How a system of judicial precedent may help the rights of athletes before the Court of Arbitration for Sport (CAS)

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`HOW A SYSTEM OF JUDICIAL PRECEDENT MAY HELP THE RIGHTS OF ATHLETES BEFORE THE COURT OF ARBITRATION FOR SPORT (CAS)[1]

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Abstract: The importance of the Court of Arbitration for Sport (CAS), in the resolution of sporting disputes, has become synonymous with the continuous development of sports law as a separate legal discipline. Such development has created different dynamics in the practice and procedure before CAS and the diversity of the system has contributed to a need for a better understanding of such practice. The author discusses the particular and unique elements of practice and procedure before the Court of Arbitration for Sport and explains that such practice has several similarities with the traditions of common law systems. He critically assesses specific elements of practice such as the standard of proof, examination of witnesses, the use of presumptions and negative inferences, along with the use by CAS Panels of previous decisions and concludes that although there is no declared system of binding precedent, in practice, CAS Panels, silently, operate a form of such binding precedent. He explains that such system will enhance the rights of athletes during litigation (particularly during the Olympic Games) and he calls for ICAS to declare a system of binding precedent before the CAS.

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[1] A different version of this work, with more emphasis on the system of judicial precedent, is published by the author in the *'Year Book of International Sports Arbitration 2015'*, Duval & Rigozzi eds, *'The Influence of Common Law Traditions on the Practice and Procedure Before the Court of Arbitration for Sport (CAS).'*

Introduction

The author has over twenty years of clinical experience before the Court of Arbitration for Sport (thereafter CAS). Over the years he has witnessed the significant development of this unique court for sport and became witness to a remarkable creation of a separate body of case law and procedure. These unique elements for the practice and procedure of sports law have strengthened not only the argument that sports law deserves to be a separate legal discipline, but they have also created a need for recognition of the importance for protecting the rights of sport participants and other stakeholders, before this supreme court for sport.

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[2] recognises that the House of Lords (changed 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 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[3]. 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 are able to determine, to a great extent, a 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 important, as is important the existence of statute.

It is with regret that the author has to 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

[2] Practice Direction [1966] 3 All ER 77. See also N. Duxbury, 'The Nature and Authority of Precedent, 2008, pp. 125-149.

[3] 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, 11.

with the present work. Although the highest court in sport (CAS) does not have a pre-determined application of a specific legal system, the author advocates the importance of common law, in the determination of legal matters before the CAS and its perceived influence in the creation of sports law principles. The common law, it is submitted, plays an important role before the 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."* [4]

Common Law or Civil Law before CAS?

The main function of the CAS is to resolve sporting disputes between parties. Although such disputes are dealt with via arbitration, in practice, a CAS matter takes the form of a full trial, even at the appellate level, as the general applicable rule is that all appeals before the CAS, take the form of a *de novo* hearing.[5]

The practice of sports law before the CAS, over the years, has contributed enormously towards the creation of a remarkable body of case law, as well as statutory law. A unique *lex sportiva* is now in place, which highlights the importance of the CAS in the development of sports law principles and its influence on the practice and procedure of sports law. It is the creation of this remarkable body of case law which forms the basis of the present work.

The nature of the proceedings before the CAS is undoubtedly private and it is usually private international law and Swiss law that govern the proceedings, particularly, in the absence of an express agreement between the parties as to the application of a specific law. What is not specifically stated, however, is the choice, if any, of the actual legal system that governs the process before the CAS. Given that there is a mixture of arbitrators (judges) from both, common law and civil law jurisdictions, it becomes imperative for the practicing lawyer to identify the appropriate medium and, therefore, conduct the proceedings in the appropriate manner.

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

[5] Pursuant to the CAS Rule 57, which grants CAS Panels the authority to produce a full review of the facts and the law. See also the case of ***CAS 2009/A/1880-1881***, where the panel stated as follows: *"…the CAS appeals arbitration allows a full de novo hearing of a case, with all due process guarantees, which can cure any procedural defects or violations of the right to be heard occurred during a federation's (or other sports body's) internal procedure. […] it is the duty of a CAS panel in an appeals arbitration procedure to make its independent determination of whether the Appellant's and Respondent's contentions are correct on the merits, not limiting itself to assessing the correctness of the previous procedure and decision"* (paras. 142, 146).

From the author's experience, it is submitted that proceedings before the CAS (and even during the pre-trial stage) are conducted with the style one meets in a common law jurisdiction. Although the judges, to a certain extent, apply the 'inquisitorial' civil law style of examination, this is limited to questions, during the proceedings, towards the witnesses and sometimes, towards Counsel for either side. Overall, parties are free to submit the evidence of their choice and test it, during the proceedings, in the common law style of 'adversarial' examination, that is, through Counsel for either side. Such examination of the evidence may take the form of written statements, witness testimonies and even applications for pre-trial disclosure. Even during the proceedings before the panel of judges, the process is very much influenced by the common law tradition, whereby, the process involves opening and closing statements, examination in chief and cross-examination and the right to re-direct.

It is, however, the parties' references to previous decided cases and the continuous use of such decisions by different panels of judges that would allow one to enquire whether there is a system of *stare decisis* before the CAS. One may produce an attempt at dismissing the existence of such system in the proceedings before the CAS and argue that the CAS panels of judges simply take a note of previous cases, for the sake of consistency and clarity. But is it not this contention that forms the basis for the application of a system of judicial precedent?

It is not disputed that there is now a specific system of *lex sportiva* and the sheer volume of decided cases before the CAS serves to demonstrate that different principles of sports law develop through the examination, analysis and, consequently, via the decisions of the CAS. This only can serve as a catalyst towards a persuasive argument that the CAS does have a system of precedent.[6] As the Panel states in the case of ***Canadian Olympic Committee & Beckie Scott v International Olympic Committee CAS 2002/O/373***: *"CAS jurisprudence has notably refined and developed a number of principles of sports law, such as the concepts of strict liability (in doping cases) and fairness, which might be deemed part of an emerging lex sportiva."*

With this in mind, it is worth examining, both, scholarship and practice, so a determination could be achieved as to whether there is a *de facto* system of *stare decisis* before the CAS. Certain commentators have suggested that the existence of the CAS Awards *"demonstrate the*

[6] For further discussion see ***Canadian Olympic Committee & Beckie Scott v International Olympic Committee CAS 2002/O/373***

existence of a true stare decisis doctrine within the field of sports arbitration"[7], whereas others have suggested that CAS arbitrators *"…are not generally obliged to follow earlier decisions but they usually do so in the interests of legal certainty."*[8] The author is inclined to accept and follow such interpretation, given that the CAS Panels make constant use of previous decided cases, particularly when they identify the *ratio decidendi* in their Awards. It is common practice and, indeed, usual reference to previous decisions can be identified in almost every single CAS Award. Such is the importance of precedent in the procedure and practice before the CAS, that it is now common practice for Counsel to submit a Bundle of Authorities before the CAS Panel, in support of his/her submissions. This is also true in situations where the composition of the CAS Panel is mixed, with arbitrators from common law and civil law jurisdictions adjudicating together upon a sporting dispute.

There are, however, instances, in practice, when CAS arbitrators disagree with the above interpretation. In the case of ***CAS 2008/A/1545***[9] the Panel made reference to the case of ***CAS 97/176, (award of 15 January 1998)***, with regards to the value of judicial precedent, where it was stated: *"…in arbitration there is no stare decisis. Nevertheless, the Panel feels that CAS rulings form a valuable body of case law and can contribute to strengthen legal predictability in international sports law. Therefore, although not binding, previous CAS decisions can, and should, be taken into attentive consideration by subsequent CAS panels, in order to help developing legitimate expectations among sports bodies and athletes"*.[10] Similarly, the same Panel also made reference to another CAS Award of ***CAS 2004/A/628*** (award of 28 June 2004), where it was stated: *"In CAS jurisprudence there is no principle of binding precedent, or stare decisis. However, a CAS Panel will obviously try, if the evidence permits, to come to the same conclusion on matters of law as a previous CAS Panel."*[11] Having looked at the two aforementioned authorities, the Panel concluded: *"Therefore, although a CAS panel in principle might end up deciding differently from a previous panel, it must accord to previous*

[7] *Arbitral Precedent: Dream, Necessity or Excuse?* 23 ARB. International 357, 366 (2007), Gabrielle Kaufmann-Kohler

[8] *Sport, Mediation & Arbitration*, 155 (2009), Ian Blackshaw. Similarly, *Sports Law: Implications for the Development of International, Comparative and National Law and Global Dispute Resolution,* 85 Tul. L. Rev. 269, 29 (2010).

[9] ***Arbitration CAS 2008/A/1545 Andrea Anderson, LaTasha Colander Clark, Jearl Miles-Clark, Torri Edwards, Chryste Gaines, Monique Hennagan, Passion Richardson v. International Olympic Committee (IOC),*** award of 16 July 2010.

[10] At paragraph 40.

[11] At paragraph 73.

CAS awards a substantial precedential value and it is up to the party advocating a jurisprudential change to submit persuasive arguments and evidence to that effect."[12]

The above analysis suggests that in the CAS procedure there is no *de facto* recognition of the doctrine of binding precedent, at least, not in theory. In practice, however, it is submitted that the constant use of previous decisions and the undisputed reference of different CAS Panels to the elements of consistency, continuity and legal certainty, suggest that the doctrine of binding precedent operates before the CAS, albeit, with some minor exceptions. The author submits that, in practice, the CAS operates in a similar manner with regards to The Supreme Court in the UK (previously known as the House of Lords), where judges are allowed to depart from their own previous decisions. The fact that 'persuasive arguments' and 'evidence to that effect' may lead towards a jurisprudential change, demonstrate the argument that if CAS Panels feel 'right to do so', they may depart or decide not to follow previous decisions. In fact, in such cases, the CAS Panels go at length to explain the reasons of their 'departure' from previous cases and they tend to do so by distinguishing relevant authorities on the facts and on the merits.

Binding or Persuasive authority?

One issue, which has remained elusive, over the years, is a clear declaration from the ICAS as to the nature of the Awards pronounced by the CAS. Although the *Anderson*[13] Award explicitly recognises that there is no system of binding precedent before the CAS, nevertheless, such Award also recognises the *'substantial value'* of precedent. This situation appears to be self-conflicting and contradictory and to a certain extent, with respect, it does not assist in the procedure and practice before the CAS.

One explanation for the lack of an explicit declaration of the binding (or otherwise) nature of the CAS Awards is possibly the acknowledgement that arbitral awards do not usually contain any form of precedential nature.[14] This may be true, in the sphere of international arbitration; but is the CAS, in practical and pragmatic terms, an arbitral tribunal, or is it a Court, with full power to examine the facts and the law, examine the evidence and the witnesses and produce decisions where future disputes may rely upon for guidance? In pragmatic terms, the CAS procedure and practice resemble practice in a civil or criminal court. The process before the CAS is identical to the process of a civil or criminal court, whereby procedural rules determine

[12] At paragraph 55.
[13] Supra 9.
[14] *Redfern and Hunter on International Arbitration,* Blackaby et al, 2009.

the actual practice of Counsel and judges alike and offer guidance as to the rights of litigants. The proceedings are formal, and the primary duty of Counsel remains the same: the duty to the Court. Rules of evidence play an important role in the final determination of the matter in question, whereas language and court-etiquette are observed at all times and those practising advocacy at the highest level, are familiar with the appropriate pace, tone of the voice, body posture and eye contact with the judges. These are all issues that play a significant role in the proceedings before the CAS and the formal process applies, without an exception, in the Ordinary and the Appeals Divisions of the CAS.

Moreover, the CAS Awards, in their majority, do not have a confidential nature and, unless the parties agree otherwise, are published in the CAS website and are available and free to everyone. In addition, the CAS website contains a specific 'Jurisprudence' section, where those interested can access recent Awards or even the Archive where older Awards are stored. This creates a useful tool of actual Law Reporting, like the one in the UK. In the author's opinion, this process is substantially relevant and identical to the most important ingredients that form the basis of a common law system.

In the premises, reference needs to be made to statutory interpretation employed by the CAS, which over the years, has assumed a significant role in the understanding and appreciation of different relationships in sport. The CAS has assumed a primary role in interpreting rules and regulations of sporting governing bodies. Such regulations, along with the Statutes of the said sporting bodies, form the basis of real and actual statutory interpretation and it is, without a doubt, a practice that occurs constantly. One would be hard pressed in discovering one single CAS Award that fails, in one way or another, in its attempt to interpret specific rules and statutes.

The above analysis suggests that, in theory, the doctrine of binding precedent does not exist before the CAS. In practice, the author submits, the doctrine of binding precedent is very much exercised, and it occurs more often than not. In the limited amount of CAS Awards that CAS Panels declared the absence of a system of binding precedent, they also took the opportunity to suggest that there must be good reasons as to why a CAS Panel may decide to depart from a previous authority, regardless of the composition of such Panel. In the author's opinion, the CAS is usually reluctant to avoid previous decisions, particularly where facts and *ratio decidendi* of previous and present matters appear to be and, are, as a matter of fact, identical or similar. Although not specifically stated, it is submitted that some form of unique existence of

precedent (in the common law understanding) is exercised before the CAS. One may argue that such precedent is not binding, but such is the force of its application on present and future CAS Panels that one would also accept the premise that the persuasive nature and constant reference to such nature of previous decisions, constitutes a *de facto* practice of judicial decision making that tends to become binding, in a looser interpretation of the meaning of the word.

The CAS standard of proof as an example of a practising common law tradition

The common law tradition with regards to the rules of evidence has devised two different standards of proof. In civil matters the standard of proof is on the *balance of probabilities* and this is the standard of proof generally required to be met by either party seeking to discharge the burden of proof. On the other hand, the criminal standard of proof is *beyond reasonable doubt*.[15] In the sporting context, sports law jurisprudence has devised a third standard of proof, which is currently identified between the common law civil and criminal standards of proof. Those practicing before the CAS recognise and use the *comfortable satisfaction* standard of proof. The CAS jurisprudence suggests that this standard is above the common law civil standard of proof, but below the common law criminal standard of proof.[16] In the case of ***IAAF v RFEA & Josephine Onyia***[17] such standard of proof was defined as being *"greater than a mere balance of probability but less than proof beyond reasonable doubt."*

Although specific CAS Panels have suggested in the past that they are not obliged to follow rules of evidence[18], it is the author's respectful submission that this is exactly what they do in practice. One would be hard pressed in identifying situations where CAS Panels did not follow the rules of evidence, particularly, during proceedings. As a matter of fact, CAS Panels have consistently used direct and circumstantial evidence and have proceeded with rulings on whether specific pieces of evidence are admissible or not. From the author's experience before

[15] The common law civil standard of proof, obviously, is determined on the balance of probabilities. In ***Miller v Minister of Pensions [1947]*** Lord Denning explained: *"It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'we think it more probable than not', the burden of proof is discharged, but if the probabilities are equal it is not."* This suggests that the civil standard of proof requires the party with the burden to prove that the defendant's actions were 'more likely than not'. It has been suggested by Lord Hoffman in the case of ***Secretary of State for the Home Department v Rehman [2001]*** that the only higher degree of probability required by the law is the criminal standard. This means that the civil standard cannot be broken down into different categories with the aim of producing immediate standards.

[16] See the case of ***CAS 2010/A/2229.*** This standard was first used in sport in the case of ***Korneev and Gouliev v IOC, CAS 003-4L (Atlanta)***. Its true origin in the law can be identified in the Australian case of ***Briginshaw v Briginshaw [1938] 60 CLR 336.***

[17] ***CAS 2009/A/1805, CAS 2009/A/1847***

[18] See ***D'Arcy v Australian Olympic Committee CAS 2008/A/1574***

the CAS, such instances have been an integral part of the pre-trial stage of a CAS matter and determined the outcome of such matter during the appeal hearing.[19]

It is also worth stating that there is another similarity between the CAS evidential process and the one in the common law tradition. The standard of proof is normally used at the end of the trial, when all the different pieces of evidence have been submitted and examined. It may be also used in the situation where there is a submission of a no case to answer, particularly where one party has failed to adduce evidence.[20]

In terms of the use of evidence, importance must be placed to the procedure at the Ad Hoc Divisions of CAS and with reference to the Olympic Games. Given the necessary requirement for a speedy process during the Olympic Games[21], especially when applications for Provisional & Conservatory Measures are concerned, the examination of material~~s~~ facts and evidence by Panels, forms a fascinating blending of common law and civil law attitudes, with the former playing a rather 'heavier' role, where examination in chief and cross-examination are concerned. This is true, especially in anti-doping law matters where the cross examination of witnesses, in particular, forms the underlying basis for the discovery of the truth and the testing of the evidence's probity. On the other hand, the inquisitorial approach by the Panel, may play a subsidiary role, but nevertheless, an important one.[22]

Given the above analysis, it is the author's respectful submission that the substantial influence of the common law traditions, with regards to the standard of proof before the CAS, is also evidenced by the use of other considerations, such as the admissibility of evidence, its rebuttal, the use of presumptions and the use of circumstantial evidence. In anti-doping litigation, for example, the use of presumptions is often. There is a presumption that the onus of proof is with the sporting governing body (or the anti-doping organisation) to establish the alleged offence, provided that the anti-doping test has been conducted properly and executed correctly. To this effect, the common law influence on the rebuttal of a presumption in anti-doping litigation is evident, as such rebuttal must be made on the balance of probabilities. In other words, if the prosecuting authority is alleging a positive anti-doping test and the presumption is that such

[19] See ***IAAF v SEGAS, Kenteris & Thanou CAS 2005/A/887*** [unreported].
[20] ***Miller v Cawley [2002] EWCA Civ 1100, The Times 6 September 2002.***
[21] See below the specific section on CAS and Olympics and Paralympics.
[22] This is true where the conduct of the Hearing is concerned. Both, the Olympic Chapter (Art. 15.b and d) and the CAS Code (Arts 44.1-44.3) offer to Panels a wide range of powers, particularly on the examination of witnesses and the ordering of evidential proceedings.

test was conducted properly, then the athlete has to show how the substance entered his/her body and in doing so he/she must rebut such presumption on the balance of probabilities.[23]

Similarly, the CAS is not agnostic or unfamiliar with the use of circumstantial evidence (for example, the blood profile of an athlete), particularly in anti-doping litigation. The use of negative inferences is also used before the CAS and Counsel, more often than not, are prepared to make submissions in favour of the Panel drawing negative inferences, in the situation where one or more of the opponent's witnesses are refusing to give oral testimony before the Panel. Oral testimony, or lack of it, carries considerable weight in the final determination of a CAS Panel. As it was stated in the CAS Award of ***T v FIG CAS 2002/A/385***[24] *"The Panel was not afforded the opportunity to form its own impression of the athlete. It is difficult for the Panel to identify further mitigating circumstances if an athlete decides not to appear before the Panel for the hearing of his/her case which may have a very substantial impact on his/her future professional career."* [25]

The above analysis, with regards to the standard of proof applied by the CAS, suggests that such application is consistent with common law and given the enormous importance CAS Panels place on the analysis and evaluation of evidence, it is submitted that the influence of traditional common law principles and methods characterises the core of the proceedings before the CAS.[26]

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[23] ***IRB v Keyter CAS 2006/A/1067***. It was stated by the Panel: *"…that the occurrence of a specified circumstance is more probable than its non-occurrence."* The athlete may also have the opportunity to demonstrate departures from the International Standards for Testing.

[24] At paragraph 57. See also ***USADA v Montgomery CAS 2004/O/645, Hamilton v USADA & UCI CAS 2005/A/884, IAAF v SEGAS, Kenteris & Thanou CAS 2005/A/887*** [unreported].

[25] This much is also supported by the new version of the WADA Code 2015.

[26] The common law civil standard of proof, for example, has some flexibility in its application. Such flexibility may be interpreted according to the seriousness of the allegation and suggests that if such allegation exists, then the degree of probability needs to be raised. Although this position has now been rejected, it is submitted that it walks in tandem with the current standard of proof before the CAS. This is true in anti-doping litigation as the WADA Code clearly explains that any anti-doping organisation must establish the alleged anti-doping violation 'to the comfortable satisfaction of the hearing body bearing in mind the seriousness of the allegation which is made.' This, in essence, means that the more serious the allegation the higher the degree of satisfaction and, consequently, the standard of proof. Further, the above ~~This~~ submission is well enshrined not only in the CAS jurisprudence but in English and wider common law too, making the argument that the CAS procedure and practice resemble common law, even stronger. For example, the origin of the 'comfortable satisfaction' standard is identified in the Australian case of ***Briginshaw v Briginshaw [1938]*** where Justice Rich stated: *"In a serious matter like a charge of adultery the satisfaction of a just and prudent mind cannot be produced by slender and exiguous proofs of circumstances pointing with a wavering figure to an affirmative conclusion. The nature of the allegation requires as a matter of common sense and worldly wisdom the careful weighing of testimony, the close examination of facts proved as a basis of inference and a comfortable satisfaction that the tribunal has reached both a correct and just conclusion."* In the English case of ***Hornal v Neuberger Products Ltd [1957] 1 QB***

CAS, Olympics and Paralympics: Time for review of the sporting justice process

As it was suggested above, a speedy resolution of a dispute between an athlete and a governing body, must be at the forefront of policy and procedure. Notwithstanding the appreciation of the importance of a Games in the professional career of an athlete, it is submitted that the design and execution of a fast dispute resolution process, before and during the Games, not only would it offer redress to situations where justice was denied, but it would also restore public confidence in the system of sporting justice. This is true in a system where judicial precedent could be applied, where certainty, transparency and consistency would add further significant benefits to an even speedier resolution of a sporting dispute.

That said, emphasis must be placed on the important dichotomy between the procedural and jurisdictional requirements of remedial avenues at first instance (where a national and/or international governing body is concerned). Although CAS, (at least in theory), has a relatively fast process in relation to its Ad Hoc Divisions[27], such fast process may produce a 'much ado about nothing' result, if procedure at first instance is unnecessarily delayed and/or there are appellate limitations, creating, thereby, a jurisdictional hurdle that cannot be overcome. Where jurisdiction is concerned, CAS' Arbitration Rules applicable to the CAS ad hoc division for the Olympic Games, create an important appellate limitation, where the claimant/applicant is required to exhaust all internal avenues before an application to the CAS is filed. The second paragraph of Article 1 states: *"In the case of a request for arbitration against a decision pronounced by the IOC, an NOC, an International Federation or an Organising Committee for the Olympic Games, the claimant must, before filing such request, have exhausted all the internal remedies available to her/him pursuant to the statutes or regulations of the sports body*

247 it was stated: *"The standard of proof depends on the nature of the issue. The more serious the allegation the higher the degree of probability that is required; but it need not, in a civil case, reach the very high standard required by the criminal law."* Similarly, in the CAS Award of ***USADA v Montgomery CAS 2004/O/645*** it was stated: *"…the more serious the allegation the less likely it is that the alleged event occurred and, hence, the stronger the evidence required before the occurrence of the event is demonstrated to be more probable than not."*

[27] This is an important development for the discipline of sports law and in relation to procedure, as CAS has established an Ad Hoc division that sits in the City responsible for organising the Olympic Games. According to Article 1 of the Arbitration Rules applicable to the CAS ad hoc division for the Olympic Games: "*The purpose of the present Rules is to provide, in the interests of the athletes and of sport, for the resolution by arbitration of any disputes covered by Rule 61 of the Olympic Charter, insofar as they arise during the Olympic Games or during a period of ten days preceding the Opening Ceremony of the Olympic Games."* Similarly, Article 2 declares: "*For the period fixed in Article 1, the ICAS shall establish an ad hoc Division of the CAS (hereinafter the "ad hoc Division"), the function of which is to provide for the resolution by arbitration of the disputes covered by Article 1 by means of Panels set up in accordance with the present Rules."*

concerned, unless the time needed to exhaust the internal remedies would make the appeal to the CAS Ad Hoc Division ineffective." Although the last sentence of Article 1 leaves a 'window' for by-passing such jurisdictional limitations, in the author's experience, such exception may, sometimes, create a rather high threshold to be met and it requires an examination on a case to case basis, rather than creating a standard and equal approach across the different applications before the CAS. In the premises, it is submitted that such appellate/jurisdictional limitations create an obstacle in the speedy and effective resolution of sporting disputes and, to a certain extent, have the potential of violating established rights afforded to athletes.

In light of the above submissions, one may arrive at the conclusion that the current system of sporting justice needs an immediate revision. Such revision would need to strengthen athletes' rights, by incorporating a universal and harmonised system of judicial process, particularly where an immediate examination of a sporting dispute is required and where an athlete's participation at a major event is concerned. There may be instances where the rules of a sporting governing body do not allow for appeals to the CAS, especially where such governing body operates at national level. Although national legislation may exist (towards protecting an athlete's rights), such legislation may not be subject to speedy procedural requirements and it may not offer the athlete the desired effect. This, therefore, creates a jurisdictional limitation where the athlete is unable to appeal to the CAS and seek the appropriate remedies. In this case, international federations have an important role in ensuring that their national members create appeal mechanisms, especially where participation of athletes/players in Olympiads is concerned. This very issue was the subject matter under analysis for the author, in one of his recent cases before the CAS[28].

Similarly to the submissions above, there may be instances where international governing bodies refuse to allow participation of individuals in certain events. In the absence of a compelling justification for refusing an individual his/her participation at an event, especially if reference is made to the Olympic Games, CAS may be the only forum where a speedy resolution may be achieved. This is true where the International Olympic Committee (IOC) is concerned, given that its seat is in Switzerland and, depending on the country where the Olympic Games are organised, CAS (with its ad hoc divsions) may be the solution to jurisdictional and other procedural limitations. Notwithstanding the argument that the IOC may

[28] *CAS 2018/A/5816 Susan Cooke v World Chess Federation (FIDE) and Welsh Chess Union* [unreported].

not be seen as an organisation above the law and the international legal order, it is important to state that CAS must be seen to act (and act) as the ultimate and supreme arbiter on checks and balances, particularly where an 'abuse of discretion' element is applied against athletes, and/or other fundamental rights afforded to athletes have been violated.

In the premises, it is submitted that the *'all internal avenues must be exhausted'* instruction in the CAS' procedural rules must be waived, especially during the Olympic Games and/or must, at least, become the exception and not the rule. It is more often than not that sport judicial decisions at national level and/or appeal decisions before tribunals of international bodies, may be characterised as *'hometown'* decisions. To ensure that transparency and consistency exist, in the decision making of judicial fora, it is the author's respectful submission, that the CAS must act as a first instance sporting dispute resolution forum, particularly before and/or during the Olympic Games period, without the need for an athlete to seek redress first at national/international level. The *'de novo'* doctrine that the CAS applies into its procedure and practice may solve any attempts by national and international bodies to delay the process of an athlete's dispute and/or attempt to limit the available remedies for such athlete, days before the Olympic Games or even during the Olympic Games.

The author regrets to submit that the above does take place often in the world of sport and it is, without a doubt, an anathema of the worst kind and one that ferociously and revengefully violates established rights afforded to athletes and other general principles of law. The examples are many, but the author would respectfully direct the reader to the case of his client, the Greek sprinter Miss Katerina Thanou, when in 2008 she was refused participation in the Beijing Olympic Games, without a compelling justification. The reader may also recall that the refusal of participation of Miss Thanou in the 2008 Games was exclusively and strictly connected to her previous matter before the CAS, which was settled with the IAAF in 2006.[29] The IOC's argument remains, to this date, that Miss Thanou could not have participated in the Beijing Olympics, because of her involvement in an anti-doping matter four years previously. The reader may reach appropriate conclusions here, but three years after Miss Thanou's dispute with the IOC, a similar matter was sent to CAS for adjudication, which touched upon a similar issue, that is, the legitimacy of a rule that prohibits, a previously banned athlete, to be selected

[29] ***IAAF v SEGAS, Kenteris & Thanou CAS 2005/A/887*** [unreported]. Add insult to injury, the IOC refuses, to the present date, to upgrade Miss Thanou to the first place in the 100m event at the Sydney Olympics in 2000, following the conviction of Marion Jones, and award the gold medal to Miss Thanou. The reader must note, that the IAAF has already upgraded Miss Thanou to the first place for that event.

for a national Olympic team and, consequently, prohibits participation in the Olympic Games. In the matter of ***CAS 2011/A/2658 British Olympic Association (BOA) v. World Anti-Doping Agency (WADA),*** the CAS was asked to rule on the legitimacy and applicability of such rule.[30] This matter referred to an Appeal brought forward by the BOA against a decision reached by WADA, to hold BOA's Bye-Law of its Rule 7.4 invalid. Such Bye-Law did not allow for membership or selection of athletes who have, previously, served an anti-doping ban. The *Anti-Doping Bye-Law* stated: *"Any Person who is found to have committed an Anti-Doping Rule violation will be ineligible for membership or selection to the Great Britain Olympic Team or to receive funding from or to hold any position with the BOA as determined by the Executive Board in accordance with the BOA's Bye-Law on Eligibility for future membership of the Great Britain Olympic Team."*

The above Bye-Law was ratified by the BOA in 2009 and WADA informed the BOA, in November 2011 that such Bye-Law was not in compliance with the WADA Code. In particular, WADA wrote to BOA on 21 November 2011 stating: *"…that the British Olympic Association has been determined to be non-compliant with the (WADA) Code because your rule on selection for the Olympic Games is an extra sanction, and non-compliant for the same reason the IOC eligibility rule was deemed non-compliant by the Court of Arbitration for Sport."* This determination constituted the 'decision' against which the BOA appealed to the CAS.

The above determination by WADA, came as a result of another CAS Award in the case of *US Olympic Committee v International Olympic Committee, CAS 2011/O/2422* [the USOC Award], on 4 October 2011. In this case, the USOC challenged the validity of an IOC rule [IOC Regulation] which stated: *"Any person who has been sanctioned with a suspension of more than six months by any anti-doping organisation for any violation of any anti-doping regulations may not participate…in the next edition of the Games of the Olympiad and of the Olympic Winter Games following the date of expiry of such suspension."*

The BOA did not share WADA's view and attempted to distinguish the *USOC* Award from its own Appeal. In various pieces of correspondence prior to the Appeal, the BOA stated that its Bye-Law made reference to a selection policy and it was neither a rule of ineligibility nor a sanction and, consequently, did not violate the WADA Code.

[30] A copy of the reasoned decision may be accessed here: https://www.wada-ama.org/sites/default/files/resources/files/cas-2011-a-2658-boa.pdf . For further discussion see Gregory Ioannidis *'BOA v WADA: Harmonisation v Self-Regulation',* Denning Law Journal, Vol 24, pp 169-176.

The CAS Panel did not agree with such submission, although it was cautious to acknowledge[31] that *"both Parties are strong advocates in the fight against doping"* and that *"BOA and WADA both recognise that doping is fundamentally contrary to the spirit of sport."* The Panel summarised the main issue under consideration at Paragraph 8.2 of its Award and stated: *"The dispute between the Parties here involves one means of pursuing the fight against doping, not the fight itself. The Bye-Law prevents an athlete who has had a doping offence from being selected to represent the British Olympic Team. The core issue to be determined here is whether BOA may pursue that policy on its own or whether that policy must be pursued, if it all, through the world-harmonised WADA Code."*

The Panel's reasoning is explicit in terms of the BOA's acceptance of the WADA Code, as the BOA is one of its signatories. The Panel states at paragraph 8.12 of its Award that the BOA has agreed to limit its autonomy by signing the Code and, therefore, accepting its terms. The Panel makes the important point that the purpose of WADA's existence is to harmonise different anti-doping rules and sanctions throughout the world.[32] If the BOA was allowed to operate independently and separately from WADA, in terms of sanctions, such harmonisation [and the fight against doping] would assume the risk of being seriously undermined.

The Panel came to the conclusion that the effect of the Bye-Law is to make an athlete *'ineligible'* for participation in the Olympics.[33] It is submitted that such interpretation is correct and confirms the argument that the two issues in relation to the application of the BOA's Bye-Law, concern the 'eligibility' and 'participation' of athletes in sporting competitions. The Panel, similarly, had no difficulty in finding that the BOA's Bye-Law *'renders an athlete ineligible to compete - a sanction like those provided for under the WADA Code.'* [8.26 and 8.33 of the

[31] Paragraph 8.1 of the Award.

[32] The Panel states at Para. 8.12: *"However, NOC's like BOA have agreed to limit their autonomy by accepting the WADA Code. In particular, Article 23.2.2 WADA Code, requires that its Signatories, including NOC's do not make any additional provisions in their rules which would change the substantive effect to any enumerated provisions of the WADA Code, including its sanctions for doping. The purpose of Article 23.2.2 WADA Code is indeed the very purpose of the WADA Code: the harmonisation throughout the world of a doping code for the use in the fight against doping. This worldwide harmony is crucial to the success of the fight against doping. The WADA Code is intended to be an all-encompassing code that directs affected organisations and athletes. The WADA Code ensures that, in principle, any athlete in any sport will not be exposed to a lesser or greater sanction than any other athlete; rather, they will be sanctioned equally. By requiring consistency in treatment of athletes who are charged with doping infractions or convicted of it – regardless of the athlete's nationality or sport – fairness and proper enforcement are achieved. Any disharmony between different parties undermines the success of the fight against doping. For these good reasons, NOCs and other Signatories agreed to limit their autonomy to act within their own spheres with respect to activities covered by the WADA Code."*

[33] Paragraphs 8.24 – 8.26 of the Award. In particular, the Panel states at Para. 8.24: *"…disbarment from the Team for life carries with it the direct consequence of never being able to participate in the Olympics and as a consequence to compete in the Games. That is the underlying reality of ineligibility."*

Award]. Accordingly, the Panel concluded that the BOA's Bye-Law has the effect of a disciplinary sanction and it is, therefore, incompatible with the WADA Code.

The above discussion serves to illustrate the importance of the CAS as a supreme arbiter of sporting disputes, particularly when reference is made to issues that relate to the Olympic Games ~~and~~ that require a speedy resolution. Similarly, an argument must be made for the same process to apply before and during the Paralympic Games. At the moment the CAS does not operate such ad hoc division for the Paralympic Games and it may be safe to conclude that this is because the International Paralympic Committee (the IPC) has not asked for one to be created. The IPC may have a good and valid reason for not requesting the introduction of such important process, but equally, one must not dismiss at face value the fact that Paralympic athletes are also elite-level athletes and, on many occasions, they have to compete against adversity (in addition to competing with one another). There may be a compelling justification for the introduction of a similar process before the CAS, for the same reasons already analysed above.

Finally, it is respectfully submitted that the above arguments may create a more compelling case for the introduction of a system of judicial precedent before the CAS, particularly, where the Olympic Games are concerned, along with issues of selection of athletes, participation, classification and so on. It is imperative for stakeholders to communicate effectively with one another and discuss extensively the benefits of such system. A system of judicial precedent would be important during the Olympic and Paralympic Games, because it would offer certainty and consistency and it would contribute further to an even speedier process. This, consequently, would safeguard the rights of individual athletes and it would restore confidence in the judicial function of the CAS.

Conclusion

The analysis in the present work suggests two things: first, the CAS does not consider its decisions to be binding and secondly, the 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 the 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 the 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, the 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 the 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.

It is submitted that the doctrine of binding precedent promotes convenience and predictability. It also promotes consistency and clarity of legal thought. 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, it is clear that precedent is a source of law and as such, a compelling justification exists for the 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 the CAS to adopt a specific method of statutory interpretation, with aids that would stem from the analysis and interpretation of case law. This is true in a situation where statutes and regulations of sporting governing bodies are unclear and confusing. The 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.[34] 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. The CAS judges, therefore, need a clear framework and aids of statutory interpretation, which will assist them during the examination and analysis of case law.

It is this unexplored relationship between case law and statute that needs to be at the forefront of any judicial development before the CAS. As it was suggested at the beginning of this work, the influence of common law to the procedure and practice before the CAS is great and it cannot be dismissed at face value. The analysis in this work suggests that there is a fine relationship and a workable marriage between common law and civil law traditions, in the administration and application of justice before the CAS. The author respectfully submits that this is a marriage between equal partners. One needs the other to survive and one cannot function without the other.

In conclusion, it is submitted that the 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 the CAS and that previous decisions must be binding on sporting governing bodies and their legislative organs. This is true in the case of WADA and the IAAF, where they both tend not only to recognise the judicial superiority of the CAS, but to follow, indiscriminately, its decisions.

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 the 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.

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[34] 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"*, *"Drugs and Doping in Sport: Socio-Legal Perspectives"*, Cavendish, 2000, p. 42.

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