

## LEX SPORTIVA AND LEX MERCATORIA

**Marios Papaloukas**

*Assist. Professor of Sports Law*

*Univiversity of Peloponnese, Attorney at Law, Greece*

**Abstract:** *In the early 90's the sports establishment attempted to introduce a special legal order called Lex Sportiva. Although it was the first time for sports, other sectors have been known to make efforts to introduce a global legal order. Many years before Lex Mercatoria was proposed by the commercial sector. However Lex Mercatoria lacks an authority with a coercive power to impose its rules and therefore it has to rely on national authorities. Lex sportiva on the other hand rejects any national intervention and possesses all the authority and coercive power needed in order to impose its rules. It emerges therefore as a set of rules of law of a universal nature.*

### **I. The Authority behind the Rules of Law**

There are many rules governing a person's behaviour. These can be moral rules, social rules etc. Of all these rules only some are so vital for society that must be upgraded to the status of legal rules. This upgrading however is not a simple procedure. Legal theory provides a set of requirements in order for any rule to be considered as a rule of law. All legal rules dictating human behaviour have the following characteristics:

1. They are of a general and abstract nature and they do not apply to a specific person.
2. They dictate the external behaviour of a person.
3. They are obligatory in the sense that a specific authority will ensure its application.
4. They are not issued by the persons they are imposed upon but by an «external» authority.

In that sense rules imposed by the same persons as the ones they are imposed upon as well as rules without the authority to impose them, they are of contractual nature, at best. For an institution to be considered a creator of law it must possess some sort of authority in order to be able to impose its rules without any «external» help. This authoritative power will also ensure the application of a Tribunal's decisions. Without authority and coercive power there can be no rule of law.

### **II. International Law and Global Law**

Legal provisions in order to acquire an international nature have to go through the decision procedure of sovereign State's governments. An international pro-

vision can be signed and adopted by a certain State and not by another. These provisions can be invoked before a Court of Justice against the former but not against the latter.<sup>1</sup> Global rules on the other hand have a more universal effect.<sup>2</sup> They are not left to the free will of those concerned. They are imposed on each and every one of them irrespective of whether they are adopted, signed or ratified by them. Compliance will be required even if the subject is not aware of their existence.

Therefore international law draws its power from national law and national sovereign governments. International law is generated based on the will of national governments. Global law on the other hand is imposed upon national governments. This means that global law in order to be enforceable it needs a coercive power that is of higher level than that of any national authority.<sup>3</sup>

### **III. Lex Mercatoria**

Nowadays, the most commonly known globalised sector is the economy. However, various sectors of society all over the world are developing a global law of their own. Classic examples thereof are ecology and human rights. In both these cases there are tendencies towards a legal globalization not merely in insulation from State institutions but even above or against State institutions. However Lex Mercatoria<sup>4</sup> is considered as the oldest and most successful example of a global law without a State. It is a transnational law governing economic transactions.<sup>5 6</sup>

All the rules applied to economic transactions all over the world appear to have the following features:

- They are a set of very general rules applied in a different manner on every case.
- They are applied for a very long period of time amongst merchants all over the world.
- They are applied in a uniform manner.
- The merchants applying these rules do so thinking they are following a rule of law.

---

<sup>1</sup>Panagiotopoulos, D. (2011). «Sports Law. Lex Sportiva & Lex Olympica». Ant. N. Sakkoulas Publishers. p. 148-149.

<sup>2</sup>Panagiotopoulos, D. (2011). «Sports Law. Lex Sportiva & Lex Olympica». Ant. N. Sakkoulas Publishers. p. 149-152.

<sup>3</sup>Panagiotopoulos, D. (2011). «Sports Law. Lex Sportiva & Lex Olympica». Ant. N. Sakkoulas Publishers. p. 132-152.

<sup>4</sup>Pampoukis, H., «Lex Mercatoria», A. N. Sakkoulas (in Greek), p. 17 ff.

<sup>5</sup>Panagiotopoulos, D. (2011). «Sports Law. Lex Sportiva & Lex Olympica». Ant. N. Sakkoulas Publishers. p. 128-132.

<sup>6</sup>Teubner, G., “Global Law without A State”, 1997, Brookfield: Dartmouth, p. 3-28

#### IV. Lex Mercatoria and the Rule of Law

Lex Mercatoria has developed from commercial practice over hundreds of years and enjoys the recognition in the private as well as the public sector.<sup>7</sup> It derives from private institutions and suggests that they have the power to impose their will on commercial relations. These commercial relations however are a part of the economic life. States claim a public interest on the economic relations of their subjects and therefore they are very reluctant to allow private entities to take over their rulemaking powers. Private stakeholders in the commerce sector cannot impose their will on a State and regulate in the field of commerce. They can only apply contractually agreed rules as well as customary rules. Furthermore, they do not possess the necessary coercive power to ensure the implementation of these rules. In case of a conflict they have to rely on State Tribunals (national or international). Even in cases of commercial arbitration, the implementation of the arbitration ruling is ensured by State authorities.<sup>8</sup>

The arguments against the existence of a Lex Mercatoria usually include the fact that commercial customs by themselves are incapable of creating law and that they can only do so if they are transformed into law by a formal act of a sovereign state.<sup>9</sup> This is the only way that its rules can acquire binding force and appear as a source of law.<sup>10</sup> Without a sanctioning power, all its features suggest nothing more than that lex mercatoria is a set of global customs. **Without the authority to be imposed on individuals, lex mercatoria would lack coercive power, a key feature in order to become a rule of law.** Even if national courts all over the world recognized its existence, still it could not be considered a separate legal order if a formal act of a national authority is required for it to be enforced.

#### V. Lex Sportiva and the Rule of Law<sup>11 12</sup>

Those wishing to relate to any part of the sports sector have to abide to all of its rules. The penalty for breaking the rules ranges from temporary to life-long suspensions. A suspension from the sports community for an athlete or for any

---

<sup>7</sup>Nafziger, J., «International Sports Law», International Publishers Inc., Adsey, New York, 2nd Edition, 2004, p. 49.

<sup>8</sup>Teubner, G., “Global Law without A State”, 1997, Brookfield: Dartmouth, p. 3-28

<sup>9</sup>Panagiotopoulos, D. (2011). «Sports Law. Lex Sportiva & Lex Olympica». Ant. N. Sakkoulas Publishers. p. 128-132.

<sup>10</sup>Teubner, G., “Global Law without A State”, 1997, Brookfield: Dartmouth, p. 3-28

<sup>11</sup>Panagiotopoulos, D., «Lex Sportiva: Sports Institutions and the Rule of Law», Sports Law Implementation and the Olympic Games, Ant. N. Sakkoulas Publishers. p. 33-45, also published in International Sports Law Review Pandektis, Vol. 5:3, p. 315-327..

<sup>12</sup>Panagiotopoulos, D. (2011). «Sports Law. Lex Sportiva & Lex Olympica». Ant. N. Sakkoulas Publishers. p. 102-152.

other professional in the sports business is often a career-ending punishment and always a life-changing experience. Due to the principle of monopoly, there is no other alternative for the outcast. Thus the global sports establishment based on its monopolistic status, its self governance as well as the exclusion penalty for any one not abiding to its rules, emerges as a global sports regime.

Inside this global sports regime, there is a central authority adopting rules (due to sports self-governance), that are imposed to all its subjects (due to the exclusion rule) and although an exclusion penalty theoretically could be perceived as nothing more than a dismissal from a position, in reality (due to the monopoly) it is a professional catastrophe.

Contrary to the rules of *Lex Mercatoria*, the rules of *Lex Sportiva* acquire binding force by the coercive power of sports authorities and they never need a formal act of a sovereign state.<sup>13</sup> <sup>14</sup>Quite the opposite in fact! Interventions from State authorities are never welcome<sup>15</sup> and as a rule perceived by sports authorities as a «*casus belli*».<sup>16</sup>

The most serious arguments invoked against the existence of *Lex Sportiva* is that its rules come from private institutions,<sup>17</sup> <sup>18</sup> that they are contractual in nature<sup>19</sup> and that *Lex Sportiva*'s exact content and boundaries are far too vague and uncertain.<sup>20</sup>

The highest sports authorities (e.g. the IOC) are more than international, they are global institutions. If sovereign states seen as national institutions can create international law then global institutions must be creating global law and not some kind of rules, inferior to that created by national institutions. The argument that its rules are contractual in nature can be debated by the fact that international law is also of contractual nature. After all according to the theory of

---

<sup>13</sup>Panagiotopoulos, D. (2011). «Sports Law. *Lex Sportiva* & *Lex Olympica*». Ant. N. Sakkoulas Publishers. p. 128-132.

<sup>14</sup>Panagiotopoulos, D. «International Sports Rules Implementation – Decisions Executability», *Marquette Sports Law Review*, Vol. 5:1, p. 1-12.

<sup>15</sup>See Panagiotopoulos, D. (2011). «Sports Law. *Lex Sportiva* & *Lex Olympica*». Ant. N. Sakkoulas Publishers. p. 107-122.

<sup>16</sup>See Nelson, A., «When, Where and Why does the State Intervene in Sport: A Contemporary Perspective», *Bond University, Sports Law e-journal*, 1st of July 2005. See also <http://www.philstar.com/sports/717298/government-intervention-sports-inescapable>

<sup>17</sup>See Foster, K., «Is there a Global Sports Law?», *Entertainment and Sports Law Journal*, May 2003.

<sup>18</sup>See Foster, K., «*Lex Sportiva*: Transnational Law in Action», Presented at International Conference on *Lex Sportiva*, Univeristas Pelita Harapan, Indonesia, September 2010.

<sup>19</sup>See Foster, K., «*Lex Sportiva* and *Lex Ludica*: The Court of Arbitration for Sport's Jurisprudence», *Entertainment and Sports Law Journal*, January 2006.

<sup>20</sup>See para. 124 of CAS 2005/C/976 & 986 FIFA & WADA, award of 21 April 2006.

social contract or political contract originating during the age of enlightenment, individuals have consented, either explicitly or tacitly, to surrender some of their freedoms and submit to the authority of a ruler (or to the decision of a majority), in exchange for protection of their remaining rights. Thomas Hobbes and Jean-Jacques Rousseau are among the most prominent of 17th and 18th century theorists of social contract.<sup>21</sup> According to these theories therefore even state authority is based on contract. In the same way it could be argued that there is a life-long, unrevokable contract among all stakeholders in the global sports society.

Lex Sportiva includes many rules from different sources. It is true that theory is still not unanimous about some of these sources. However there is no doubt that CAS jurisprudence forms a large part of the Lex Sportiva. CAS opinions always cite prior arbitral awards, therefore definitely a sports jurisprudence is created.<sup>22</sup> The fact that Lex Sportiva is based on case law is not enough to support an argument that it is too vague and uncertain to enable it to be used to determine the specific rights and obligations. After all Common Law is also based on case law.

In conclusion it is very difficult to claim that at least inside the global sports regime, the rules adopted lack coercive power or lack the authority that will ensure their implementation. Lex Sportiva rules therefore, should be considered as rules of law.

## VI. The Supremacy of Sports Rules

What is very interesting is that sports rules deriving from the international federations or from other private institutions such as WADA or IOC are ignored by legal theory and they are not included in the ranking of the rules of law. Arguably Constitutional provisions are placed on the apex of the pyramid of rules of law. Apart from that it is not certain however exactly where sports rules rank. One cannot say that sports rules rank higher than national, international or even constitutional provisions but at the same time one cannot say that they always rank lower than them. In practice when a sports rule is challenged against any legal provision, the sports rule is not declared superior but at the same time it is not declared inferior either.<sup>23 24</sup> National judicial authorities often reject sports

---

<sup>21</sup>See wikipedia [http://en.wikipedia.org/wiki/Social\\_contract](http://en.wikipedia.org/wiki/Social_contract)

<sup>22</sup>See Foster, K., «Lex Sportiva: Transnational Law in Action», Presented at International Conference on Lex Sportiva, Universitas Pelita Harapan, Indonesia, September 2010. quoting Lenard, M., «The Future of Sports Dispute Resolution», Pepperdine Dispute Resolution Law Journal. 2009, Vol. 10., p. 173.

<sup>23</sup>Panagiotopoulos, D., «Olympic Games' Law», Ant. Sakkoulas, Athens, 1991, p. 179-186

<sup>24</sup>Panagiotopoulos, D., «Sports Law in the 21st Century: Professional Athletic Activity», presented at the 1st Sports Law Congress, Trikala, Greece, 4-6 June 1999.

related cases as inadmissible based on lack of jurisdiction. This is the way by which judicial authorities recognize the fact that sports rules form a separate legal order that exists and operates independently outside and next to state law in a parallel manner.<sup>25</sup>

## VII. *Lex Sportiva* as a Global Sports Legal Order

Sports rules as they are globally applicable, they seem to affect the entire (sports) world. Inside the sports world, private acts acquire a universal power such as the Olympic Charter. These sports rules claim immunity from national law and national legal proceedings.<sup>26 27</sup>

Some academics have argued that there is no global but merely an international aspect in sports law and they view sports law as a branch of international law that uses the *jus commune*, the general principles of international law.<sup>28</sup> In their view the international aspect of sports law should be limited to the principles of international law applicable to sport. Apart from that, international law deals with relations between nation-states and can be applied by national courts. By contrast, global sports law is an a-national law (a law without a nation)<sup>29 30</sup> forming a separate and globally autonomous legal order.<sup>31</sup> One cannot call it international sports law because international law acquires its power from nation-states nor can one call it supra-national law because it is not above but merely beside national law. It is created by private institutions that organize the sport globally and its decisions affect all those involved in the sports sector. These decisions cannot be challenged before national courts but only before a special arbitral tribunal the CAS, whose decisions are implemented by the coercive authority of the sports establishment acquired as a result of the monopolistic nature and the sports authorities' power of exclusion.<sup>32</sup>

---

<sup>25</sup>Panagiotopoulos, D. «International Sports Rules Implementation – Decisions Executability», *Marquette Sports Law Review*, Vol. 5:1, p. 1-12.

<sup>26</sup>Foster, K., «Is there a Global Sports Law», *Entertainment Law*, Vol. 2, No. 1, Spring 2003, p.1-18.

<sup>27</sup>Panagiotopoulos, D. (2004). «Sports Law [*Lex Sportiva*] in the World». Ant. N. Sakkoulas Publishers. p. 579.

<sup>28</sup>Nafziger, J., «International Sports Law», International Publishers Inc., Adseley, New York, 2nd Edition, 2004, p. 48-61.

<sup>29</sup>Panagiotopoulos, D., «*Lex Sportiva*: International or *Sui Generis* – Unethnic Law?», 6th International Scientific Practical Conference, Moscow State Law Academy et all, Russia 30-5-2012, published in «Sports Law Prospects of Development», pp. 25-31.

<sup>30</sup>Panagiotopoulos, D. (2011). «Sports Law. *Lex Sportiva* & *Lex Olympica*». Ant. N. Sakkoulas Publishers. p. 102-152.

<sup>31</sup>Foster, K., «Is there a Global Sports Law», *Entertainment Law*, Vol. 2, No. 1, Spring 2003, p.1-18.

<sup>32</sup>Panagiotopoulos, D. (2011). «Sports Law. *Lex Sportiva* & *Lex Olympica*». Ant. N. Sakkoulas Publishers. p. 149-151.

The legal sources of the global sports law are however very heterogenous. Global sports law is produced mainly by private entities. The most common examples for such entities are the IOC, the International Federations and WADA. In the 1980's however a new private institution emerged and over time managed to contribute significantly to the expansion, unification and consolidation of the global sports rules. This institution is known as «Court Arbitration Sport (CAS)». Until today it has produced a large number of arbitral awards thus forming a sports jurisprudence interpreting sports rules and unifying their application at a global level. All these sources of global sports law became known as «Lex Sportiva».<sup>33 34</sup>

The term Lex Sportiva is a very peculiar one both in name as in substance. The term is very popular in the sports law theory however its existence as well as its exact meaning is still debated. It was first used by academic researchers of sports law in the 1990's. The special characteristics of the Lex Sportiva were first framed by the president of the International Association of Sports Law, Prof. Dimitrios Panagiotopoulos in the early 1990's. Debating Max Kummer's theory according to which sports rules belong to the realm of «non-law», he claimed instead not only that sports rules are legal rules but also that they form a special sports legal order and the global recognition of its autonomy is the only way to resolve relevant legal problems and to further develop sports law theory<sup>35</sup>.

---

<sup>33</sup>See Panagiotopoulos, D. (2011). «Sports Law. Lex Sportiva & Lex Olympica». Ant. N. Sakkoulas Publishers. p. 102-152.

<sup>34</sup>Casini, L., «The Making of a Lex Sportiva, Max Planck Institute International Conference, Heidelberg, June 14-15 June 2010.

<sup>35</sup>Panagiotopoulos, D., «Issues on Scientific Determination and Application of Sports Law», presented at the 1st International Congress of Sports Law, Athens, 11-13 December 1992. (Proceedings published by thr Hellenic Center of Research on Sports Law in 1993, see pages 65-88)