Cup referees and stadiums. The sportswear manufacturer in question had specialised in the development and production of sports gear conforming exactly to the rules of the DFB, FIFA and UEFA. To the firm, this World Cup contract alone was worth about 500,000 Euro in revenue.[37]

From a legal point of view, one has to bear in mind that sports rules are regulations set by national or international associations and have their legal basis in private law. They rank below statute in the hierarchy of legal norms.[38] However, it is also important to know that sports rules imposing abstract and general rules of conduct[39], especially where allowed or forbidden movements are concerned,[40] are often distinguished by their indefinite wording. Thus, we speak of "unlawful play" or "unsporting behaviour" when in the referee's opinion the player plays dangerously.[41] This definition must be more clearly defined since it does not state exactly where the line is to be drawn. This kind of wording may be described as "indefinite terms" created by associations. In the above-mentioned example, the associations transfer the power to decide to the referee.[42]

c) The Binding Character of Standardised Rules

It is obvious that a national or international competition can only serve its purpose if all participants are subject to the same rules. It would be next to impossible to have the German "Bundesliga", for instance, if every club were to have and practise its own rules. The same applies at an international level to the European Leagues and European and World Championships.

When joining a club, the athlete initially agrees to submit to the statutes of the club only. How, then, can the rules of national and international associations

für Sportgeräte und -ausrüstung, in Vieweg (ed.), Perspektiven des Sportrechts, Berlin 2005, p. 189 (pp. 198 et seqq.).

37 Cf. SZ, 06.06.2006, p. 26.

38 See, e.g., *Pfister,* Sp*u*Rt 1998, p. 221 (p. 222); *Lukes,* NJW 1972, pp. 125 et seq.

39 *Marburger,* Die Regeln der Technik im Recht, Köln 1979, pp. 258 et seqq.

40 E.g. rule 12 of the DFB soccer rules and rule 8 of the international indoor handball rules.

41 Rule 12 DFB soccer rules.

42 Referees are trained to make these decisions (e. g. demonstration film for referees "Allowed – Forbidden"). There is also a collection of "Official Decisions" by FIFA in addition to the soccer rules.

be given binding force?[43] It may happen by way of statute[44]: The national association for the specific sport draws up rules to which the associations of the Länder are bound as its members. The clubs are bound, indirectly, by force of the statutes of the respective Land's federation. In this way, the rules of national associations are embodied in the statutes of clubs. The athlete is bound by these statutes because of his admission to the club. This kind of binding force is called "indirect membership". Rules may also have a binding force with an individual, i.e. contractual, agreement.[45] This may take three forms: an individually bargained contract (for example Boris Becker – German tennis federation), a contract of participation founded on registration and admission to a particular competition, and a general licence applied for by and granted to the athlete within the respective sports association's sphere of organisation and responsibility. The last two examples are instances of submission by individual agreement.[46] The contract of participation and/or admission documents that the athlete expressly or impliedly accepts the relevant rules.

d) Sanctions Imposed by Clubs and Associations

Standardised rules and their observance are very important for sports competitions. It is therefore necessary to sanction offences, as illustrated by the fight against doping. This leads one to the classic problem of sanctions imposed by clubs and associations. The acceptance of the clubs' and associations' statutes as binding is always accompanied by a submission to the authority of the club or association. There are different dogmatic explanations for this submission: statute-based, on the one hand, and agreement-based on the other. The, supposedly, still prevailing view[47] assumes that unilateral decisions – especially punishments imposed by associations – have their legal basis in the autonomy

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43 See *Röhricht,* Satzungsrechtliche und individualrechtliche Absicherung von Zulassungssperren als wesentlicher Bestandteil des DSB-Sanktionskatalogs, in: Führungs- und Verwaltungsakademie Berlin des Deutschen Sportbundes (ed.), Verbandsrecht und Zulassungssperren, Frankfurt/M. 1994, pp. 12 et seqq.; PHBSportR-*Summerer* (fn. 4), part 2, margin numbers 148 et seqq.; BGHZ 128, 93 et seqq. = NJW 1995, pp. 583 et seqq. = Sp*u*Rt 1995, pp. 43 et seqq.; *Vieweg,* Sp*u*Rt 1995, pp. 97 et seqq., *Haas/Adolphsen,* NJW 1995, pp. 2146 et seqq. and *Heermann,* ZHR 174 (2010), pp. 250 et seqq.

44 BGHZ 128, 93 (100); *Röhricht* (fn. 43) p. 12 (pp. 15 et seqq.); *Vieweg,* Sp*u*Rt 1995, p. 97 (pp. 98 et seq.).

45 BGHZ 128, 93 (96 et seqq.); *Röhricht* (fn. 4343), p. 12 (pp. 18 et seqq.); *Vieweg,* Sp*u*Rt 1995, p. 97 (p. 99).

46 BGHZ 128, 93 (103 et seq.).

47 BGHZ 128, 93 (99); Palandt-*Heinrichs*, BGB, 69th edition 2010, § 25 margin numbers 7 et seq.; *Pfister,* Autonomie des Sports, sporttypisches Verhalten und staatliches Recht, in: Pfister (ed.), Festschrift für Werner Lorenz, Tübingen 1991, p. 171 (pp. 180 et seqq.); in more detail *Vieweg* (fn. 24) pp. 147 et seqq.

of associations. Sanctions not only provide instruments for solving internal conflicts; they also grant the opportunity to regulate an aspect of life falling within the association's autonomy. Another view[48] holds that unilateral decisions of clubs and associations have their legal basis in contract law. By joining a club, the member agrees to the statutes. Sanctions provided for in the statutes are contractual penalties as defined by §§ 339 et seqq. BGB. The penalty imposed in a particular case is at the discretion of the decision-maker.

The relationship between the association and an (indirect) member is marked by an increased potential for conflict when the association has a monopoly and the (indirect) member depends on its activities and services. Pressure points in this context are sanctions imposed by associations – for example disqualifications or suspensions due to a doping offence – and, directly related to these, the extent to which those measures are reviewed by the state courts. The importance of this problem in practice cannot be overestimated. The number of sports-related disputes stands at an estimated 420,000 per year. This exceeds the annual number of cases which come before the German labour courts.[49] Similar problems arise when a sports association refuses to issue benefits which the member believes himself to be entitled to, or makes decisions which do not express an adverse judgement as such, but, nevertheless, have negative consequences for the member.[50] Participation in courses organised by the association, nominations for[51] or admissions to a sports competition as partici-

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48 Soergel-*Hadding,* BGB, 13th edition 2000, § 25 margin numbers 37 et seq.; *van Look,* Vereinsstrafen als Verbandsstrafen, Berlin 1990, pp. 107 et seqq.

49 See *Hilpert,* BayVBI 1988, p. 161 (p. 161). See also http://www.123recht.net/article.asp?a=421&f=ratgeber_sportrecht_gerichtsbarkeit&p=4 (last accessed September 1, 2010). In 1971 *Schlosser,* Vereins- und Verbandsgerichtsbarkeit, Munich 1972, p. 20 estimated the number of sanctions imposed by clubs and associations to be 150.000.

50 For a survey see *Vieweg,* (fn. 24), pp. 49 et seqq.

51 Cf. the case of track and field athlete, Charles Friedek, who was not nominated by the DOSB to take part in the 2008 Olympic Games in Peking. While he had fulfilled the Olympic requirement of 17 metres on two occasions, he was, according to the regulation, required to achieve the same distance at a further event. An interim injunction against this decision was unsuccessful, cf. OLG Frankfurt a.M. NJW 2008, pp. 2925 et seqq. Cf. previous decision of the German Sports Court of Arbitration (Deutsches Sportschiedsgericht) against the DLV, FAZ, 21.07.2008, p. 26. For a general insight into this particular set of problems, see *Monheim,* Sp*u*Rt 2009, pp. 1 et seqq.; *Hohl,* Rechtliche Probleme der Nominierung von Leistungssportlern, Bayreuth 1992, pp. 21 et seqq.; *Weiler,* Nominierung als Rechtsproblem - Bestandsaufnahmen und Perspektiven, in: Vieweg (ed.), Spektrum des Sportrechts, Berlin 2003, pp. 105 et seqq., referring to actual cases.

pant or manager[52], the fixing of line-ups against the wishes of the clubs concerned, may all serve as illustrations.

3. Sports Tribunals

As shown above, sanctions and other decisions made by associations can interfere with an athlete's or club's activities in many ways. An athlete suspended for two years because of his first doping offence is deprived of his earnings for this time period, for example. He may be too old to continue in professional sports once the suspension has expired.[53] Decisions of associations can threaten the survival of sports clubs too: when a licence is denied because the economic requirements for it are not met, for instance.[54] Relegations (and the

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52 This is illustrated by the case of figure-skating coach Ingo Steuer, who – after failing to be nominated by the NOK for the 2006 Olympic Games in Italy because of his "Stasi" background – had to obtain an interim injunction in order to be admitted to the Games. Later, the NOK dismissed Steuer because of insulting remarks made in an interview. Steuer obtained another interim injunction, which the NOK opposed, but which was later confirmed. See LG München I Sp*u*Rt 2007, pp. 124 et seqq. In the meantime, both sides have taken to a "policy of tolerance" with Ingo Steuer still working as DEU coach, but without any direct or indirect funding by the state. In December 2008, DEU and Ingo Steuer reached an in-court settlement in order to finally resolve their dispute. According to the settlement, the DEU was expected to collect approximately 250,000 Euro in sponsorship monies in the time preceding the 2010 Winter Games in Vancouver. Ingo Steuer would then be remunerated out of this sum. The direct payment of trainers who were involved with the secret police of the German Democratic Republic is still not permitted by the Federal Ministry of the Interior.

53 Cf. the case of Justin Gatlin, a sprinter, who was penalised with an eight years' suspension for another doping attempt in 2006. An American court later shortened this ban to four years. Gatlin wished to achieve a further halving of the penalty and attempted to do this by means of an appeal before the CAS. After this appeal failed in June of 2008, he appeared in front of the District Court in Florida and obtained permission to start in the impending trials by way of an interim injunction. However, when the judge noticed that he did not have jurisdiction to decide an appeal against a CAS judgment, but rather that the matter was one for the Swiss Federal Supreme Court (Schweizerisches Bundesgericht) alone, he revoked the interim injunction four days later. Cf. FAZ, 26. 06.2008, p. 40.
F. Briatore's lifelong ban (team manager of Renault) by the FIA for arranging for Renault driver, Nelson Piquet Jr. to have an accident in the 2008 Singapore Grand Prix was lifted by the "Tribunal de Grande Instance" in Paris for insufficient evidence, cf. FAZ, 06.01.2010, p. 26.

54 *Vieweg/Neumann,* Zur Einführung: Probleme und Tendenzen des Lizenzierungsverfahrens, in: Vieweg (ed.), Lizenzerteilung und -versagung im Sport, Stuttgart 2005, pp. 9 et seqq.; *Scherrer,* Probleme der Lizenzierung von Klubs im Ligasport, in: Arter/Baddeley (eds.), Sport und Recht, Bern 2006, pp. 119 et seqq. A further example is provided by

inevitable loss of money that could have been made from the marketing of TV rights, from sponsoring, and from merchandising) may result in the economic collapse of a club. Disputes concerning particular decisions are therefore inevitable. In order to settle these internal disputes it is possible – due to the autonomy of sports associations – to set up internal tribunals (sometimes comprising several tiers as in the case of the DFB tribunal[55]), aimed at quick and fair decisions.[56] In this way, the jurisdiction of state courts is restricted. However, there are limits to autonomous self-regulation. Sports are subject to the fundamental decisions of state (in particular constitutional) law. Therefore, a certain amount of external state control is unavoidable. This leads one to the classic problem of whether and to what extent the decisions of sports tribunals may be reviewed by state courts.[57]

IV. The Two-Track Structure of Sports Law

1. The Law of Associations versus State Law

Sports law is aimed at dealing with the many conflicts that may arise from social and economic relationships within sports. It aims to strike a fair balance between the needs of all concerned and to take account of conflicting interests. This does not just mean drawing on the skill and expertise of sports organisations as embodied in their regulations.[58] It also means applying principles of general law when the associations' power of self-regulation fails or is misguided. As a consequence, sports law is distinguished by its two-track struc-

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the scandalous, manipulative dealings in Italian soccer. For a detailed examination, *Krause,* Die rechtliche Bewältigung von Sportmanipulationen in Italien, in: Vieweg (ed.), Prisma des Sportrechts, Berlin 2006, pp. 123 et seqq.
Similarly, the DEL revoked the licence of the Kassel Huskies due to ongoing insolvency proceedings. The ice hockey team thereupon secured an interim injunction from LG Köln against its exclusion from the DEL. In the end, however, the revocation of the licence was confirmed by OLG München as well as by OLG Köln, cf. FAZ, 02.07.2010, p. 31 and 27.08.2010, p. 30.

55 § 2 DFB RuVO. See *Hilpert,* Sportrecht und Sportrechtsprechung im In- und Ausland, Berlin 2007, p. 84 for an illustration of the procedure before the DFB tribunal.

56 BGHZ 87, 337 (345); *Röhricht,* Chancen und Grenzen von Sportgerichtsverfahren nach deutschem Recht, in: Röhricht (ed.), Sportgerichtsbarkeit, Stuttgart 1997, p. 19 (p. 21).

57 See infra IV. 2. Compare also *Röhricht* (fn. 56), pp. 22 et seq.

58 The DOSB directory lists the most important sports associations and has links to their statutes and rules, http://www.dosb.de/de/organisation/mitgliedsorganisationen/ (last accessed September 1, 2010). The provisions of the rules and regulations and rules regarding competitions and games are partly available on the homepages of the associations which are listed there.

ture. It comprises two sets of norms: on the one hand, there are the associations' rules; and on the other, there are the universally applicable rules of national and international law. As we shall see below, the solutions to legal issues relating to sports often depend on the determination of the exact relationship between these two sets of norms. The interplay between the associations' law and the general law, the many forms sports may take, the complexity of the interests affected – all lend special character to sports law. At the same time, they are an important contributing factor to the ever-changing nature of sports law, as evidenced by the need to adapt the associations' rules to those set by the general law.

2. The Review of Associations' Decisions by the State Courts

It should by now be obvious by now that the associations' law and state and European law do not exist in complete isolation from each other. This gives rise to the question of whether and *to what extent an association's decisions may be reviewed by state and European courts*.[59] This question is of central importance because the decisions of state and European courts have a knock-on effect on the enactment of rules by associations and on the decision-making of their executive bodies (including sports tribunals). One must distinguish between three different types of review: review of the content of rules set by an association, review of the facts, and review of the process of applying the law to the facts.

With regard to clubs and associations that do not wield any significant social and economic power, the courts confine themselves to reviewing whether the punishment imposed has a legal basis in the statutes, whether the prescribed procedure has been observed, whether the respective rules and statutes are consistent with state law and good morals, and whether the establishment of the facts is correct and the punishment imposed, not blatantly inequitable.[60] The state courts have begun to apply these principles to the review of other decisions by associations.[61] As far as associations with significant socio-economic power are concerned (as, for instance, sports associations), the re-

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59 See the jurisprudence of the EGC and ECJ under V. 2.

60 BGHZ 21, 370 (373); 47, 381 (384 et seq.); 87, 337 (343); 102, 265 (273); OLG Frankfurt/M. NJW-RR 1986, p. 133 (p. 134); OLG München NJWE-VHR 1996, p. 96 (pp. 98 et seqq.).

61 OLG Frankfurt NJW 1992, p. 2576. LG Berlin causa sport (CaS) 2006, pp. 73 et seqq.; and LG München I Sp*u*Rt 2007, pp. 124 et seqq. because of the National Olympic Committee's refusal to nominate a (certain) coach for the international contests.

stricted review of punishments has come under increasing criticism since the 1960s. The problem became all too obvious in the so-called Bundesligaskandal[62] of the early 1970s, when it appeared that the associations' executive bodies – the sports tribunals of the DFB – had largely ignored core values regarding freedom of occupation and professional rights.[63] It was at this point that the common aim of critics – i.e. to harmonise the associations' power and individual rights – was taken up by the courts.

If one accepts the associations' right to punish and make adverse decisions, not only for reasons of practicality and convenience, but also as a fundamental aspect of the constitutionally guaranteed autonomy of associations, then the problem of a lack of legal protection[64] must be dealt with. This calls for an extensive review of the content of norms[65] enacted by associations since these norms constitute the basis for sanctions and other adverse decisions. The approach of the Federal Court of Justice[66] – content review by means of an extensive consideration of interests – can be applied a fortiori to the internal relationship between an association and its members.[67] The fact that the association enjoys a monopoly position and the fact that the member is dependent on its services may be taken into account. The BGH has started to review sports rules by referring directly to § 242 BGB.[68] Where indeterminate terms – as, for example, "unsporting behaviour" – are used as a legal basis for punishment, the state courts must check whether these terms violate core principles of state law and whether it is legitimate to grant a margin of appreciation in the first place.[69] Secondly, it is necessary that the courts review the facts.[70] This

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62 See the informative documentation provided by *Rauball,* Bundesliga-Skandal, Berlin 1972, as well as *Hilpert* (fn. 55), pp. 209 et seq.

63 Academics then tried to find justification for the courts' right to supervise sanctions imposed by associations. For a general account, see *Vieweg*, JuS 1983, p. 825 (pp. 827 et seq.).

64 *Burmeister,* DÖV 1978, p. 1 (p. 2), sees the sports associations as being factually deprived of rights and further holds that they are often forced to renounce rights.

65 BGH NJW 1995, p. 583 (p. 587); NJW 2004, p. 2226 (p. 2227).

66 BGHZ 63, 282 et seqq. = NJW 1975, pp. 771 et seqq.; in more detail infra IV. 3.

67 *Nicklisch,* Inhaltskontrolle von Verbandsnormen, Heidelberg 1982, p. 29; *Reuter,* ZGR 1980, p. 101 (pp. 115 et seq.).

68 BGHZ 128, 93 (101 et seqq,) = NJW 1995, p. 583 (p. 585) = Sp*u*Rt 1995, p. 43 (p. 46 et seq.); see *Vieweg,* Sp*u*Rt 1995, pp. 97 et seqq; OLG München Sp*u*Rt 2001, p. 64 (p. 67); see also *Haas,* causa sport 2004, p. 58; for review of the content of norms set by associations, see *Vieweg* (fn. 24), pp. 159 et seqq.; *Vieweg,* Zur Inhaltskontrolle von Verbandsnormen, in: Leßmann/Großfeld/Vollmer (eds.), Festschrift für Rudolf Lukes, Köln 1989, pp. 809 et seqq.

69 H. P. *Westermann* (fn. 1), pp. 104 et seqq. m.w.N.

70 BGH JZ 1984, p. 180 (p. 187); see also *Vieweg* JZ 1984, p. 167 (pp. 170 et seq.).

prevents the athlete being deprived of his rights because facts have been incorrectly established. One must bear in mind, however, that an ad hoc field-of-play decision, such as the calling of a foul in soccer, may be necessary to ensure that the competition runs smoothly. Such a decision should not be changed retrospectively – even if, upon inspection of evidence recorded by technical means, e.g. video evidence[71], it is proven wrong. It is arguable, however, that effects of a field-of-play decision reaching beyond the competition itself – such as bans – should be subject to judicial review.[72] Thirdly, there must be a review of the process of applying the law to the facts, if only to close off potential loopholes.[73] The central question here being whether the associations may be granted a margin of appreciation.

The approach outlined above takes into consideration that the interests of sports associations and the interests of members – including the members of clubs belonging to the respective associations[74] – are not merely opposed; they also share a common basis. The approach preserves the chance of settling conflicts internally, but properly and fairly, by means of statutes and mechanisms of decision-making – for example procedures before the sports courts. By granting a margin of appreciation, the state courts can exercise restraint when replacing the decisions of expert panels with decisions of their own. The threat of having decisions reviewed and overturned by national and international courts should lead to rules and decisions being put in place by the associations which athletes and clubs can accept as proper and objective.

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71 To this end, cf. *Vieweg,* Tatsachenentscheidungen im Sport – Konzeption und Korrektur, in: Krähe/Vieweg (eds.), Schiedsrichter und Wettkampfrichter im Sport, Stuttgart 2008, pp. 53 et seqq., *idem.,* Crezelius/Hirte/Vieweg (eds.), Festschrift für Volker Röhricht, Köln 2005, pp. 1255 et seqq.; *Hilpert,* Die Fehlentscheidungen der Fußballschiedsrichter, Berlin 2010, passim. The 2010 Soccer World Cup delivered concrete examples of controversial decisions of fact in the qualifying match between France and Ireland, as well as two of the final-sixteen matches between Germany and England and Argentina and Mexico, respectively, cf. FAZ, 02.12.2009, p. 31 and 29.06.2010, p. 25.

72 H. P. *Westermann* (fn. 1), pp. 107 et seq.

73 BGHZ 102, 265 (276).

74 Punishment of non-members is, however, impermissible. See BGHZ 28, 131 (133); 29, 352 (359). Cf. *Lukes,* Erstreckung der Vereinsgewalt auf Nichtmitglieder durch Rechtsgeschäft, in: Hefermehl/Gmühl/Brox (eds.), Festschrift für Harry Westermann, Karlsruhe 1974, p. 325 (pp. 334 et seqq.) (discusses the powers of associations with regard to licensed soccer).

Sports associations are increasingly trying to prevent judicial review altogether by resorting to courts of arbitration as defined by §§ 1025 et seqq. ZPO.[75] Thus, most associations' statutes prescribe that independent sports courts take the place of the state courts – for example, the German Sports Court of Arbitration, registered on the 01.01.2008.[76] Since arbitral awards can only be reversed by a state court if they are fundamentally flawed (see the enumerative listing in § 1059 ZPO), an arbitration clause functions as a de facto exclusion of the state courts' jurisdiction[77]. This is only compatible with the constitutional right to effective legal protection if the protection offered by the court of arbitration is equivalent to that offered by a state court. At a minimum, the decision-makers must be independent and impartial. In addition, they cannot be members of the sports clubs involved.[78]

3. The Right of Admission to a Monopolistic Sports Association

The constitutional and civil law guarantee of the autonomy of associations is based on the premise that an abuse of power by the association is prevented by mechanisms of self-regulation, in particular because of the fact that membership is voluntary.[79] As a consequence of the "Ein-Platz-Prinzip", the system of sports associations is characterised by strong local and disciplinary monopolisation. Should a monopoly association, which – like DOSB and its predecessor (DSB) – functions as a distributor of public funds, embody the "Ein-Platz-Prinzip" in its statutes[80] and should it admit a sports association to a special field, conflicts with competing associations in the same discipline are bound to

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75 § 32 I of the DOSB statutes allows for that. Cf. *Monheim,* Sportlerrechte und Sportgerichte im Lichte des Rechtsstaatsprinzips – auf dem Weg zu einem Bundessportgericht, Munich 2006, pp. 134 et seqq.; See generally on requirements for the courts of arbitration for sport PHBSportR-*Summerer* (fn. 4), part 2, margin numbers 280 et seqq., as well as Führungs-Akademie des deutschen Sportbundes e. V. (ed.), Schiedsgerichte bei Dopingstreitigkeiten, Frankfurt/M. 2003, passim.

76 For a detailed discussion of the German Sports Court of Arbitration, cf. *Mertens,* Sp*u*Rt 2008, pp. 140 et seqq. and pp. 180 et seqq,; *Bredow/Klich*, CaS 2008, pp. 45 et seqq.; *Fritzweiler*, Sp*u*Rt 2008, pp. 175 et seq.; *Martens*, SchiedsVZ 2009, pp. 99 et seqq.

77 This is, however, conditional upon the arbitration agreement being framed in sufficiently clear terms, cf. LG Dortmund GRUR-RR 2009, p. 117 (p. 118).

78 See, e.g., § 32 III, IV DOSB statutes. On the issue of the Court of Arbitration for Sport's independence, see *Oschütz,* Sportschiedsgerichtsbarkeit, Berlin 2005, pp. 98 et seqq. with reference to the Swiss Federal Supreme Court.

79 MüKo-*Reuter,* BGB, 5th edition 2006, Vor § 21, margin number 93; *Leßmann,* Die öffentlichen Aufgaben und Funktionen privatrechtlicher Wirtschaftsverbände, Köln 1976, pp. 262 et seqq.

80 See supra III. 1.

arise. This is what happened in the "RKB Solidarität" case, which resulted in a landmark ruling by the Federal Court of Justice.[81]

DSB had refused admission to RKB Solidarität[82] on account of the "Ein-Platz-Prinzip" embodied in its statutes because cycling was already represented by the Bund Deutscher Radfahrer e.V. The BGH ruled that restrictions on admission to a monopoly association are subject to judicial review. It based its review on a formula deduced from § 826 BGB and from elements of § 20 VI GWB, according to which a refusal to admit must not unlawfully discriminate against the applicant vis-à-vis existing members. The key factor is a comprehensive consideration of the monopoly association's and the applicant's interests. The court found that RKB Solidarität had such a vital interest in profiting from the rights and benefits of membership that withholding those rights and advantages amounted to disadvantageous treatment. The court allowed, however, that DSB had a countervailing legitimate interest in ensuring that decisions on the entitlement to incentive measures be taken within the individual disciplines (in accordance with the "Ein-Platz-Prinzip"), so that DSB could limit itself to ensuring interdisciplinary coordination. Therefore, the clause in the statutes prescribing the "Ein-Platz-Prinzip" was – in principle – justified. The BGH, however, remanded the case back to the trial court so that it could discuss the question of how both the "Ein-Platz-Prinzip" and the principle of equal treatment of (similar) associations could be enhanced with both parties.[83] RKB Solidarität became an extraordinary member of DSB in 1977, having been granted a special area of responsibility.[84]

The Federal Court of Justice has since confirmed its ruling on several occasions.[85] Judges[86] and academics[87] have applied the decision as far as the practi-

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81 BGHZ 63, 282 et seqq. = NJW 1975, pp. 771 et seqq.

82 Before 1933, RKB Solidarität, which has its roots in a labour movement, was the biggest cycling association in the world. After World War II, it was set up again and, ever since 1964, has been trying to become a DSB member.

83 BGHZ 63, 282 (pp. 286, 291 et seqq.) = NJW 1975, p. 771 (pp. 774 et seq.).

84 According to § 5 Nr. 1 of the DSB statutes (now § 6 I, II of the DOSB statutes i.V.m. § 4 Nr. 3 DOSB-AufnahmeO).

85 Cf. BGH NJW-RR 1986, pp. 583 et seq.; NJW 1999, pp. 1326 et seqq.

86 OLG Düsseldorf NJW-RR 1987, pp. 503 et seq.; OLG Stuttgart NZG 2001, p. 997 (p. 998); OLG Frankfurt a.M. CaS 2009, pp. 152 et seqq. with critical analysis by *Heermann*; OLG München SpuRt 2009, pp. 251 et seqq.

87 *Nolte/Polzin,* NZG 2001, p. 980; *Friedrich,* DStR 1994, p. 61 (p. 65); see also *Vieweg,* Verbandsrechtliche Diskrimierungsverbote und Differenzierungsgebote, in: Württembergischer Fußballverband e. V. (ed.), Minderheitenrechte im Sport, Baden-Baden 2005, p. 71 (pp. 73 et seqq.).

cal result is concerned. In their explanations, they variously draw on the formula of the BGH (derived from § 826 BGB and § 20 VI GWB)[88], on §§ 20 I, 33 GWB (previously §§ 26 II, 35 GWB)[89], or on the horizontal effect of fundamental rights.[90] Sometimes, the right of admission is understood to be an aspect of the principle of equal treatment and an offshoot of customary law.[91] An alternative view holds that the association has bound itself by its statutes.[92]

V. The International Character of Sports Law

A survey of the phenomenon that is Sport which confines itself to the national arena can no longer do justice to the subject. The international aspect of sporting competitions plays an extremely important role and is one of its essential characteristics.

1. The Relationship between National and International Associations

The globalisation of sports[93] affects all areas of the sporting process. There are few professional disciplines that may still be confined to the borders of only one country. International competitions are organised as world events for clubs (e.g. Champions League und Europa League in soccer) as well as for national teams and individual athletes (e.g. the Olympics and world championships). Ideally, uniform rules should apply to all participants in international

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88 Cf. BGH NJW 1999, pp. 1326 et seqq.; OLG Frankfurt WRP 1983, p. 35 (p. 37); OLG Stuttgart NZG 2001, p. 997 (p. 998); OLG Düsseldorf Sp*u*Rt 2007, pp. 26 et seqq.; OLG München Sp*u*Rt 2009, p. 251 (p. 251); *MüKo-Reuter* (fn. 79), before § 21, margin number 114.

89 LG Frankfurt, cited in OLG Frankfurt WRP 1983, p. 35 (p. 37).

90 *Nicklisch,* JZ 1976, p. 105 (pp. 107 et seqq.); *Reichert,* Vereins- und Verbandsrecht, Köln 12. edition 2010, S. 196 margin number 1070; Neuwied 10th edition 2005, pp. 232 et seq., margin number 655; The decision of the BGH, BGH NZG 1999, pp. 217 et seqq. also tends towards this direction.

91 *O. Werner,* Die Aufnahmepflicht privatrechtlicher Vereine und Verbände (unpublished professorial dissertation), Göttingen 1982, pp. 606 et seqq.; *Baecker,* Grenzen der Vereinsautonomie im deutschen Sportverbandswesen, Berlin 1985, pp. 74 et seqq.

92 *Grunewald,* AcP 182 (1982), p. 181 (p. 184).

93 *Adolphsen,* Eine lex sportiva für den internationalen Sport?, in: Witt/Casper et al. (eds.), Die Privatisierung des Privatrechts, Jahrbuch der Gesellschaft junger Zivilrechtswissenschaftler, Heidelberg 2003, p. 281 (pp. 282 et seq.). *Heß*, Voraussetzungen und Grenzen eines autonomen Sportrechts unter besonderer Berücksichtigung des internationalen Spitzensports, in: Juristische Studiengesellschaft Karlsruhe (ed.), Aktuelle Rechtsfragen des Sports, Heidelberg 1999, pp. 1, 39 et seqq.; For an extensive account, see *Nafziger,* International Sports Law (2nd edition), Ardsley, New York, 2004.

competitions. It is for this reason that every global competition is organised and marketed centrally by an international association (e.g. FIFA). Participating athletes as well as national associations and clubs either submit to these uniform rules by contractual agreement or are bound to them through statutes, due to the pyramidal structure of sports organisations.[94]

For international professional soccer, the situation is as follows: along with DFB, there are at present 208 national associations in total that are collectively assembled under the banner of FIFA, an umbrella organisation for international soccer. All of these national associations must be members of one of FIFA's six confederations (continental associations). For Europe, this is UEFA. On the one hand, FIFA membership gives national associations lucrative advantages in the shape of financial and logistic support; on the other, there are far-reaching obligations, concerning the statutes, ideals, and aims of FIFA. It is FIFA's most important job to organise the world championships in soccer. Altogether, 52 national European associations are members of UEFA. Apart from the European Championships in football, UEFA organises competitions for clubs, i.e. the Champions League and the Europa League.

2. Requirements under European Law

European Law holds considerable sway over the organisation of professional sport – even over the creation of the rules and regulations of individual sports bodies. This is made clear by the case of long-distance swimmers Meca-Medina and Majcen who, during the 1999 World Championships, tested positive for Nandrolone and were consequently barred from membership of FINA, the international swimming federation, for four years. In spite of a later reduction of the bar to two years by the International Sports Court of Arbitration, CAS, the athletes filed a complaint with the European Commission in which they argued that the anti-doping regulations concerned were incompatible with European competition law and freedom to provide services. Both the Commission and the European General Court (formerly European Court of First Instance)[95] were of the opinion that, due to the fact that the doping provisions in question were not of economic relevance, the European Treaty (now, TFEU) did not apply.[96] Doping bans served sporting, non-economic purposes and were therefore not subject to review by the European Courts.

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94 See supra III. 2. c.

95 EuG Sp*u*Rt 2005, pp. 20 et seqq., Cf. *Schwarze/Hetzel,* EuR 2005, pp. 581 et seqq.

96 The ECJ ruled hat sporting activities are encompassed by European law only insofar as they are part of economic life as defined in Art. 2 EC, ECJ Slg. 1974, p.1405 (Walrave); Slg. 1995, I-4921 (Bosman); Slg. 2000, I-2681 (Lehtonen).

The ECJ[97] was of an entirely different opinion. Anti-doping regulations and the sanctions threatened by the same could have completely negative effects upon competition. In spite of this, however, the case was not successful because the provisions under attack were found to be proportionate to the aim of ensuring fair competition. In this line of jurisprudence, recently confirmed in the case of MOTOE[98], the ECJ acknowledges that sport has a certain special role to play in society; this special role does not, however, remove sport from the purview of European Law. [99]

The influence of EU primary law[100] on association rules and regulations is clearly evident in the development of the so-called foreign player clause in professional football. Until the mid-1990s, the Registered Player Charter of the DFB provided that no more than three foreign players could take part in any Bundesliga game simultaneously. Such rules were common both nationally and internationally. Their primary aim was to promote 'home-grown' players. The Bosman decision (which concerned the Belgian Football Association) was the subject of furore when the ECJ[101] decided that such clauses are not compatible with Art. 48 EEC (now Art. 45 TFEU, ex-Art. 39 EC). As a result, the DFB lifted its own provision concerning foreign players in the 1996/1997 season. As regards non-EU players, however, a similar limit remained in place. A further decision of the ECJ of the 12.04.2005[102], however, finally brought an end to such clauses. The Russian professional footballer, Simutenkov, had taken a case against a provision put in place by the Spanish Football Association which provided that only a limited number of non-EU foreign players could be employed. The ECJ viewed the provision as violating the prohibition of discrimination which was explicitly included within a partnership agreement concluded

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97 ECJ Sp*u*Rt 2006, pp. 195 et seqq. The decision is harshly criticised by *Infantino*, Sp*u*Rt 2007, pp. 12 et seqq. His article is in turn heavily criticised by *Pfister*, Sp*u*Rt 2007, pp. 58 et seqq.

98 ECJ EuZW 2008, p. 605 (p. 607). Cf. *Mournianakis*, WRP 2009, pp. 562 et seqq.

99 On the issue of the applicability of European (competition) law to sports rules and regulations cf. the EU Commission White Paper on Sport (COM(2007) 391 final). *Stein,* Sp*u*Rt 2008, pp. 46 et seqq. is also instructive in this regard.

100 Cf. in this context the new rules of jurisdiction for sport in Art. 165 TFEU. *Muresan,* CaS 2010, pp. 99 et seqq.; *Persch* NJW 2010, pp. 1917 et seqq. are also instructive in this regard.

101 ECJ, Case C_415/93 (15 December 1995), Court of Justice Reports 1995 I-4921 et seqq., NJW 1996, pp. 505 et seqq.; the judgment and its consequences were very thoroughly discussed by legal scholars. Cf. *Arens,* Sp*u*Rt 1996, pp. 39 et seqq.; *Streinz,* Sp*u*Rt 1998, p. 1 (pp. 2 et seq.); *Vieweg/Röthel,* ZHR 166 (2002), p. 6 (pp. 8 et seqq.).

102 ECJ EuZW 2005, pp. 337 et seqq. (with comment by *Fischer/Groß*) = Sp*u*Rt 2005, pp. 155 et seqq.

between the EU and Russia. The inadmissibility of foreign-player clauses (effective as of 1996/1997) was extended to include non-EU players who were the subject of association agreements concluded between EU and non-EU states.[103] Since then, DFB has responded by completely abolishing the foreign-player clause as of the 2006/2007 season.[104]

In practice, association rules and regulations which concern the compensation of a football club for its training of a particular player after that player has been transferred to another football club are common. In the view of domestic courts[105], such a provision represents an infringement of § 138 I BGB in connection with Art. 12 I GG. The ECJ[106], however, takes a different view. Compensation for the training of youth players is, in its opinion, essentially compatible with the principle of freedom of movement of workers (Art. 45 TFEU) because it serves a legitimate purpose i.e. the promotion of the training and recruitment of youth footballers. As the contentious (French) clause did not refer to compensation for the training of youth players, but rather to a liability to pay damages independently of the training costs as compensation for breach of contract, the ECJ decided that the regulation in question was unfitting and disproportionate.

3. Efforts to harmonise international sport

Due to the multitude of national and international competitions, athletes and associations may find themselves subject to different regulations, depending on the sporting event in which they are participating. This may be considered a highly unsatisfactory state of affairs.[107] Taking sanctions as an example, it may be almost impossible to explain why the same offence can result in completely different penalties, depending upon whether the offence takes place at national or international level. The right to equal treatment and equal opportunities

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103 Similarly, ECJ SpuRt 2009, pp. 61 et seqq. This case dealt with the association resolution of EWG–Turkey, the wording of which corresponded closely to the association agreement of EWG–Russia.

104 See decision taken at assembly of December 21, 2005. In addition, a "local-player rule" was introduced (see § 53a DFB SpielO), according to which every association is obliged to give contracts to at least 12 German players and at least four players trained in a German club. Cf. jurisprudence of the EGC and ECJ under V. 2.

105 BGH NJW 1999, pp. 3552 et seqq.; OLG Bremen NJOZ 2009, pp. 3892 et seqq.; OLG Oldenburg SpuRt 2005, pp. 164 et seqq.

106 EuGH NJW 2010, pp. 1733 et seqq. (C-325/08, Olympique Lyonnais SASP/Olivier Bernard, Newcastle UFC).

107 *Schleiter*, Globalisierung im Sport, Stuttgart 2009, pp. 45 et seqq. uses the term regulation deficit of international sport in this context.

must be guaranteed, at least where the same sport is concerned. Otherwise, sports may lose credibility and athletes are virtually invited to challenge and reject the sanctions imposed on them as being arbitrary. Efforts at harmonisation, therefore, go hand in hand with the internationalisation of sport – particularly in regard to doping and fair play.

As far as harmonisation is concerned, a giant step forward was taken – after years of effort – in the fight against doping[108] with the establishment of WADA and the enactment of the WADA Code.[109] The central elements of harmonisation in this case are doping controls, analysing methods, sanctions, and legal protection. The harmonising process is, however, far from complete. On the contrary, it appears to have become all the more relevant now that some countries – France and Italy among them – have criminalised doping. As a result – depending on the individual athlete's nationality or the venue of the competition – sanctions imposed by associations may be complemented by pecuniary penalties or even prison sentences imposed by state courts. The possible introduction of a state law prohibiting doping has been the subject of much discussion in Germany, too.[110] In the end, however, the German legislature opted merely to tighten up the drug laws (AMG).[111]

An example from the realm of cycling[112] demonstrates the current fragmented state of the relevant legislation. The German professional cyclist Danilo Hondo was suspended for two years by CAS because of a doping offence. Due to the specific legal position in Switzerland (where Hondo has his permanent residence), the local court of the canton – not normally the court of competent jurisdiction – was empowered to review the decision of the sports tribunal. This was only possible because the headquarters of both the international cycling federation UCI and the WADA are also in Switzerland. Thus, the lawsuit

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108 E. g. *Vieweg/Siekmann* (fn. 10).

109 See fn. 10. For a detailed discussion of the matter, see *Kern*, Internationale Dopingbekämpfung, Hamburg 2007, pp. 221 et seqq.

110 Cf. for a detailed discussion *Jahn*, ZIS 2006, pp. 57 et seqq.; *Jahn*, Sp*u*Rt 2005, pp. 141 et seqq.; *Vieweg*, Sp*u*Rt 2004, pp. 194 et seqq.; *Leipold*, NJW-Spezial 2006, pp. 423 et seq.; *Heger*, JA 2003, pp. 76 et seqq.; *Fritzweiler*, Sp*u*Rt 1998, pp. 234 et seq. See also the final report of the Sports Rights' Commission against doping (ReSpoDo) for possible legal initiatives to prevent, control, and sanction doping in sports, Frankfurt/M. June 15, 2005 (a summary of the final report can be downloaded at http://www.dosb.de/fileadmin/fm-dosb/downloads/dosb/endfassung_abschlussbericht.pdf, last accessed September 1, 2010); see also *Hauptmann*, Sp*u*Rt 2005, pp. 198 et seqq., pp. 239 et seqq.

111 See infra VIII. 4.

112 FAZ, 22.03.2006, p. 34.

concerning the doping offence was a purely national conflict, with the result that instead of the federal court the local court of the canton was competent to deal with the appeal against the CAS decision. The court of the canton granted a preliminary injunction, provisionally reversing the judgment, but ultimately upheld the CAS ruling.[113]

The application of the fair play principle (cited repeatedly all over the world) also requires international standardisation. Up until now, neither academics nor practitioners have succeeded in developing a general definition of the term "fair play".[114] According to the International Fair Play Charter, the term fair play means "more than just observance of the rules of the game; rather, fair play describes the mental attitude of the athlete: respect for the opponent and for the protection of his psychological and physical health. A player behaves fairly if he puts himself in the other athlete's shoes."[115] This approach could be regarded as too narrow in so far as it refers only to the relationship between the athletes themselves. The idea of fair play, however, must also be enforced in a vertical direction, i.e. between individual athletes and governing associations as well as between athletes and spectators.[116] Sports rules, the conditions of competition, and the requirements for admission must not be laid down arbitrarily. They must be compatible with the principle of equal treatment. The classification of each and every offence as unfair behaviour is equally problematic. Offences against mere rules of order not aimed at the protection of others (such as the prohibition upon taking off one's shirt after scoring) might not be considered violations of the fair play principle. The binding force of the fair

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113 Cf. http://www.merkur-online.de/sport/gericht-verlaengert-hondo-sperre-428989.html (last accessed September 1, 2010). In the end, the court of the canton added the time periods during which the cyclist could take part in competitions because of the interim injunction to his time of suspension. In January 2008, Danilo Hondo returned to competitive cycle racing and continues to participate in the sport.

114 For various attempts at a definition, see *Vieweg* (fn. 71). p. 1255 (pp. 1266 et seqq.); *P. J. Tettinger,* Fairneß als Rechtsbegriff im deutschen Recht, in: Scheffen (ed.), Sport, Recht und Ethik, Stuttgart 1998, pp. 33 et seqq.; on the term "fairness", see generally *H. P. Westermann,* Fairness als Rechtsbegriff, in: Württembergischer Fußballverband e. V. (ed.), Fairness-Gebot, Sportregeln und Rechtsnormen, Stuttgart 2004, p. 79 (pp. 81 et seqq.); *Lenk,* Fairness in der Siegergesellschaft? Statement zur Preisverleihungsfeier 2001 der Fairness-Stiftung, http://www.fairness-stiftung.de/FairPreisStatements2001.asp?Statement=LenkStatement (last accessed September 1, 2010); *Lenk/Pilz,* Das Prinzip Fairness, Osnabrück, Zürich 1989.

115 See http://sport.freepage.de/cgi-bin/feets/freepage_ext/41030x030A/rewrite/lksport/fairaggzit.html (last accessed September 1, 2010).

116 The principle of fair play was clearly violated by Hamburg professional footballer, Paolo Guerrero, who threw a plastic drinks bottle at an abusive fan after a game. He consequently received a five-game ban, cf. FAZ, 07.04.2010.

play principle is derived from various legal sources: sometimes Art. 6 ECHR[117] is cited, at other times reference is made to the general provision of § 242 BGB.[118] Commitment by the associations themselves and by all of those bound by their codes can be achieved by embodying the principle of fair play in the statutes and rules of sports associations.[119] Finally, one could describe fairness as a private international rule of law (lex sportiva).[120] This area is still reasonably undeveloped. Therefore, it seems a little premature to proceed on the basis of the existence of a binding lex sportiva.[121]

4. The "50+1" and "6+5" rules

Currently, two sets of problems which both have European law as a common background and which are the subject of debate should be mentioned.

At present the DFL so-called 50+1 rule which has it's legal basis in section 8 subsection 2 of the rules and regulations of the body and section 16 c) subsection 2 of the DFB rules and regulations is highly controversial. In accordance with the "50+1" rule, the registered players' divisions of the clubs of the first and second Bundesliga which have been sold off to legal entities are only granted the license necessary for participation in games if the club itself owns at least 50+1 of the voting shares in the legal entity. Opponents of this regulation – which makes it impossible for outsider large-scale investors to gain a majority share in a German football club – view it as being a clear hindrance to competition and, therefore, a violation of European Law.[122] In academic journals, two strongly opposing points of view are represented. Whereas the aboli-

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117 For a general overview of its significance in the area of sport see *Soek,* Die prozessualen Garantien des Athleten in einem Dopingverfahren, in: Röhricht/Vieweg (eds.), Doping-Forum, Stuttgart 2000, pp. 35 et seqq.

118 BGHZ 87, 337 (344); *Vieweg,* JZ 1984, pp. 167 et seqq.; BGHZ 102, 265 (276); 105, 306 (316 et seqq.); 128, 93 et seqq.; *Vieweg,* SpuRt 1995, pp. 97 et seqq.; cf. also *Röhricht,* AcP 189 (1989), p. 386 (p. 391).

119 Cf. Nr. 6 Basic Principles of the Olympic Charter; see *Vieweg* (fn. 71), p. 1255 (p. 1271).

120 For a detailed discussion see *Adolphsen* (fn. 93), pp. 281 et seqq.; *Adolphsen* (fn. 31), pp. 628 et seqq.; *Nafziger* (fn. 93), p. 61; *Oschütz* (fn. 78), pp. 351 et seqq.

121 See *Vieweg* (fn. 71), p. 1255 (pp. 1271 et seq.); *Oschütz* (fn. 78), pp. 359 et seqq.; *Schleiter* (fn. 107), pp. 76 ff.; *Röthel,* JZ 2007, pp. 755 et seqq.

122 Of all of football officials, president of Hannover 96, Martin Kind is a particularly vocal advocate of the abolition of the "50 + 1rule". An application to do so was, however, rejected by an overwhelming majority during the general assembly of members of the DFL on 10.11.2009. Cf. HB, 11.11.2009, p. 30. Cf. http://www.ftd.de/sport/fussball/ 1bundesliga/news/:50-1-hannover-96-reicht-schiedsgerichtsklage-ein/50069563.html (last accessed September 1, 2010) as regards the arbitration action before the permanent arbitration panel of the DFB.

tion of the "50+1" rule is viewed as unlawful by some[123], who support a claim to retain the status quo, enforceable by the courts, another point of view[124] considers the conformity of the "50+1" rule to the provisions of competition law to arise out of the freedom of sports associations to create their own rules and regulations. This would enable a basic decision, based on the politics of sport, to refuse to allow soccer to be transformed into an "investors' ball-game". The opponents of "50+1" are vehemently against this.[125] They adhere to the view that the regulation in its current form is disproportionate because, in advance and without exception, it obstructs investors from acquiring an isolated majority share. Therefore, they maintain, it is an infringement of the European basic principle of freedom of competition (Art. 101 TFEU, ex-Art. 81 EC). As regards the obvious European concerns regarding the "50+1" rule, it is clear that, on an association level, there exists an urgent need to regulate this area. If the concerns outlined cannot be dispelled in the near future, a clarification by the ECJ will be necessary.

Similarly, the European admissibility of the so-called 6+5 rule is both controversial and topical. This rule states that each football club must begin each game with at least six players each of whom would be entitled to play for the national team of the countries in which the respective teams have their seats. Only five players in the starting team do not have to fulfil this stipulation. Both the European Commission[126] and many legal scholars[127] express considerable legal doubts in relation to the "6+5" rule especially in light of the guarantee of free movement of workers enshrined in Art. 45 TFEU (ex-Art. 39 EC). Nonetheless, FIFA – backed by isolated voices[128] – wants to have the rule in place as soon as possible. In the meantime, however, UEFA has taken a different route and decided in favour of the so-called homegrown rule, in accordance with which eight players in each club must have trained in the country in which the club is based for at least three years when they were between the ages of 15 and 21. As this rule does not hinge on the nationality of the players, the European Commission regards it as being compatible with European Law.[129]

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123 *Hovemann/Wieschemann*, Sp*u*Rt 2009, pp. 187 et seqq.

124 *Summerer*, Sp*u*Rt 2008, pp. 234 et seqq.; *Verse*, CaS 2010, pp. 28 et seqq.

125 *Deutscher*, Sp*u*Rt 2009, pp. 97 et seqq.; *Stopper*, WRP 2009, pp. 413 et seqq.; *Klees*, EuZW 2008, pp. 391 et seqq.; *Ouart*, WRP 2010, pp. 85 et seqq.

126 Cf. FAZ, 31.05.2008, p. 30.

127 *Streinz*, Sp*u*Rt 2008, pp. 224 et seqq.; *Resch*, ZESAR 2007, pp. 354 et seqq.; *Hoppe/Frohn*, CaS 2008, pp. 251 et seqq.

128 E.g. *Battis/Ingold/Kuhnert*, EuR 2010, pp. 33 et seqq.

129 See report in EuZW 2008, p. 421. Likewise, *Streinz*, Sp*u*Rt 2008, p. 224 (p. 228).

5. International Courts of Arbitration – the Court of Arbitration for Sport (CAS)

CAS/TAS (the French designation), founded in 1984, is charged with facilitating up-to-date and informed decisions and is intended to reduce the amount of control held by national courts. The rules and regulations imposed by international federations such as FIFA are incapable of excluding the state completely. Rather, upon exhaustion of all internal control measures, there still exists the possibility of appealing to the general courts of law. The competence of these courts is determined by connecting factors like the athlete's nationality or his place of residence. The state courts then apply the substantive law as determined by the rules of private international law. As the outcome of a case may vary depending on the applicable substantive law, the globalisation of sports brings with it a danger of judicial fragmentation. For reasons of equality, a unitary sports jurisdiction is much to be desired.[130] The establishment of international courts of arbitration would solve this problem.[131] According to Art. 192 of the Code on Private International Law, the parties may exclude an appeal to the state courts altogether by including a suitable provision in their arbitration clause.[132] As a rule, a legal action would then have to be dismissed for procedural reasons. Like many other international associations, FIFA has laid down in its statutes[133] that final decisions can be reviewed by CAS only.[134] CAS was initially founded by the IOC. At this stage, however, it has become independent of it and can be regarded as a real court of arbitration.[135] Of particular note in recent years are the arbitral verdicts handed down in the cases of Webster[136] and Matuzalem[137] in which CAS was concerned with the matter of the assessment of damages in the event of breach of contract by professional athletes.

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130 *Adolphsen,* SchiedsVZ 2004, p. 169 (p. 170); *Weller,* JuS 2006, p. 497 (p. 499).

131 For a detailed account, *Adolphsen,* SchiedsVZ 2004, pp. 169 et seqq.

132 Under German law (§§ 1025 et seqq. ZPO), arbitration clauses function as an exclusion of the state courts' jurisdiction. See supra IV. 2.

133 Art. 60 IV FIFA statutes.

134 See *Netzle,* Das internationale Sport-Schiedsgericht in Lausanne, in: Röhricht (ed.), Sportgerichtsbarkeit, Stuttgart 1997, pp. 9 et seqq.; *Hilpert* (fn. 55), pp. 341 et seqq.; *Monheim* (fn. 75), pp. 381 et seqq.; *Oschütz* (fn. 78), pp. 43 et seqq. describes the composition, the jurisdiction and the course of proceedings of CAS.

135 *Oschütz* (fn. 78), p. 130

136 Sp*u*Rt 2008, pp. 114 et seqq. For a critical analysis of the case, cf. *Menke/Räker,* Sp*u*Rt 2009, pp. 45 et seqq.

137 Sp*u*Rt 2009, pp. 157 et seqq.

CAS's right to final decision was thrown into doubt by a judgment rendered by the Swiss Federal Supreme Court on the 22nd of March, 2007.[138] For the first time, a CAS decision was overturned by a state court. CAS had suspended Argentinian tennis pro Guillermo Canas for fifteen months on account of a doping offence. The athlete appealed the case to the Swiss Federal Supreme Court despite the fact that such an appeal was expressly ruled out by the ATP regulations. The court decided that the waiver (based on Art. 192 of the Code on Private International Law) was invalid and that the action was therefore admissible. Unlike parties to a conventional commercial contract, athletes and associations did not find themselves in a horizontal, but in a vertical relationship. Athletes were inevitably faced with an unpleasant choice between accepting the association's conditions and foregoing their right to engage in sports professionally. A valid waiver would require a degree of freedom of choice: agreement to an exclusion clause could only be said to be voluntary if the athlete was allowed to participate irrespective of it. Since an assumption of voluntary consent seems quite far-fetched in professional sports, any waiver pursuant to Art. 192 of the Code on Private International Law would, on this view, have to be considered inadmissible.[139] In its subsequent decision and based on the opinion of the Swiss Federal Supreme Court, the CAS[140] imposed a 15-month ban upon Canas and, in doing so, confirmed its first arbitral verdict.

VI. Multiplicity of Effects - Illustrated by Reference to Sponsoring

It is a feature of sports law that, quite frequently, a large number of persons are directly or indirectly affected by statutory or contractual regulations, creat-

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138 Schweizerisches (Swiss) Bundesgericht Sp*u*Rt 2007, pp. 113 et seqq. = CaS 2007, pp. 145 et seqq. (the latter citation in French) with a review by *Baddeley,* CaS 2007, pp. 155 et seqq. For a thorough analysis, cf. *Oschütz,* Sp*u*Rt 2007, pp. 177 et seqq.

139 *Oschütz,* Jusletter June 4, 2007, margin number 11, also arrives at this conclusion. Accordingly, in the aftermath of the case, several arbitral verdicts of the CAS were challenged in the Swiss Federal Court of Justice. The most prominent case to date is probably the "Pechstein" case. In its judgment of 25.11.2009 (CAS 2009/ A/ 1912, Sp*u*Rt 2010, p. 71 with comment by *Emanuel*, Sp*u*Rt 2010, pp. 77 et seqq.), the CAS accepted indirect evidence of doping for the first time as the basis for a competition ban of several years by the ISU upon the speed skater, Claudia Pechstein. The Swiss Federal Surpreme Court initially granted Pechstein's application for an injunction (CaS 2009, pp. 368 et seq.) and allowed her to participate in the Olympic Game qualifiers by means of an interim injunction. Ultimately, however, the complaint against the court of arbitration's decision was disallowed in the proceedings of 10.02.2010. Cf. the proceedings to date CaS 2010, pp. 3 et seqq. (with comment by *Reissinger*).

140 Sp*u*Rt 2007, pp. 244 et seqq.

ing the potential for multiple conflicts. This may be illustrated by reference to sponsoring: usually, we understand the term "sponsoring" to mean the allocation of money and products as well as services by companies to persons and organisations in sporting, cultural, social or ecological fields for the entrepreneurial aim of marketing or communication.[141] For this purpose, a sponsoring contract, which directly affects the sponsor and the sponsee, is concluded. Whereas the sponsee profits by taking in money, the sponsor hopes for additional revenue from a positive "image transfer".[142] The economic importance of sponsoring is immense in commercial and professional sports. Alongside ticket sales, merchandising, and the marketing of TV rights, sponsoring agreements represent one of the main sources of income for promoters. For example, 15 firms paid up to 45 million Euro each to become official partners of the FIFA World Cup 2006.[143] During the 2010 World Cup, the six official FIFA partners for marketing and other rights paid about 110 million Euro each.[144] Nine firms are currently named as so-called TOP sponsors[145] of the IOC for the Olympic Games in Vancouver in 2010 and those in London in 2012. These are expected to spend a total of 883 million US dollars on the games.[146] Manufacturers of sporting goods are also increasing their engagement in the area of sponsoring by developing new sponsoring concepts. Adidas, for example, will produce a uniform "Liga-ball" for the first and second Bundesliga for the first time in the 2010/11 season and will pay the 36 professional clubs about 25 million Euro in total over a period of five years. Naming rights are becoming more and more important as the (re-)naming of football stadiums in Germany shows. The Munich "Allianz Arena" is one example.[147]

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141 *Vieweg,* Sp*u*Rt 1994, pp. 6 et seqq.; cf. also *Reichert,* Sponsoring und nationales Sportsverbandsrecht, in: Vieweg (ed.), Sponsoring im Sport, Stuttgart 1996, p. 31 (pp. 31 et seq.). On sponsoring generally, see *Weiand,* Kultur- und Sportsponsoring im deutschen Recht, Berlin 1993; *Wegner,* Der Sportsponsoringvertrag, Baden-Baden, 2002; *Bruhn/Mehlinger,* Rechtliche Gestaltung des Sponsorings (2 vols.), Munich 1992 (vol. I) and 1999 (vol. II).

142 For a detailed account of the aims of sponsors, see *Weiand,* Der Sponsoringvertrag, Munich 1999, pp. 5 et seq.; *Wegner* (fn. 141), pp. 39 et seq.

143 *Hamacher,* Sp*u*Rt 2005, p. 55.

144 Cf. *Wittneben,* GRUR-Int. 2010, p. 287 (p. 288).

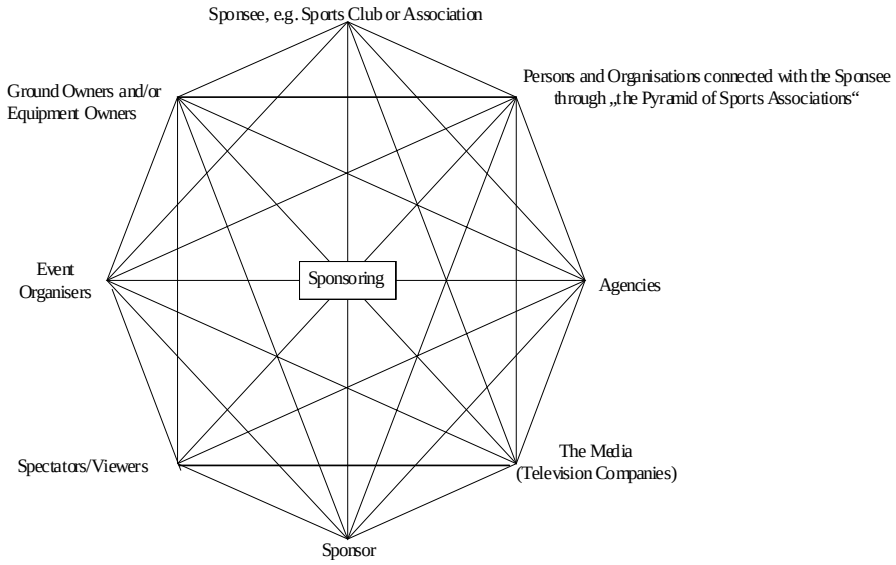
145 TOP is the abbreviation for "The Olympic Partners".

146 http://www.reuters.com/article/idUSTRE60B2KT20100112 (last accessed September 1, 2010); IOC 2010 Olympic Marketing Fact File, p. 14 (http://www.olympic.org/Documents/IOC_Marketing/IOC_Marketing_Fact_File_2010%20r.pdf (last accessed September 1, 2010). The IOC, however, is trying to win another TOP sponsor for the 2012 Olympic Games in London in order to exceed the 1 billion US dollar mark.

147 According to *Wittneben,* GRUR 2006, p. 814 (p. 814) twelve of the eighteen Fußball-Bundesliga associations play in a stadium named after the sponsor. Out of 119 stadi-

Another recent example is provided by the sale of naming rights to Toyota by the Handball-Bundesliga, which has been officially known as the TOYOTA Handball-Bundesliga since the 2007/08 season.[148] Although the German Football Bundesliga does not yet have a "name sponsor"[149], many European football leagues do, some of which generate considerable profit. For example, Barclay's Bank sponsors the English Premier League ("Barclay's Premiership") to the amount of 30 million Euro per year.

The following figure illustrates that – apart from sponsor and sponsee – many third parties are indirectly affected:



For the athletes and clubs of a sponsored club or association – i.e. for those connected with the sponsee through the pyramid of sports associations – a number of questions arise concerning; their share in the bargain, their advertis-

ums named after their respective sponsors, 52 are to be found in Germany. See generally on this *Thiele,* ecolex 2005, pp. 773 et seqq.

148 Cf. FAZ, 17.08.2007. Toyota pays an estimated 2 Million Euro per season for this right.

149 Deutsche Telekom AG did acquire an option for the naming rights as of the 2007/08 season, but allowed these to lapse, unused, cf. SZ, 16.02.2007, pp. 15, 28.

ing duties[150], or, conversely, their duty to refrain from advertising[151]. Similarly, the promoter is indirectly affected (if he is not the sponsee). Conflicts of interest – concerning the amount of remuneration, stadium publicity and marketing – may also arise in relation to the owner of the sports ground (if he is not the promoter of the event). The promoter's interests compete with the interests of the media, especially those of television companies, to gain the highest possible revenue from advertising in order to recoup their investment in the purchase of TV rights.[152] This last scenario shows that the interests of those concerned may also run parallel to each other: a positive viewer response increases the advertising revenue for both the promoter and the media, for instance.[153] Agencies work in this complicated market, supporting sponsors, sponsees, and

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150 See *Reichert* (fn. 141), pp. 45 et seqq.

151 The extent to which athletes and associations owe loyalty to the sponsor must also be addressed. An example of this is the row over costumes between German swimmers and the DSV at the 2008 Short-Course European Championships. Many athletes were extremely critical of Adidas' swimsuits which were, apparently, not suited to competitions, whereupon Adidas terminated its supplier contract with the DSV without notice, cf. FAZ, 18.12.2008, p. 32.

152 The potential for conflict between promoter and the media became evident during the Tour de France 2007. German television companies ARD and ZDF stopped their live reports after several cases of doping were detected. Sat 1 and Pro Sieben took over, but with disastrous results (a market share of only 5.6% decidedly below par). See SZ, 26.07.2007, p. 17.
The extent of the occasional influence of the media on sports associations was apparent in the case of the German showjumper, Christian Ahlmann who, in the Olympic Games, used a "banned substance" on his horse, Cöster, and was subsequently banned from the FEI for four months. The broadcasters ARD and ZDF demanded that the FN impose effective measures against this infringement. At this point, the FN feared a withdrawal of television channels from showjumping. Against this background, the penalty imposed by the FEI appeared to be too lenient. The FN filed an appeal on the facts with CAS, whereupon the ban was extended to eight months. Cf. FAZ, 25.10.2008, p. 30; FAZ, 15.08.2009, p. 28.

153 On the relationship between sponsoring and the media, see generally *Weiand* (fn. 141), pp. 138 et seqq.; *Bruhn/Mehlinger* (fn. 141), vol. I, pp. 23 et seqq.
The correlation between the interests of sponsors, organisers and the media as well as the connected risk potential is apparent in the cases of Emig and Mohren. Both Jürgen Emig, former head of sports of the regional broadcaster HR, and Wilfried Mohren, former head of sports of the regional broadcaster MDR, received considerable amounts of money in bribes from organisers and sponsors in order to ensure that their sports events would be broadcast in preference to others. Emig is said to have received 625,000 Euro in total, Mohren, 330,000 Euro. Emig was sentenced to two years and eight months imprisonment for corruption, breach of trust and the aiding and abetting of bribery. Mohren received a suspended sentence of two years imprisonment for corruption, fraud, the acceptance of benefits and fiscal evasion. Cf. BGHSt 54, 202; FAZ, 01.10.2009, p. 37.

the media in finding suitable partners and in bargaining over and closing contracts.[154] Finally, the interests of spectators are at stake. If tickets are handed out to sponsors in advance and never reach the market, the public demand for seats may not be met or stadiums may remain half empty.[155]

While there used to be a lack of binding rules in this area (despite competing interests and the consequent potential for conflict)[156], most sports associations have now integrated such rules into their statutes and regulatory instruments.[157] The DFL "Rules on the Exploitation of Commercial Rights", for instance, contain a subsection headed "Marketing Rights in Sponsoring and Special Forms of Advertising" where relations between the "Ligaverband" and its members – the clubs of the first and second "Bundesliga" – are regulated as far as sponsoring is concerned.[158] The legal relations between the parties most immediately affected, however, are regulated mainly by contract.[159] Sponsoring contracts between sponsor and sponsee can relate to individual events, to sporting equipment and sportswear, as well as to licences concerning trademarks and similar matters.[160] Usually, the desired sponsoring money can only be obtained by granting the sponsor exclusive marketing rights in return. This may be done by assigning trademarks.[161] However, trademark protection is difficult to attain because these designations are usually purely descriptive. This is particularly true in the case of the designation of big sporting events (such as

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154 *Vieweg,* Sp*u*Rt 94, p. 6 (p. 10); *Weiand* (fn. 142), pp. 14 et seqq.; *Wegner* (fn. 141), pp. 63 et seqq.

155 The distribution of so-called VIP tickets by the sponsors among business partners and, in particular, public officials can also throw up fiscal risks and the danger of being prosecuted for a criminal offence. For instance, Utz Claassen, the former chairman of the board of the energy provider, EnBW was charged with the granting of undue advantages because before the 2006 World Cup, he had sent tickets to the event to members of government in Baden-Württemberg responsible for making decisions which materially affected the company. Claassen was eventually acquitted because it could not be proven that he wanted to influence the government officials' decision-making by making gifts of the tickets, cf. BGHSt 53, 6; *Staschik*, Rechtliche Grenzen der Kontaktpflege im Sport, Sp*u*Rt 2010, pp. 187 et seqq.

156 Cf. *Vieweg,* Sp*u*Rt 1994, pp. 73 et seqq.

157 On the permissibility of such rules generally, *Reichert* (fn. 141), pp. 36 et seqq.; *Bruhn/Mehlinger* (fn. 141), vol. II, pp. 43 et seqq.

158 See § 12 OVR and in respect of the distribution of the sponsoring monies § 19 OVR.

159 See *Weiand* (fn. 142); *Wegner* (fn. 141).

160 *Vieweg,* Sp*u*Rt 1994, p. 73 (p. 73 et seq.). For a thorough discussion of competition law issues in the area of sport sponsoring, cf. *Heermann,* WRP 2009, pp. 285 et seqq.

161 For a very informative account, see *Neumann,* Marken und Vermarktung im Sport, in: Vieweg (ed.), Spektrum des Sportrechts, Berlin 2003, pp. 295 et seqq.

"Olympics" or "World Cup 2006").[162] Thus, when the city of Leipzig applied (unsuccessfully) to host the Olympics, a special "Law to Protect Olympic Symbols and Designations" was passed in order to guarantee the level of protection demanded by the IOC as a prerequisite for application.[163] Shortly before the Football World Cup in Germany, two decisions of the Federal Court of Justice concerning trademark protection attracted public attention. The Federal High Court[164] decided that registration of the trademark "Fußball WM 2006" was "insufficiently distinctive" as defined by § 8 II Nr. 1 MarkenG and had to be erased. In a further decision in the lead-up to the 2010 World Cup in South Africa, the BGH[165] imposed severe restrictions upon FIFA's trademark rights and denied the global football federation's claim for cancellation against the sweet manufacturer, Ferrero, on points of trademark law as well as ones of competition law.

VII. Sports as a Cross-Sectional Matter

The growing commercialisation and professionalism of sports have led to conflicts the solutions to which must be drawn from various branches of law. Sports affect all branches of national law as well as European law. "Sports and"-disciplines – like sports and commercial law, sports and labour law, sports and media law, sports and tort law, sports and the law of associations, and sports and constitutional law, to cite only a few examples – make up the multi-facetted matter of sports law. Relations between promoters, associations, athletes, and fans are governed by private law.[166] Claims in contract and claims in tort have to be derived from the norms of the BGB. The marketing of big sports events, especially the transfer of marketing and commercial rights to the

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162 *Hamacher,* Sp*u*Rt 2005, p. 55 (p. 55).

163 For the legal reasoning, see BT-Drs. 15/1669, p. 8. From the beginning, there was doubt whether the OlympSchG was constitutional. LG Darmstadt, Sp*u*Rt 2006, pp. 164 et seqq. and *Degenhart,* AfP 2006, pp. 103 et seqq., believe it to be unconstitutional. Contra *Nieder/Rauscher,* Sp*u*Rt 2006, p. 237 (pp. 238 et seq.).

164 BGH WRP 2006, pp. 1121 et seqq. = GRUR 2006, pp. 850 et seqq. = Sp*u*Rt 2007, pp. 19 et seqq.

165 BGH K&R 2010, 401 et seqq. Also *Soldner/Rottstegge*, K&R 2010, 389 et seqq.

166 Cf. as regards the admissibility of a Federal Republic-wide stadium ban for (potential) hooligans BGH Sp*u*Rt 2010, pp. 28 et seqq. with comment by *Breucker*.

media, is based on private law (BGB, UWG, UrhG etc.), too.[167] In addition, administrative law can apply if, for instance, security measures are to be taken against clubs or fans. The prevention of danger (police and safety law) often plays an important role, especially as far as big sports events are concerned.[168] As for constitutional law, an athlete's fundamental rights may be at stake where sanctions imposed on him or her (e.g. disqualification or suspension) are in question. The rules of an association and the measures taken in a particular case must be compatible with the athlete's freedom of profession as defined by Art. 12 GG.[169] Finally, criminal law is time and again the focus of public attention. The recent "game fixing" scandal in German soccer (criminal aiding and abetting of fraud as defined by § 263 StGB)[170] concerning referee, Robert

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167 The matter of whether amateur football games may be exploited in the Internet without consent or reimbursement is a highly contentious one (the "Hard-Court Heroes" case). Although the courts have rejected this idea up until now, (cf. LG Stuttgart Sp*u*Rt 2008, pp. 166 et seqq.; OLG Stuttgart Sp*u*Rt 2009, pp. 252 et seqq.), legal scholars are almost unanimous in their support for the free use of such footage cf. *Feldmann/Höppner*, K&R 2008, 421 et seqq.; *Hoeren/Schröder*, MMR 2008, pp. 553 et seq.; *Maume*, MMR 2008, pp. 797 et seqq.; *Frey*, CR 2008, pp. 530 et seqq.; *Ernst*, CaS 2008, pp. 289 et seq.; *Ehmann*, GRUR-Int. 2009, pp. 659 et seqq.; *Ohly*, CaS 2009, pp. 148 et seqq.; ibid., GRUR 2010, pp. 487 et seqq.; *Maume*, MMR 2009, pp. 398 et seq.; *Paal*, CR 2009, pp. 438 et seqq.; *Fesenmair*, NJOZ 2009, pp. 3673 et seqq.; *Peukert*, WRP 2010, pp. 316 et seqq.). In a judgement delivered on 28.10.2010 (file no. I ZR 60/09), the BGH decided that there existed no intellectual property rights under Competition Law for the organisers of amateur football games per se and that, therefore, recordings could, in principle, be used without obtaining consent or providing reimbursement. The organiser could, however, ensure that he had sole economic rights of use by making reference to his domiciliary rights.

168 See *Deutsch,* Polizeiliche Gefahrenabwehr bei Sportgroßveranstaltungen, Berlin 2005; *Breucker,* NJW 2006, pp. 1233 et seqq. As regards the henceforth lawful detention of potential hooligans in the joint database "violent offenders, sports related" cf. BVerwG, judgment of 09.06.2010 – file no. 6 C 5.09.

169 In addition to freedom of profession, the personal rights of the athlete enshrined in Art. 2 I in conjunction with Art. 1 I GG may be affected. One need only think of the case of the 800 metre sprinter, Caster Semenaya of South Africa who, subsequent to her superb victory in the 2009 track and field World Championships in Berlin was the subject of a worldwide public discussion of her gender – initiated by the actions of the IAAF – of her gender, cf. FAZ 27.09.2009, p. 20.

170 Hoyzer was requested by a "betting mafia", of which the Sapina brothers were part, to manipulate the Bundesliga- and DFB Championship games which they had betted upon in order to realise higher betting proceeds. The issue of whether the making of a manipulated bet was criminal fraud or only a "non-criminal racket", as the Federal Public Prosecution viewed it, was contentious. At final instance, the BGH ruled that fraud had taken place, BGHSt 51, 165. Cf. also *Jahn/Maier,* JuS 2007, pp. 215 et seqq.; *Engländer,* JR 2007, pp. 477 et seqq.; *Saliger/Rönnau/Kirchheim,* NStZ 2007, pp. 361 et seqq.; *Radtke,* Jura 2007, pp. 445 et seqq. At the end of 2009, a further Europe-wide football

Hoyzer, the ever-relevant hooligan problem (especially §§ 223 et seqq., 123 StGB), and the recurring debate[171] concerning the pros and cons of having an anti-doping code[172] spring to mind.

VIII. Doping

There is hardly another topic that – for decades – has raised the tempers of sports enthusiasts as much as the problem of how to combat doping. Over the years, the efforts of national and international sports associations have created a complicated patchwork of competences, methods of control and analysis, lists of prohibited substances, sanctions, and remedies. The "Krabbe"[173], Baumann"[174] and "Pechstein"[175]cases (of particular relevance to Germany) and the instructive "Roberts"[176] case may serve as examples.[177] WADA and the World Anti-Doping Code mark an important step towards harmonisation. Yet both international comparison and a comparison of the different disciplines

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betting scandal was uncovered, in which at least 32 games in Germany and 200 Games Europe-wide (even in the Champions' League) were implicated, cf. FAZ, 21.11.2009, p. 30.

A further case of corruption in sport is currently playing out in the arena of handball. Charges of corruption and breach of trust and the aiding and betting of the same, respectively, were filed against former manager of THW Kiel Uwe Schwenker as well as former trainer Zyonimier Serdarusic. Schwenker is accused of having transferred 92,000 Euro of THW Kiel's money in order to bribe the referee of the second leg of the 2007 Champions' League Final, FAZ, 01.02.2010, p. 22.

171 In favour of sanctions by the state *Cherkeh/Momsen,* NJW 2001, pp. 1745 et seqq.; *Digel,* Ist das Dopingproblem lösbar?, in: Digel/Dickhuth (eds.), Doping im Sport, Tübingen 2002, pp. 118 et seqq.; *Prokop,* Sp*u*Rt 2006, pp. 192 et seqq.; contra *Dury,* Sp*u*Rt 2005, pp. 137 et seqq.; *Jahn,* Sp*u*Rt 2005, pp. 141 et seqq.; *Heger,* JA 2003, pp. 76 et seqq.; *Fröhmke,* FoR 2003, pp. 52 et seq.; *Krähe,* Sp*u*Rt 2006, pp. 194 et seq.; *Grunsky*, Sp*u*Rt 2007, pp. 188 et seqq.; for a comprehensive survey, *Vieweg,* Sp*u*Rt 2004, pp. 194 et seqq.

172 Even with the introduction of a new anti-doping law which stops short of making doping a criminal offence, the debate still rages on. Bavaria has recently put a new citizens' initiative for a Protection of Sports Act into action and has drafted a corresponding bill. See infra VIII. 4.

173 Führungs-Akademie des Deutschen Sportbundes e.V. (ed.), (fn. 75), pp. 211 et seqq. gives a chronological account of the Krabbe-Cases I-III.

174 For a documentary of the facts, *Haug*, Sp*u*Rt 2000, p. 238; for more detail see *Adolphsen,* Sp*u*Rt 2000, pp. 97 et seqq.

175 Cf. Fn. 139.

176 See *Martens/Feldhoff,* Der Fall Roberts – Ein Slalom zwischen Staatsgericht und Schiedsgericht, in: Vieweg (ed.), Prisma des Sportrechts, Berlin 2006, pp. 343 et seqq.

177 See *Hilpert* (fn. 55), pp. 326 et seqq. for a list of all doping offenders.

show that substantial differences in regulations, especially with regard to doping controls during training, remain. Furthermore, not all sports organisations have accepted the WADA Code as binding.[178] The amount of legal literature dealing with the doping problem has grown to immense proportions.[179] In view of the current developments, further discussions at national and international level are sure to follow[180]: In the 2008 Tour de France, Stefan Schumacher and Bernhard Kohl[181] had positive doping tests. This was also the case for Patrik Sinkewitz and Alexander Winokurow during the 2007 Tour de France. In the same year, then race-leader Michael Rasmussen was suspended. Also of note is the confession to doping by Floyd Landis, whose 2006 victory was disallowed.[182] As to horseriding, there have been positive tests for doping in the case of Isabell Werth and Christian Ahlmann. The "Pechstein" case is a further example. The most pressing question, however, is whether sports fraud should become a criminal offence.

1. The Aims of the Ban on Doping

The ban on doping is intended to achieve three things: equal opportunities and fair play[183], protection of athlete health[184], and continued respect for sport[185].

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178 A list of all national and international sports associations that accept the WADA Code (like the German sport associations do) is to be found at http://www.wada-ama.org/en/dynamic.ch2?pageCategory.id=270 (last accessed September 1, 2010).

179 The bibliographies of these works prove that. *Adolphsen* (fn. 31), pp. 707-745; *Petri,* Die Dopingsanktion, Berlin 2004, pp. 403-423; *Vieweg/Siekmann* (fn. 10), pp. 683-709.

180 Peter Danckert, then chairman of the Bundestag-Sportausschuss, was sceptical as regards the issue of public funding for top athletes, cf. SZ, 20.07.2007, p. 27.

181 FAZ, 15.10.2008, p. 30. Bernhard Kohl is also at the centre of the affair concerning the Vienna Bloodbank of the blood plasma manufacturer, Humanplasma, which is said to have been requested by biathletes, long-distance runners and cyclists to assist their doping attempts, cf. FAZ, 02.04.2009, p. 27.

182 FAZ, 21.05.2010, p. 30.

183 Equal opportunity in competition is also endangered by so-called techno-doping. This term encompasses any increase in the performance of the human body by means of technical assistance. In particular, the case of Oscar Pistorius, an athlete who has had both of his lower legs amputated, caused quite a stir. Although a biomechanical assessment by *Brüggemann et al* (see Sports Technology 2008, No. 4/5, pp. 220-227) confirmed that the carbon prosthetics employed by the athlete did grant him clear advantages over healthy runners, the CAS lifted a starting ban imposed by the Field and IAAF in relation to the 2008 Olympic Games in Peking based on this assessment, cf. CAS Sp*u*Rt 2008, pp. 152 et seqq. CAS did not appear to be convinced of the existence of a "metabolic advantage" for the athlete. *Krähe* is particularly critical of this decision, cf. Sp*u*Rt 2008, p. 149. Cf. *Schild*, CaS 2008, pp. 128 et seqq.

2. Anti-Doping Measures

The most important tool in the fight against doping is the establishment of a comprehensive system of control.[186] This calls for both "in-competition" and "out-of-competition" controls. "In-competition" controls at the national level have been carried out since 1968. Rigorous "out-of-competition" controls were introduced in 1990. Since its establishment in 2003, the National Anti-Doping Agency has been responsible for organising anti-doping controls in Germany. The number of in-competition controls in 2009 was approximately 2,500 per year and that of out-of-competition controls, easily about 3,700.[187] Athletes are selected either systematically or at random and asked for a blood or urine sample. In general, there is no prior warning. A problem arises if the athlete is not available, which, in the past, occurred, despite detailed reporting obligations, in up to 20% of cases.[188] For this reason, detailed notification requirements for athletes (so-called Athlete Whereabout Requirements) were introduced as of 01.01.2009 in the new World Anti-Doping Code. Pursuant to Fig. 11.1.3, all top-level athletes who are part of the "Registered Testpool"[189] must disclose in advance where they are resident and where they will be training in the following year as well as the competitions in which they intend participating. The National Anti-Doping Organisation or, as the case may be, the international sport association must be notified immediately of any – even minor – changes. Furthermore, Fig. 11.1.4 contains an obligation for the athletes to provide a window of 60 minutes per day in the following quarter during which they must make themselves available for doping tests at a particular place. Any infringements of the notification requirements contained in the WADA Code can result in severe penalties (ban from competing) for the athletes. In light of the massive infringement of the athletes' personal freedom, it

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184 In 1987 Birgit Dressel (participant in a combined competition) and in 1988 shot-putter Ralf Reichenbach died after having doped themselves. See *Linck,* NJW 1987, pp. 2545 et seqq.

185 When doping scandals continually occur, the loss of credibility for the sport concerned can, in the worst case scenario, be so far-reaching that spectators and sponsors abandon the sport permanently; for example, the decisions of both Gerolsteiner and Telekom to stop their involvement with cycling due to countless cases of doping, cf. FAZ, 05.09.2007, p. 17 and FAZ, 28.11.2007, p. 32.

186 See *Digel* (fn. 171), pp. 9 et seqq.

187 Cf. NADA- Jahresstatistik 2009 at http://www.dshs-koeln.de/biochemie/rubriken/07_info/stat_09.pdf (last accessed September 1, 2010).

188 *Pabst,* Wenn der Kontrolleur vergebens klingelt, SZ, 28.08.2006, p. 2.

189 The matter of which athletes are included in the RTP is decided by the international sports bodies and national anti-doping organisations, cf. Fig. 11.2 WADA Code as well as Art. 5.2 NADA Code.

is often asserted that the WADA provisions are legally impermissible.[190] A multitude of international sports associations – FIFA and UEFA amongst others – reject the system of notification required by WADA as being disproportionate.[191]

The analytic procedures used by accredited laboratories have become progressively more accurate over the years. In some instances, athletes who did not expect to be found out were convicted, either because of the time lapse since taking the drug or because they had taken a "masking" substance. Still, the pressure to keep up with new developments continues as doping analysts confront new and harder-to-trace drugs.[192]

3. Sanctions

Sanctions for doping offences are usually imposed by the national or international sports association responsible for the case in question. Sanctions by state agencies exist in only a handful of countries. The sanctions available to sports organisations are (1) disqualification of the athlete concerned and (2) forfeiture. There are also fines[193] – which can be substantial – and bans, the duration of which depends on whether the athlete involved is a first-time or a repeat offender. Problems in this context are posed by the need to ensure proportionality between the doping offence and its punishment and by the question of whether fault is a necessary element of liability.[194]

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190 For example, by *Musiol,* Sp*u*Rt 2009, pp. 90 et seqq.; *Korff,* Sp*u*Rt 2009, pp. 94 et seqq., *Schaar* in: FAZ, 04.03.2009, p. 28. Cf. general discussion of the area *Niewalda,* Dopingkontrollen im Konflikt mit allgemeinem Persönlichkeitsrecht und Datenschutz, Berlin 2011 (being printed).

191 Cf. FAZ, 19.02.2009, p. 28 and HB, 26.03.2009, p. 20.

192 For example, a limited method of proving gene-doping has only recently become available, cf. FAZ, 21.03.2009, p. 27. The indirect proof of doping by abnormal blood values – as in the case of Pechstein – has been fiercely debated, cf. FAZ, 06.07.2009.

193 The Tour de France 2007 cyclists had to sign a declaration by UCI to pay a fine of one year's earnings in addition to the usual suspensions in case of a doping offence. On the validity of a declaration of obligation, cf. *Bahners/Schöne,* Sp*u*Rt 2007, pp. 227 et seqq. On fines for doping in sponsoring contracts, see *Nesemann,* NJW 2007, pp. 2083 et seqq.
Romanian footballer Adrian Mutu had to pay a fine to the amount of 17.2 million Euro to his former club, FC Chelsea, due to cocaine abuse. This punishment was confirmed by both CAS (judgment of 31.07.2009 – file no. CAS 2008/A/1644) and the Swiss Federal Supreme Court (judgment of 10.06.2010 – file no. 4 A 458/ 2009).

194 See *Petri* (fn. 179), pp. 208 et seqq.

An athlete may appeal the imposition of a sanction to the internal review system of the sports organisation concerned or to a court of arbitration, such as, for instance, CAS. Recourse to the state courts is increasingly being cut off by arbitration clauses.[195]

4. Anti-Doping Code?

Doubts concerning the efficacy of leaving the fight against doping in the hands of sports organisations have led to calls for legislative intervention. There was and still is disagreement over whether the regulation of the subject matter previously contained in §§ 6a I, 95 I Nr. 2a of the Drug Act (AMG) was sufficient[196] or whether "sports fraud" should be made a crime[197] (§ 263 of the Criminal Code, criminalising fraud in general, is commonly[198] believed not to

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195 Supra IV. 2. on the relevance of arbitration courts and on the decision of the Swiss Bundesgericht on the validity of arbitration clauses. For a thorough account, see *Soek,* Die prozessualen Garantien des Athleten in einem Dopingverfahren, in: Röhricht/Vieweg (eds.), Doping-Forum, Stuttgart 2000, pp. 35 et seqq.; *Soek*, The Strict Liability Principle and the Human Rights of Athletes in Doping Cases, The Hague 2006, pp. 325 et seqq.

196 *Linck,* NJW 1987, p. 2545 (p. 2551); *Heger,* JA 2003, p. 76 (pp. 79 et seq.); *Prokop,* Sp*u*Rt 2006, pp. 192 et seqq.; for a detailed account of the preconditions for imposing a penalty under AMG and BtMG, see *Schild,* Sportstrafrecht, Baden-Baden 2002, pp. 169 et seqq. In favour of bringing doping offenders within the UWG regime, *Frisinger/Summerer,* GRUR 2007, pp. 554 et seqq.

197 Cf. *Rössner*, Doping aus kriminologischer Sicht – brauchen wir ein Anti-Dopinggesetz?, in: Digel/Dickhuth (eds.), Doping im Sport, Tübingen 2002, p. 118 (pp. 125 et seqq.); *Fritzweiler*, Sp*u*Rt 1998, pp. 234 et seq.; on making self-doping a crime, *Heger*, Sp*u*Rt 2007, pp. 234 et seq.; see also *Cherkeh/Momsen*, NJW 2001, pp. 1745 et seqq. In favour of an anti-doping law and of penalising offenders *Peter Danckert*, former chairman of the sports committee of the German Bundestag, *Clemens Prokop*, DLV-president, and *Helmut Digel*, honorary president of the DLV; SZ, 29./30.07.2006, p. 35; SZ, 03.08.2006, p. 32; SZ, 05./06.08.2006, p. 36. The matter was dealt with in a more intensive manner by the ReSpoDo, which was founded in June 2004. A summary of its final report may be accessed at http://www.dosb.de/fileadmin/fm-dosb/downloads/dosb/endfassung_abschlussbericht.pdf (last accessed September 1, 2010).

198 According to *Schild,* Doping in strafrechtlicher Sicht, in: Schild (ed.), Rechtliche Fragen des Dopings, Heidelberg 1986, p. 13 (p. 28) there is no relevant deceit involved; contra *Otto,* Sp*u*Rt 1994, p. 10 (p. 15); *Schneider-Grohe,* Doping, Lübeck 1979, p. 148; *Hilpert* (fn. 55), pp. 321 et seq. For more detail on possible fraud scenarios, *Cherkeh/Momsen,* NJW 2001, p. 1745 (pp. 1748 et seqq.); *Heger,* JA 2003, p. 76 (pp. 80 et seqq.) and *Ackermann,* Strafrechtliche Aspekte des Pferdeleistungssports, Berlin 2007.

apply to this situation). Critics[199] of the proposal worry about an undue curtailment of the autonomy of sports organisations, a conflict with the traditional principle of strict liability, and an undesirable criminalisation of athletes. They also point out that the proposed legislation would probably not be of much use in practice (because of the heavy workload of policemen and public prosecutors) and that the relevant sections of the AMG already make it possible for police and prosecuting authorities to intervene. They believe that a tightening-up of the drug laws would be sufficient to render the fight against doping more effective. The legislature agreed and confined itself to an amendment of the Drug Act. The statute[200] imposes penalties of up to ten years for commercially trafficking doping substances. The mere fact of possessing certain common – and especially dangerous doping substances may result in penalties if the amounts found far exceed those needed for private consumption.[201] This statutory provision does not go far enough for Bavarian State Government in particular. It recently prepared a new draft for a statute to combat doping and corruption in sport.[202] The draft provides that not only possession and dealing in doping substances will be penalized, but also participation in competitions under the influence of doping substances and bribery as well as the bribing of participants, trainers and referees. It remains to be seen if and in what way the legislature will lead to improvements in this field.[203]

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199 *Thomas Bach,* president of the DOSB, sees no need for further measures in the fight against doping. Academics, too, are, for the most part, not in favour of penalising doping; see, e. g., *Dury,* Sp*u*Rt 2005, pp. 137 et seqq; *Jahn,* Sp*u*Rt 2005, pp. 141 et seqq; *Fröhmcke,* FoR 2003, pp. 52 et seq.; *Krähe,* Sp*u*Rt 2006, pp. 194 et seq.; *Heger,* Sp*u*Rt 2007, pp. 153 et seqq., takes a more differentiated view but also disapproves of penalising out-of-competition doping.

200 The German Bundestag passed the law on July 5, and it was published in the Bundesgesetzblatt on the 31.10.2007. Thus, the more stringent rules against doping came into force on the 01.11.2007.

201 In relation to the punishment of blood doping in accordance with the amended AMG, cf. *Reuther,* Sp*u*Rt 2008, pp. 145 et seqq.

202 The draft is printed in Sp*u*Rt 2010, pp. 104 et seq. It has attracted support (*König,* Sp*u*Rt 2010, pp. 106 et seq.) as well as opposition (Kudlich, Sp*u*Rt 2010, pp. 108 et seq.; *Beukelmann,* NJW-Spezial 2010, pp. 56 et seq.); *Bannenberg,* Sp*u*Rt 2007, pp. 155 et seq. also follows the same line as the Bavarian State Government. She calls for the creation of a section 298a BGB in order to combat "sports fraud".

203 For the many questions in this context, see *Vieweg,* Sp*u*Rt 2004, p. 194 (pp. 195 et seq.).

IX. Liability Issues

1. The Basics of Liability

Sports tend to put people in physical proximity with each other, whether voluntarily or involuntarily. Professional sports in particular are characterised by a network of relationships between athletes, clubs, associations, organisers, owners of venues, and spectators. Given the many points of contact, conflicts are bound to arise. It is hardly surprising, therefore, that the courts have been swamped with cases which give rise to liability issues in a sports context.

Initially, these cases tended to feature ski accidents.[204] They usually raised issues of liability in tort. Liability pursuant to § 823 I BGB requires the tortfeasor to have breached a duty of care. Since the standard of care expected of skiers has never been codified, the task of formulating an appropriate standard is left to the courts. The FIS rules[205] for skiers, first drawn up in 1967[206], are helpful in this regard (not only for judges with no personal experience of skiing). As rules set by a private body, they are not legally binding. However, they are generally regarded as defining the applicable standard of care. The dogmatic justification advanced in support of this power to define the standard of care differs. Some point to the fact that the FIS rules are accepted by the general public as being the expected standard of care[207], others go so far as to treat them as customary law.[208] As with the FIS rules, the rules of other sports organisations concretise the applicable standard of care and thus modify the gen-

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204 See e. g. OLG Karlsruhe NJW 1959, pp. 1589 et seq.; OLG Stuttgart NJW 1964, pp. 1859 et seq.; BGH NJW 1972, pp. 627 et seqq.; more recently, OLG Hamm NJW-RR 2001, pp. 1537 et seq.; OLG München NJW-RR 2002, pp. 1542 et seq.; LG Ravensburg Sp*u*Rt 2008, pp. 39 et seqq.; a general account of Austrian and German jurisprudence on skiing accidents, see *Pichler/Fritzweiler,* Sp*u*Rt 1999, pp. 7 et seqq. The case of the prime minister of Thüringen, Althaus, is a well-known example. Althaus was sentenced to a fine in summary proceedings for involuntary manslaughter which occurred as a result of a skiing accident in Austria, FAZ, 05.03.2009, p. 4.

205 Available at http://www.fis-ski.com/de/fisintern/allgemeineregelnfis/10fisregeln.html (last accessed September 1, 2010).

206 The FIS rules were amended in 1990 and 2002. For the 2002 update, see *Pichler,* Sp*u*Rt 2003, p. 1 et seq.

207 BGHZ 58, 40 (43 et seq.); BGH NJW 1987, p. 1947 (p. 1949); OLG München Sp*u*Rt 1994, p. 35 (p. 36); *Heermann/Götze,* NJW 2003, p. 3253 (pp. 3253 et seq.); Mü-Ko-*Wagner,* BGB, 5th edition 2009, § 823 margin number 555.

208 OLG München Sp*u*Rt 1994, pp. 35 et seqq.; OLG Hamm Sp*u*Rt 2002, p. 18 (p. 19); OLG Brandenburg MDR 2006, pp. 1113 et seq.; *Scheuer,* DAR 1990, p. 121; *Dambeck/Lehr,* Piste und Recht, in: Schriftenreihe des Deutschen Skiverbandes (ed.), Kempten 1989, p. 47.

eral principles of tort liability.[209] Liability issues surrounding sporting events have proved to be another field for litigation. Event organisers face comprehensive duties of care. Clubs and associations may become liable to each other and to their members in contract or in tort. Finally, spectators and even third parties may feature in liability scenarios. Arriving at a workable solution to these situations of conflict calls for sensitivity to the sports context, since an application of general rules would frequently lead to unsatisfactory results.

2. Typical Cases

Traditionally, jurisprudence and legal scholars have classified the multitude of cases of liability in a systematic manner.[210]

a) Liability of Clubs and Club Committees

Clubs follow the general rule of liability. Where the club has entered into a contract – with athletes, spectators, or sponsors – it may be liable pursuant to §§ 280 et seqq. BGB for culpably (§ 276 I BGB) breaching its contractual duties.[211] In this context, the club has to answer for the culpable behaviour of its committee members (§ 31 BGB)[212] and for the culpable behaviour of any other person it employs in discharging its contractual duties (§ 278 BGB). In practice, liability in tort tends to be more of a problem. A club owes a duty of care to all those coming into contact with its sporting activities. The duty varies depending on the type of sport in question and the size and the degree of professionalism of the event concerned. The volenti principle applies to all typical injuries.[213] These injuries are outside the club's sphere of responsibility (even if there is no contractual exclusion clause[214]). The dogmatic justification for this exclusion of liability differs. Some[215] point to the principle enshrined in § 254 BGB (volenti non fit injuria). Others modify the definition of negligence pur-

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209 See generally *Scheffen,* NJW 1990, pp. 2658 et seqq.; *Pfister* (fn. 47), pp. 186 et seqq.

210 Cf. e.g. *Scheffen*, NJW 1990, pp. 2658 et seqq.; and *Vieweg* Haftungsrecht, in: Nolte/Horst (eds.), Handbuch Sportrecht, Schorndorf 2009, p. 123 (pp. 128 et seqq.).

211 See *Heermann,* Haftung im Sport, Stuttgart 2008 , p. 66.

212 This is controversial: see § 278 BGB and Staudinger-*Weick,* BGB, Berlin 2005, § 31 margin number 3; *Flume,* Die Personengesellschaft, Heidelberg 1977, pp. 321 et seq.; MüKo-*Reuter* (fn. 79), § 31 margin number 32.

213 BGH NJW 1975, pp. 109 et seqq.; BGH VersR 1984, p. 164 (p. 165).

214 On the possibilities of and limits upon contractual exclusions of liability, *Heermann* (fn. 211), pp. 78 et seq.

215 OLG Köln NJW 1962, pp. 1110 et seq.; *Friedrich,* NJW 1966, p. 755 (pp. 760 et seq).

suant to § 276 I BGB.[216] According to these scholars, certain types of behaviour should not be considered negligent based on a "sports-specific interpretation" of the term negligence.[217] Other authors [218] do not consider this behaviour to be unlawful at all. The courts[219], on the other hand, usually resort to the catch-all provision of § 242 BGB and accuse the tort victim of inconsistent behaviour (venire contra factum proprium) if he voluntarily exposes himself to a risk of danger and yet tries to recover damages once the risk has materialised. Atypical and concealed risks are an entirely different matter. A club is required to take reasonable precautions against these.[220] An orientation regarding duties of care can be found in the relevant rules and regulations of sports associations (e. g. the International Ski Competition Rules[221]) or, more generally, in the relevant rules for accident prevention of the so-called Verwaltungsberufsgenossenschaft (German Accident Prevention and Insurance Association, Section Administration).

Where third parties are injured, a board member may be found personally liable as well as the club.[222] Committee members may also become liable to the club itself.[223] Conversely, there may be situations, where the club is found to be liable to its board members.[224]

b) Liability of Organisers

The above applies, mutatis mutandis, to the organisers of a game.[225] It is often difficult to resolve the preliminary issue of who is organising a game.[226] The

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216 *Deutsch,* VersR 1974, p. 1045 (pp. 1048 et seqq.); *Fritzweiler,* Die Haftung des Sportlers bei Sportunfällen, Munich 1978, pp. 140 et seq.

217 See *Lange,* Schadensersatz, § 10 XV 4, pp. 645 et seq.

218 *Heermann* (fn. 211), p. 57 et seqq.

219 See, e. g., BGHZ 63, 140 (144 et seqq.); see also *Füllgraf,* VersR 1983, p. 705 (p. 710).

220 Clubs organising competitions have to take precautions to prevent hooliganism, see AG Koblenz Sp*u*Rt 2006, p. 81. Trespassing must be prevented, see DFB-Sportgericht Sp*u*Rt 2006, p. 87.

221 See *Pichler*, Sp*u*Rt 1994, p. 53 (pp. 54 et seqq.).

222 For possible constellations, see *Heermann* (fn. 212), pp. 82 et seqq. In this connection, the new regulation contained in § 31a BGB must be observed, in accordance with which any honorary members of the board in an internal relationship to the club are responsible only where intention and/or gross negligence are present. Cf. *Orth,* Sp*u*Rt 2010, pp. 2 et seqq.

223 Most recently, LG Kaiserslautern Sp*u*Rt 2006, pp. 79 et seqq.; *Heermann* (fn. 211), pp. 93 et seqq.

224 See *Heermann* (fn. 211), pp. 91 et seqq.

225 For a detailed treatment of the matter, cf. *Vieweg/Röhl,* Sp*u*Rt 2010, pp. 56 et seqq.; see also *Fellmer,* MDR 1995, pp. 541 et seqq. The matter of the organisor's responsibility

organiser may, but need not be the home club. "Organiser" is defined by the courts[227] as someone who is responsible for preparing and conducting a game and who bears the financial risk. In its "Europapokalheimspiele"[228]-ruling, the BGH treated UEFA, rather than the German soccer federation as (co-) organisers. This would lead to the classification of the DFL as co-organisers of the German soccer championships. Apart from owing contractual duties, organisers may owe a duty of care in tort. Thus, organisers must ensure that spectators are not hit by stray ice hockey pucks[229] or footballs.[230] They may also have to restrain attacks by fellow spectators.[231]

c) Liability of Associations

Liability for unlawfully withholding or revoking a licence is especially relevant in this context.[232] Without a licence, an athlete cannot participate in a sports competition. For the applicant, the effect of being refused a licence or of having an existing licence revoked is equivalent to being placed under a (temporary) de facto ban: he is denied access to potential sources of revenue (television, sponsoring, marketing and spectators). This frequently threatens an athlete's livelihood with the result that licence disagreements are almost bound to end up in court. If the court decides that the licence was unlawfully terminated or withheld, the damages awarded can be considerable.[233] In addition to being

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arose in the "Zugspitzlauf" case, for example. During the 2008 "Zugspitzlauf" race, two men died due to hypothermia and exhaustion caused by a storm. The Public Prosecutor proceeded on the basis that the organiser had not paid heed to its duty of care because it had been warned of the storm before it occurred. Garmisch-Partenkirchen Local Court, however, acquitted the organiser of the charge of involuntary manslaughter due to the victims' own responsibility for their endangerment, FAZ, 02.12.2009, p. 9.

226 *Hannamann,* Kartellverbot und Verhaltenskoordinationen im Sport, Berlin 2001, pp. 172 et seqq.; *Stopper,* Ligasport und Kartellrecht, Konstanz 1997, pp. 79 et seqq.; *Stopper,* Sp*u*Rt 1999, pp. 188 et seqq.

227 BGHZ 27, p. 264 (p. 266); BkartA Sp*u*Rt 1995, p. 118 (p. 121).

228 BGHZ 137, pp. 296 et seqq.

229 BGH NJW 1984, p. 801 (p. 802); OLG Celle Sp*u*Rt 1997, pp. 203 et seq., with an annotation by *Blum.*

230 OLG Schleswig-Holstein Sp*u*Rt 1999, pp. 244 et seq.

231 LG Gera Sp*u*Rt 1997, pp. 205 et seq.; LG München I Sp*u*Rt 2006, pp. 121 et seq.

232 For a detailed discussion *Heermann,* Haftungsfragen bei Lizenzverfahren im Ligasport, in: Heermann (ed.), Lizenzentzug und Haftungsfragen im Sport, Stuttgart 2005, p. 9 (pp. 24 et seqq.); *Körner/Holzhäuser,* CaS 2007, pp. 3 et seqq.; *Scherrer* (fn. 54), pp. 122 et seqq.

233 In addition to the responsibility of the sports association, the auditor involved is generally also found to be liable, see *Heermann* (fn. 232), pp. 13 et seqq., who also deals with further third parties who may also be liable.

required to answer for their own culpable behaviour, sports clubs or associations may become vicariously liable for the negligent acts of third parties (such as referees[234]).

d) Liability of Athletes

Liability issues typically arise where one competitor is injured through the act of a fellow competitor. These "competitor-caused injuries" (Mitspielerverletzungen) have come before the courts on several occasions over the past few decades.[235] The cases usually revolve around the question of how stringent a duty of care is owed by fellow competitors towards each other. The usual standard of care – that one is liable for any negligently inflicted injury (§ 276 I 1 BGB) – does not really fit the context of sports. When it comes to the observance of the rules of the game, it seems inappropriate to make the person who causes the damage reimburse the victim for any and all injuries sustained. The rules of the game – the FIS rules referred to above, for instance – serve to modify the applicable standard of care.[236] Generally, liability is also limited where the rule infringement is minor and a typical risk of the sport – in cases where athletes get carried away by zeal for the game, are momentarily inattentive, or are worn out by fatigue, for example.[237] It is only when it comes to the matter of the legal basis for limiting liability in such cases that there is a (considerable) divergence of views. While some point to the above-mentioned modification of the standard of care, others put forward doctrines like consent[238], volenti non fit iniuria (cf. § 254 BGB)[239], or abuse of process.[240] [241]To

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234 Cf. in this context the recent "Hoyzer" case. *Eufe,* Sp*u*Rt 2006, pp. 12 et seqq.; *Eufe* does not think that the DFB is answerable for the negligence of the referee. He says that the DFB should only have general liability for negligence in the area of its own selection and control.

235 See BGH VersR 1957, pp. 290 et seqq.; later BGHZ 63, pp. 140 et seqq. = NJW 1975, pp. 109 et seqq.; BGHZ 154, pp. 316 et seqq. = NJW 2003, pp. 2018 et seqq.; OLG München NJOZ 2009, p. 2268.

236 *Scheffen,* NJW 1990, p. 2658 (p. 2659).

237 BGHZ 154, 316 (324 et seq.); OLG Karlsruhe NJW-RR 2004, pp. 1257 et seqq.; KG Sp*u*Rt 2008, pp. 76 et seqq., AG Düsseldorf Sp*u*Rt 2007, p. 38 (p. 38); Palandt-*Sprau,* BGB, 69th edition 2010, § 823 margin number 217; for a divergent view regarding sailing regattas *Müller-Stoy,* VersR 2005, pp. 1457 et seqq.; *Behrens/Rühle,* NJW 2007, pp. 2079 et seqq.

238 The concept of consent, which would act as a defence, is dismissed by the BGH as an "artificial assumption" which can, if need be, only be applied to extremely dangerous types of sports such as car racing; cf. BGH NJW 1975, p. 109 (p. 110).

239 *Nipperdey,* NJW 1957, p. 1777 (p. 1779); *Stoll*, Das Handeln auf eigene Gefahr, Tübingen 1961, pp. 260 et seqq.; *Deutsch,* VersR 1974, p. 1045 (pp. 1048 et seqq.); *Pichler,* Sp*u*Rt 1997, p. 7 (p. 9).

sum up, competitors only become liable to fellow-competitors if they cross the "unfairness" threshold.[242] The matter of where that threshold lies is a one that cannot be determined in the abstract, but has to be considered anew in each individual case[243], taking due account of the special characteristics[244] of the sport concerned.

Similar limitations on liability apply where an athlete injures a member of staff or a spectator. Staff members and spectators voluntarily expose themselves to a risk of injury and are therefore less deserving of legal protection than third parties. As against third parties, the ordinary rules of tortious liability apply.[245] Athletes may also become liable to clubs, associations or sponsors.[246]

e) Liability of Spectators

Spectators may become liable when actively intervening in a game or other sports contest. One high-profile example is the case of Monica Seles, who was stabbed on the tennis court by a spectator using a 13-cm-long knife. A spectator who physically attacks and injures an athlete is liable in tort pursuant to

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240 BGHZ 34, 355 (363); BGH NJW 1975, p. 109 (p. 110).

241 Even though an express limitation of liability to cases of intention and gross negligence may be agreed upon in individual cases, there exists, nonetheless, the possibility of review in accordance with § 307 BGB in the case of combative sports and competitions with which the risk of considerable danger is associated. Cf. BGH Sp*u*Rt 2009, pp. 122 et seqq.

242 OLG Hamm Sp*u*Rt 2006, pp. 38 et seq.; LG Freiburg Sp*u*Rt 2006, pp. 39 et seq.; OLG Hamburg Sp*u*Rt 2006, pp. 41 et seq. AG Düsseldorf Sp*u*Rt 2007, pp. 38 et seq. These principles have been of equal application to both contact and non-contact sports since the car race decision of the BGH (BGHZ 154, pp. 316 et seqq. = NJW 2003, pp. 2018 et seqq. = Sp*u*Rt 2004, pp. 260 et seqq.). The decisive issue is that the sport in question carries a high risk of injury. See *Behrens/Rühle* , NJW 2007, p. 2079 (p. 2080).

243 According to recent decisions of the BGH, (Sp*u*Rt 2008, pp. 119 et seqq.), an exclusion of liability in the event of minor infringements of regulations does not come into play if and insofar as insurance protection exists. The existence of personal liability insurance does not, however, form a basis for claims – the injured party must always prove that the injuring party has undergone a breach of his duty of care. Cf. BGH NJW 2010, pp. 537 et seqq.

244 E. g. boxing, a "physical" sport, has a different standard of care than tennis, where there is no bodily contact with the competitor. For a discussion of the different types of liability, see *Heermann* (fn. 211), pp. 108 et seqq. For an analysis of liability in Asian combative sports, cf. *Günther*, Sp*u*Rt 2008, pp. 57 et seqq.

245 See *Heermann* (fn. 211), pp. 128 et seqq.

246 For a comprehensive account, *Heermann* (fn. 211), pp. 132 et seqq.

§§ 823 et seqq. BGB.[247] This liability is invoked not only by intentional, but also by negligent acts of spectators. The liability of spectators, unlike the liability of fellow athletes, is not limited, because attacks by spectators are not part of the typical risk athletes impliedly assume in agreeing to take part in a game.[248] Hooligans and "streakers", too, must compensate third parties for any losses resulting from their unlawful behaviour.[249]

X. Conclusion

Sports today no longer exist in a legal vacuum. The (pecuniary and non-pecuniary) interests of those involved are too important to be placed completely outside the purview of the law. Globalisation and professionalism as well as the commercialisation and the growing media interest in sports have made it impossible to resolve conflicts by trusting self-regulation alone. The final stage in the regulation of sport by and through law has not yet been reached. This is evident from the sustained efforts at harmonisation at international level and from the never-ending debate about the pros and cons of a German anti-doping code. Despite a genuine need for regulation, one should not lose sight of what is after all a key characteristic of sports – the fact that clubs and associations are in principle entitled to manage their own affairs and to do so autonomously. There must be a limit to the control exercised by the state courts where sports offer better and more effective solutions. Laying down the rules of the game and specifying sanctions for rule infringement, for instance, are matters integral to sports that must remain the exclusive preroga-

247 It is a different matter in the case of the promoter's liability which was excluded in the Seles case due to a lack of foreseeability. LG Hamburg NJW 1997, pp. 2606 et seqq.; *Mohr,* Sp*u*Rt 1997, pp. 191 et seqq.

248 For a similar view, see *Heermann* (fn. 211), p. 225.

249 *Thaler,* Hooliganismus und Sport, in: Arter/Baddeley (eds.), Sport und Recht, Bern 2006, p. 245 (pp. 261 et seq.). In accordance with §§ 280 I, 631 BGB, hooligans must compensate third parties (e. g. a club) for any losses ; see Rostock Sp*u*Rt 2006, pp. 83 et seqq.; generally on the liability of spectators when trespassing unlawfully, AG Brake Sp*u*Rt 1994, pp. 205 et seq., annotated by *Bär*. As regards the admissibility of a stadium ban for (potential) hooligans extending across the Federal Republic, cf. BGH Sp*u*Rt 2010, pp. 28 et seqq.

tive of clubs and associations. The goal should be to strike an appropriate and fair[250] balance between self- and legal regulation. It is precisely this delicate balancing act that makes sports law such an interesting and ever-evolving interdisciplinary area of law.

[250] For more information on the term "fairness", see supra (fn. 114) as well as *Scherer/Ludwig* (fn. 23), p. 110 et seq.

List of Abbreviations

AcP	Archiv for die civilistische Praxis (Law Journal)
AfP	Zeitschrift für Medien- und Kommunikationsrecht (Law Journal)
AG	Amtsgericht (Local Court) bzw. Aktiengesellschaft (public limited liability company)
AMG	Arzneimittelgesetz (Drug Act)
ARD	Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland (Consortium of public law broadcasting bodies of the Federal Republic of Germany)
Art.	Article
AufnahmeO	Aufnahmeordnung (Regulations regarding admission to DOSB)
BayVBl	Bayerische Verwaltungsblätter (on Bavarian Administration)
BGB	Bürgerliches Gesetzbuch (Civil Code)
BGHSt	Sammlung der Entscheidungen des Bundesgerichtshofs in Strafsachen (Judgments by the Federal Court of Justice – Criminal Division)
BGHZ	Sammlung der Entscheidungen des Bundesgerichtshofs in Zivilsachen (Judgments by the Federal Court of Justice – Civil Division)
BLSV	Bayerischer Landes-Sportverband e.V. (Bavarian Sports Association)
BT-Drs	Bundestagsdrucksachen (Legislative Materials)
BtMG	Betäubungsmittelgesetz (Narcotics Act)

BVerwG	Bundesverwaltungsgericht (Federal Administrative Court)
CaS	causa sport (Law Journal)
CAS	Court of Arbitration for Sport
CR	Computer und Recht (Law Journal)
DAR	Deutscher Akkreditierungsrat (German Accreditation Council)
DEU	Deutsche Eislauf-Union (German Ice-Skating Union)
DFB	Deutscher Fußball-Bund (German Football Association)
DFL	Deutsche Fußball Liga (German Football League)
DLV	Deutscher Leichtathletik-Verband (German Athletic Association)
DOSB	Deutscher Olympischer Sportbund (German Olympic Association)
DÖV	Die öffentliche Verwaltung (Public Administration)
DSB	Deutscher Sport Bund (German Sport Association)
DStR	Deutsches Steuerrecht (German Tax Law)
DSV	Deutscher Schwimm-Verband (German Swimming Federation)
EC	Treaty establishing the European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECJ-Slg	Judgments by the European Court of Justice
EEC	Treaty establishing the European Economic Community
e.g.	exempli gratia (for example)
EGC	European General Court
EnBW	Energie Baden-Württemberg (local energy provider)
Et Seqq.	And the following

EU	European Union
EuGH	European Court of Justice
EuR	Zeitschrift Europarecht (Law Journal)
EuZW	Europäische Zeitschrift für Wirtschaftsrecht (Law Journal)
e.V.	eingetragener Verein (registered association)
FAZ	Frankfurter Allgemeine Zeitung (German Daily)
FEI	Fédération Équestre Nationale (International Equestrian Federation)
FIA	Fédération Internationale de L'Automobile (International Automobile Federation)
FIFA	Fédération Internationale de Football Association (International Football Federation)
FINA	Fédération de Internationale de Natation (International Swimming Federation)
FIS	Fédération Internationale de Ski (International Skiing Federation)
FIVB	Fédération de Internationale de Volleyball (International Volleyball Federation)
FN	Deutsche Reiterliche Vereinigung (German Equestrian Federation)
FoR	Forum Recht (Law Journal)
FSV	Fußballsportverein (football club)
GG	Grundgesetz (Basic Law)
GmbH	Gesellschaft mit beschränkter Haftung (Limited liability company)
GRC	Charta der Grundrechte der Europäischen Union (Charter of Fundamental Rights of the European Union)

GRUR	Gewerblicher Rechtsschutz und Urheberrecht (Commercial Legal Protection and Copyright Law)
GRUR-RR	Gewerblicher Rechtsschutz und Urheberrecht Rechtsprechungs-Report (Commercial Legal Protection and Copyright Law - Report on Legal Practice)
GWB	Gesetz gegen Wettbewerbsbeschränkungen (Anti-Trust Act)
HB	Handelsblatt
HR	Hessischer Rundfunk (regional broadcaster)
IAAF	International Association of Athletics Federations
IASL	International Association of Sports Law
ICR	International Ski Competition Rules
IESR	Independent European Sport Review's
ISU	International Skating Union
IOC	International Olympic Committee
ISLA	International Sport Lawyers Association
JA	Juristische Ausbildung (Law Journal)
JR	Juristische Rundschau (Law Journal)
Jura	Juristische Ausbildung (Law Journal)
JuS	Juristische Schulung (Law Journal)
JZ	Juristenzeitung (Law Journal)
LG	Landgericht (Regional Court)
K & R	Kommunikation & Recht (Law Journal)
LL.M.	Legum Magister/Magistra (master of laws)
LSV	Landessportverband (Sports Association of a German Land)
MarkenG	Markengesetz (Trademark Protection Act)
MDR	Mitteldeutscher Rundfunk (regional broadcaster)
MMR	MultiMedia und Recht (Law Journal)

MüKo	Münchener Kommentar (Commentary on German Law)
NADA	Nationale Anti-Doping Agentur (National Anti-Doping Agency)
NJOZ	Neue Juristische Online-Zeitschrift (Law Journal)
NJW	Neue Juristische Wochenschrift (Law Journal)
NJW-RR	Neue Juristische Wochenschrift-Rechtsprechungsreport (Law Journal - Report on Legal Practice)
NJWE-VHR	Neue Juristische Wochenschrift Entscheidungsdienst Versicherungs- und Haftungsrecht (Law Journal - Report on Legal Practice)
NOK	Nationales Olympisches Komitee für Deutschland (National Olympic Committee for Germany)
NStZ	Neue Zeitschrift für Strafrecht (Law Journal)
NZG	Neue Zeitschrift für Gesellschaftsrecht (Law Journal)
OLG	Oberlandesgericht (Higher Regional Court)
OlympSchG	Gesetz zum Schutz des olympischen Emblems und der olympischen Bezeichnungen (Law on Protection of Olympic Emblems and Terms)
OVR	Ordnung für die Verwertung kommerzieller Rechte (Rules on the Exploitation of Commercial Rights)
p.	page
pp.	pages
PHBSportR	Praxishandbuch Sportrecht (Reference Book on Sports Law)
ReSpoDo	Rechtskommission des Sports gegen Doping (Sports Anti-Doping Commission)
RuVO	Rechts- und Verfahrensordnung (Procedural Code)

RKB	Rad- und Kraftfahrerverbund (Bicycling and Motorcycling Federation)
SchiedsVZ	Neue Zeitschrift für Schiedsverfahren (Law Journal)
SpielO	Spielordnung (rules of the game)
SpuRt	Sport und Recht (Law Journal)
StGB	Strafgesetzbuch (Criminal Code)
SZ	Süddeutsche Zeitung (German Daily)
TAS	Tribunal Arbitral du Sport (Court of Arbitration for Sport)
TFEU	Treaty of the Functioning of the European Union
UCI	Union Cycliste Internationale (International Cycling Union)
UEFA	Union des Associations Européennes de Football (European Football Association)
UrhG	Urhebergesetz (Copyright Act)
UWG	Gesetz gegen den unlauteren Wettbewerb (Unfair Competition Act)
VersR	Versicherungsrecht (Insurance Law)
WADA	World Anti-Doping Agency
WRP	Wettbewerb in Recht und Praxis (Law Journal)
ZDF	Zweites Deutsches Fernsehen (German broadcaster)
ZGR	Zeitschrift für Unternehmens- und Gesellschaftsrecht (Law Journal)
ZHR	Zeitschrift für Handelsrecht (Law Journal)
ZIS	Zeitschrift für internationale Strafrechtsdogmatik (Law Journal)
ZPO	Zivilprozessordnung (Code of Civil Procedure)