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The Court of Arbitration for Sport and Its Jurisprudence

An Empirical Inquiry into Lex Sportiva

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Johan Lindholm
Department of Law
Umeå University
Umeå, Sweden

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Series Information

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Preface

If I had to write one of those snappy back cover blurbs for this book, I might go with "a book written by a law geek for other law geeks". I first encountered and began conducting empirical studies of large sets of legal materials about six years ago. Ever since I began working on my doctoral thesis, I have had one foot in constitutional law and particularly the constitutional law of the European Union. Researching EU law inevitably involves sifting through a substantial number of decisions by the Court of Justice, searching for patterns and meaning that are sometimes rather obscure. It has therefore been very exciting to discover, together with my friend and colleague Mattias Derlén, that methods commonly used in other research fields provide great assistance when exploring the proverbial haystack. Through this process, I have become a great believer in the promise of exploring legal questions and legal assertions using real-world data, an approach to legal research that is frequently referred to as empirical legal studies.[1]

Since my other foot is firmly placed in the field of sports law, I naturally began to consider how this field might benefit from empirical legal studies and the Court of Arbitration for Sport (CAS) was an obvious candidate. CAS is a central actor in international sports and in the development of international sports law, and the institution has therefore attracted much attention by lawyers and non-lawyers alike.[2] Also, the data necessary to conduct such studies is available as it is relatively easy to get access to at least a significant portion of CAS's decisions. I therefore started collecting CAS decisions wherever I could find them in 2014 and, with the help of my research assistants Ellen Dalsryd and Johan Olsson (thank you guys!), began extracting information from the decisions and compiling a dataset. With indispensable economic backing by the Swedish Research Council for Sport and the School of Sport Science at Umeå University (thank you for believing in this project!), I began analysing this dataset seeking to empirically explore questions and

[1] This is a quite broad field of research that includes a rich variety of research interests and approaches.

[2] As evidenced by the fact that when I have told people at parties that I am writing a book about CAS, many have actually been interested!

claims about CAS posed by sports stakeholders and sports lawyers and to replicate previous empirical studies of arbitration institutions for CAS. I would estimate that somewhere between 10,000 and 15,000 lines of code went into conducting what you now have in front of you. I want to thank the people at T.M.C. Asser, particularly Antoine, Ben, and Frank, for giving me this great opportunity to study CAS and to experiment with methods that are not part of the legal researcher's standard toolbox.

I imagine that the main audience for this book are sports lawyers. In my experience, sports lawyers are very interested in CAS and its jurisprudence but generally neither familiar with nor particularly interested in such things as statistics, network analysis or machine-learning-assisted text analysis. I have therefore sought to strike a balance where I try as far as possible to concentrate the main text on legal questions and legal implications. That has, however, not always been possible, and I thank in advance for the reader's patience if I at times geek out. However, I am hoping that this book may also provide something to readers that are interested in empirical legal studies, arbitration law and transnational law.

Having conducted and presented empirical legal studies for some time, I have received different types of responses and I expect the same will be true for this study. This book is not intended to provide and does not provide answers to all questions relating to CAS, nor will it provide the final answers to the questions that it seeks to answer just because it is based on empirical evidence. I hope that this book can inspire and assist further research into CAS and its jurisprudence.

Paris, France Johan Lindholm
July 2018

Contents

Abbreviations

ADD	Anti-Doping Division
AHD	Ad Hoc Division
AOC	Australian Olympic Committee
ATF	Arbitration Tribunal for Football
BAT	Basketball Arbitral Tribunal
BOA	British Olympic Committee
CAS	Court of Arbitration for Sport/Tribunal arbitral du sport
CAS Code	The Code of Sports-related Arbitration
CJEU	Court of Justice of the European Union
CONI	Comitato Olimpico Nazionale Italiano (Italian Olympic Committee)
CPC	The Swiss Civil Procedure Code
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
FEI	Fédération Equestre Internationale
FFTri	Fédération Française de Triathlon
FIFA DRC	FIFA Dispute Resolution Chamber
FIFA RSTP	FIFA Regulations for the Status and Transfer of Players
FINA	Fédération Internationale de Natation Amateur
FIS	Fédération Internationale de Ski
FISA	International Rowing Federation
IAAF	International Association of Athletics Federations
IBA	International Bar Association
ICAS	International Council of Arbitration for Sport
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICF	International Canoe Federation
ICSID	International Centre for Settlement of Investment Disputes

IF	International Sport Federation
IIHF	International Ice Hockey Federation
IOC	The International Olympic Committee
ITU	International Triathlon Union
LSHG	Ligue Suisse de Hockey sur Glace
New York Convention	The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Award
NOC	National Olympic Committee
PCA	Permanent Court of Arbitration
PILA	The Swiss Private International Law Act of 1987
SCOTUS	United States Supreme Court
SFT	Swiss Federal Tribunal (Bundesgericht/Tribunal federal)
SGB	Sports governing body, i.e. associations and corporations, that organize and govern sport through regulations, decisions and agreements
TFEU	Treaty on the Functioning of the European Union
UCI	Union Cycliste Internationale
USADA	United States Anti-Doping Agency
WADA	The World Anti-Doping Agency
WADC	The World Anti-Doping Code

Part I
Introduction

Chapter 1
Cour Suprême du Sport Mondial

Abstract More than thirty years have passed since CAS was created. During those three decades, CAS has evolved from a relatively marginal arbitration institution to the international "supreme court" for sports that decides many of the most important cases in sports and in doing so has a profound effect on sports more generally. CAS is also one of the key actors driving the establishment and continued development of arguably one of the best examples of a transnational legal order, the lex sportiva. This warrants an in-depth analysis of CAS as an institution, the actors involved in its activities, and its decisions. This chapter introduces CAS and the book. It describes the questions that the book seeks to answer and the theoretical framework from which it departs. It then goes on to describe the data and the methods used to study that data. This includes, in particular, a brief introduction to some of the key concepts of network analysis.

1.1 The First Thirty Years

The idea of establishing an international arbitration tribunal to handle sports-related disputes was introduced in 1981 at the XI Olympic Congress in Baden-Baden, Germany, by the then recently-appointed president of the International Olympic Committee (IOC), Juan Antonio Samaranch. The next year, during its 85th session in Rome, the IOC established a working group entrusted with the task of developing an arbitration court for sport. The year after that, on 6 April 1983 in New Delhi, the IOC ratified the statutes of the Court of Arbitration for Sport (CAS)[1] and on 30 June 1984 CAS commenced its activities in Lausanne, Switzerland.

These may not seem like extraordinary events. CAS was not an entirely new or unique type of institution. On the contrary, the practice of resolving disputes

[1] CAS also has an alternate but equally official French name, le Tribunal arbitral du sport or TAS. For consistency and clarity, I will only refer to the institution's English name, including when citing its decisions.

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through arbitration rather than in ordinary national courts is so old that its origin is "lost in obscurity"[2] and the national and international legal framework governing arbitration courts, such as the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Award (the New York Convention), was in place long before CAS.[3] Indeed, in a way, CAS was and still is but one among several international arbitration institutions.[4]

Nor did sports stakeholders receive CAS with extraordinary enthusiasm.[5] CAS's initial workload must accurately be described as quite modest: during its first decade in existence, CAS issued on average about three decisions per year.[6] This initially quite humble level of operations was likely somewhat of a disappointment to those who were hoping and expecting great things of CAS. This included Samaranch who intended for CAS to become a true "cour suprême du sport mondial,"[7] a supreme court for world sports, or "a kind of Hague Court in the sports world."[8] This was a bold ambition and a challenge for CAS to live up to.

However, every court needs and deserves time to establish itself.[9] As expressed by the head of the working group developing CAS and its first president, Kéba Mbaye,[10] shortly after the establishment of the institution, only the future would be able to reveal whether CAS's creation was cause for celebration.[11] We now find ourselves some distance into that future as CAS has been operational for thirty-four years.[12] While CAS is still quite young compared to many dispute resolution institutions, sufficient time has passed to both warrant and enable a description and evaluation of how it has fared thus far.[13]

This book seeks to provide such a description and evaluation, focusing both on CAS as an institution, its jurisprudence, and the actors involved. This entails,

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[2] Wolaver 1934, p. 132. Cf. Emerson 1970, pp. 155–156. By the time of the middle ages the practice was well-established and regulated in many jurisdictions. See e.g. Noussia 2010, p. 11.

[3] Blackaby et al. 2015, pp. 4–6. See further Sects. 2.1 and 10.1.

[4] Mbaye 2006, p. 19.

[5] Cf. Casini 2011, pp. 1321–1322.

[6] See further Sect. 3.3.

[7] Quoted in Mbaye 2002, p. xii. See also SFT's decision 27 May 2003 in case 4P.267–270/2002, 129 ATF 445 (*Lazutina & Danilova v. IOC*), para 3.3.3.3.

[8] IOC President Juan Antonio Samaranch's opening speech at the 85th session of the IOC.

[9] See Sect. 3.3. See also Hess 2015, pp. 59–60.

[10] In accordance with Juan Antonio Samaranch's vision, Kéba Mbaye was recruited from the International Court of Justice.

[11] Mbaye 2006, p. 19.

[12] However, this book focuses on the first 30 years, i.e. the period between 1984 and 2014. See further below Sect. 1.5.

[13] That being said, this book does not represent the first endeavor to evaluate CAS's progress. See e.g., in chronological order, Mbaye 2002, pp. xi–xii (concluding after eighteen years that the CAS had made remarkable, extraordinary, and rapid progress towards its goals); Yi 2006, p. 339 ("After twenty-two years, Juan Antonio Samaranch's dream is reaching fruition."); Reilly 2012, p. 80 ("Having celebrated its 25th birthday in 2009, the CAS is today firmly established as the Supreme Court for sport internationally.").

among other things, studying the litigants that bring disputes before CAS and the arbitrators that resolve those disputes, identifying and analyzing structures among these actors and in CAS's jurisprudence, and examining how CAS and its jurisprudence has developed over time to identify trends and shifting tendencies.[14] In this regard, this book can perhaps be described as a sort of biography of a legal institution, detailing its life thus far, identifying key characteristics and key moments. In doing so, we will go back and forth between, on one hand, describing CAS and its jurisprudence on a general or systematic level and, on the other, diving more deeply into specific episodes, decisions, actors, and issues.

One thing that characterizes this book and distinguishes it from most other studies of CAS, as well as from many studies of other judicial institutions,[15] is its relatively heavy reliance on empirical data and quantitative analysis. In this sense, this book can be described as an empirical inquiry into CAS and its jurisprudence. However, as explained in greater detail later in this chapter, the empirical approach is integrated with more traditional legal theory and methods for the purpose of achieving a richer and more complete understanding of CAS and its jurisprudence. Also, more fundamentally, the study relies on more traditional legal theory and scholarship, which also guides the choice of research questions.

1.2 Studying the Judge: CAS as an Arbitration Court

Why should we be interested in studying CAS and its jurisprudence? The first reason, which is perhaps the reason that is most obvious to lawyers, is that CAS constitutes a powerful dispute settlement institution that decides many important cases in the field of sports. CAS plays a particularly significant role when it comes to sports-related disputes involving high-level competition, such as the Olympic Games, or large amounts of money, such as football players transfers. Thus, the impact that CAS exerts on sports and its stakeholders through its decisions is direct, concrete, and significant.

One of the reasons for establishing CAS as a "supreme court for international sports"[16] was to unify all sports under a common dispute resolution body that would ensure fair, equal, and consistent enforcement of sports rules across all

[14] As explained in greater detail below, this book seeks to cover the development from CAS's inception to the end of 2014.

[15] There are, however, noteworthy exceptions, e.g. Drahozal and Naimark 2002; Hansford and Spriggs II 2008; Segal et al. 2005. My own previous research includes several studies where empirical data was used to describe and analyze the jurisprudence and method of the Court of Justice of the European Union (CJEU). See e.g. Derlén et al. 2013; Derlén and Lindholm 2014, 2015, 2016, 2017a. Where appropriate, this book draws on the experiences of previous empirical research of other judicial institutions, including for the purpose of comparison.

[16] See above Sect. 1.1.

nations and all sports.[17] In other words, one of the main purposes of CAS is to establish an international level playing field with regard to sports adjudication. In this sense, CAS has a clear place in the preexisting and well-established international structure where sports is organized on a sport-by-sport basis by federations and other sports governing bodies[18] (SGBs) on national, regional, and international levels. Within this structure, CAS has an internal, coordinating, and harmonizing role. CAS also plays an important role in legitimizing this structure and its claim for self-governance to external actors, such as political institutions and courts.

In this manner, how CAS functions and acts has far-reaching implications for its own legitimacy and the legitimacy of organized sports more generally. This is particularly clear when it comes to CAS's involvement in disputes between, on one hand, SGBs and, on the other, individual clubs and athletes. In such cases, CAS acts as an arbiter in a conflict between, on one hand, a rule- and decision maker and, on the other, those governed by those rules and decisions, not entirely dissimilar to the role played by national courts resolving disputes between public entities and individuals.[19] CAS's ability and willingness to resolve such disputes in a fair, competent, independent, and consistent manner can significantly impact not just the legitimacy of CAS but also of SGBs and organized sports more generally, both in the eyes of other sport stakeholders (thereby enhancing the internal legitimacy of the system) and in the eyes of the general public, politicians, ordinary courts, corporations, and other external actors (thereby enhancing its external legitimacy).[20] For these reasons, one of the aims of this book is to describe how CAS is organized and operates, and to evaluate this from the perspective of such fundamental values as fairness, competence, independence, and consistency.

In carrying out this examination, we will primarily study CAS and its jurisprudence on a general level, looking for trends and tendencies, in a manner that is likely more or less familiar to most lawyers.[21] However, like other courts and dispute resolution institutions, CAS is not at its core a building or an entity but ultimately a collection of individuals interacting with each other. Studying CAS and its jurisprudence should therefore include and will include studying social relations between different actors – most importantly between CAS arbitrators, between parties before CAS, and between arbitrators and parties – and the characteristics of different actors, particularly those that exert a particularly high degree of influence over CAS and its decisions.

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[17] Cf. McLaren 2001, pp. 380–381 (specifically discussing the role of CAS when it comes to combating doping).

[18] Associations, corporations etc. that organize and govern sport through regulations, decisions, and agreements, e.g. national federations, international federations, the IOC, national Olympic Committees, and the World Anti-Doping Agency (WADA).

[19] See further Chap. 10.

[20] Cf. McArdle 2015, pp. 19–35.

[21] Even if the use of a combination of more traditional legal methods and empirical methods to carry out that examination may perhaps be less familiar to some.

These parts of the study are inspired by existing research on international arbitration courts, including research conducted by scholars in the fields of law, sociology, and international relations.[22] One might therefore say that this book in parts adopt not only an empirical approach but also a multidisciplinary approach to CAS and its jurisprudence. Understanding how actors involved in CAS's activities interact, what characterizes those who participate in and exercise influence over CAS and its jurisprudence, and these actors' tendencies adds depth to the description but also, and more importantly, has direct bearing on CAS's legitimacy, how sport-related disputes are resolved, and the development of international sports law more generally.[23]

This book focuses squarely on CAS. I nevertheless hope that it can also make a modest contribution to existing knowledge of how arbitration and arbitration institutions function generally. Even though arbitration is an old and well-established form for resolving disputes,[24] existing knowledge of how arbitration courts work is limited.[25] Although it is by no means universal and absolute, one major reason why parties traditionally have elected to resolve their disputes through arbitration is the confidentiality of the proceedings and the resulting awards.[26] As a consequence, studying how arbitrators operate and reach their decisions has been likened to studying a black box.[27] Although arbitration courts have generally become more transparent and therefore more accessible to researchers,[28] CAS is a comparatively transparent arbitration institution. The fact that a substantial portion of CAS's jurisprudence is publicly available and considered in this book gives extensive insight into how CAS and, perhaps, other arbitration institutions function.[29]

1.3 Studying a Legal Bumblebee: CAS and the Development of a Transnational Legal Order

A second major reason motivating this study is the role that CAS and its jurisprudence play in the development of a transnational legal order, often referred to as lex sportiva.[30] There is a steadily increasing wealth of legal literature

[22] See Chap. 9.

[23] Schill 2012.

[24] See above Sect. 1.1.

[25] Drahozal 2003.

[26] Blackaby et al. 2015, p. 30.

[27] See e.g. Berger 2013, p. 7; Rogers 2006, p. 1345; Tucker 2016.

[28] See below Sect. 1.5.

[29] While I will be drawing on existing research of other arbitration institutions for understanding and evaluating CAS, I generally leave to experts on other arbitration institutions to determine whether the findings made here regarding CAS are generalizable or valid for those other institutions.

[30] However, as explained in more detail immediately below, the term lex sportiva is somewhat problematic as it is ambiguous and used in various ways.

discussing transnational legal orders[31] or, as they are alternatively referred to, private legal orders,[32] a national law,[33] or "private law beyond the state."[34] To claim that something constitutes a transnational legal order essentially means claiming that it is a legal order created by private institutions, not governed by national legal systems and that is in this regard autonomous, with norms applying across nations.[35] To use Teubner's words, the development of "global law without a state."[36]

There are innumerable candidates for transnational legal order's in the world. However, much of the existing literature has focused on three: the (new) lex mercatoria (the law merchant), the lex digitalis (the law of the internet), and the lex sportiva (the law of sports).[37] Despite appearances, the term lex sportiva is neither old nor proper Latin but relatively recently created from the term lex mercatoria.[38] By making this connection, lex sportiva positions itself in the context of transnational legal orders and by way of comparing itself to lex mercatoria, lex sportiva draws on the pedigree of its older and more well-established cousin.[39] While this book can hopefully make some small relevant contribution to our understanding of transnational legal orders more generally,[40] its study object is limited to lex sportiva.

CAS and its jurisprudence is not only a possible object of study when exploring transnational law but a particularly well-suited one. As one author puts it, "CAS represents one of the world's more successful attempts at bringing order to transnational issues."[41]

But what exactly is meant by lex sportiva? The concept of transnational legal orders is by itself quite complex and elusive. However, the term lex sportiva is additionally problematic as it is used to refer to different things and not always with great precision.[42] Although some internal differences can be detected, it is possible to discern two main uses of the term lex sportiva.

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[31] See generally Jansen and Michaels 2008.

[32] See e.g. Teubner 2002.

[33] See e.g. Michaels 2007.

[34] See e.g. Jansen and Michaels 2008.

[35] See e.g. Foster 2003, p. 2.

[36] Teubner 1997.

[37] For an introduction and comparison of the three, see Vieweg and Staschik 2015, pp. 34–36. The proposition that a transnational legal order was developing in sports was supposedly first put forth by Giannini in 1949. See Wax 2015, p. 147.

[38] In CAS 98/200, *AEK Athens*, quoted immediately below, CAS also expressly invokes lex mercatoria.

[39] Beloff 2005, p. 49; Erbsen 2006, p. 441; Latty 2011, p. 37; Siekmann 2011, p. 4.

[40] As some of the findings made herein may be applicable to other private legal orders as well.

[41] Yi 2006, p. 290.

[42] See e.g. Erbsen 2006, p. 441 ("Commentators do not agree on what Lex Sportiva means, but many share a belief that it exists."); Vieweg and Staschik 2015.

The first main use focuses heavily on CAS and the normative impact of its jurisprudence. Somewhat simplified one could say that this use of the term, which is the narrower of the two, primarily views lex sportiva as "judge-made sports law."[43] Under this definition, lex sportiva refers to a number of (general) principles that CAS has identified, developed, or created and expressed in its jurisprudence.[44] An early example of this view can be found in CAS's decision in *AEK Athens*:[45]

> Sports law has developed and consolidated along the years, particularly through the arbitral settlement of disputes, a set of unwritten legal principles – a sort of lex mercatoria for sports or, so to speak, a lex ludica – to which national and international sports federations must conform, regardless of the presence of such principles within their own statutes and regulations or within any applicable national law, provided that they do not conflict with any national "public policy" ("ordre public") provision applicable to a given case.

CAS in this instance adds confusion by using the term lex ludica in *AEK Athens* but in subsequent decisions replaces it with the term lex sportiva while seemingly referring to essentially the same thing.[46] While it is not always clear what is meant by the term lex sportiva, when CAS uses the term in its decisions it frequently appears to refer to the body of rules and principles recognized in its previous decisions.[47] There are also many examples of legal researchers using the term in essentially the same way.[48]

In *AEK Athens* and many subsequent decisions, CAS emphasizes that these unwritten legal principles apply globally to all stakeholders in sports regardless of sports rules to the contrary. Thus, one of the key characteristics of lex sportiva, under this narrower definition, is the superior position of these principles in the hierarchy of sports norms. In this way, the term lex sportiva, as understood here, is closely connected to CAS's above-mentioned mission to provide fair, equal, and consistent enforcement in the world of sports.[49]

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[43] Casini 2011, p. 1319.

[44] Which of these verbs most accurately captures reality depends on the particular situation and perhaps also on the perspective of the observer. See further Chap. 7.

[45] CAS 98/200, para 156.

[46] CAS 2002/O/373, *Scott*, para 14 ("CAS jurisprudence has notably refined and developed a number of principles of sports law, such as the concepts of strict liability (in doping cases) and fairness, which might be deemed part of an emerging 'lex sportiva'."). Whether any relevant distinction can be made between lex sportiva and lex ludica has been the subject of scholarly discussion, see e.g. Foster 2006; Parrish 2012; Siekmann 2011. Foster uses the term "lex ludica" to refer to sporting rules in a narrow sense, "the actual rules of the game", including formal rules and regulations and "equitable principles of sports". Foster 2006, para 8.

[47] See e.g. CAS 2002/O/410, *GFA v. UEFA*, p. 4; CAS 2002/A/417, *Witteveen*, para 84; CAS 2004/A/707, *Millar*, para 53; CAS 2004/A/776, *FCP v. FIRS*, para 16; CAS 2007/A/1424, *FEB v. FIQ*, para 17; CAS 2008/O/1455, *Boxing Australia v. AIBA*, para 42; CAS 2010/A/2268, *I v. FIA*, para 75; CAS 2011/A/2646, *Club Randewrs de Talca*, para C.1.ii.

[48] See e.g. Erbsen 2006; McLaren 2001; Mitten and Opie 2010; Nafziger 2004; Wax 2015, p. 148.

[49] Cf. Reeb 1998, p. xxxi ("Centralizing the resolution of sports disputes within the CAS should encourage the harmonization of certain major legal principles which are still applied haphazardly by the top sports bodies…").

There is some disagreement regarding which principles should properly be included in lex sportiva thus defined and differences in opinion reveal more deep-rooted differences in how lex sportiva is understood. Many of the principles that CAS has recognized and applied in its jurisprudence are not unique for the area of sports but rather general legal principles found in various national or international legal orders.[50] CAS, SGBs, and other sport stakeholders are in practice required to respect these general legal principles, at least if they want to be sure that their rules, decisions, and agreements will survive courts reviewing them. This most importantly includes certain basic fundamental rights. CAS has however also recognized and applied a number of other general legal principles, including for examples certain contractual principles and public law principles. These principles have become part of the norms governing sports through a process of borrowing and sometimes modifying norms developed in national and international legal orders.[51] These principles are frequently covered by the term lex sportiva, not least when CAS uses it.

However, some argue that including all these principles in the term lex sportiva overly extends it and advocate using a narrower definition that only covers principles that are uniquely applicable in the field of sports. These commentators frequently focus on the transnational nature of lex sportiva and, in particular, the autonomy of transnational legal orders vis-à-vis national legal orders. From this perspective, one of the key advantages of lex sportiva is its ability to enhance the autonomy of sports and its governing bodies[52] and the application and enforcement of general legal principles does not support the existence of a legitimate, independent, and unique transnational legal order in the field of sports.[53] Depending on what level of uniqueness one requires – or, differently phrased, what level of similarity with existing legal principles one allows – on may end up with a very narrow definition of lex sportiva that contains little substantive content.[54] However, one can in CAS's jurisprudence identify certain principles that are more unique to

[50] See e.g. CAS 98/200, *AEK Athens*, para 156 ("Certainly, general principles of law drawn from a comparative or common denominator reading of various domestic legal systems and, in particular, the prohibition of arbitrary or unreasonable rules and measures can be deemed to be part of such lex ludica."). See further Chap. 7.

[51] Beloff et al. 2012, pp. 308–309; Beloff 2005, p. 52 ("in locating these principles and rules, sports law borrows, magpie-like, from private law as well as public, appropriately mixing Latinisms with French phrases, civil and common law concepts."); Hess 2015, pp. 68–69; Latty 2007, pp. 305–323.

[52] See e.g. Beloff 2005, p. 53 ("one of [lex sportiva's] key objectives is to immunise sport from the reach of the law, to create in other words a field of autonomy within which even appellate sports tribunals should not trespass.").

[53] See e.g. Beloff 2005; Foster 2003; Foster 2006, paras 4–9; Vieweg and Staschik 2015, pp. 23–24.

[54] See e.g. Erbsen 2006 ("CAS's nominally unique Lex Sportiva is really an amalgam of general due process and equity norms tailored to sporting disputes…" Ibid. p. 454.).

sports,[55] and that can be referred to as sui generis principles[56] or *principia sportiva*[57], such as "the fundamental principle of sport that all competitors must have equal chances…"[58]

The theory and perspective that drives this narrowing of lex sportiva to only include sui generis sports principles are closely related to the theory and perspective that drives the second and broader use of lex sportiva: lex sportiva as a transnational legal order. This use of the term includes, besides the general principles discussed above,[59] also other transnational sports rules.[60] Thus, under this definition of lex sportiva, CAS is one among several important actors in the field of sports that contribute to the creation of an autonomous, global, and transnational legal order. Similarly, under this view, CAS's jurisprudence is but one of the sources of that legal order, albeit a rather important one. Other important actors include national, regional, and international SGBs and other sources include the sports rules they establish, that is written, formalized norms established by SGBs in the shape of for example statutes, charters, rules, codes, and regulations, which if they achieve global application constitute an important source of lex sportiva in this broader sense. The extensive inclusion of written rules established by institutions sets lex sportiva apart from more "spontaneous" legal orders, such as lex mercatoria.[61] From this perspective, CAS and other actors cooperate in responding to the need of a system of internationally applicable, non-state-based rules and principles governing sports.[62] Consequently, lex sportiva can be understood as a body of anational rules and principles that allows sport-related activities and disputes to be disconnected from the rules and principles of various national legal systems.[63]

CAS's role in relation to these regulations is not limited to interpretation and application. As explained by Foster, CAS's functions include identifying best practice standards from these regulations.[64] Some of these best practices are given

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[55] Beloff et al. 2012, p. 309; Hess 2015, pp. 67–68; Latty 2007, pp. 323–332.

[56] See Foster 2003, p. 9. Cf. Panagiotopoulos 2013, p. 132 (describing lex sportiva as a "sui generis sporting legal order").

[57] Latty 2007, p. 323.

[58] CAS 2001/A/317, *Aanes*, para 24.

[59] Whether this only includes principles that are unique to sports or also a broader range of principles varies.

[60] See e.g. Buy et al. 2015, pp. 140–141; Casini 2011, p. 1319; Duval 2013, pp. 827–828; Latty 2011, p. 37.

[61] Buy et al. 2015, pp. 140–141.

[62] See e.g. CAS 2006/A/1082 & 1104, *Barreto Càceres*, para 36 ("…il convient de passer outre les règles étatiques internes qui seraient contraires aux principes et au cadre juridique des règles que la FIFA a pour but d'instaurer. Dans le domaine particulier du droit du sport, il est important de pouvoir recourir à des normes transcendant tel ou tel système étatique particulier. Cette possibilité de développer des règles dégagées, dans la mesure du possible, de toute référence à un système de normes étatiques particulières, répond en effet à un besoin spécifique découlant de l'organisation du sport.").

[63] Rigozzi 2005, p. 628.

[64] Foster 2006, para 6.

the status of general principles and are applied as part of lex sportiva,[65] for example in the area of doping based on the World Anti-Doping Code (WADC).[66] Best practices are also given broad force through SGBs implementing them in their own rules and regulation.[67]

Using the same term with different meanings does of course confuse things, but it does not appear possible to solve this issue by selecting one definition as inherently superior. Rather, it seems that the divergence stems from a difference in perspective.[68] If one is primarily concerned with the norms governing sports and their application in individual cases, as is for example primarily the situation for CAS panels, the first, narrower definition is quite sufficient and a broader definition complicates matters unnecessarily. However, if one's interest in lex sportiva is rooted in an interest in the autonomy of sports or the nature of law more generally, only the latter, broader definition will suffice.

I find it difficult not to be fascinated by these issues and this discussion considering the radical implications. The concept of transnational legal orders is problematic under traditional legal theory as it is difficult, if not outright impossible, to reconcile transnational legal orders with the well-established state-based theory of law that has dominated modern legal thinking.[69] The claim that there are self-regulatory private-based orders constitutes a strong and quite controversial challenge to the Westphalian connection between law and state,[70] and to the division between private and public entities.[71] If private actors engaged in a particular field are capable of establishing their own legal order, it can hardly be true that states have a monopoly on lawmaking.[72] National courts have consequently been unwilling to accept the existence of private legal orders, including lex sportiva. For example, in *Baumann* the German Oberlandesgericht Frankfurt unequivocally stated that there is no such thing as a lex sportiva independent of national law,[73] and similar stances

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[65] CAS 2002/A/373, *Scott*, para 14.

[66] See e.g. CAS 2005/C/841, CONI, para 44 ("based on the WADC, which constitutes more and more a fundamental 'lex sportiva', a sanction is possible if there is an anti-doping rule violation…"); CAS 2008/A/1545, *Anderson*, paras 65–66.

[67] Foster 2006, para 6.

[68] Cf. Nafziger 2015, pp. 161–162.

[69] See e.g. Teubner 2002.

[70] Tuori 2011, pp. 296–304 ("The most serious challenges to links between law and state arise from legal relationships transcending nation-state boundaries. Phenomena questioning the state's internal sovereignty, such as self-regulation of the economy and sports, also tend to have a transnational background and transnational links." Ibid. p. 296).

[71] Teubner 2008.

[72] See e.g. Anter 2014, pp. 173–188 (regarding the connection between the state's legitimate monopoly on force and its legal monopoly).

[73] OLG Frankfurt's decision 18 April 2001 in case 13 U 66/01 (*Baumann v. DLV*), para 56 ("eine von jedem staatlichen Recht unabhängige lex sportiva gibt es nicht.").

have been taken by Swiss[74] and English[75] courts. There are thus good arguments why lex sportiva, in the sense of a "true" transnational legal order that is actually and completely autonomous of national law, does not and cannot exist.

However, the fact that the notion of law as state-based has thoroughly dominated our understanding of law for a long time does not preclude that notion from shifting gradually. Researchers have previously pointed out that the idea of law as being exclusively state-based is strongly challenged by many real-world phenomena,[76] and as explored in this book there are some tangible indications of the existence of such a private legal order in the area of sports.

Thus, researchers studying lex sportiva are confronted with a seemingly paradoxical situation. On one hand, national courts and traditional legal theory dictate that private legal orders do not and cannot exist, but the researchers' observations do not always clearly fit that theory. Much like bumblebees, according to a popular myth,[77] lex sportiva can be observed doing things that it should not be able to do.[78]

This book departs from and engages with the theory of lex sportiva presented above. However, it does not aim to definitively answer whether lex sportiva constitutes a transnational legal order.[79] Rather, we will explore how CAS and its jurisprudence contribute to the establishment of lex sportiva because how CAS functions and acts support the creation and legitimacy of a transnational legal order in the sports area.[80]

In doing so, a number of questions will be considered. Is CAS independent and impartial in relation to SGBs and other sport stakeholders? The answer to this question is crucial for both the internal and external legitimacy of lex sportiva. They are also closely related to respecting the principle of legality, which is indispensable in an order claiming to be a legal order.[81] Does CAS otherwise support the effective adjudication of disputes and enforcement of rules, regulations, and principles in the area of sports? In order to make a credible claim for the existence of an autonomous

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[74] SFT's decision 20 December 2005 in case 4C.1/2005, BGE 132 III 285 (*X. AG v. Y*), pp. 288–289 ("Von privaten Verbänden aufgestellte Bestimmungen stehen vielmehr grundsätzlich zu den staatlichen Gesetzen in einem Subordinationsverhältnis und können nur Beachtung finden, so weit das staatliche Recht für eine autonome Regelung Raum lässt… Sie bilden kein 'Recht' im Sinne von Article 116 Abs. 1 IPRG und können auch nicht als 'lex sportiva transnationalis' anerkannt werden, wie dies von einer Lehrmeinung befürwortet wird").

[75] See Foster 2003, p. 14.

[76] See e.g. Barents 2004, pp. 17–19; Duval 2013, p. 823; MacCormick 1999; Schultz 2014, pp. 4–6.

[77] The often repeated "fact" that bumblebees should not be able to fly according to the laws of physics, is in fact a myth. See e.g. Zetie 2003.

[78] See also Paulsson 2011, pp. 315–317.

[79] See e.g. Hess 2015, p. 61 ("Lex sportiva is assumed to be an autonomous legal order…"). I am doubtful about my ability to provide a valuable contribution to a field where much impressive research has already been done, see e.g. Casini 2011; Erbsen 2006; Foster 2003; Latty 2007.

[80] In the second, broader sense of the term. For a similar reasoning, see e.g. Panagiotopoulos 2011.

[81] See also Sect. 7.2.

legal order there must be institutions with powers necessary to transform it into reality. To what extent does CAS define and contribute to the substantive content of lex sportiva? Rules are the basic building block of a legal order and no legal order can exist without rules.[82] Does CAS act in a consistent, transparent, and foreseeable manner? Does CAS and its jurisprudence contribute to structure and unity? Rules do not by themselves a system make; it is when rules are organized in a consistent and coherent manner that a system starts to take shape.[83] Consistency and predictability is of central importance for the legitimacy of the order as a whole.[84]

1.4 Descriptive and Critical, Doctrinal and Empirical

As already touched upon, a range of methods and perspectives will be applied and combined to achieving the aims of this book. This book is in many regards quite descriptive, and intentionally so. For example, it aims to describe how requests turn to decisions and how this process has developed over time,[85] what types of issues CAS resolves,[86] and what characterizes CAS arbitrators[87] and parties that come before CAS.[88] These types of empirical questions are somewhat different than the normative questions that legal researchers traditionally and primarily engage with. That is not to say that normative questions cannot be empirical questions. On the contrary, to ask what is the law governing a particular issue (*de lege lata*) is to ask an empirical question.[89] However, while those types of question can be and predominantly are resolved using a doctrinal approach, at least some of the empirical questions posed in this book requires using different methods. For example, to what extent female arbitrators are represented in CAS is an empirical question with a quantifiable answer that is attainable given sufficient and accurate data.[90]

In order to answer that question and many of the other questions posed in this book, a combination of methods commonly used in social science will be

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[82] It is, however, equally obvious that unlike national legal orders, lex sportiva, as a "specialized legal order" neither needs nor aims to be "complete" in the sense that it contains a rule for every situation.

[83] In formulating these questions, I have drawn generally on the thoughts of Duval 2013; Kerchove & Ost 1994; Schultz 2014.

[84] Franck et al. 2017, p. 1128. Cf. Brower and Schill 2009, p. 473 (discussing investment-treaty arbitration).

[85] See Sects. 3.3–3.6.

[86] See Chap. 6.

[87] See Chap. 9.

[88] See Chap. 10.

[89] To state that the law *is* one thing or the other is to make a factual or empirical statement or, one could argue, a prediction.

[90] See Sect. 9.2.2.

employed, including in particular statistical analysis, network analysis, and text mining. In doing so, I hope to demonstrate to the reader that such methods are valuable, if not indispensable, for answering not only questions of a more socio-legal nature such as the one in the example above, but also many core legal questions. For example, as demonstrated below it is possible to empirically observe and quantify a particular decision's role as precedent and how this shifts over time.[91] To answer this and similar questions, this book spends quite extensive attention on how CAS (or perhaps more accurately how actors involved with CAS) have actually acted as evidenced by the cases that were brought before it and how those cases were decided.[92]

I choose to describe this as empirical legal research in that it seeks to answer legal questions by capturing a legal reality. This is not particularly novel. Empirical questions and statements are relatively common in legal studies,[93] and can for example concern how law works, how changes in law affects the application of law, how courts interpret and apply the law, and how legal services are performed.[94] Nor is it necessarily uncontroversial. For example, it is an empirical fact that CAS delivered 309 decisions in 2014 and that that is exactly 103 times more decisions than it delivered in 1987.[95] Some of the empirical claims provided in this book are perhaps more controversial, for example that *Quigley* is CAS's premiere landmark decision.[96] However, they are not different in kind and should not be treated in a fundamentally different manner.

Nor are the research questions asked in this book particularly novel. Most of the questions have previously been asked by other researchers or are based on claims previously made by other researchers. In this regard, this study follows in the methodological footsteps of several, previous studies examining CAS and its jurisprudence.[97] What may however distinguish this study from some studies seeking to answer same or similar questions is the size of the material considered and, as a consequence, some of the methods used to study that material. Empirical legal research has become significantly more common in the last decade.[98] It allows us to empirically test theoretical statements about the law and to draw normative conclusions from empirically supported findings.[99]

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[91] See Chap. 5. See also Derlén and Lindholm 2017b.

[92] Although it takes a slightly different approach and asks some quite different questions, this book is in part inspired by Segal et al. 2005 who empirically examine the role of the Supreme Court of the United States (SCOTUS) in the American legal system.

[93] Epstein and King 2002, p. 3.

[94] See generally Cane and Kritzer 2010.

[95] See Sect. 3.3.

[96] See Sect. 5.3.

[97] See e.g. Bersagel 2012; Erbsen 2006; Foster 2006.

[98] See e.g. Cane and Kritzer 2010.

[99] Cahoy 2010, p. vi; George 2006, p. 146.

There are many arguments for conducting empirical legal research. One of them is to enhance the legitimacy of legal reasoning that may otherwise be viewed as a smokescreen, particularly by external actors (i.e. non-lawyers).[100] Empirical research supports the development of legal theory by allowing for testing and developing theories in and about law and helps to separate the normative from the descriptive.[101] To base our understanding of law and legal institutions on anecdotes is dangerous. While anecdotes can be accurate, reliable, and representative, they may also instead be atypical and misleading. In this sense, empirical data "contextualizes anecdotes."[102]

1.5 Data Collection, Confidentiality, and Public Access

In conducting empirically-based research, the quality of the research is dependent on the quality of the underlying data. In the case of this study, the primary underlying data is CAS's decisions.[103] One traditional characteristic of arbitration is that the proceedings and the awards are confidential, and from the litigants' perspective this was one of the advantages of arbitration over adjudicating disputes in ordinary courts.[104] However, the confidentiality of the proceedings and the awards is a major methodological challenge when studying arbitration tribunals, particularly when conducting quantitative research that requires a representative data sample. The level of transparency differs between arbitration institutions and in recent years there has been a trend towards increased transparency.[105] Collecting large, representative sets of arbitration awards can however still be problematic.

CAS proceedings and awards are to some extent guarded by confidentiality. The arbitrators participating in CAS panels are generally bound by confidentiality.[106] Moreover, according to the CAS Code, cases brought under Ordinary Arbitration Procedure[107] are as a general rule confidential but the proceedings and the awards can be made public "if all parties agree or the Division President so decides."[108] This binds all parties and includes any information relating to the dispute.[109] It is

[100] Posner 1995, p. 3.

[101] Heise 1999, pp. 813–814.

[102] Drahozal 2003, pp. 23–24; Franck 2007, pp. 13–14 (p. 14 quoted).

[103] However, we will also explore data on decisions by other sports dispute resolution institutions and the backgrounds of CAS arbitrators. See Sect. 4.3 and Chap. 9.

[104] See above Sect. 1.2.

[105] See e.g. Malatesta and Sali 2013; Rogers 2006; Smeureanu 2011.

[106] Article S19 CAS Code ("CAS arbitrators and mediators are bound by the duty of confidentiality, which is provided for in the Code and in particular shall not disclose to any third party any facts or other information relating to proceedings conducted before CAS.").

[107] See further Sect. 2.2.

[108] Article R43 CAS Code.

[109] Mavromati and Reeb 2015, p. 312.

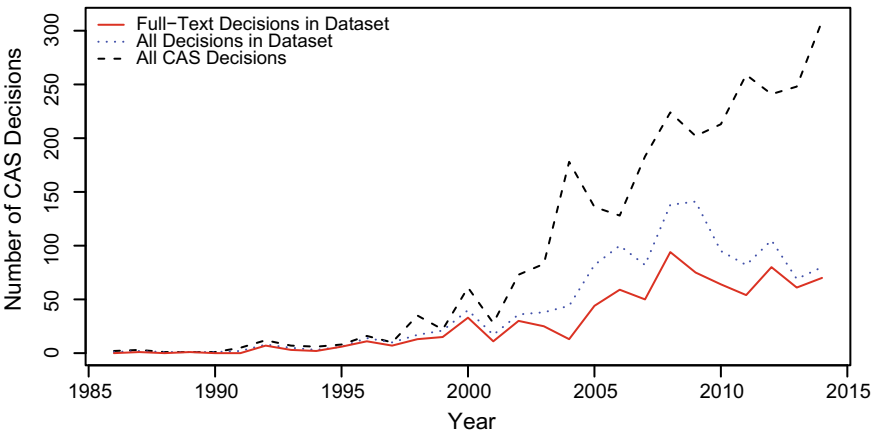

Fig. 1.1 Dataset Representativeness. [*Source* The author]

generally quite rare that the parties agree to make such awards public. At the time of writing, the CAS jurisprudence database contains 33 CAS decision in if we assume that cases brought under the Ordinary Arbitration Procedure. This is a rather low number considering that CAS received 602 such cases during the studied period. Overall, CAS ends up issuing an award in roughly two out of three requests.[110] Thus, if we assume that cases brought under the Ordinary Arbitration Procedure follow the overall trend we can estimate that less than one in ten decisions issued under the Ordinary Arbitration Procedures has been made public. This is a quite modest publication rate. However, it does provide at least some public access to these CAS decisions.

The rules governing the confidentiality of cases brought to CAS under the Appeals Arbitration Procedure[111] are essentially reversed compared to the rules governing the Ordinary Arbitration Procedure: they are as a general rule made public subject to an opt-out system. According to the CAS Code, in these cases "[t]he award, a summary and/or a press release setting forth the results of the proceedings shall be made public by CAS, unless both parties agree that they shall remain confidential."[112] While CAS does not publish all its decisions rendered under the Appeals Arbitration Procedures, it does publish a significant portion. This allows for and encourages the systematic creation of and adherence to jurisprudence.[113]

The term "published CAS decision" is in this book used broadly to refer to all CAS decisions that I through my best effort was able to access in full text. This primarily includes decisions that CAS has actively made public, early on in the

[110] CAS, Statistics 2016.

[111] See further Sect. 2.2.

[112] Article R59 CAS Code.

[113] See Blackshaw 2012, p. 7.

CAS Digest and more recently through its online jurisprudence database.[114] These decisions can be considered published in a more narrow and official sense. However, the dataset also includes a number of decisions that are publicly accessible through other channels.

All in all, I have been able to collect and study 830 CAS awards and opinions, which for the sake of simplicity hereinafter will be referred to as "CAS decisions", issued between CAS's inception and the end of 2014. Because CAS sometimes combines several proceedings in a single decision the collected decisions reflect 946 requests for a decision. The decisions collected and considered in full text represent approximately 31 percent of all CAS decisions issued during the period in question.[115]

From the text of the CAS decisions collected I have been able to gather some information about a quite significant number of unpublished CAS decisions, that is CAS decisions rendered during the studied period that I were not able to access in full text. CAS frequently refer to its previous decisions in its decisions.[116] Such references frequently contain information about a rule or principle relied upon, but may also contain information about the parties, the procedure, the nature of the dispute, when the decision was rendered, and so on. Most of these references are to published CAS decisions, that is decisions included in the dataset. However, analyzing these references have also resulted in partial but reliable information about 295 additional, unpublished CAS decisions.[117] As discussed below, this quite extensive practice of referencing to unpublished decisions is problematic from a legal standpoint.[118]

Altogether, the combined body of published and unpublished CAS decisions considered here, altogether 1,125 decisions, represents almost 42 percent of all decisions issued by CAS during the studied period. The data thus includes a substantive share of all CAS decisions. It would obviously be preferable to consider every decision issued by CAS. However, as discussed above, the confidentiality of CAS proceedings and decisions does not allow this.

The data considered is on the whole likely to be quite representative for CAS's body of jurisprudence. For the purpose of evaluating data representability it is initially relevant to note that data considered is well distributed over time relative to the number of decisions issues by CAS.[119] Thus, it is unlikely that the data selection will cause the study to miss developments over time. It is also encouraging that the

[114] http://jurisprudence.tas-cas.org. Accessed 7 September 2018.

[115] According to statistics released by CAS it issued 2,695 decisions between 1986 and 2014. CAS, Statistics 2016.

[116] See further Chap. 4.

[117] When such references are discussed in the context of network analysis, they are referred to as "out-of-network references". This is the reason why certain reference to CAS decisions are below named "*Unknown*".

[118] See Sect. 4.5.

[119] See above Fig. 1.1 *Dataset Representativeness*.