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Defending the Rights of Athletes Before the Court of Arbitration for Sport (CAS): Revising Procedural and Substantive Aspects of Sports Law Litigation and Practice

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Introduction

Often a decision of a disciplinary tribunal of a national federation will produce procedural and/or substantive errors that could, as a matter of fact, violate rights of individual athletes. This article critically examines situations where such procedural and substantive errors may arise, within the sphere of disciplinary law in the sports law discipline and proposes an international regulatory framework upon which appellate and remedial limitations could be cured. In doing so, the author reinforces the argument that the Court of Arbitration for Sport (CAS) must remain the final arbiter of sporting disputes, with a proposal that its decisions be applied uniformly across national disciplinary tribunals. In this light the author proposes the creation of a framework of sporting judicial precedent, whereby the rights of athletes should be strengthened.

The starting point—athletes must pay attention

Procedural, jurisdictional and appellate limitations

The starting point for a sports law adviser, in a sporting dispute, would be the identification of the relevant forum for adjudication and its subsequent jurisdiction. Advisers, therefore, must look carefully at the regulations of the relevant federation and seek to discover not only provisions for the dispute resolution process, but, more importantly, to identify an 'appeal' provision, that would enable the complainant to file an appeal before CAS (should the decision at first instance go against them).

In the premises, it is submitted that it is not uncommon for CAS to dismiss an application for an appeal because of *lack of jurisdiction*, or because the applicant was *manifestly* late in submitting the application. Advisers, therefore, must ensure that the appeal is filed within the 21-day time limit provided for in the procedural rules of CAS, or according to the time limit the rules of the relevant sporting body prescribe.

In addition, advisers must ensure that CAS has jurisdiction to hear the appeal. Such jurisdiction usually derives from the regulatory framework of the sporting governing body in question, or when there is a specific and express arbitration agreement between the parties. A specific clause would normally indicate a route to appeal, although close attention must be paid to the actual wording of the relevant provision. This is an important point that requires further analysis.

Rules of national governing bodies are usually in line with the rules of international governing bodies or have been drafted in the same spirit. It may be the case that certain provisions require members to recognise the jurisdiction of CAS, regarding disputes of national dimension. However, the purpose of these provisions may not be to compel CAS to admit in all types of disputes that the national governing body has jurisdiction to hear. In this instance, confusion may be created by the provision which specifically "recognises" the jurisdiction of CAS. *Although such provision may "recognise" the jurisdiction of CAS, this does not mean that the provision also "grants" such jurisdiction to CAS.* In other words, CAS jurisdiction will be operative only when such jurisdiction is specifically granted by the provisions of the national governing body (see the four appeals in the matter of CAS 2011/A/2483, *Iraklis Thessaloniki FC v Hellenic Football Federation & Greek Super League*).

The issue of jurisdiction usually walks in tandem with appellate limitations. It is very often the case that rules of national federations and national anti-doping organisations, omit, wilfully and intentionally, to incorporate appellate provisions in favour of CAS. This, in essence, creates an anomaly for the administration of sporting justice at an international setting, as athletes are precluded from seeking remedies in a situation where an error of law and/or interpretation has occurred at national level. Consequently, the only available option for the athlete is an application to the appropriate fora of the relevant international federation, in the hope that such

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application may be considered (see CAS 2018/A/5816, *Susan Cooke v World Chess Federation & Welsh Chess Union*, unreported). If the international federation, however, refuses to consider the application and/or reaches a negative decision for the athlete, any remedial avenues will be eliminated. The last resort would be CAS, but the regulatory framework of the international federation must have relevant appellate provisions in favour of CAS. Even so, could a federation's decision not to decide be considered as a "decision" for the purposes of the procedural and jurisdictional criteria of CAS?

A closer look at the CAS jurisprudence suggests that a decision of a body of a federation not to open a disciplinary procedure against a third body (a national federation for example) constitutes an appealable decision (in conjunction with the rules of the federation) within the meaning of CAS Rule 47 (see CAS 2004/A/659, *Galatasaray v FIFA*). The same applies where the Federation arrives at a conclusion that it does not have jurisdiction and, consequently, its decision not to entertain a complaint is considered a "negative" decision (see CAS 2011/A/2343, *CD Universidad Catolica v FIFA*). Similar considerations can be applied in the situation where a federation issues a letter which materially affects the legal situations of the addressee, in which case such letter constitutes a decision (see CAS 2004/A/478, CAS 2011/A/2474).

The second hurdle—identifying the legal basis of the claim

Specific examples: selection criteria of athletes and legitimate expectation

It is often the case that the subjective criteria of selection of athletes may come into play. The relevant sport's expert selectors are in a better position and more qualified to decide upon the performance and qualification criteria and, subsequently, the selection criteria and the overall selection process. Our submission is, however, that once the qualification and selection criteria have been communicated to the athlete and such selection criteria have been met by the athlete, there is no compelling justification in excluding the said athlete from participation. This is true in the situation where there is no provision in the relevant regulations of the federation which allows a selection committee to depart from the established selection criteria. This, in essence, creates a legitimate expectation for the athlete, which is capable of being enforced against the decision of the relevant selection committee. It is submitted, therefore, that a decision by a selection committee to exclude an athlete from participation at an event, which is contrary to the wording of the selection policy and inconsistent with the general application of the rules, must be deemed unlawful and void.

It is also submitted, that an athlete's exclusion from an event, without a compelling justification and against the selection/qualifying criteria and/or the applicable rules, suggests that the nature of such exclusion resembles the anathema of a disciplinary action and it is, as a matter of fact, a form of punishment. In the absence of remedial avenues to the athlete, such decision also constitutes a denial of justice, as it is arbitrary and capricious, and it offends against the sense of justice and equity (see CAS 2005/A/944, *Aris FC v FIFA*).

In the premises, a valid and compelling contention suggests that excluding an athlete, who has met the qualifying and selection criteria, from an event, is not a matter where the court is required to evaluate the standard of the said athlete's performance. This is a matter where the grounds for exclusion, other than being purely technical, are strictly legal and constitutional, as the improper restrictions show that the exclusion has been arbitrary and procedurally unfair.

Legitimate expectation and estoppel

The above discussion suggests that the exclusion of an athlete from an event may give rise to a situation where CAS can intervene (after a relevant application and once the issue of jurisdiction has been settled), as the merits are valid and established and there is a legitimate expectation of being able to compete or to be selected to compete, particularly where the candidate has met the selection criteria. This legitimate expectation is based on the issue of reliance on behalf of the athlete, which is a pre-requisite for participation in competitions. As such, the legal basis of an estoppel exists, in that the relevant deciding body is estopped from denying the competence of CAS, *without a specific clause to the contrary* (see CAS 98/2000, *AEK Athens & Slavia Prague v UEFA*).[1]

Furthermore, the significance and importance of CAS as the supreme arbiter in sporting disputes that give rise to arguments of legitimate expectation, can be fully illustrated in the situation where an athlete raises submissions in favour of the doctrine of estoppel. English law has developed the doctrine of equitable estoppel (or promissory estoppel), with an aim to curing injustice caused by a gap in the law of the land. The significance of this equitable doctrine is reflected in the several criteria that the applicant needs to establish before such equitable remedy may be awarded. Such criteria suggest the following:

a. There must be a promise upon which the promisor ought to reasonably expect an act or forbearance on the part of the promisee;
b. The promisee relied on the promise made by the promisor;

[1] The same contention cannot solely be articulated in terms of contract, but also in the alternative basis of the grounds of judicial review that arise irrespective of contract, as a function of the sport governing body's control and regulation of its sport.

c. The promisee suffered a detriment (i.e. economic loss);
d. It would be inequitable to allow the promisor to go back to their promise;
e. Equitable estoppel must be used as a defence against the promisor.

CAS has consistently applied this doctrine in its decision making and has created a plethora of important decisions in its jurisprudence. The protection and enforcement of legitimate expectations of athletes, in conjunction with the doctrine of estoppel, can be found in sporting disputes arising before the Olympic Games and concern cases of selection and participation of athletes. For example, in the matter of CAS OG/02/006, *New Zealand Olympic Committee v The Salt Lake Committee for the Olympic Winter Games of* 2002 the ad hoc CAS Panel estopped the organisers of the winter Olympic Games from prohibiting participation of the New Zealand athletes, as the latter had already submitted the Olympic Games entries and had met the qualification criteria. The Panel argued, inter alia, that the organisers of the Games had created a legitimate expectation for the athletes, and it would have been unfair to exclude them from the Games and contrary to the doctrine of estoppel.

In the premises, it can be sensibly submitted that although the doctrine of estoppel remains an equitable doctrine and, therefore, discretionary, it also remains a remedial avenue deeply embedded in contract law and, as such, it may be enforced against the party who breached it. This is clear in the CAS decision in the matter of CAS 2000/A/284, *Sullivan v Judo Federation of Australia*, where it was decided that the Policy of a sport governing body contains terms that can create legitimate expectations, upon which athletes will act to meet them. Such relationship, inevitably, creates a contractual basis that confers rights and obligations upon the parties. Consequently, the Panel held in the *Sullivan* matter at [18]: "The Agreement became the terms of reference for the Athletes and the Athletes by their participation in the selection events accepted and were entitled to rely upon the Agreement."

National courts have taken a very similar view, where a policy of a sport governing body was held to be a "contractually enforceable policy" (see *Elliot Hilton v The National Ice-Skating Association of the United Kingdom Limited* [2009] I.S.L.R. 75). Such contractual relationship has also been identified in other matters regarding arbitral awards of national and international bodies and in relation to selection criteria disputes (see *GB Rhythmic Gymnastics Group v British Gymnastics Association*, Sports Resolutions, 5 March 2021 and CAS OG 12/03, *Lynch v Horse Sport Ireland*).

Once the contractual basis of the relationship between an athlete and a sport governing body has been identified and established, adjudicating Panels would move to consider objective and subjective criteria before a final determination can be made, as to whether a legitimate expectation has been created for the athlete, and whether the sport governing body can be estopped from going back on their promise. This is an important point in the process and advisers must clearly identify the subjective elements of the matter in question. In this light, it is submitted that CAS would never rule on the evaluation of a performance of an athlete, as this is something that can be done more effectively by those who have expert knowledge of the relevant sport. Nor would CAS ever intervene in a specific subjective evaluation that can be identified in the selection criteria (see CAS OG/06/002, *Andrea Schuler v Swiss Olympic Association & Swiss Ski*). This is particularly true where there is no specific allegation from the athlete that the sport governing body acted in bad faith, or in an unreasonable and arbitrary manner.[2] In the premises, CAS would always be cautious on its determination of the subjective criteria where selection issues are concerned. CAS is aware that the subjective nature of the evaluation process regarding selection creates a remarkable discretion for selection committees who are often in a more qualified position to rule upon the best athletes for their team.

On the other hand, if specific selection criteria have been identified and published by a sport governing body and there is a clear indication that these criteria have been met by a specific athlete, and that the athlete in question has acted upon such criteria to their detriment, then a legitimate expectation begins to come into play. It is evident from its jurisprudence that CAS will always move to protect the legitimate expectations of athletes and this is an important aspect of practice before this supreme court of sport arbitration. This was made clear in the authority of CAS 96/153, *Watt v Australian Cycling Federation* that once a sport governing body has reached a decision to select an athlete, and the athlete acted upon it and to her detriment (changing her training regime and preparation), then a legitimate expectation has been created in favour of the athlete, and the sport governing body is estopped from going back on its promise.[3]

This is also true when CAS must apply legal certainty and in doing so it must consider whether a particular sport governing body has followed the rules of fair, equal, transparent and logical governance, in line with the regulations, statutes and selection criteria established. In the matter of CAS 2008/A/1502, *AOC & AWU v FILA*, it was held that international federations must not abandon their qualification criteria upon which athletes had relied.

The issue of reliance and the subsequent creation of a legitimate expectation is strictly connected with the elements of communication and knowledge. A critical analysis of the current jurisprudence demonstrates that once the qualification and selection criteria have been communicated to the athlete, and the athlete has acted upon them, then procedural fairness dictates that parties

[2] In the matter of CAS 2008/A/1540 *Andrew Mewing v Swimming Australia Limited*, it was held by CAS that when the acts of a sport governing body are arbitrary and discriminatory, CAS will always have the authority to annul a decision.
[3] Contrast this decision with the decision in the matter of CAS 14/002, *Clyde Getty v International Ski Federation*.

respect their obligations. Any changes in the selection and qualification criteria must be properly communicated to the athletes, in clear and precise terms and by respecting the principles of procedural fairness and *venire contra factum proprium* (see CAS OG/12/01, *Alexander Peternell v South African Sports Confederation and Olympic Committee & South African Equestrian Federation*; CAS OG/06/008, *Isabella Dal Balcon v Comitato Olimpico Nazionale Italiano & Federazione Italiana Sport Invernali*; CAS 2008/O/1455, *Boxing Australia v AIBA*; CAS 2000/A/278, *Chiba v Japan Amateur Swimming Federation*).

"Wednesbury unreasonableness" and irrationality

Finally, the protection of a legitimate expectation and/or promise made to an athlete by a sport governing body, must not be taken as a rule that applies equally in all cases. Given the modern complexities of professional sport and the interpretational difficulties regulations tend to pose, it is submitted that each case must be considered according to its individual characteristics and facts. In this light, an athlete who was accused of bringing the sport into disrepute, was held to be in breach of internal rules of its native Olympic committee and as a result he was de-selected from participating in the Olympic Games (see CAS 2008/A/1574, *Nicholas D'Arcy v Australian Olympic Committee*). In a similar fashion, CAS has also ruled upon the requirement of an athlete to maintain a good repute (as envisaged in the relevant by-law of the national Olympic committee) in CAS 2008/A/1605, *Chris Jongewaard v Australian Olympic Committee*).

The interesting aspect of these two Australian CAS rulings is that they appear to consider and apply (to a certain extent) the common law doctrine of *unreasonableness* in the *Wednesbury* sense. The fascinating aspect of these two decisions, within the wider area of academia and practice for *lex sportiva*, centres around the principles that would normally apply in a judicial review application that prays for the quashing of a public body decision.

Considering legal theory, it is submitted that the *Wednesbury* test was developed by the Court of Appeal in the UK in the matter of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) 1 K.B. 223. In its ruling, the Court established three conditions that must be present before a decision could be reached on whether to quash a bad public administrative decision:

(a) The public body took into account factors that need not have been considered;
(b) The public body failed to consider factors that lawfully should have been taken into account; or
(c) The decision was "so absurd that no sensible person could ever dream that it lay within the powers of the authority".[4]

With this in mind, it is submitted that the two CAS rulings in the Australian matters appear to be focusing on the third condition of the *Wednesbury* test, in that they require an assessment of whether the sport governing body's decision was unreasonable (in the *Wednesbury* sense) and/or irrational.[5] Although in the two Australian cases CAS Panels found that the relevant governing bodies did not act unreasonably in deselecting the respective athletes, they did so by adopting an assessment of this common law concept, without limiting their scope of powers.

Defending the rights of athletes—when time is of the essence

Interim measures when participation at an event is at stake

An important aspect of procedure and practice before CAS relates to the ability of applicants to seek urgent protective measures in the form of an application for a stay of execution of the appealed decision. The legal basis for such application can be identified in art.183 of Swiss Private International Law and R37 of the CAS Code. The latter provides that CAS may, upon request of a party, order preliminary or protective measures.

According to CAS practice and jurisprudence (see CAS 2003/O/486; CAS 2013/A/3324; CAS 2013/A/3199; CAS 2010/A/2071; CAS 2001/A/329; CAS 2001/A/324), there is *a three-stage test* that needs to be satisfied for a successful application on such protective measures (provided that the issue of jurisdiction has been settled):

1. The requested measures must be necessary to protect the applicant from irreparable harm.
2. There must be a likelihood of success on the merits of the claim.
3. The interests of the applicant in the requested measures must outweigh those of the opposite party.

The above stated criteria are cumulative (CAS 2013/A/3199; CAS 2010/A/2071; 2007/A/1403) and are also clearly set forth in art.R37(5) of the CAS Code. Before a detailed examination of such criteria could be produced, it is necessary to state that an application for a stay before CAS is, by and large, a question of facts and evidence. Advisers should accept that each case needs to be considered according to its individual facts and characteristics, although some general submissions are applicable in a wider scale of cases. For example, CAS is prepared to accept an application for a stay and annul

[4] Per Lord Greene MR at [229].
[5] This element was further developed by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1984] UKHL 9, where he stated: "By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness'. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it."

a decision at first instance where an athlete has been excluded from participation at the Olympics, if facts and evidence support the contention that such decision was unfair, discriminatory and arbitrary (see CAS 96/153, *Watt v ACF*; CAS 2008/A/1540, *Andrea Schuler v Swiss Olympic Association*; CAS 2000/A/284, *Sullivan v JFA*). In addition, advisers must also pay attention to the important regulatory and contractual requirement that all internal remedies have been exhausted, prior to an application for a stay at CAS. In any event, CAS has the power to examine facts and the law with a de novo process and, therefore, it has the power to remedy any injustice suffered at first instance.

In terms of the *first criterion* and in accordance with CAS jurisprudence (and as a general rule), when deciding whether to grant a request for a stay, CAS considers whether the measure sought is useful to protect the applicant from substantial damage that would be difficult to remedy at a later stage. This is the so called "irreparable harm" criterion: "The Appellant must demonstrate that the requested measures are necessary in order to protect his position from damage or risks that would be impossible, or very difficult, to remedy or cancel at a later stage" (CAS 2007/A/1370-1376; CAS 2008/A/1630).

The first criterion cannot be satisfied with submission of financial and reputational arguments. The reason for this is that such arguments relate to the award of damages that cannot constitute irreparable harm, as they can always be compensated/remedied at a later stage. In addition, while according to CAS case law (CAS 2008/A/1569) it is not in itself sufficient that a participant is prevented from competing in sports events to justify a stay in itself, CAS has consistently recognised that a suspension from participating in a major sports event, such as the Olympic Games, which subsequently found to be unjustified, can cause irreparable harm (CAS 2008/A/1453; CAS 2014/A3571; CAS 2016/A/4710). Irreparable harm, therefore, has been defined as "any damage that cannot be fully compensated if the applicant succeeds on the merits" (see CAS 2006/A/1141, *MP v FIFA & PFC Krilja Sovetov*). Although the irreparable harm condition does encompass a factual background, it is submitted that CAS jurisprudence allows for a common reasoning in the examination of facts and evidence that relate to such condition. This is in a situation where an athlete is excluded from the Olympic Games, yet a CAS Panel subsequently sets aside the original decision (see CAS 2003/O/482, *Ortega v Fenerbahce & FIFA*). CAS has consistently ruled that suspensions/exclusions from major international events can never be recovered, particularly in the short-span athletic careers (see CAS 2008/A/1453, *Soto Jaramillo & FSV Mainz 05 v CD Once Caldas & FIFA*). It is important to remind the reader that an applicant *need only make a showing that the risk of suffering irreparable harm is plausible*, by alleging and bringing prima facie evidence of such risk (see CAS 2008/A/1525, *Apollon Kalamarias v Hellenic Football Federation & Olympiakos FC*).

The above argument receives additional credibility where a *legitimate expectation* argument could be established. This is true when an athlete has met the qualifying and selection criteria, yet the relevant selection committee decides against the selection of the said athlete, without a compelling justification. At this juncture, an important distinction needs to be made between the technical points of the matter at hand (an athlete's performance) and the constitutional points (fair and equitable selection process and decision making). The Court in not required to evaluate and consider the former. The latter gives rise to a matter where the grounds for exclusion, other than being purely technical, are strictly legal and constitutional, as the improper restrictions may show that the exclusion has been arbitrary and unfair. In this case, a submission can be raised that an athlete's non-participation at the Olympic Games, caused by an unreasonable decision by a selection committee, may be highly prejudicial, particularly where the athlete has met the qualification and selection criteria and followed consistently the normative environment created by the regulator.

In the premises, the above arguments were raised by the author in the matter of CAS 2018/A/5816, *Susan Cooke v World Chess Federation & Welsh Chess Union* (unreported), in his representation of the appellant chess player. It was also accepted by CAS that the player had established the plausibility of irreparable harm and a mere possibility of such harm would suffice (non-participation at the Olympic Games after qualification, cannot be compensated). It follows, therefore, that the damage caused by such decision at first instance, can only be remedied with an immediate stay on the decision to exclude the athlete from the Olympic Games.

In relation to the second criterion, when deciding to grant provisional measures, the applicant "must make at least a plausible case that the facts relied upon by him/her and the rights which he/she seeks to enforce exist and that the material criteria for a cause of action are fulfilled" (see CAS 2000/A/274; CAS 2004/A/578; CAS 2014/A/3751).

The second criterion gives rise to a fact/evidence-based exercise, although the general rule is that each case shall be reviewed on its own merits. Whether an applicant's arguments will prevail can only be addressed in the final award, it is important for the applicant that, at the time of the application for a stay, his or her arguments must be sufficient to satisfy the second criterion.

Finally, the third criterion is the most difficult for the applicant to satisfy, and from experience, many applicants fail solely on this final criterion. In accordance with CAS jurisprudence, when deciding whether to grant protective measures, the President of the Division (or the Panel if it has been constituted), must consider whether the interests of the applicant outweigh those of the opposite party and of third parties ("balance of convenience" test): "It is then necessary to compare the disadvantages to the Applicant of immediate execution of the decision with the

disadvantages for the Respondent of being deprived such execution" (see CAS 2008/A/1453; CAS 2008/A/1630; CAS 2008/A/1677).

This final criterion is extremely subjective and in general terms it can be viewed under a different light where different Panels are concerned. This is because, when examining a request for a stay, it is important for Panels to compare the risks incurred by the applicant in the event of immediate execution of the application, with the disadvantage for the other party from the non-immediate execution. Thus, the interest of the applicant to obtain the protective measure must be assessed in comparison to the interest of the other party, or other persons, who may be affected by the measure (see CAS 2015/A/4259). This is an extremely difficult decision for a CAS Panel, particularly where the rights of an individual athlete who has been unfairly excluded from the Olympic Games, must be balanced against the rights of other athletes and the competition as a whole that may be affected.

In summary, it is worth noting that advisers must be very careful in the preparation of an Application for protective measures. The analysis above clearly demonstrates the difficulty in persuading a Panel that the three cumulative criteria for a successful application have been met and that a plausible case has been made. The outcome of such Application tends to determine, to a very great extent, the conclusion of the matter in question, and, therefore, caution must be applied in the preparation of the Application.

It is also important for the reader to remember that provisional measures do not qualify as arbitral awards and they, therefore, cannot be appealed to the Swiss Federal Tribunal. Although parties usually tend to respect and follow CAS decisions on applications for protective measures, it is submitted that CAS does not have the power to enforce such measures against the parties, nor does it have the power to sanction non-compliance.

A universal system of sporting binding precedence?

The discussion above demonstrates that jurisdictional and appellate limitations at national level may limit the ability of athletes to challenge national-level aberrant and opaque decisions. This is an important consideration for the sports law discipline and one that deserves further recognition.

There are many examples where national federations' rules and/or national anti-doping organisations' rules do not provide for appeals to CAS.[6] In addition, tribunals set up by these governing bodies do not feel obliged to follow decisions by CAS, and as a result, there is a danger of creating inconsistency in the application of a unified system of decision making. This is mostly evident in anti-doping litigation where national anti-doping panels, more often than not, ignore and/or refuse to follow important and well-established decisions by CAS.

This inevitably weakens the procedural and substantive rights of individual athletes and creates an unjustified degree of unpredictability in the advice offered to such athletes. In this light, we would respectfully attempt to encourage international governing bodies and CAS to work together in the creation of an international procedural framework, whereby tribunals of national federations and of national anti-doping organisations would undertake the obligation to respect and follow decisions rendered by CAS.

The nature of a system of judicial precedent

Given the significance of CAS in the sport dispute resolution process, it is important for practitioners to identify a framework where clear guidance is given for practice and procedure before such forum. Rules of evidence, rules on examination, as well as a system on decided cases and the force they may have on adjudicating panels, may all be elements that determine the effective and appropriate advice to a client. Consistency and clarity are both important elements in the practice of law and given that clients tend to seek the use of professional advisers and experts for their matters before CAS, it is equally important that a system of judicial precedent is applied and declared before CAS. Although CAS does not apply (at least officially) a system of binding precedent, *it is the author's respectful submission that CAS Panels do, silently, operate within the parameters of an undeclared system of judicial precedent*.

Although lawyers from civil law systems may find the system of binding precedent anachronistic, nevertheless, the importance of the common law towards the application of a system of binding precedent (and of justice) and its influence on modern legal reasoning and thinking cannot be dismissed at face value. Modern legal thinking is largely based on the application of legal reasoning which stems from the accumulated experience and wealth of case-analysis and expertise that judicial creativity and ingenuity offer through the system of judicial precedent.

The binding nature of the doctrine underpins the essence of the English legal system and its old-established existence and operation serve to demonstrate its important nature. This, however, is not an anathema, nor is a mechanism which makes the law static. The law develops through the decided cases but the rule of the binding nature of the doctrine is not absolute. The *Practice Direction of 1966*[7] recognises that the House of Lords (now to the Supreme Court) may treat previous decisions as binding but may also depart from them when it appears right to do so. In the premises, it is submitted that any perceived limitations of the doctrine of binding precedent that may be apparent to the civil lawyer can be dismissed by the relative freedom of the judiciary, for the determination of the scope and reason of previous decisions and the justification for a departure from a

[6] See, for example, procedural rules of UKAD and NADP.

[7] *Practice Direction* [1966] 3 All E.R. 77. See also N. Duxbury, *The Nature and Authority of Precedent* (Cambridge, Cambridge University Press, 2008), pp.125–149.

previous decision, when the fresh circumstances of a new case warrant so. This freedom of departure from previous decisions has been reluctantly exercised by the highest court in England over the years.[8] Nevertheless, it remains a freedom upon which the doctrine operates and exercised for the efficient development of the law.

It is also arguable that this freedom has not stretched the boundaries of judicial creativity. Although one would think that common law remains judge-made law, the critical examination and evaluation of the doctrine of binding precedent suggests that there is a fine balance between case law and statute. Notwithstanding the remarkable elements of stability and certainty the doctrine creates, as practitioners can determine to a great extent sound legal advice from the outset, the doctrine walks in tandem with the existence of statute. It is statutory law which forms the genesis of a particular law, but it is case law which interprets such law and explains not only the intention of the legislator but offers guidance as to its correct and purposeful application. It is submitted, therefore, that judge-made case law is as important as the existence of statute.

It is with regret that the author must submit that the relationship between case law and statute has been remarkably unexplored. It is submitted that such relationship is evident even in civil law systems, where statute plays a primary role in the determination of a legal principle. Although previous decisions do not have a binding effect on judges, in civil law systems reference to such previous decisions is exercised and has a strong persuasive effect.

It is this unexplored relationship that forms the basis for a future international system of judicial decision making, in the sphere of the sports law discipline that the author wishes to promote with the present work. Although the highest court in sport (CAS) does not have a predetermined application of a specific legal system, the author advocates the importance of common law in the determination of legal matters before CAS and its perceived influence in the creation of sports law principles. The common law, it is submitted, plays an important role before CAS and the doctrine of binding precedent "… exemplifies the general balance which the common law strikes between certainty and adaptability. This general balance is a child of common law's methods, and it represents a large part of its genius".[9]

Conclusion

The analysis in the present work suggests two things: first, CAS does not consider its decisions to be binding and, secondly, CAS is reluctant to depart from its previous decisions for reasons of consistency and legal certainty. This, in essence, creates some form of precedent, albeit not binding in the common law meaning. The reader of this work will probably arrive at the same conclusion, which indicates a syndesis between common law and civil law and, at the same time, demonstrates the unique nature of the operation of CAS. There is a lot to be said from this marriage of common law and civil law traditions and a lot more to be gained.

That said, there is a minority of CAS Panels having declared that CAS does not consider its previous decisions binding and that there is no operation of the doctrine of stare decisis. The present analysis, however, indicates exactly the opposite. Where the facts warrant so (and this is true in the majority of anti-doping litigation) the CAS Panels are reluctant to depart from previous decisions for reasons of consistency and legal certainty. In essence, CAS operates like another UK Supreme Court, where the judges are not bound by their own previous decisions, but they are vehemently discouraged from departing from them without a compelling justification.

Opponents of the doctrine of binding precedent may argue that this constant reliance on previous decisions and the unparalleled desire for uniformity may lead to oppression and that a bad decision may bind lower courts for years. This may be true in certain situations, but in the author's opinion such argument cannot dissuade the use of binding precedent as CAS is the Supreme Court in sport and, in practice, its decisions are respected and followed worldwide. Its decisions may not be binding over national courts, but they very much form and determine the structure and synthesis of the regulatory framework and overall self-regulation in modern sport.

Despite some of the criticisms of the doctrine of binding precedent, with regards to how oppressive uniformity could be, the author submits that without a system of binding precedent, confusion and uncertainty usually prevail. This is particularly true in anti-doping litigation, where clarity and consistency in the decision making is important and imperative. This specific area of academic inquiry and practice would benefit immensely from a binding system of precedent upon national disciplinary sport tribunals.

It is submitted that the doctrine of binding precedent promotes convenience and predictability. It also promotes consistency and clarity of legal thought. In anti-doping litigation this premise is of the utmost significance. The law moves and develops through judicial decision making and it is evident that judicial precedent is not static, as it promotes flexibility. Above all, precedent is a source of law and, as such, a compelling justification exists for CAS to adopt it.

Finally, it has been suggested in this work that there is a fine balance between case law and statute and that this relationship has been unjustifiably unexplored. The time is right for CAS to adopt a specific method of

[8] Some commentators submit the necessity of judicial creativity in stronger terms: "… it is an abdication of judicial responsibility for judges, at least in the law of obligations, to decline to develop the common law on the grounds that legislation is more appropriate. Even if a statutory solution would be better, no-one can predict whether legislation will, or will not, be passed. It is therefore preferable for judges to proceed as they think fit, whether the decision be in favour or against a development, knowing that the Legislature is free to impose a statutory solution if the common law position is thought unsatisfactory or incomplete", Professor Burrows (2012) 128 *Law Quarterly Review* 232, 258; N. Duxbury, *The Nature and Authority of Precedent* (Cambridge, Cambridge University Press, 2008), p.11.

[9] Lord Justice Laws, "Our Lady of the Common Law", ICLR Lecture, 1 March 2012, p.3.

statutory interpretation, with aids that would stem from the analysis and interpretation of case law and such method needs to be applied equally among national sport tribunals. This is true in a situation where statutes and regulations of sporting governing bodies are unclear and confusing. CAS is not a stranger to rules of sporting governing bodies who cause friction in the relationship between athletes and the governing bodies themselves. It is true that sometimes the rules of sporting governing bodies resemble the architecture of an ancient building.[10] Several parts are missing, and several other parts need to be put in the right place, so the operation of the building is workable. The same can be said for many of the statutes and regulations of sporting bodies. CAS judges, therefore, need a clear framework and aids of statutory interpretation which will assist them during the examination and analysis of case law.

In conclusion, it is submitted that CAS is a necessary mechanism for the resolution of sporting disputes and its operation is important for the development of sports law as a dynamic and separate legal discipline. The CAS procedure and practice, however, can be improved, particularly with an acknowledgement that a system of precedent operates before CAS and that previous decisions must be binding on sporting governing bodies and their legislative organs with emphasis on national disciplinary sport tribunals. This is true in the case of WADA and World Athletics (former IAAF), where they both tend not only to recognise the judicial superiority of CAS, but to follow its decisions too. If international bodies follow such decisions, the same can be concluded at national level too where adjudicating bodies are concerned.

In the author's view, therefore, the silent operation of the doctrine of binding precedent confirms to a great extent the remarkable and considerable influence of common law traditions on the procedure and practice before CAS. Such influence has crawled into the operation of judicial decision making slowly but steadily and has determined, without stretching the boundaries of judicial creativity, the future not only of self-regulation but also shaped the development of the discipline of sports law as a unique, autonomous and specialised body of law. It is time now that the sporting world recognised the superiority of CAS as the final arbiter of sporting disputes and created a framework of binding precedent at lower sport disciplinary tribunals at national level. This, it is submitted, will produce the required clarity and certainty in the application of judicial decision making in *lex sportiva* and it would significantly enhance the rights of individual athletes in litigation.

[10] Michael Beloff QC suggests: "In my experience, rules of domestic or international federations tend to resemble the architecture of an ancient building: a wing added here, a loft there, a buttress elsewhere, without adequate consideration of whether the additional parts affect adversely the symmetry of the whole", in "Drugs, Laws and Verspapaks", in J. O'Leary, *Drugs and Doping in Sport: Socio-Legal Perspectives* (Cavendish, 2000), p.42.