

ABSTRACT

This report faces some issues concerning the role played by arbitration in sports law. Therefore, it seemed reasonable to move from the definition of the word *sport* to point out its inherent aspects that lead to the consolidation of sports law, that is to say the set of regulations which rule the so called “institutional sport”. This one allows the practice of professional competitions in sports.

Since its range and relevance, one must recall also the phenomenon known as “social sport”, which plays outside the Federal and Olympic routes, and involves great part of the population. Besides the distinction between “institutional” and “social” sport, it is true that sport itself encompasses such a variety and intensity of values to justify, even though the absence of a clear set of regulations, the recognition of some rights defended by constitutional law. The world of institutional and organized sports cannot be understood unless it is appointed as the local branch of a “primary” and “sovra-national” international code, recognizable in the C.I.O.

At the same time, it is acknowledged by the Italian Republic as a legal order restrained to a specific area, subjected to the C.O.N.I. This one transmits the trends and directives moved by the international boards, but it also guarantees that relationships with the order of the State are subjected to the principle of autonomy.

With reference to this last aspect, it seemed relevant to analyze the overall structure of sports code - specifically the relations among the subjects who belong to it - and to point out the main problems appearing from the law n. 280 of 2003 which has, though not succeeding, tried to reconnect sports law with the law of the State.

Actually sports code benefits of specific mechanisms of justice which are proper to solve *ex sé* sports claims that might arise within, through the institution of arbitration.

The majority of federal statutes contain the so called “obligation of justice” that, as in the nature of its original statement, represented an instrument to safeguard the autonomy of domestic law against the interferences of ordinary law.

At the light of a new interpretation suggested by the constitution, at the moment such obligation establishes for the partners to refer to sports law in first instance, then, if needed, to turn to a judging authority depending by the State.

There is still no accorded rule respect those claims grounded on subjective juridical positions which might be relevant also for ordinary law.

The law n. 280 of 2003, besides codifying the so called “principle of relevance” that affirms the supremacy of general law on sector laws, tried to, even though some imperfections and absorbing a given doctrinaire and jurisprudential formulation, distinguish some leading guides. According to the disposition of regulations within such law, it is possible to define four typologies of issues in sports code: technical, disciplinary, economical and administrative. The way they relate to the law of the State depends on the different boards that are called to regulate institutional sport.

Here's where the well-known dispute between the C.O.N.I, which is a public board, and sports federations, which instead are private associations without recognition, rises from.

Concerning sports federations, there is also a publicist interpretation which stands for their recognition as branches subjected to the C.O.N.I, at liste while they pursue activities of common and general interest. The formulation according which such federations are instead regulated by private matters in sports code, believes that the proper scheme to be adopted is the one referring to the regulations of private subjects in public control, following the principle of horizontal subsidiarity (drawn from article 118 of the Italian Constitution).

This leads, according who's writing, to a a relationship between sports federations and C.O.N.I more suitable to the spirit of the legislator.

According to such constitutional principle, private activities can be subjected to a public regulation, also because they are conformed by the C.O.N.I itself, thanks to its regulative powers. The publicist interpretation of sports federations, perceived as branches of the public board mentioned above, is not convincing, since its adoption will lead to a strong detachment with the overall law system.

Neither it seems appropriate to qualify federations as public boards with fairly accepted self-government powers, since no law recognizes them with such prerogative.

The sports law system rising from law n. 280 forces the interpreter to face some critical issues. With reference to the already mentioned technical and disciplinary issues, generally it can be said that, while they might keep some external relevance, such issues are grounded on subjective juridical positions of “simple interests” and therefore are of no relevance for the law of the State. Only federations' inner justice can solve the claims *de quibus* by applying sports code, while the appeal to an authority of the State will lead to a flaw in jurisdiction. *Nulla quaestio*, nothing prevents, though, to call for irritual arbitration, but the resulting sentence cannot be contested in front of ordinary judges (at the senses of the article 808 *ter* c.p.c.).

This leads many authors to believe that “technical law”, or generally speaking law within sports federations, represents a special niche in sports code.

Even if the article 2, comma 1, d.l. n. 220 of 2003, by assessing to sports code the regulation of issues grounded on technical and disciplinary matters, might have given some arguments sustaining the emanation of a special judge “not of the State”, the following law (law n. 280 of 2003) dispelled any doubt.

Ignoring for a moment the probable conformity of such “special” justice to the constitution, it still needs to be noticed how procedures of sports federations' inner justice serve a different function from the jurisdictional ones having reference to the State, which they are not opposed to, or alternative to.

Usually they play a limited role, to formalize the instrument through which the will of the sports board is expressed, that is to say the measures it establishes to regulate the relations with the partners. Consequently, the sentence is the expression of the sports board the associate belongs to; in no case the will of both parties is respected.

Concerning the other issues (in matters of discipline, administration and economics), that are relevant for the overall law, article 3 of law 280 of 2003 submits the appeal to the jurisdiction of the state only if two conditions are satisfied: it must be the case of claims which not fit in any other branch of sports code and the subject must have go across all the grades predicted by sports law (the so called sports prejudicial).

No question of constitutional unlawfulness might arise in the second case, if the effective and proper tutelary of the subject is guaranteed. As a matter of fact, according to the well-established jurisprudential orientation of the Constitutional Court, there is no compromission of the citizen's right of defense only because the appeal to ordinary justice is dependant on the reliability and conformity of the request. Although, even if the introduction of a trial filter such as the one mentioned above responds to general needs, it is still up to the sports law to guarantee the principle of reasonableness and which are the proportions and measures to be applied to make tutelary more efficient and effective.

Assessing all the issues relevant for the overall law, especially the economical ones, it must be noticed that in such case alternative tutelary is guaranteed. Briefly, the holder of a subjective right related to financial matters could appeal both to the inner branches of sports code and to the ordinary judge. The first ones cannot though be considered to have reference to arbitration, since they fail in impartiality. Besides the procedure one decided to opt for, the resulting measure could be contested in front of the general law or, as in article 808 *ter* c.p.c., through the ordinary act of appeal. This applies also to job claims, embraced by economical justice, no matter a clause referring to arbitration in sports employment contracts. Besides, the resolution *de quibus* of claims in sports through the institution of arbitration arouses some perplexities.

The ongoing series of regulative reforms lead to the distinction of two typologies of arbitration concerning employment: the first adjusted by article 5 of law n. 533/73 and the second one articles 412 *ter* and *quater*. The doctrine appears to be split between those who believe that job claims in sports could be solved through the application of both forms of arbitration, while others, recalling that federal regulations don't foresee the possibility - for the *exequatur* - to contest the arbitration, consider only arbitration *ex* article 5 law n. 533/73 to be truly effective. There are also those who doubt that dispositions mentioned above have arbitration consistence, when applied to sports matters.

The Supreme Court of Appeal seems to be doubtless; according to it, arbitration in sports employment issues is a form of irritual arbitration referable to the one regulated by article 5 of law n. 533/73. The so called administrative claims, instead, are more controversial and miss a clear interpretation by the doctrine and the jurisprudence.

I'm of the advise that such claims are not submitted to the supremacy of sports federations, which administrative activity - mainly the management and the power to admit or to refuse its members in the events organized by the federation - must be always lead back to private law, since it is the unilateral regulation (advanced by the federation) of an associative relation. The law n. 280 of 2003, by assigning to Lazio Tar any claim not regulated by sports code (sports prejudicial still effective; the only exception being claims revolving around financial issues) surely has introduced a new hypothesis of exclusive and special jurisdiction, linked to the specific matter of the claims.

The attitude of the legislator here seems to clearly collide with what is affirmed by the Constitutional Court, sentence n. 204 of 2004.

As known, recalling this pronouncement, the judge in charge to verify the legitimacy of the law tried to reset the exceptional character of exclusive jurisdictions compared to ordinary justice. The judge anchored exclusive jurisdiction to authoritative and hierarchical role of the public function practised from time to time.

On the other hand, the tone of article 3 of the law n. 280 of 2003, while tracing the area of pertinence for exclusive jurisdiction, adopts a particularly wide and generalized formulation, assigning to the administrative judge not just the faculty to rule on the appealing against measures delivered by sports federations that might have an authoritative role, but on “any claim” in which “members” or “affiliates” see themselves opposed to C.O.N.I or any other sports board.

This might constitute the unconstitutionality of the law.

The whole system of sports law was further complicated by the institution, foreseen by the statute of the C.O.N.I, of a permanent arbitration entity, thought and regulated just as the international T.A.S. The statute reveals that such board assured justice in sports code through arbitration - surely also because the institution had “*sovra-national inspiration*” - which lead to a (contractual) pronouncement, then contestable according to the *lex fori*. By pursuing this function, it didn't compromise the alternative role of C.O.N.I, neither for claims referred to inner justice, neither for those involving the ordinary law, in case of subjective juridical positions that might interest also the State.

If it's true that sports code, which higher management degree is represented by C.O.N.I., is different from the regulations of any other Italian sports federation, since the first one is “primary” and “sovra-national”, one must necessarily agree that the arbitration solution seen by article 12 of C.O.N.I Statute could not represent “*a further degree, simply juxtaposed to particular and contingent remedies, since it represents (represented) an heterogeneous and final instance*”. The arbitration resulted from such procedure therefore was not an act of the C.C.A.S., but it ended to be “*a code that precedes them both, in logical and juridical manners*”.

While the issue has been smoothed this way, it was still to be defined which role C.C.A.S played in the regulation of singular sports claims. When the C.C.A.S was called to state on juridical controversies irrelevant for general law (i.e. “simple interests”) the resulting measure could not be contested in front of any judge, whether a domestic or ordinary one. But when arbitration measures referred to subjective positions with external relevance, they could not be ignored by the Republic, which was forced to recognize them as “irritual arbitrations”, that is to say “*as results of autonomy in functions of justice*”. Briefly, public control carried on through the action of nullification, see article 808 *ter* c.p.c., in power of the competent judge, according to ordinary measures.

Only administrative claims required the assessment of an exclusive jurisdiction, which territorial competent branch was restrictively Lazio TAR. With regards to this, law n.280 of 2003 presented an antinomy: administrative judges, who were usually called to pronounce themselves in case the measures presented vices of legitimacy, were, in such occasion, called for contestations (*ex* article 808 *ter* c.p.c.) with negotiation extents. Despite it was not surprising that one turned to an administrative judge even without a resulting measure - once agreed that in evolving law systems and administrative trials it might happen that the TAR acknowledges agreements or acts that absorb agreements - it's true that the reform dating 2003 did not seem (and still doesn't) pursuant to the Constitutional Court's sentence n. 204 of 2004.

Even if one ignored the probability of unconstitutionality, there was still a practical issue to take into account: which were the vices that could be contested in front of the TAR, rejecting the irritual arbitration? Lazio TAR, section III *ter*, April 7 2005, n. 2571, moving

from the irritual tone of the arbitration, tried to coordinate the competence of the ordinary judge applied to a refusal on negotial basis *ex art. 808 ter c.p.c.* and the article 3 of the law n. 280/03. The final result consisted in the admittance, in front of Roma Lazio TAR, of *“some sort of combination between the rejection turned to the ordinary judge and the one caused by conventional issues of incompetence, violation of law and abuse of power in front of the administrative judge”*.

Briefly, next to the arbitration – against which the vices inferred from article 808 *ter c.p.c.* are claimed – there are also the so called presupposed acts, that is to say the acts resulted at the end of the sports prejudicial assessed by the various branches foreseen by sports law. This solution was not convincing though, since such an appeal to the administrative judge would have not taken into account of the steps - where justice proceedings are held - that had to be pursued according to the dispositions in sports law.

It admitted somehow the dispensable nature of sports law, as the sentence of the court and the inner federal sports branches wont cause any verification, a prerogative of the ordinary judge. At the end it would represent just an extra charge for the citizen who could, in case being a loser in the lawsuit, appeal to the administrative judge.

Besides, also the formulation granted by the State Council did not seem to be convincing, as once again the pertinence of sports law was denied. According to this interpretation, sports law becomes essentially administrative management, which could be contested by the administrative judge *“according to the power to contest the presupposed acts and, therefore, not because of vices belonging to the measure called by the arbitrating Chamber”*.

In conclusion, both the directives drawn at solving the antinomy related to article 3 exalted that section of the law, which assured jurisdictional reserve to the administrative judge, but neglected the part which recognized the relevance of sports law.

C.O.N.I tried to simplify the tangled system of sports law by reforming the mechanisms of sports law and arbitration foreseen in its institution, through the Statute adopted on February 26, 2008. With the introduction of the “Alta Corte Giustizia Sportiva” (in succession A.C.G.S.) and the “Tribunale Nazionale di Arbitrato per lo Sport” (in succession T.N.A.S.) C.O.N.I new statute made a clear distinction between administrative

functions and arbitration functions, that is to say between functions answering to a specific interpretations of claims (as last degree foreseen by sports law) and functions related to strict arbitration.

As to that, article 12 *bis* of the Statute of C.O.N.I individuated in the A.C.G.S. the permanent administrative branch, with particular judging options.

Article 12 *ter* of the Statute instead qualified the T.N.A.S. as the arbitrating entity in charge with the functions previously recognized to the C.C.A.S. Even though any opinion concerning this innovation is premature, it is necessary to point out how the new regulations of the Statute seem to rely on the jurisprudential criteria that prescribe the subdivision of judging departments according to the nature of the claim (here incurring between sports associates).

The A.C.G.S., as for the dispositions of the Statute, has to take care of claims grounded on unavailable rights relevant for national sports law, so that it will *de facto* regulate mainly “administrative” issues.

It seems fair evident that the conclusions drawn by administrative law in front of the rejections of the arbitrations delivered by the C.C.A.S could be applied also here.

But this solution is far from being satisfying: the institution of a third degree in sports law, as a necessary step in order to appeal for ordinary justice, doesn't suit with the deflative needs of the overall system. Thus, as noticed for the procedure taking place in front of the C.C.A.S., to consider the jurisdictional activity of sports federations as simple routine administration, weakens the value of inner federal justice statements.

Still, there is the doubt that to reject a measure delivered by the A.C.G.S. in front of the TAR - seen as exclusive jurisdictional branch under the State - might be slightly unconstitutional. Besides, the assessment of the partial nature of the decisions held by the districts within the T.N.A.S. - considered to be an alternative to ordinary justice in solving some claims- it is surely appreciable, as well as the recall of articles 828 and ss. c.p.c. The same way, the TAR - which serves an ordinary judge in case of the rejection of a private measure concerning sport - will not be acquainted with the matters of the dispute as the arbiters see it, but needs to examine the arbitration only in face of the law.

The recall to article 828 c.p.c. could be interpreted also as an index of the content of arbitration procedure within the T.N.A.S. Considering only this one, as a matter of fact, it would seem that the reform primary objective was to introduce in sports law, as opposed to the irritual arbitration ending in front of the C.C.A.S., a real and proper arbitration, which resulting measures cannot be rejected at the senses of 808 *ter* c.p.c., although at those of 828 c.p.c.

Differently, the T.N.A.S. will cover the grey areas in jurisdiction, those left aside by the A.C.G.S. This means it could decide on technical, disciplinary and economical issues in the same way. The first ones, especially, since they ground mainly on “simple interest”, that is to say subjective juridical positions that could never be addressed to an ordinary judge (since there's a jurisdiction flaw) and submitted to arbitration- would not fit with a statute's disposition of ritual arbitration.

Nevertheless, the prospected aporia could be solved, according to who's writing, by assuming that the generic recall at the institution of arbitration by article 12 *ter* of the new Statute of C.O.N.I must not exclude the possibility of irritual arbitrations held in front of the T.N.A.S, so that the T.N.A.S could be called to judge on sports claims- which are of no relevance for the State- through an irritual arbitration. As to this, the resulting arbitration could not be rejected and submitted to the ordinary law of the State.

Besides the typologies of the claims involved, the T.N.A.S. benefits, differently form the singular sports federations and C.O.N.I itself, from the same “alterity” and *suitas* C.C.A.S took advantage of.

At the light of such notice, one could surely affirm that the recent reform of the C.O.N.I Statute tried to guarantee the respect of individual rights, as well as the autonomy and prerogatives of each branch in institutional sport.

Nevertheless, there are still some perplexities on the tone and degree of the Statute's regulations, therefore on their effectiveness in solving critical interpretations arouse by the law n. 280 of 2003.