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BEYOND THE FIFA REGULATIONS, BUT THROUGH THE FIFA REGULATIONS:[1] THE POWERS OF FIFA JUDGES AND CAS ARBITRATORS

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ABSTRACT: Art. 1 of the Swiss Civil Code empowers FIFA judges and CAS arbitrators to go beyond the literal text of regulations, allowing them to adapt, extend, and integrate provisions to address gaps and ambiguities in an ever-evolving legal landscape. This provision is a powerful and transformative tool that acknowledges the inherent limitations of written law, emphasizing the dynamic relationship between legal texts and reality, facilitated through interpretation and gap-filling. This paper seeks to demonstrate that, in applying general rules to specific cases, judges and arbitrators inevitably shape the law by bridging written and unwritten norms beyond the text. It further examines how this process of integrating norms outside the text can be effectively executed while preserving the principle of legal certainty.

L'art. 1 del Codice civile svizzero autorizza i giudici FIFA e gli arbitri CAS ad andare oltre il testo letterale dei regolamenti, consentendo loro di adattare, estendere e integrare le disposizioni per colmare le lacune e le ambiguità in un panorama giuridico in continua evoluzione. Questa disposizione è uno strumento potente e trasformativo che riconosce i limiti intrinseci della legge scritta, enfatizzando il rapporto dinamico tra i testi legali e la realtà, facilitato dall'interpretazione e dal riempimento delle lacune. Il presente lavoro cerca di dimostrare che, nell'applicare le norme generali a casi specifici, i giudici e gli arbitri modellano inevitabilmente il diritto creando un ponte tra norme scritte e non scritte al di là del testo. Esamina inoltre come questo processo di integrazione delle norme al di fuori del testo possa essere efficacemente eseguito preservando il principio della certezza del diritto.

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[1] The title to this article is an adaptation the author made from the Préface to F. Gény, *Méthode d'interprétation et sources en droit privé positif*, I, LGDJ , Paris, 1899 written by R. Sailelles, which the latter closes as follows: "*Aussi je ne saurais mieux finir que par cette forte devise, inspirée d'un mot analogue d'Jhering, autour de laquelle converge, qu'enveloppe ou que développe, comme l'on préfère, tout le livre de M. Gény: «Par le Code civil, mais au-delà du Code civil ! Je serais ceux peut-être qui en eussent volontiers retourné les termes: Au-delà du Code civil, mais par*

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Regolamenti sportivi – Lacuna – Interpretazione letterale – Integrazione delle norme – Spirito normativo.

SUMMARY: 1. Introduction – 2. The challenge to legal positivism – 3. Delineating the contours of Art. 1 CC – 4. The interpretation of rules – 5. Filling-in lacunae in sports regulations: Customary law and free research – 6. Custom – 7. The judge-legislator – 8. The role of the doctrine and the jurisprudence – 9. Conclusion

1. Introduction

Every time a dispute is brought to the FIFA Football Tribunal or Court of Arbitration for Sport ("CAS"), judges and CAS arbitrators[2] must discern the law, regulations, and/or legal principles applicable to the case at stake and decide accordingly.

This task becomes straightforward when the regulation articulates a rule that is explicit, unambiguous, and directly applicable to the case. But even the most accurately drafted laws or regulations cannot capture life's infinite plethora of circumstances, and often, the questions of law presented to a Court do not find an answer in the text.

The Swiss Civil Code ("CC") of 1907 solves the above situation in its Art.1. Testimony to the doctrinal debates of its time,[3] the CC decided to leave behind the principles of radical legal positivism and consciously embraced its limitations, acknowledging the law's incapability to regulate every possible situation from its first article.

Far from giving up control, it turned that limitation into a strength by equipping judges with powerful tools to interpret but also, in exceptional cases, to decide "*according to the rules he would establish if he were to act as a legislator*", through a structured system of multiple sources of law that complete its inevitable shortcomings and work as a breathing apparatus, oxygenating the text and keeping it fresh.

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le Code civil ! Je reconnais que ce serait manquer un peu de hardiesse et vouloir conserver une part de fiction. Aussi, je n'insiste pas, trop heureux de me laisser convaincre, pourvu que cela puisse convaincre ce à quoi nous tenons le plus c'est à «l'Au-delà». Il sera désormais que cet «Au-delà» ne devienne pas le mot d'ordre de tous les juristes".

[2] In the following, the term "judge" will be used interchangeably to denote judges within bodies of sports organizations and arbitrators of the Court of Sports for Arbitration (CAS).

[3] To my best knowledge, only the Spanish Civil Code of 1889 adopted an open system of sources of law years before the CC. "*Article 1: 1. The sources of the Spanish legal system are written laws, custom and general legal principles*". An official English translation of the code is available at *https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Spanish_Civil_Code_ (Codigo_Civil_Espanol).PDF*.

To achieve this, Article 1 CC[4] entrusts the judiciary to act as part of the solution in addressing legal gaps, softening the boundaries of Montesquieu's traditional separation of powers and "*almost entrusting them with the role of auxiliary legislator*":[5]

> "1. *The law applies according to its wording or interpretation to all legal questions for which it contains a provision.*
> 2. *In the absence of a provision, the court shall decide in accordance with customary law and, in the absence of customary law, in accordance with the rule that it would make as legislator.*
> 3. *In doing so, the court shall follow established doctrine and case law*".

With a specific focus on FIFA regulations, this paper reviews the scope and objectives of those tools, explaining how judges may use them to bring legal certainty when confronted with difficult questions of law or gaps in sports regulations

Understandably, judges might feel uneasy in going beyond the text to solve a dispute for which the existing regulations have no direct, obvious answer, opting in most cases to superficially fall back on the principle of legal certainty stripped of substantive content and not always privy to the avenues that Art. 1 CC offers them.

This paper strives to provide a framework through which the judges can look beyond the limits of the text when the regulations contain a lacuna and may do so in the light of legal certainty.

2. The challenge to legal positivism

We need to rewind the clock to 21 January 1793 when Louis XVI shouted for the last time: "*I forgive those who are the cause of my death*" before meeting the guillotine in the Parisian Place de la Revolution (today named Place de la Concorde, right exactly where FIFA has its Member Associations Division and the Clearing House), not that it has any relation, but still, a daily reminder of how life can always take an unexpected turn.

Authors seem to agree that the decay of the ancient regime and the advent of the Enlightenment period shaped a current of cultural positivism that marked the intellectual landscape in Europe for the next century. Auguste Comte[6] is deemed to be the founder of positivism as a philosophical movement according to which knowledge is not valid if it is not based on the experimental verification typical of the natural sciences.[7]

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[4] The English translation of the CC is available at *https://www.fedlex.admin.ch/eli/cc/24/233_245_233/en*.

[5] P. Lucien-Brun, *Le Rôle et les pouvoirs du Juge, dans le Code Civil Suisse*, Imprimerie Saint-Brune, Grenoble, 1920, 20.

[6] Auguste Comte (1798-1857).

[7] J.G. Martínez Martínez, *El concepto de justicia en el pensamiento de Norberto Bobbio y otras cuestiones de su filosofía jurídica*", available at *https://dehesa.unex.es/bitstream/10662/15734/1/0213-988X_10_197.pdf*.

From such perspective the law was conceived as a closed system that could not be dissociated from the will of the legislator and the text, and judges, were simply the "*bouche qui prononce les paroles de la loi; des êtres inanimés qui n'en peuvent modérer ni la force, ni la rigueur*".[8]

The belief in this ideal and fantastic legislator whose laws had to be all-embracing was rooted in Rousseau's doctrinaire ideas[9] and the profound mistrust on judges which was explicitly engraved in article 4 of the Napoleon Civil Code of 1804: "*Le juge qui refusera de juger sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice*",[10] still enshrined in the current French civil code.[11]

But a hundred years after the French Civil Code of 1804, the predominant idea in Europe of the judge as "*mouth of the law*" became obsolete and disconnected from reality. The judiciary was forced to resort to impossible syllogisms[12] to decide on matters that were not written or codified in the law because the legislator could not have anticipated them at the beginning of the nineteenth century. The challenges of the Industrial Revolution across Europe required the law to upgrade to a new and evolving economic and social reality.[13] A new system of sources of law beyond a text that could not breathe was the need of the hour.

In that context, the formalistic approach consisting of reducing the role of judges to simply apply the law was soon questioned by prominent jurists like

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[8] Montesquieu, *De l'Esprit des Lois*, XI, 6. Translation: "[the] *mouth that pronounces the words of the law; inanimate beings that can moderate neither its force nor its rigour*".

[9] R. Sailelles, *Préface*, to F. Geny, *Méthode d'interprétation et sources en droit privé positif*" cit., XII.

[10] Art. 4 Code Civil 1804: *"The judge who refuses to judge on the pretext of the silence, obscurity or inadequacy of the law, may be prosecuted as guilty of denial of justice".*

[11] The French Civil Code is available at *https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006070721/LEGISCTA000006089696/?anchor=LEGIARTI000006419280#LEGIARTI000006419280*.

[12] E. García de Enterría, *Reflexiones sobre la Ley y los principios generales en del Derecho*, Ed. Thomson Reuters, Madrid, 1984, 18: *"a) pronto se advierte que la tipificación de supuestos de hecho por el legislador no puede jamás agotar la variable y proteica riqueza de situaciones capaz de presentarse en una vida social cuya evolución nada detiene. Sin embargo, esta constatación va a motivar un artificioso esfuerzo para apuntalar la teoría básica: 'las laguna de la ley' se integran mediante un proceso deductivo operado inmanentemente a partir de las proprias leyes positivas, mediante la llamada 'expansión lógica' de las normas singulares, sin acudir a ningún principio trascendente de justicia material, y ello con objeto de no romper la unidad y homogeneidad del sistema: es el dogma de la completezza dell'ordinamento en la expresión clásica de DONATI".*
Translation: "*a) it is soon realized that the typification of factual assumptions by the legislator can never exhaust the variable and protean wealth of situations capable of arising in a social life whose evolution does not stop anything. However, this observation will motivate an artificial effort to underpin the basic theory: 'the gaps in the law' are integrated by means of a deductive process operated immanently from the positive laws themselves, by means of the so-called 'logical expansion' of the individual rules, without resorting to any transcendent principle of material justice, and this in order not to break the unity and homogeneity of the system: it is the dogma of la completezza dell'ordinamento in DONATI's classic expression".*

[13] *Commentaire Romand CO I, Art. 1 3-5. Ed. Helbing Lichtenhahn*".

Jhering in Germany[14] or Gény in France,[15] who exerted a major influence on the drafters of the Swiss Civil Code of 1907, which is still used today to apply and interpret the law in the civil law disputes and also the regulations of international sports federations based in Switzerland.[16]

Gény described the matrix in which the legal community had lived since legal positivism took over after Louis XVI abruptly abandoned our world as a fiction. According to him, the entrenched belief that the law was self-sufficient, that there was nothing good outside the written law, and that the role of the jurisprudence and the doctrine was merely to draw logical conclusions from the text were no longer valid paradigms. So, it needed to be reassessed.

He was one of the fathers of the so-called "school of free scientific research," which opposed the "school of exegesis" (or interpretation), which had prevailed since the French Revolution and reduced the entire legal system to written law.

A novelty for some and a return to classic Roman law for others, the cornerstone of free scientific research was the acknowledgement that the legal system manifests itself also from sources that are out of the text, which some authors believe to be close to the role of Pretors and their edicts in the creation of Roman law.[17]

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[14] U. Fasel, *Eugen Huber hört Rudolf von Jhering*, Stämpfli Verlag AG, Bern, 2023.

[15] R. Sailelles, *Préface*, to F. Geny, *Méthode d'interprétation et sources en droit privé positif*" cit.: "*Voici près d'un siècle que nous vivons sur le malentendu d'une fiction qui a produit tous les avantages qu'elle était destinée à procurer, et dont, depuis quelque temps, nous ne sentons plus que les inconvénients. Il faut enfin revenir à la réalité. La fiction était de croire, non pas à proprement parler que la loi suffisait à tout - tout le monde sait qu'il n'est aucune loi codifiée qui puisse embrasser et prévoir tout l'ensemble des rapports juridiques - mais que la jurisprudence, et également la doctrine, en interprétant la loi, ne se plaçaient qu'au point de vue d'une recherche de volonté, et qu'elles ne faisaient que tirer les solutions logiques qu'eût acceptées le législateur: non pas le législateur moderne, mais l'auteur même de la loi, quel que fût l'intervalle à jeter en bloc entre le passé et le présent*".

[16] U. Haas. *Applicable law in football-related disputes - The relationship between the CAS Code, the FIFA Statues and the agreement of the parties on the application of the national law*, CAS Bulletin, 2015-2, available at *https://www.tas-cas.org/fileadmin/user_upload/Bulletin_2015_2_internet_.pdf.*

[17] E. García de Enterría, *Reflexiones sobre la Ley y los principios generales en del Derecho*, cit., 202: "*La superioridad del Derecho Romano sobre otros sistemas jurìdicos histoòricos anteriores o posteriores estuvo justamente, no ya en la mayor perfeccioòn de sus leyes (acaso las de Licurgo, o las de cualquier otro de los grandes legisladores mitificados, fuesen superiores), sino en que sus juristas fueron los primeros que se adentraron en una jurisprudencia seguìn principios, la cual ha acreditado su fecundidad, e incluso, paradoòjicamente, su perennidad, y hasta su superior certeza, frente a cualquier coòdigo perfecto y cerrado de todos los que la historia nos presenta*".

Translation: "*The superiority of Roman law over other earlier or later historical legal systems was precisely not in the greater perfection of its laws (perhaps those of Lycurgus, or those of any other of the great mythologised legislators, were superior), but in the fact that its jurists were the first to develop a jurisprudence according to principles, which has proved its fruitfulness and even, paradoxically, its durability, but in the fact that its jurists were the first to develop a principled jurisprudence, which has proved its fecundity, and even, paradoxically, its perenniality, and even its superior certainty, compared to any perfect and closed code of all those that history has presented to us*". Available at *https://dialnet.unirioja.es/servlet/articulo?codigo=2112894*.

For this school of thought, the text of the law was just a fraction of a legal system with a greater outreach. Gény found that customary law and doctrine constituted elements that coexisted alongside written law that could be incorporated into the legal system through jurisprudence, which he conceived as an instrument of integration of that law outside the existing codified law. The law was understood as a living organism that, instead of looking inward, had to look outward, open itself to reality, and nourish itself from it.

Under these optics, the text continued to prevail but was not the only source of the legal system. The text becomes the "passport" to bring the case before a judge, who will then, following a specifically designed methodology, be free to look beyond it when it concludes that the existing laws or rules are insufficient to provide a sound decision.

This was, in essence, the historical context and sources from which Eugen Huber, professor at the University of Bern, drew inspiration in 1892 when he was tasked to prepare the preliminary draft for the CC.[18] As a matter of curiosity, Wolf[19] explains how Professor Huber, through a letter on 27 December 1899, eventually thanked Gény for sending him a copy of the first edition of his "*Méthode d'interprétation et sources en droit prive positif*" and confirmed him that he would find the proper environment to test his theory in Switzerland.

One cannot ignore that the solution adopted by Art. 1 of the Swiss Civil Code has faced notable criticism. For example, in the mid-twentieth century, Professor Norberto Bobbio[20] was particularly critical of it, considering an exception and arguing that it undermined legal certainty for rejecting the positivist approach of self-integration of norms, which was prevalent across European civil law systems.

In view of this author, Bobbio's criticism serves to underscore the truly revolutionary nature of Art. 1 CC.

But no matter how interesting Huber's history is, this study is limited to analysing his *theme* and its application to international sports arbitration without claiming or aspiring to cover the historical evolution of Art. 1 CC in its entirety.

Huber's vision looms long and stands in view of the author, valid still in 2024. Hence, understanding the regulatory powers of judges in Switzerland

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[18] P. Lucien-Brun, *Le Rôle et les pouvoirs du Juge, dans le Code Civil Suisse*, cit.

[19] E. Wolf, *Les Lacunes du Droit et Leur Solution en Droit Suisse*. Communication faite à Bruxelles, le 6 novembre 1965, au Centre National de Recherches de Logique.

[20] N. Bobbio, *Teoría de la Justicia*, Ed. Tirant lo Blanch, Madrid, 2024, 105.

"*9. Corrientes contrarias la certeza. El concepto de autointegración, que prevalece en los principales ordenamientos civiles europeos, encuentra una excepción en el ordenamiento suizo, donde en el art. 1 se prevé que el juez, en caso de lagunas, resuelva el caso como si fuera él mismo el legislador, con total discreción, independientemente de los vínculos que lo relacionen con el ordenamiento jurídico".* Translation: "9. Currents contrary to certainty. The concept of self-integration, which prevails in the main European civil systems, finds an exception in the Swiss legal system, where Art. 1 provides that the judge, in case of lacunae, resolves the case as if he were the legislator himself, with complete discretion, independently of the links that link him to the legal system".

becomes crucial, even more so in a world where the tech revolution, global pandemics, and military conflicts incessantly seem to test the limits of the legal system (and regulations of sports federations), whose updating is often late and so offering not good enough answers.

3. Delineating the contours of Article 1 CC

It is common ground in the jurisprudence of the Swiss Federal Tribunal[21] and CAS[22] that the interpretation of statutes and regulations of international sports associations based in Switzerland is conducted according to Art. 1 of the CC and the methods for the interpretation applicable to the law rather than according to Art. 18 of the Swiss Code of Obligations (CO) and the principle of good faith, typically applicable to the interpretation of contracts.

A recent example of this is the SFT decision of 7 June 2021 in the matter between *Corporación Club Deportivo Tulua against Club Atlético Nacional, S.A, and the Federación Colombiana de Football*:[23]

> "*Quand il s'agit d'interpréter des statuts, les méthodes d'interprétation peuvent varier en fonction du type de société considéré. Pour l'interprétation des statuts de grandes sociétés, on recourt plutot aux méthodes d'interprétation des lois. Pour l'interprétation des statuts de petites sociétés, on se référera de préférence aux méthodes d'interprétation des contrats, telles que l'interprétation objective selon le principe de la confiance (ATF 140 Ill 349 consid. 2.3 et les précédents cités). Mettant en oeuvre ce critelre de distinction, le Tribunal fédéral a interprété al l'égal d'une loi les statuts d'associations sportives majeures, comme l'UEFA, la FIFA, en particulier leurs clauses relatives al des questions de compétence (arrets 4A_490/2017 du 2 février 2018 consid. 3.3.2, 4A_600/2016 du 29 juin 2017 consid. 3.3.4.1; 4A_392/2008 du 22 décembre 2008 consid. 4.2.1). Il en a fait de meme pour découvrir le sens de relgles d'un niveau inférieur aux statuts édictées par une association sportive de cette importance (arret 4A_600/2016, précité, ibid.)*".[24]

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[21] SFT 4A_600/2016, vid. para. 3.3.4.1. Decision available at *https://www.bger.ch/ext/eurospider/live/fr/php/aza/http/index.php?highlight_docid=aza%3A%2F%2F29-06-2017-4A_600-2016&lang=fr&type=show_document&zoom=YES&*.

[22] See e.g. CAS 2013/A/3365&336 para. "*144. FIFA is a very large legal entity with over not only two hundred affiliated associations, but also far more numerous indirect members who must also abide by FIFA 's applicable regulations (SFT 4P.240/2006). It is safe to say that FIFA's regulations have effects which are felt worldwide and should therefore be subject to the more objective interpretation principles*". Award available at *https://jurisprudence.tas-cas.org/Shared%20Documents/3365,%203366.pdf*. See also CAS 2021/A/8308 Christian Pouga-- v. FIFA, para. 61 and 62. Award available at *https://digitalhub.fifa.com/m/25916b5d9b3d8f91/original/CAS-2021-A-8308-Christian-Pouga-v-FIFA_07062022.pdf*.

[23] Appeal in civil matters against the award rendered on 12 March 2020 by the Court of Arbitration for Sport (CAS 2018/A/6057).

[24] Translation: "*When it comes to interpreting articles of association, the methods of interpretation may vary depending on the type of company in question. For the interpretation of the articles of*

The method for the interpretation of the law is laid down in Art. 1 CC[25] that establishes the prevalence of the law. Nevertheless, such article takes us a step further and explicitly states that the domains of the law extend beyond the text and encompass its spirit. This is a reminder to judges that they can find the rule applicable to an original, primary case simply by following its spirit,[26] enshrining the ideas of Geny's *school of free scientific research*.

The first part of this provision indicates what the judges should do when the law provides the according answer to the questions put forth before it (i.e. to look at the text and its spirit when required); the second part, instead, guides them when the law is silent (i.e. to apply customary law when there is one, or subsidiarily, to step into the shoes of the legislator and create the law).

In both instances, whether acting as interpreters or creators of law, the CC allows judges to go beyond the text, taking aboard the doctrine and the jurisprudence.

The CC consciously relies on judges to both interpret (*le juge interprète*) and complete the law (*le juge législateur*),[27] and this extra role given to judges is precisely what makes it unique even today and ahead of its time when it was enacted. Thus, the answer to the question in the introduction is engraved in the law: it is not against legal certainty to look outside the text but for the sake of it.

Sports regulations, like any other law, address real-life situations and often contain general, obscure, or abstract terms that require the judge to land the text back down to earth through interpretation. Sometimes the text will reveal itself incomplete and require them to go further and regulate to fill in the gaps.

Distinguishing between the two situations is utterly difficult as the lines between interpretation and filling in gaps are often blurred and mined with grey zones.

4. The interpretation of rules

Regarding FIFA regulations, Art. 56.2 of the FIFA Statutes (ed. 2022) mandates CAS panels to apply Swiss "additionally" to the various FIFA regulations.

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association of large companies, statutory interpretation methods are preferred. For the interpretation of the articles of association of small companies, preference will be given to the methods of interpretation of contracts, such as the objective interpretation according to the principle of trust (BGE 140 Ill 349 rec. 2.3 and the precedents cited). Applying this criterion of distinction, the Federal Court has interpreted the statutes of major sports associations, such as UEFA and FIFA, in the same way as a law, in particular their clauses relating to questions of jurisdiction (judgments 4A_490/ 2017 of 2 February 2018, recital 3.3.2, 4A_600/2016 of 29 June 2017, recital 3.3.4.1; 4A_392/2008 of 22 December 2008, recital 4.2.1). It did the same to discover the meaning of rules at a lower level than the statutes enacted by a sports association of the same importance (judgment 4A_600/2016, cited above, ibid".

[25] The english translation of article 1 CC is available at *https://www.fedlex.admin.ch/eli/cc/27/ 317_321_377/en*.

[26] P. Lucien-Brun, *Le Rôle et les pouvoirs du Juge, dans le Code Civil Suisse*, cit., 4.

[27] Commentaire Romand CO I, Art. 1, 31-34. Ed. Helbing Lichtenhahn.

Such a reference ensures uniform application of the various FIFA regulations and, hence, extends to the interpretation of the rules. Haas, professor at the University of Zurich, contends that the citation to Swiss law is:

> "(…) *intended to clarify that the RSTP are based on a normatively shaped preconception, which derives from having a look at Swiss law*",[28] "*Swiss law does govern, for example, the question of methodology as to FIFA rules and regulations (including the RSTP) should be interpreted…*"

Issues assumed by the FIFA regulations (for example, the consequences deriving from the termination of a contract without cause in Article 17 FIFA Regulations on the Status and Transfer of Players ("RSTP")) that are not defined by them[29] will be derived from Swiss law closing the regulatory circle and offering a higher degree of legal certainty and uniformity in a complex multi-national industry like football.

CAS jurisprudence agrees that the reference to Swiss law in the FIFA Statutes[30] must be construed as FIFA's intention to fill any gap in its rules and regulations by referring to a more comprehensive state system.[31] Other sports associations[32] domiciled in Switzerland are not as explicit as FIFA and do not refer directly to Swiss law. However, the same may apply through articles R45 or R58 of the CAS Code of Sports-related Arbitration ("CAS Code"), which subsidiarily refers the parties to Swiss law.[33]

Under Swiss law, to understand the meaning of a rule, one must first start by giving meaning to its wording. An objective interpretation of the law will require the judge to depart from the text's literal sense. Even more so when the text seems clear on its face:

> "*According to the SFT, the starting point for interpreting is indeed its wording (literal interpretation). There is no reason to depart from the plain text, unless there are objective reasons to think that it does not reflect the core meaning of the provision under review*".[34]

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[28] U. Haas. *Applicable law in football-related disputes - The relationship between the CAS Code, the FIFA Statutes and the agreement of the parties on the application of the national law*, cit.

[29] Vid. Para. 90 of TAS 2021/A/7793 *Club Sportif Sfaxien c. Rachid Ait Atmane.* Award available here: *https://jurisprudence.tas-cas.org/Shared%20Documents/7793.pdf.*

[30] TAS 2005/A/983 & 984, para. 48.

[31] See also CAS 2008/A/1705 Grasshopper v. Alianza Lima: *"12. (...) The CAS panels have rightly interpreted this in the past to the effect that Swiss law serves only to fill lacunae in the rules and regulations of FIFA. Wherever the latter contain a ruling, Swiss law, which has been declared to apply "additionally", must give way even if the otherwise applicable provision of Swiss law were mandatory (CAS 2005/A/983 & 984, no. 92 et seq.; CAS 2004/A/791, no. 60)".* Award available at *https://jurisprudence.tas-cas.org/Shared%20Documents/1705.pdf.*

[32] See for example the Statutes of the International Fencing Federation.

[33] In the case of Article R45, the reference to Swiss law is explicit in its text as the subsidiary law applicable to the merits. In contrast, Article R58 the reference to Swiss law is indirect and only as long as the federation is domiciled in Switzerland: "*...the law of which the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled...*".

[34] See e.g. CAS 2013/A/3365&336 para. 139. Award available at *https://jurisprudence.tas-cas.org/Shared%20Documents/3365,%203366.pdf.*

And so it happened, for example, in the recently published Kamila Valieva award,[35] where the panel of arbitrators - visibly affected by the unfavorable outcome - felt compelled to explain that while they had *"carefully considered whether there was scope for the exercise of its discretion to reduce the period of ineligibility according to the principles of proportionality adumbrated in CAS 2016/A/1025 and CAS 2007/A/1252*" the sanction was in accord with ("*the strictures of*") the rules.

The award closing remarks evoke the legal adage "*Hard cases make bad law*", also quoted in the Paolo Guerrero award CAS 2018/A/5571, only to emphasize the panel could not act differently or let themselves tempted to breach the boundaries of the regulations because of the harsh consequences in a particular case, as doing so would undermine the principle of legal certainty and "*a trickle could become a torrent; and the exceptional become the norm*",[36] threatening the uniform application of sports regulations.

Similarly, although departing from a different premise, in the SFT decision of 7 June 2021, the Federal Judges started by interpreting the rules of the Federación Colombiana de Fútbol in accordance with its literal meaning: "*À la lecture du texte de l'art. 43 RSJ FCF, il appert clairement que seules les décisions rendues par la CSJ FCF (CSJ COLFUTBOL) en qualité d'instance unique peuvent faire l'objet d'un appel au TAS*"[37] to eventually conclude that the panel's interpretation of the regulation was untenable and that the text of the regulation was unambiguous and clear and hence, not open to interpretation: "*La Formation a ainsi considéré, à tort, que le texte de l'art. 43 RSJ FCF était ambigu et offrait diverses interprétations possibles*".[38]

CAS has resorted to the literal interpretation[39] of FIFA regulations[40] in many instances to interpret the regulations of FIFA:[41]

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[35] Award available at *https://www.tas-cas.org/fileadmin/user_upload/9451-9455-9456_Arbitral_Award__publ._.pdf.*

[36] Quote in para. 424 of the Kamila Valieva CAS awards. See also para. 90: "*90. It is in the Panel's view better, indeed necessary, for it to adhere to the WADC. If change is required, that is for a legislative body in the iterative process of review of the WADC, not for an adjudicative body which has to apply the lex lata, and not some version of the lex ferenda*".

[37] Translation: "*On reading the text of art. 43 RSJ FCF, it is clear that only decisions rendered by the CSJ FCF (CSJ COLFUTBOL) as a single instance may be appealed to CAS*".

[38] Translation: "*The Panel wrongly considered that the text of art. 43 RSJ FCF was ambiguous and open to various possible interpretations*".

[39] See e.g. Para. 67, TAS 2020/A/7444 Munir El Haddadi & Feìdeìration Royale Marocaine de Football (FRMF) v. Feìdeìration Internationale de Football Association (FIFA) & Real Federacioìn EspanÞola de Fuìtbol (RFEF), sentence du 18 janvier 2021 (dispositif du 6 novembre 2020). Award available here: *https://jurisprudence.tas-cas.org/Shared%20Documents/7444.pdf.*

[40] On the interpretation of Article 17.2 RSTP see e.g. para. 229-233 of CAS 2020/A/7054 Sporting Clube de Portugal v. Rafael Alexandre de Coinceiçao Leao & LOSC Lille & FIFA. Award available here: *https://digitalhub.fifa.com/m/2645f60a0e69d9c3/original/CAS-2020-A-7054-Sporting-Clube-de-Portugal-v-Rafael-Alexandre-de-Conceicao-Leao-LOSC-Lille-FIFA.pdf.*

[41] See e.g. para. 20, CAS 2010/A/2071 *IFA v FAI, Kearns & FIFA*. Award available at *https://jurisprudence.tas-cas.org/Shared%20Documents/2071.pdf.*

"*2. The interpretation of the statutes and rules of a sport association has to be objective and always start with the wording of the rule. The adjudicating body will have to consider the meaning of the rule, looking at the language used, and the appropriate grammar and syntax. The identification of the intentions of the association which drafted the rule will be further taken into consideration, as well as any relevant historical background and the regulatory context in which the particular rule is located. In this respect, according to article 8 of the Swiss Civil Code, the party alleging an analysis bears the burden of demonstrating the accuracy of it. It is not sufficient for it simply to make an assertion as to the relevant rules' derivation*".

However, the literal interpretation is not the terminal station, especially for those provisions that are typically drafted in broad and abstract terms.

Certainly, sports regulations are enacted to protect the specific interests of the stakeholders and address concrete situations like the COVID-19 pandemic or the invasion of Ukraine. But as it happens with the law, nobody expects a regulation to anticipate the variety of events and circumstances that happen when life gets in the way. When that is the case, the text cannot become an unsurmountable barrier. In cases of ambiguity or lack of clarity of the regulations, arbitrators must first interpret them and look at their spirit while finding the place of that specific rule in the law.[42]

From an interpretation viewpoint, sports regulations are no different than the ordinary state law. The spirit of the law is there to interpret and vivify the text when needed, and CAS jurisprudence[43] has not shied away from doing so when needed, although -truth be told- without delving much into the scope of the spirit:

"*170. Furthermore, the Panel notes that when interpreting the rules, it is necessary to consider whether the spirit of the rule (in as much as it may differ from the strict letter) has been violated (see CAS 2001/A/354 & 355; CAS 2007/A/1437; CAS OG 12/002). It follows that an athlete or an official or a club (or anyone bound by the rules), when reading the rules, must be able to clearly make the distinction between what is prohibited and what is not (CAS 2007/A/1437)*".

Notably, Art. 1.1 CC places the text of the law and its spirit at the same level. Already in 1920, Lucien-Brun[44] explained this in his doctoral thesis:[45]

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[42] Commentaire Romand CO I, Art. 1, 59. Ed. Helbing Lichtenhahn: "*La lettre est donc un point d'appui essentiel, mais jamais le seul fondement de l'interprétation*".
Translation: "*The letter is therefore an essential point of support, but never the only basis for interpretation*".

[43] See para. 169 of CAS 2022/A/8651 Edgards Gauracs v. UEFA. Award available here: *https://jurisprudence.tas-cas.org/Shared%20Documents/8651.pdf.*

[44] P. Lucien-Brun, *Le Rôle et les pouvoirs du Juge, dans le Code Civil Suisse*, cit., 4.

[45] Translation: "*By starting from the letter and the spirit of the law, the drafters of the Code did not intend to set them in opposition to each other, and to admit, alongside a logical interpretation, a purely grammatical interpretation: even when the text of the law appears formal, the judge must not*

"*En partant de la lettre et de l'esprit de la loi, les rédacteurs du Code n'ont pas entendu les opposer l'une à l'autre, et*[46] *à côté d'une interprétation logique, admettre une interprétation purement grammaticale: même quand le texte de la loi lui paraît formel, le juge ne dois pas l'appliquer de façon mécanique, sans se préoccuper du sens et de la portée que lui confère l'ensemble des règles du Code: l'esprit doit toujours informer et vivifier la lettre, et le juge doit s'arracher à cet automatisme auquel certaines philosophes on parfois voulu réduire sa mission*".

Today, in 2024, the interpretation of the law beyond the literal meaning of the text is conducted according to the so-called "*methodological pluralism*". The spirit of the rule cannot be construed as the unmovable historical[47] will of the legislator but instead, must be seen from what the SFT defines as a "*pragmatic pluralism*"[48] perspective, under which no method of interpretation is favored (ATF 140 V 458):[49]

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apply it mechanically, without considering the meaning and scope conferred by the Code's rules as a whole: the spirit must always inform and enliven the letter, and the judge must avoid the automatism to which certain philosophers have sometimes sought to reduce his mission".

[46] Vid. Commentaire Romand CO I, Art. 1, 59. Ed. Helbing Lichtenhahn. "*Un point aujourd'hui acquis réside dans le lien qu'il y a lieu de faire entre «la lettre» (Wortlaut) et «l'esprit» (Auslegung): au lieu du «ou» prévu par le texte de la loi, on admet qu'il faut lire un «et» entre lettre et esprit*". Translation: "*One point that is now accepted is the link that should be made between "the letter" (Wortlaut) and "the spirit" (Auslegung): instead of the "or" provided for in the text of the law, it is accepted that an "and" should be read between letter and spirit*".

[47] In 1909, Alfred Martin, professor at the University of Genève challenged the predominant view at the beginning of the twentieth century according to which to identify the meaning of the law and draw consequences from it one needed to look at it from the point of view of the legislator. In essence he argued that, if the law is to be interpreted, it must be done based on contemporary ideas and needs and conform to the general will of society. Notably, Professor Martin quoted Gény to explain this: "*Pour comprendre le sens d'une loi, il faut se placer au point de vue de celui qui l'a édictée ; mais pour en tirer toutes ses conséquences pratiques, les besoins et les aspirations du temps présent doivent être consultés et satisfaits dans la mesure possible*".

A. Martin, *Observations sur les pouvoirs attribués au juge par le Code civil suisse*, E. Skilled Books, Genève, 1909, 16. Lucien-Brun seems to point in a similar direction in his doctoral thesis of 1920, when he explained that, while it was the duty of judges to rely on the preparatory works when interpreting an obscure text, they must not consider themselves bound by the interpretation the legislator attached to the text at the time of its promulgation, thus ruling out the principle known as "*authentic interpretation*" wherein only the lawmaker could give meaning to and delineate the scope of the law.

P. Lucien-Brun, *Le Rôle et les pouvoirs du Juge, dans le Code Civil Suisse*, cit., 6.

[48] Art. 1 in L. Thévenoz, Luc - F. Werro, *Code des obligations*, I, Helbing Lichtenhahn Verlag, Bâle, 2021, 71: "*Malgré la faveur que conserve souvent l'interprétation textuelle, dans la mesure où elle paraît révélatrice du sens que le législateur a voulu, le Tribunal fédéral déclare aussi ne privilégier aucun élément d'interprétation: en réalité, il entend bien plutôt s'inspirer d'une pluralité pragmatique de méthodes pour déterminer le sens véritable de la norme, et ne sc*
fonder sur une approche littérale que si la solution qu'elle impose est matériellement juste".

[49] SFT decision available at *https://www.bger.ch/ext/eurospider/live/fr/php/clir/http/index.php?highlight_docid=atf%3A%2F%2F140-V-458%3Ade&lang=fr&zoom=&type= show_document*. Translation: "*5.1 The law is interpreted primarily according to its letter (literal interpretation). However, the Federal Tribunal will only rely on a literal understanding of the text if this unambiguously*

"*5.1 La loi s'interprète en premier lieu selon sa lettre (interprétation littérale). Le Tribunal fédéral ne se fonde cependant sur la compréhension littérale du texte que s'il en découle sans ambiguïté une solution matériellement juste. Il y a lieu de déroger au sens littéral d'un texte clair, lorsque des raisons objectives permettent de penser que le texte ne restitue pas le sens véritable de la disposition en cause et conduit à des résultats que le législateur ne peut avoir voulus et qui heurtent le sentiment de la justice et le principe de l'égalité de traitement. De tels motifs peuvent découler des travaux préparatoires (interprétation historique), du but de la règle, de son esprit, ainsi que des valeurs sur lesquelles elle repose, singulièrement de l'intérêt protégé (interprétation téléologique) ou encore de sa relation avec d'autres dispositions légales (interprétation systématique). Le Tribunal fédéral ne privilégie aucune méthode d'interprétation, mais s'inspire d'un pluralisme pragmatique pour rechercher le sens véritable de la norme (ATF 138 II 557 consid. 7.1,565 et les références citées)*".

Under Art. 1 CC, when the text is unclear or offers multiple possible interpretations, the judge must discern the true scope of the rule ("*la véritable portée de la norme*").[50] To do so, judges enjoy complete freedom to interpret the norm and find its scope and relationship with other provisions (systematic interpretation) in the regulation, the aim it pursues, the interests it protects (teleological interpretation), or the purpose of the legislator when drafting and enacting the norm (historical and teleological interpretation),[51] or even resort to other criteria, like the professional context or comparative law.[52]

All these methods require a subjective decision from the judge (a judgement of value), which is not found in the text but can be achieved from the text by way of interpretation.

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leads to a materially correct solution. There are grounds for departing from the literal meaning of a clear text when there are objective reasons for believing that the text does not convey the true meaning of the provision in question and leads to results that the legislator could not have intended and that offend against the sense of justice and the principle of equal treatment. Such grounds may derive from the preparatory work (historical interpretation), the purpose of the rule, its spirit and the values on which it is based, in particular the interest protected (teleological interpretation) or its relationship with other legal provisions (systematic interpretation). The Federal Supreme Court does not favor any particular method of interpretation but draws on a pragmatic pluralism to seek the true meaning of the rule (BGE 138 II 557 rec. 7.1 p. 565 and references cited)".

[50] See para. 3.5 SFT 131 II 562, Available at *http://relevancy.bger.ch/php/clir/http/index.php?highlight_docid=atf%3A%2F%2F131-II-562%3Ade&lang=de&type=show_document*.

[51] See e.g. Para. 65, 62 CAS 2021/A/8308 Christian Pouga v FIFA. Award available here: *https://jurisprudence.tas-cas.org/Shared%20Documents/8308.pdf*.

[52] Commentaire Romand CO I, Art. 1, 66. Ed. Helbing Lichtenhahn: "*La lettre est donc un point d'appui essentiel, mais jamais le seul fondement de l'interprétation*".
Translation: "*The letter is therefore an essential point of support, but never the only basis for interpretation*".

61. Any statutory interpretation begins with the letter of the law (literal interpretation), but this is not decisive: the interpretation still has to find the true scope of the norm which also derives from its relationship with other legal provisions and its context (systematic interpretation), the aim pursued, particularly the protected interest (teleological interpretation), as well as the will of the legislator as it may be understood from the "travaux préparatoires" (historical interpretation). The judge or arbitrator departs from a clear legal text only when the aforementioned other methods of interpretation show that this text does not correspond in all respects to the true meaning of the provision in question and leads to results which the legislator could not have wanted, which conflict with the sense of justice, or the principle of equal treatment. No specific method of interpretation or component must prevail or be favoured when seeking the true meaning of a norm (SFT 4A_600/2016, paras 3.3.4.2, and the references; CAS 2013/A/3365 &3366, paras 137f; CAS 2017/A/5356, para 86)".[53]

Ultimately, it will come to the judges' discretion to decide which interpretation method they resort to. If despite the above exercise, there are still various possible valid interpretations, *it is appropriate to choose the one that complies with the Constitution* ("*il convienne de choisir celle qui est conforme a la Constitution*[54]"), as the federal legislator, in accordance with principle of legality, would not propose a solution against the first rule of the legal system.

Generally, when interpreting exceptions to general rules[55] or rules of a disciplinary or punitive nature,[56] panels will usually adopt a restrictive approach to safeguard fundamental rights. In contrast, in other instances, such as the legal interest or standing[57] or the scope of an arbitration agreement,[58] they are more prone towards an expansive interpretation, as a conscious choice of Switzerland to impulse and facilitate arbitration. Panels can also look up to the general principles of law[59] or resort to analogy to interpret a rule, or to teleological reduction to rule out the application of a provision to a particular case.

The boundaries between interpreting rules and filling in gaps in the regulations are not evident. Practice shows that not every omission in the rules constitutes a lacuna.

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[53] CAS 2021/A/8308 Christian Pouga v. FIFA.

[54] See para. 3.5 SFT 131 II 562, Available here: *http://relevancy.bger.ch/php/clir/http/index.php?highlight_docid=atf%3A%2F%2F131-II-562%3Ade&lang=de&type=show_document.*

[55] See e.g. *https://jurisprudence.tas-cas.org/Shared%20Documents/2690.pdf.*

[56] See e.g.

[57] See e.g. Para. 63 CAS 2021/A/8308 *Christian Pouga-- v. FIFA*: "*63. In the present case, the analysis of Article 15(2) FDC clearly requires a broad and flexible approach, which is mindful of the interest of the creditor, namely the Appellant*".

[58] See e.g. para 73 of CAS 2017/A/5054 *Martin Fenin v FC Istres Ouest Provence.* Award available here: *https://jurisprudence.tas-cas.org/Shared%20Documents/5054.pdf.*

[59] See e.g. CAS 2005/A/1180 Galatasaray SK v. Frank Ribéry & Olympique de Marseille. Award available here: *https://jurisprudence.tas-cas.org/Shared%20Documents/1180.pdf.*

In CAS 2020/A/7134 *Altay SK v. Pedro Miguel Pina Eugenio*,[60] where the Sole Arbitrator concluded that the fact that Article 14bis of the RSTP did not contain a rule dealing with the case where the 15-day deadline would end on a weekend or public holiday, did not constitute a lacuna in the regulations and ultimately the question could be solved by way of interpretation.

The lack of an according provision -he says- does not leave this situation technically ungoverned:

> *"70. The provision which is "lacking", would therefore constitute an additional provision and not one which was required to create a meaningful regulation.*
>
> *71. Such provision could therefore only be considered to constitute a lacuna if a legislator must reasonably be expected to create an according additional provision which explicitly deals with the specific case of deadlines which end on public holidays".*

Even so, there are times when a judge will inevitably encounter a roadblock in interpreting a rule, facing an omission or gap within the regulation.

5. *Filling-in lacunae in sports regulations: Customary law and free research*

If we focus on the RSTP, Art. 56.2 of the FIFA Statutes instructs CAS to apply Swiss law in addition to the various regulations of FIFA. This reference in Article 56.2 is not a "*wide-ranging remission to Swiss law but it only states that Swiss law is to apply additionally, since the application of Swiss law aims at filling the gaps in the FIFA rules and regulations*"[61] and, therefore, will serve the purpose to complete whatever is already regulated in the RSTP, but not necessarily matters not governed by it, for which the CAS panel will have to look at the conflict-of-law rule in Article R58 of the CAS Code and decide accordingly.

For matters regulated in or falling under the scope of the RSTP, the remit to Swiss law to fill-in lacunae, including Article 1 CC is therefore, pertinent.

The first paragraph of Article 1 CC focuses on situations where the text provides an answer to a question of law brought before the court. A rule that exists must be interpreted to make sense of it.

The second paragraph, on the other hand, deals with what to do when the text or its spirit doesn't provide a solution. It recognizes first customary law as the primary backup source of law when the text is silent, and subsidiarily, in the absence of a binding practice, it grants judges the exceptional authority to take a decision acting as if they were legislators.

The Federal Tribunal defines this capacity of judges to complete the missing rule in the law as the "*insertion principle*" ("*principe d'insertion*"),

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[60] Award available here: *https://jurisprudence.tas-cas.org/Shared%20Documents/7134.pdf*.

[61] D. Mavromati - M. Reeb, *The Code of the Court of Arbitration for Sport Commentary, cases and materials*, Wouters Kluwer, 2015, 545.

also emphasizing that the principle of primacy of the law (*principe de légalité*) requires in any event that a judge filling in a lacuna must do it within the limits of the rule he or she is completing. It also indicates a preference for judges to resort to analogy when integrating new rules: "*dans l'élaboration de cette règle, le juge doit avant tout puiser 'dans le donné normatif fourni par le droit en vigueur', et de préférence recourir à l'analogie avec des règles légales existantes*".[62]

6. Custom

In general, Swiss scholars[62] agree that customary law plays a residual, if not insignificant, role in civil law. CAS panels have also acknowledged customary law as a valid method to fill in gaps in sports regulations and have given it serious consideration: "*33. Swiss doctrine and jurisprudence recognize the potential importance of customary law within an association (i.e. in German the so-called "Vereinsübung" or "Observanz" and in French the so-called "droit coutumier"; cf. RIEMER H. M., Berner Kommentar, 1990, Syst. Teil, before Art. 60-79 Swiss Civil Code, N 321, 351 ff.; HEINI/SCHERRER, Basler Kommentar, 2006, Preface to Art. 60-79 Swiss Civil Code, N 23). In addition, CAS has recognized the institution of customary law in an association in many decisions, for instance in CAS 2004/A/589*".[64]

By way of example, the Sole Arbitrator in TAS 2021/A/2720 FC *Italia Nyon & D. c. LA de l'ASF & ASF & FC Crans*[65] remarked that private regulations in sports can also create customary law under the same conditions as for objective law through the uniform and constant application, and the conviction of all interested parties that there is a binding legal order.

The CC indicates that customary law is only called upon to complete the written law; hence, it cannot correct it or repeal it.[66]

In CAS 2012/A/2754 *UC Sampdoria v. Club San Lorenzo de Almagro & FIFA*,[67] FIFA argued their own RSTP contained a lacuna for not addressing the consequences arising from the fact that a club was placed under judicial administration and contended (without success) that such gap had been filled by "*constant, consistent, longstanding and undisputed practice*", insisting on

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[62] Commentaire Romand CO I, Art. 1 33. Ed. Helbing Lichtenhahn.
Translation: "*in drawing up this rule, the judge must first and foremost draw 'on the normative data provided by the law in force', and preferably resort to the analogy with existing legal rules*".
[63] Commentaire Romand CO I, Art. 1, 28. Ed. Helbing Lichtenhahn.
[64] See e.g. CAS 2008/A/1622 FC Schalke 04 v. FIFA, CAS 2008/A/1623 SV Werder Bremen v. FIFA, CAS 2008/A/1624 FC Barcelona v. FIFA.
Award available at https://jurisprudence.tas-cas.org/Shared%20Documents/1622,%201623,%201624.pdf.
[65] Award available at https://jurisprudence.tas-cas.org/Shared%20Documents/2720.pdf .
[66] P. Lucien-Brun, *Le Rôle et les pouvoirs du Juge, dans le Code Civil Suisse*, cit.,12.
[67] Award available at *https://jurisprudence.tas-cas.org/Shared%20Documents/2754.pdf*.

closing the case and refusing to decide on the merits, due to the existence of *lis pendens* at a national level, which - according to FIFA -, "*acquired force of customary law*".

The CAS panel acknowledged that in Switzerland, customary is a subsidiary source of law that according to the "*majority of Swiss scholars*",[68] it requires the concurrence of an objective and a subjective element. The objective element (*longa consuetudo*) presupposes the existence of widespread practice for a very long time. The subjective element (or *opinio juris sive necessitates)* needs that a practice should emerge out of the spontaneous and unforced behavior of various members of a community/society.

Eventually, the CAS panel considered that FIFA failed to discharge the burden of proof as to the supposed widespread practice and their arguments in that regard were ultimately ignored.

Customary law was also invoked without success by former FIFA General Secretary in CAS 2017/A/5003 *Jerôme Valcke v FIFA*[69] as means to justify a breach of the FIFA travel regulations. Mr. Valcke, however, failed to establish the: (i) existence of a loophole in the applicable regulations, (ii) constant practice of the association, and (iii) acceptance by members of the association of its mandatory or binding nature.

In view of the author, a timid and indirect reference to customary practice can be inferred from CAS 2015/A/3910 *Ana Kuze v. Tianjin Teda FC*.[70] This award concerns a contractual-related claim (hence, the principles of interpretation are based on Article 18 CO) and the seasoned CAS panel resorted to the "*business practice in football*" to fill in a lacuna in the employment contract and accepts a request for default interest at a 5% rate as: "*The latter is in line with practice in the 'football industry'*".

The CAS jurisprudence evidences how difficult it is to establish the existence of customary law.[71] Huber was already aware of this, and for that reason, he opened the text beyond its words to offer judges a powerful tool to solve real-life equations whose solutions could not be found by applying a mathematical algorithm.

7. Free research: The judge-legislator

In further application of Art. 1 CC, in lack of customary rules, a judge confronting a lacuna in the regulation will have to decide a case in accordance with the rules he or she would have enacted by stepping into the shoes of the legislator.

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[68] See para. 67 of the award.

[69] See para. 206 of the award. Award available at *https://jurisprudence.tas-cas.org/Shared%20Documents/5003.pdf*.

[70] Award available at *https://jurisprudence.tas-cas.org/Shared%20Documents/3910.pdf*.

[71] See also para. 19.8 of the award. Available here: *https://jurisprudence.tas-cas.org/Shared%20Documents/2690.pdf*.

The jurisprudence of the Swiss Federal Tribunal distinguishes between three possible situations: (i) A proper or authentic lacuna, (ii) an improper lacuna, and (iii) an *intra legem* lacuna, also called qualified silence, attaching different consequences for each one of them. Let's now see how the three types of *lacunae* operate.

A proper or authentic lacuna is where the lawmaker has inadvertently omitted to address a question of law which it should have addressed, and no solution is apparent from the text or interpretation of the law:

> "*lorsque le législateur a omis d'adjoindre à une règle conçue de façon générale la restriction qu'imposent, dans certains cas déterminés, le sens et le but de la règle considérée ou d'une autre règle légale*".[72]

In other words, the silence in the law is contrary to the economy of the law.[73] According to the Swiss Federal Tribunal, only a proper or authentic lacuna will require the judge's intervention to fill it.[74]

An illustrative example of how the above referred insertion principle operates in the context of a CAS panel filling in a missing rule in lack of custom is Art. 17 of the RSTP, which despite regulating only cases of termination of contracts without cause, it also covers cases where the contract is terminated with just cause.

The missing rule in the RSTP (i.e., no consequences foreseen when terminating an employment contract with just cause) is filled by a CAS panel within the limits of the RSTP (i.e. the RSTP regulates the termination of employment contracts), CAS ends up ruling "*beyond the RSTP, through the RSTP*".

For example, see the reference of the Sole Arbitrator in TAS 2021/A/7793 *Club Sportif Sfaxien c. Rachid Aït Atmane* held as follows:

> "*90. A ce sujet, l'Arbitre unique note que le RSTJ règle à son art. 17 les conséquences financières d'une rupture de contrat sans juste cause. Ce règlement ne prévoit en revanche pas de disposition traitant expressément de ces conséquences en cas de résiliation anticipée justifiée du contrat. Pour combler cette lacune, on trouve dans la pratique du TAS des sentences appliquant par analogie l'art. 17 RSTJ, des décisions se fondant sur l'art. 337b CO à titre de droit supplétif, voire examinant la situation sous l'angle de ces deux dispositions conjointement (p. ex. CAS 2013/A/3398)*".[75]

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[72] See ATF 117 II 494, recital 6. Award available at *https://relevancy.bger.ch/php/clir/http/index.php?lang=fr&type=show_document&highlight_docid=atf://117-II-494:fr&print=yes*.
Translation: *"when the legislator has omitted to add to a rule conceived in a general way, the restriction which, in certain specific cases, the meaning and purpose of the rule in question or of another legal rule require*". H. Deschenaux, *Le Titre préliminaire du Code civil*, in *Traité de droit civil suisse* tome II, 1, Éditions universitaires Fribourg Suisse, Fribourg, 1969, 93.

[73] See ATF 117 II 494, recital 6.

[74] See para. 3.5. SFT 131 II 562, Available here: *http://relevancy.bger.ch/php/clir/http/index.php?highlight_docid=atf%3A%2F%2F131-II-562%3Ade&lang=de&type=show_document*.

[75] Award available here: *https://jurisprudence.tas-cas.org/Shared%20Documents/7793.pdf*.

A milestone of considerable heft in the application of the principle of insertion of missing rule in relation to the RSTP is sporting succession of football clubs.

It was the FIFA bodies and CAS jurisprudence which created, developed and integrated the concept of sporting succession during the early years of the 21st century before it was introduced for the first time in Art. 15.4 of the 2019 edition of the FIFA Disciplinary Code. Sporting succession was conceived as a tool to promote contractual stability and protect football creditors against clubs going into administration, bankruptcy or liquidation and reemerging through a newly created entity taking over the identity of the former club.[76] In the lack of a rule governing the matter, the jurisprudence looked beyond the text to create a principle of law that was later positivized in the regulations.

In the view of the undersigned, an authentic lacuna existed also in Annexe 7[77] of the RSTP (March 2022 edition)[78] concerning the so-called "*Temporary rules addressing the exceptional situation deriving from the war in Ukraine*" and the effects on employment contracts of an international dimension of players and coaches in Russia and Ukraine. In summary, under Annexe 7 players and coaches are entitled to suspend their contracts with their clubs during the war and temporally sign with another club.

The first version of Annex 7 omitted to contemplate the possibility of clubs receiving players fleeing Ukraine or Russia, to further transfer them to third clubs during the period of suspension of their employment contracts. The immediate clarification introduced by FIFA in the May 2023 edition of Article 8.1 of Annexe 7 of the RSTP,[79] banning payments in transfers of players whose contracts were suspended, suggests (i) that there was an omission in the regulation and (ii) that it can be reasonably presumed that such lacuna was accidental, unintentional and/or the result of an oversight by FIFA,[80] and (iii) that it was never the intention of FIFA to allow such conducts in the first place.

Translation: "*90. In this respect, the Sole Arbitrator notes that Art. 17 of the RSTJ regulates the financial consequences of a breach of contract without just cause. However, there is no provision dealing expressly with these consequences in the event of justified early termination of the contract. To fill this gap, CAS practice includes awards applying Art. 17 RSTJ by analogy, decisions relying on Art. 337b CO as suppletive law, and even examining the situation from the angle of these two provisions together (e.g. CAS 2013/A/3398)*".

[76] J. Cambreleng Contreras - S. Samarth - J.F Vandellós Alamilla (eds), *Sporting Succession in Football*, Sports Law and Policy Centre, Nocera Inferiore, 2020, 47 ss.

[77] Award available here: *https://digitalhub.fifa.com/m/6f2d58dc8abe261a/original/-1787_Temporary-rules-addressing-the-%20exceptional-situation-deriving-from-the-war-in-Ukraine_EN.pdf.*

[78] Available here: *https://digitalhub.fifa.com/m/6f2d58dc8abe261a/original/-1787_Temporary-rules-addressing-the-exceptional-situation-deriving-from-the-war-in-Ukraine_EN.pdf.*

[79] Available here: *https://digitalhub.fifa.com/m/6f2d58dc8abe261a/original/-1787_Temporary-rules-addressing-the-%20exceptional-situation-deriving-from-the-war-in-Ukraine_EN.pdf.*

[80] See para. 66 CAS 2020/A/7134.

However, regarding Annex 7 of the RSTP, it is important to note that the Panel in CAS 2023/A/10103 *FC Shakhtar Donetsk v. Olympique Lyonnais*, in its award of 10 September 2024, took a different view.[81] The Panel perfunctorily concluded that no lacuna existed, stating that "*Just because there could be other provisions inserted, does not mean that there is a lacuna in the rules. It may be that the legislator intended to leave such provisions out or it may be that other rules deal with any alleged lacuna*".[82]

Hence, the singular and yet exceptional duty of judges to complete the missing rule through free research is meant to keep the law fresh and flexible, enabling the judiciary to keep its foot in a world too big and complex to be encapsulated in a legal code. As a result, this responsibility with which they are entrusted, comes with high responsibility and well-defined limits.

In 1965, Wolf described it very clearly: "*Mais il n'est pas libre quant à la méthode à suivre pour former sa conviction. Si le Code exige du juge qu'il décide "selon les règles qu'il établirait s'il avait fait acte de législateur", cela est plutôt une limitation qu'autre chose. Comme l'a précisé Eugen Huber dans l'exposé des motifs de l'avant-projet du Code Civil, cela veut dire qu "il ne doit pas statuer arbitrairement, sous l'influence de circonstances momentanées, pitié, indignation, animosité personnelle, mais agir comme si, faisant office de législateur, il avait à édicter une règle pour l'appliquer ensuite à l'espèce qui lui est déférée*".[83]

It is, therefore, not the circumstances of a particular case the judge will be having in mind when creating law but instead the role the legislator would have assumed to give an answer to a situation which should have been reasonably[84] regulated when the rule was enacted and that was necessary to protect the general interest, which in turn will help taking a satisfactory decision to the question of law presented by the parties in a particular case and also in future cases.

Lastly, is worth making a passing reference to Art. 182 (2) of the Federal Swiss Private International Law Act ("PILA")[85] that, likewise, accords arbitrators the right to directly create law, to fill in procedural lacunae, such as for example a rule on evidentiary matters as mentioned in CAS 2019/A/6669 *Sayed Ali Reza v. FIFA*.[86]

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[81] See para. 146 to 160 of the award.

[82] Para. 148.

[83] E. Wolf, *Les Lacunes du Droit et Leur Solution en Droit Suisse*, cit.
Translation: "*It must not rule arbitrarily, under the influence of momentary circumstances, pity, indignation, personal animosity, but act as if, acting as legislator, it had to enact a rule to then apply it to the case referred to it*".

[84] Vid. para. 78-83 CAS 2020/A/7134.

[85] "2. *Where the parties have not determined the procedure, the arbitral tribunal shall determine it to the extent necessary, either directly or by reference to a law or to arbitration rules*". [emphasis added] An official translation of the PILA can be accessed here: *https://www.fedlex.admin.ch/eli/cc/1988/1776_1776_1776/en*.

[86] Award available here: *https://jurisprudence.tas-cas.org/Shared%20Documents/6669.pdf.*

Conversely, improper lacunae appear in cases where the law offers an answer to a question of law which is, however, unsatisfactory.[87] According to the *traditional view*,[88] judges are, in principle, prohibited from correcting improper lacunae unless they can lead to an abuse of rights under Art. 2 CC.

To the author's best knowledge, there are not many examples of improper lacunae in the RSTP. One example is the non-applicability of the principles of training compensation to women's football. Since 2004 the definitions in the RSTP end with a Nota Bene according to which: "*Terms referring to natural persons are applicable to both genders. Any term in the singular applies to the plural and vice-versa*".

In that logic, there was no apparent reason to exclude the application of Art. 20 RSTP on Training compensation to women's football. No authentic lacuna existed, as Article 20 was all-encompassing and thus applied equally to both genders, at least on paper.

However, the members of the FIFA Dispute Resolution Chamber (DRC) in a decision of 7 April 2011[89] concluded otherwise. According to FIFA the training compensation system *was* "*created considering the reality of men's football*". The costs used for its calculation were established after large studies of figures concerning men's football alone and the reality of women's football significantly differed from that of the men's game particularly with regards to professionalization.

In what seemed a severe rebuke to FIFA and the Respondent club, CAS[90] overturned the decision of the DRC,[91] leading FIFA to amend Art. 20

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[87] See SFT 131 II 562, Available here: *http://relevancy.bger.ch/php/clir/http/index.php?highlight_docid=atf%3A%2F%2F131-II-562%3Ade&lang=de&type=show_document*.

[88] Vid. Commentaire Romand CO I, Art. 1 33 and 34. Ed. Helbing Lichtenhahn. "*Le pouvoir du juge est par ailleurs limiteì au comblement d'une authentique lacune. Lorsque la loi offre une solution, mais que celle-ci est mateìriellement insatisfaisante (lacune improprement dite), le juge n'est en principe autoriseì aÌ corriger la loi-selon les conceptions traditionnelles - que dans les cas qui seraient constitutifs d'abus de droit (CO 2 II)86. Demeurent réserveés les cas où le juge est en droit de trancher en équité* (CC 4)".

Translation: "*The judge's power is also limited to filling an authentic lacuna. When the law offers a solution, but this is materially unsatisfactory (so-called improper lacuna), the judge is in principle authorised to correct the law - according to traditional conceptions - only in cases which would constitute an abuse of rights (CO 2 II). Cases where the judge is entitled to decide in equity (CC 4) remained reserved*".

See also Commentaire Romand CO I, Art. 1 34. Ed. Helbing Lichtenhahn.

Professor Amstutz seems to challenge the traditional view according to which judges are called to intervene only when confronted with an authentic lacuna: "*En particulier, l'idée que le juge ne saurait se prononcer sur le droit désirable en dehors des lacunes proprement dites semble clairement contraire au pouvoir que Huber entendait reconnaitre à ce dernier*".

[89] DRC decision of 7 April 2011, no. 411375. Available here: *https://digitalhub.fifa.com/m/63812c43c0dea553/original/mddehp33qaqnlgqcvjbv-pdf.pdf*.

[90] See CAS 2016/A/4598, *WFC Spartak Subotica v. FC Barcelona* of 21 June 2017. Award not published.

[91] CAS 2016/A/4598 *WFC Spartak Subotica v. FC Barcelona* para. 88: "*The Panel unanimously concludes, on the basis of the evidence before it, that the RSTP 2012, including provisions relating to training compensation, apply to women's professional football as well as to men's*".

RSTP to make clear that the principles of training compensation do not apply to women's football introduced in the June 2018 edition of the RSTP, which remains in force to this day.

There is no doubt that the RSTP provided an answer to the question of law presented to the court (i.e. whether the transfers of women footballers triggered training compensation between clubs), which could produce unsatisfactory results if applied,[92] but still insufficient for CAS to intervene.

A second more recent case involving an improper lacuna is found in the award of the CAS ad hoc Division for the 2022 Olympic Games in the matter involving the Provisional Suspension of Kamila Valieva.[93] As opposed to the training compensation example the CAS panel considered it necessary to intervene in the Valieva case.

The CAS panel found the Russian Anti-Doping Agency ("RUSADA") Anti-Doping Rules and the World Anti-Doping Code ("WADC") were silent with respect to Provisional Suspensions imposed on Protected Persons and that this fact led to a different and harsher treatment for the latter with respect to other categories of athletes. According to the panel the strict application of the rules was "*not satisfactory from a legal point of view*".

Despite the above, the panel opted to resort to interpretation making explicit it was not rewriting new rules or making policies on behalf of the competent sporting body.

> "*201. (...) The Panel wishes to emphasize that it does not see itself as a policymaker or rule maker, but it is properly called upon, as are courts around the world, to interpret rules and how they work*".

The panel in this first Valieva award contributed to defining the limits of arbitrators when interpreting rules when stating they will necessarily account for "*(...) the overarching principle of justice and proportionality on which all systems of law*"[94] are based.

The different outcomes in the two above cases reveal how fine the line between the interpretation of rules and judges' free research in filling in lacunae is. In both situations, the law offered an unsatisfactory answer to a question of law, yet the first panel opted to stay put and apply the literal meaning of the text, while the second decided to interpret the law, accounting for its spirit beyond the text.

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[92] CAS 2016/A/4598 *WFC Spartak Subotica v. FC Barcelona* para. 86: "*The Panel does accept that if the RSTP 2012, when applied to women's football, could be shown in a significant number of cases to produce a result which was unduly burdensome for the transferee club, that would be a serious point against the literal interpretation of the RSTP 2012 applying them to women's football. However, that has not been shown in this appeal*".

[93] See para. 193 to 202 in OG 22/008 & 22/009 & 22/010 *IOC & WADA & ISU v. RUSADA & Kaila Valieva & ROC*, award of 17 February 2022.

[94] Para. 200 and 201 of the award in the matter CAS ad hoc Division *OG 22/008 & 22/009 & 22/010 IOC & WADA & ISU v RUSADA & Kamila Valieva U ROC,* award of 17 February 2022.

And finally, there is an *intra legem* lacunae when the silence in the law is deliberate and planned. The legislator refrains from defining the details of the rule and wants the judge to decide following a legal mandate. It is part of a legislative technique where the rule adopts a neutral stance which will allow it to adapt over time to social changes, new values etc.

The regulation on how to deal with *intra legem lacunae* is found in Art. 4 CC, which falls beyond the scope of this study. Art. 4 CC instructs judges to decide applying the *principles of justice and equity*[95] when the law expressly confers them discretion (power of appreciation) or requires them to decide based on the circumstances of the case or good cause.

The term "*just cause*" in Art. 14 of the RSTP is a clear example of qualified silence.

Notably, the landmark award CAS 2005/A/1180 *Galatasaray SK v. Fran Ribéry & Olympique Marseille*[96] revealed the gap in the 2001 edition of the RSTP for it did not define when there was "*just cause*" to terminate a contract. FIFA omitted to define the term just cause in the regulation. To determine the purport of the term "*just cause*", the panel resorted to Swiss law and specifically to the jurisprudence to complete the text and give it meaning.

Along the same lines, in a dispute revolving around Art. 14bis RSTP, the awards CAS 2021/A/8477 *Dang Van Lam v. Muangthong United FC*, CAS 2021/A/8492 *Muangthong United FC v. Dang Van Lam & Cerezo Osaka* of 30 March 2023,[97] the Sole Arbitrator remarked "*Article 14bis of the RSTP does not stipulate a time limit within which the grounds of termination must be raised or within which a warning letter must be notified*".[98]

In other words, Article 14bis RSTP does not address within what time frame a person entitled to terminate a contract (i.c. due to outstanding salaries) can reasonably be expected to decide on whether he or she wants to terminate such a contract.

The Sole Arbitrator eventually fell back on Swiss law and CAS jurisprudence "*as an interpretative tool for determining the contents of the RSTP*"[99] and "*fill this lacuna*",[100] concluding the grounds for early termination of a labor contract must be invoked without delay, with a margin of two or three working days for reflection and obtaining legal advice. Instead, other panels have decided that Article 14bis RSTP is exhaustive so that reference to Swiss law is

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[95] Art. 4 CC: "*Where the law confers discretion on the court or makes reference to an assessment of the circumstances or to good cause, the court must reach its decision in accordance with the principles of justice and equity*". Available here: *https://www.fedlex.admin.ch/eli/cc/24/233_245_233/en*.

[96] Award available here: *https://jurisprudence.tas-cas.org/Shared%20Documents/1180.pdf*.

[97] Award not published.

[98] Para. 169.

[99] Para. 169.

[100] Para. 174.

not required and that a player can terminate a contract with just cause until the club has paid the outstanding remuneration.

Lastly, another example worth mentioning is the case 5A_21/2011 *Gibraltar Olympic Committee v. Comité International Olympique,*[101] where the Federal Tribunal found that Rule 34 of the Olympic Charter in force at the time of the disputed events contained a lacuna "*intra legem*" given the vast power of appreciation it conferred upon the IOC to interpret the term "*country*". The discussion circled around the meaning of the word "*country*", this being a crucial element allowing to apply for recognition by the International Olympic Committee.

The Swiss Federal Tribunal decided that when interpreting a disposition like the one referred above, where only its external contours were apparent (the term "*country*" being vague in its face and capable of encompassing a variety of situations), it was permitted to take into consideration a new rule which was not in force but was approved subsequently and codifies or specifies or completes the former rule.

Drawing a line between situations where judges are called to resort to interpretation of vague or unclear regulations, and situations where they must regulate by resorting to customary practice or by stepping into the shoes of the legislator is no easy task as the limits between the two are often blurred.[102]

As it stands, according to Swiss Federal Tribunal, judges should only intervene when confronted with a so-called authentic lacuna, that is, when the legislator failed to regulate a matter that it should have otherwise regulated, and thus the text offers no solution to a particular situation.[103]

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[101] See consid. 5.4.3. "*5.4.3 Vu le large pouvoir d'appréciation laissé au CIO, la règle 34 de la Charte constituait en quelque sorte une lacune "intra legem". Or, lorsqu'il y a lieu de combler une telle lacune, c'est-à-dire d'interpréter une disposition dont seuls les contours généraux ont été arrêtés, il est permis de prendre en considération une réglementation nouvelle, qui n'est pas encore entrée en vigueur, notamment lorsque celle-ci codifie ou concrétise le pouvoir d'appréciation de l'autorité amenée à statuer*".
Translation: *5.4.3 Given the broad discretion left to the IOC, Rule 34 of the Charter constituted something of an "intra legem" lacuna. However, when there is a need to fill such a gap, i.e. to interpret a provision of which only the general outlines have been determined, it is permissible to take into consideration new regulations that have not yet entered into force, in particular when they codify or concretise the discretionary power of the authority called upon to rule.*
Decision available here: *https://www.bger.ch/ext/eurospider/live/fr/php/aza/http/index.php?highlight_docid=aza%3A%2F%2F10-02-2012-5A_21-2011&lang=fr&type=show_document&zoom=YES&.*
[102] ATF 2C_818/2009, consid. 4.6.
[103] Vid. G. Scyboz - P.R. Gilliéron, *Code civil suisse et Code des obligations annotés (CC & CO)*, Helbing Lichtenhahn Verlag, Bâle, 2024, 4. "*(...) seule l'existence d'une lacune proprement dite appelle l'intervention du juge, tandis qu'il lui est interdit de corriger une lacune improprement dite, à moins que le fait d'invoquer le sens réputé déterminant de la norme ne soit constitutif d'un abus de droit, voire d'une violation de la Constitution*".
Translation: "*(...) Only the existence of a genuine lacuna as such calls for the judge's intervention, whereas he is forbidden to correct an improperly stated lacuna, unless invoking the deemed determining meaning of the norm would constitute an abuse of right, or even a violation of the Constitution*".

However, it is the author's view, that the implications of the double role of judges as interpreters and creators of law are in practice limited to situations, which will require them to look *beyond the text, but through the text*: either by looking at the spirit of the law and interpret it within the boundaries of the Constitution; either by looking at customary practice when this exists, or by regulating themselves when it doesn't, in all cases keeping in mind the principle of autonomy of sport and the freedom that sports organizations benefit from to regulate their own affairs.

To round off, a brief reference to the role of doctrine and jurisprudence is also necessary. Para. 3 of Art. 1 CC also requires judges to take inspiration from these sources.

8. The role of the doctrine and the jurisprudence

The CAS jurisprudence has proven to be particularly prolific in resorting to convincing doctrine.

The published awards contain references to meaningful commentaries and articles by distinguished law scholars. Given its rapid evolution and increasing complexity, sports law is a great catalyst for legal doctrine from which CAS arbitrators often draw inspiration.

On the other hand, jurisprudence goes a step beyond scholars' opinion.

Judges interpret and apply the law and fill in the possible gaps by interpreting or integrating new rules. Judicial decisions and arbitral awards are, as a matter of fact, the practical manifestation of the law. A law that is - by definition - read in the abstract and must accommodate real-life conflicts. Some authors[104] have even affirmed that every judicial decision enshrines the process of the creation of law. When judges decide upon a question of law brought before them, they are, in fact, creating the law for that specific case.

That said, jurisprudence is not a source of law in Switzerland, and hence, as opposed to common law legal systems, it does not have a binding effect or create a legal precedent that must be followed by subsequent decisions, nor does it create customary law in the sense of Art. 1.2 CC.

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[104] E. García de Enterría, *Reflexiones sobre la Ley y los principios generales en del Derecho*, cit., 194: "*GEìNY en Francia, VON BULOW, REICHEL e ISAY en el mundo germaìnico, POUND y CARDOZO en el anglosajoìn, entre otros muchos (16), hicieron patente definitivamente que en toda decisioìn judicial (y esto puede aplicarse a la integridad del proceso de aplicacioìn del Derecho, aunque no toda tenga la auctoritas de la aplicacioìn por el juez) se reproduce necesariamente en mayor o menor medida el proceso de creacioìn o produccioìn del Derecho, que en toda interpretacioìn judicial de una norma hay necesariamente una conformacioìn valorativa de esta norma, que toda decisioìn judicial entranÞa una decisioìn originaria sobre el orden juriìdico (17)*".
Available here: *https://dialnet.unirioja.es/descarga/articulo/2112894.pdf*.

Lucien-Brun[105] rejected very early the idea that a longstanding and consistent jurisprudence may become a source of law through the backdoor of customary law:[106]

> "*La fonction du juge n'est pas de créer un droit coutumier : elle est seulement de le constater, de le confirmer par sa reconnaissance, tout au plus d'en préparer la naissance en aiguillant dans un sens défini la pratique juridique*".

Conceding otherwise – continues Lucien-Brun –[107] would put in question the authority of judges and undermine the very purpose of jurisprudence that the CC initially sought to establish, which is to stimulate the role of judges acting *modo legislatoris* when the circumstances require so:

> "*Sur-même, ce serait admettre que la jurisprudence peut se lier elle-même, ce serait même l'obliger à se lier : au lieu de favoriser l'activité créatrice du juge, ce système n'aboutirait qu'à immobiliser la jurisprudence, et sous prétexte d'augmenter son autorité, à réduire son rôle effectif dans l'élaboration du droit*".

The freedom of CAS panels to overrule previous CAS jurisprudence in similar situations is seen in the award CAS 2014/A/3620 *US Città de Palermo v. CA Talleres de Córdoba* on training compensation, where the Panel concluded that the approach of a previous panel "*was misconceived*", and "*As a result, this Panel has taken the view that there is no precedential value in the "Panionios Case*". Panels can, therefore, draw inspiration from previous awards in similar matters to promote consistent jurisprudence and legal certainty in applying the rules. Still, they are in no way limited by them.

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[105] P. Lucien-Brun, *Le Rôle et les pouvoirs du Juge, dans le Code Civil Suisse*, cit., 14. "*(1) Sur ce point, la pensée du législateur ressort nettement des travaux préparatoires : dans l'Avant-Projet, la doctrine et la jurisprudence étaient classés comme une source formelle de droit, à laquelle le juge devait faire appel avant de recourir à la libre recherche (2). Cette disposition a été remplacée par la forme actuelle : "le juge s'inspire de la jurisprudence". (3) Substitution d'où résulte que le législateur s'est finalement refusé à faire de la jurisprudence une source de la coutume (...)*".
Translation: "*(1) On this point, the legislator's thinking is clear from the preparatory works: in the Preliminary Draft, the doctrine and the jurisprudence were included as a formal source of law, to which the judge had to refer before resorting to free research (2). This provision has been replaced by the current form: "the judge shall draw inspiration from the jurisprudence". (3) This substitution means that the legislator ultimately refused to make jurisprudence a source of custom (...)*".

[106] P. Lucien-Brun, *Le Rôle et les pouvoirs du Juge, dans le Code Civil Suisse*, cit., 19.
Translation: "*The role of the judge is not to create customary law: it is merely to observe it, to confirm it by recognizing it, or at the very most to prepare for its emergence by guiding legal practice in a defined direction*".

[107] P. Lucien-Brun, *Le Rôle et les pouvoirs du Juge, dans le Code Civil Suisse*, cit., 15.
Translation: "*Instead of encouraging the creative activity of the judge, this system would only result in immobilizing the jurisprudence and, under the pretext of increasing its authority, reducing its actual role in the development of the law*".

9. Conclusion

In essence, Art. 1 CC emphasizes that judges and CAS arbitrators, by extension, are not slaves to the words in a law or regulation. Instead, they are tasked with organically taming the strictures of the text through interpretation or extending it by incorporating the missing rule in an ever-changing landscape.

The study of Art. 1 CC evidence the sophistication behind its simplicity and the existence of communicating vessels between legal texts and reality that transcend the simple historical interest and that must be acknowledged, mastered, and also used today in 2024.

The tools and mechanisms in Art. 1 CC are incredibly powerful and facilitate a smooth flow between written and non-written law.

As a personal note, I concluded that there can't be sealed walls between interpreting obscure terms and filling a gap in a regulation. In both cases, judges – certainly with a different intensity – are called to assist the legislator and, to a greater or lesser extent, create law. After all, aren't in many ways judges creating law every time they apply a law, or a regulation drafted in general terms to a particular case?

Art. 1 CC reminds judges and CAS arbitrators that they should feel empowered to interpret the rules beyond their literal meaning and integrate new ones when necessary. Such attribution, while exceptional, must be exercised judiciously and within the boundaries established by the Federal Tribunal's jurisprudence and the Federal Constitution, thereby reinforcing the principle of legal certainty rather than undermining it.