The Influence of Common Law Traditions on the Practice and Procedure Before the Court of Arbitration for Sport (CAS)

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THE INFLUENCE OF COMMON LAW TRADITIONS ON THE PRACTICE & PROCEDURE BEFORE THE COURT OF ARBITRATION FOR SPORT (CAS)

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Abstract: The importance of the Court of Arbitration for Sport, in the resolution of sporting disputes, has become synonymous with the continuous development of sports law as a separate legal discipline. The unique structure of this supreme Court for sport, along with its composition, have created an unparalleled framework for the practice of sports law and at the same time 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 calls for ICAS to declare a system of binding precedent before the CAS and suggests that such system will restore certainty, predictability, consistency and clarity.

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1.1 Introduction

The majority of nations in today's modern world follow one of the two main legal traditions, namely common law or civil law. Civil law is originated in what we call today continental Europe and was developed there. Common law, on the other hand, emerged in England during the Middle Ages and was also applied in British colonies throughout the borders of the British Empire. Its influence on the American legal tradition, as well as on other former and current commonwealth traditions, is evident today.

Common law is generally uncodified and although there is a body of statutory law~~, through legislation~~, it is largely based on judicial precedent. The law, therefore, develops through decided cases with presiding judges deciding upon facts and the law. Although the law is usually interpreted, followed, distinguished or overruled in the two highest courts in England, such as the Supreme Court (formerly known as the House of Lords) and the Court of Appeal Court, the influence of judicial precedent on lower courts is pre-determined, as they are obliged to follow decisions from the higher courts, because of the binding nature of such decisions. Procedure is largely adversarial, meaning that the facts and the law are presented and argued by the lawyers, with the judge being a moderator.

Civil law, on the other hand, is codified. Nations that follow a civil law legal tradition place emphasis on and follow large codified statutory instruments, which they update regularly. Such codes describe, in a comprehensive manner, substantive law, procedural law and penal law. Although the judge is the supreme arbiter of facts and has powers to investigate, examine and rule on a matter, his/her powers are largely determined by the relevant codes and his/her decision making is confined within the limitations created by such codes. The judge's powers, in a civil law legal tradition, therefore, are less crucial in the 'creation' of the law, than those of parliament with its legislative decision making.

Before we examine the influence of English common law on the practice and procedure before the Court of Arbitration for Sport (thereafter CAS), it is necessary to evaluate the origins of this unique legal tradition.

1.2 The origins of Common Law and its historical development.

English Common Law finds its origins in the early Middle Ages in the Kings Court (*Curia Regis*). This royal court was based in Westminster, London and was responsible for the administration of justice for most of the country. As is was the case with many courts in those days, the court was more concerned with the application of remedies, rather than the application of any procedural rights. It was after the Norman Conquest in 1066 that, through a system of *writs* (royal orders), such remedies would be afforded to applicants for wrongs suffered. Although the Norman Conquest had a heavy

influence on society, it did not bring an immediate end to Anglo-Saxon law.[1] Several elements of Anglo-Saxon law survived and continued to influence the administration of justice.[2]

The Normans attempted to influence the administration of justice through the application of customary law they had in Normandy. They spoke French and they did not have professional lawyers, at least, not in the modern sense of the word. Those who were given the task for the administration of justice were clergymen, who had knowledge of Roman law and canon law. It was that time when Roman law emerged in a form of a justice system, however, its presence had no substantial influence. This was because the early Anglo-Saxon system was very sophisticated and because the system of writs had become highly formalised and very rigid in its application. This remedial system of writs became so important in the administration of justice that at the same time it created inflexibility and rigidity. It was this rigidity that led to requests for remedial applications directly to the King, with the result the creation of a separate court: it was the court of *Equity*, or the Chancery, as it is widely known, named after the King's chancellor.

The court of equity was given the task to apply principles of equity based on different sources, such as Roman law and natural law, with the aim to achieve justice. It was the emergence of these improved remedies in the King's court that allowed the clarification of the rigid and complicated system of writs and further set the stone for the creation of the system of common law, approximately during the late 12th century.

Roman law continued to play an important role in the administration of justice, although one may argue that its true influence is being underestimated. The actions, for example, of trespass and adverse possession were evident in the administration of justice and had analogies with Roman law. Similarly, Chancery and maritime courts applied Roman law, whereas the principle of mistake influenced contract law and the Roman law principle of fault was embedded into the law of negligence. It was clear that common law and Roman law (along with other laws such as canon law) co-existed, albeit in competitive terms. Precedent began to emerge and was to be followed and the

[1] **Anglo-Saxon law,** the body of legal principles that prevailed in England from the 6th century until the Norman Conquest (1066). In conjunction with Scandinavian law and the so-called barbarian laws (*leges barbarorum*) of continental Europe, it made up the body of law called Germanic law. Anglo-Saxon law was written in the vernacular and was relatively free of the Roman influence found in continental laws that were written in Latin. Roman influence on Anglo-Saxon law was indirect and exerted primarily through the church. There was a definite Scandinavian influence upon Anglo-Saxon law as a result of the Viking invasions of the 8th and 9th centuries. Only with the Norman Conquest did Roman law, as embodied in Frankish law, make its influence felt on the laws of England.

[2] Such elements were the jury, ordeals (trials by physical test or combat), the practice of outlawry (putting a person beyond the protection of the law), and writs (orders requiring a person to appear before a court).

first books on equity were published and it was not until the 17th century when common law prevailed over other laws.

Common law continued to develop rapidly and its unique influence on legal reason and the general administration of justice was to allow for the creation of important legal customs and institutions. Courts of law and equity appeared to function separately until the 19th century when writs were abolished. Despite this, common law continued to emerge as the prevailing legal system and some elements from the old system of writs, such as subpoenas and warrants, continue to exist in the present day with regards to the practice of common law. An example of this important influence on legal reason and practice is the writ of *habeas corpus*, which protects individuals from unlawful detention. The writ of habeas corpus developed during the same period as *Magna Carta,* which is one of the most significant developments with regards to individual liberties. One of the most famous and important liberties relates to the premise that no man could be imprisoned or punished without the judgement of his peers. This premise eventually led to the birth of trial by jury, which is one of the most significant creations of common law, although a form of jury trial could also be identified in Ancient Greece.[3]

1.3 The modern influence of common law on legal thinking and the principle of *Stare Decisis*

It is submitted that it is natural and, indeed, normal to follow previous decisions in everyday affairs. To do so produces several obvious benefits, particularly in terms of accumulated experience, previous knowledge and consistency. The last element of consistency produces an attractive and much desired proposition for the successful development of things. It is not uncommon for modern business mediums to follow previous decisions and to base their procedures on the benefits of accumulated experience from previous decisions. Although there is always the danger that persistent reliance on the same decision may cause inflexibility and, eventually, a static process, it is submitted that ways of evading a rigid adherence to previous practice, do assist in the friction between consistency and instability.

As there is a constant interaction between legal principles and facts, it is arguable that a system which allows a marriage between consistency and adaptability, can produce the required levels of fairness and justice. Although this is not an absolute proposition, in general terms, it is fair to say that the

[3] Ancient Athens had a mechanism, called *dikastaí*, to assure that no one could select jurors for their own trial. The institution of trial by jury was ritually depicted by Aeschylus in the *Eumenides*, the third and final play of his *Oresteia* trilogy. In this play the innovation is brought about by the goddess Athena, who summons twelve citizens to sit as jury. The god Apollo takes part in the trial as the advocate for the defendant Orestes, and the Furies as prosecutors for the slain Clytaemnestra. In the event the jury is split six to six, and Athena dictates that in such a case the verdict should henceforth be for acquittal.

Common law system has achieved, to a great extent, this marriage. The most important achievement of the common law system, however, has been the application of uniformity in the development of the law and, consequently, in the administration of justice. Uniformity is, undoubtedly, the element that characterises the unique~~superior~~ nature of common law and which serves as a catalyst towards stability and efficiency.

The importance of the common law towards the application 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.

For the civil lawyer, however, the doctrine of binding precedent may appear obsolete, inflexible, stale and rigid. Indeed, civil lawyers may conclude that the system of binding precedent is unnecessary as it creates an environment of rigidity and oppression. As B. Cardozo argues: *"Uniformity ceases to be a good when it becomes uniformity of oppression. The social interest served by symmetry or certainty must then be balanced against the social interest served by equity and fairness or other elements of social welfares."*[4] A civil lawyer labours under enormous difficulty to comprehend the necessity and importance of the difficult predicament of a common lawyer, who has to burden himself with complicated long judgements, in an effort to identify just one sentence of the binding *ratio decidendi* and the judges' unfortunate situation where they are bound and required to follow a precedent, which may be 500 years old. Indeed, it has been argued that a common law judge may be *"a slave to the past and a despot for the future, bound by the decisions of his dead predecessors and binding for generations to come the judgements of those who will succeed him."*[5]

When a condemning and highly polemical view like this is applied, it is easy to understand the civil lawyer's disapproval of the dynamics of common law. This perception, with respect, is subjective and it does not reflect the true picture of the doctrine of *stare decisis*. 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[6] recognises that the House of Lords (changed now to The Supreme Court) may treat previous decisions as binding, but may also

[4] B. Cardozo, "The Nature of the Judicial Process", New Haven, USA 1920, p. 113.
[5] A. Goodhart, "Precedent in English and Continental Law", 1934, 50 Law Quarterly Review, p.61.
[6] Practice Direction [1966] 3 All ER 77. See also N. Duxbury, 'The Nature and Authority of Precedent, 2008, pp. 125-149.

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[7]. Nevertheless, it remains a freedom, upon which the doctrine operates and exercised for the efficient development of the law.

Similarly, it is submitted that the freedom of the judiciary to apply fairness and justice on a given matter is not limited by the application of the doctrine. As Lord Denning, the former Master of the Rolls, argues: *"If lawyers hold to their precedents too closely, forgetful of the fundamental principles of truth and justice which they should serve, they may find the whole edifice comes tumbling down about them. Just as the scientist seeks for truth, so the lawyer should seek for justice. Just as the scientist takes his instances and from the builds up his general propositions, so the lawyer should take his precedents and from them build up his general principles. Just as the propositions of the scientist fail to be modified when shown not to fit all instances, or even discarded when shown in error, so the principles of the lawyer should be modified when found to be unsuited to the times or discarded when found to work injustice."*[8]

This justifies the reason behind the creation of the Practice Direction of 1966 and it acknowledges the need of judges to be able to depart from the awkward situation where they have to distinguish previous bad precedents on the facts. The relative freedom of judges to depart from previous decisions is an integral part of the English legal system and goes to the root of the doctrine of stare decisis. As Duxbury argues: *"The value of the doctrine of precedent to the common law ~~w...~~ is not simply that it ensures respect for past decisions but also that it ensures that bad decisions do not have to be repeated."*[9]

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[7] 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.

[8] The Rt. Hon. Lord Denning, *The Discipline of the Law* (London: Butterworths, 1979) at 285-314.

[9] Duxbury ~~(n 14)~~ N, *"The Nature and Authority of Precedent"*, Cambridge, Cambridge University Press, 2008, 11. See ~~x;~~ also S Hershovitz, *'Integrity and Stare Decisis'* in S Hershovitz (ed), Exploring Law's Empire (Oxford, Oxford University Press, 2006).

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.

The continuous interaction between case law and statute also confirms the dynamic nature of the doctrine of judicial precedent. The relative freedom of the judiciary to depart from previous decisions and distance itself from Parliament, particularly in the light of bad precedents, is exemplified with numerous statements. According to Lord Steyn: *"It would certainly be the easy route for the House to say 'let us leave it to Parliament'. On balance my view is that it would be an abdication of our responsibilities with the unfortunate consequence of plunging both branches of the legal profession in England into a state of uncertainty over a prolonged period."*[10]

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 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."* [11]

[10] ***Arthur Hall v Simmons [2000] 3 WLR 543*** at 683.
[11] Lord Justice Laws, "Our Lady of the Common Law", ICLR Lecture, 1st March 2012, p. 3.

1.4 The Court of Arbitration for Sport (CAS) and its Procedure

Origins and historical development

The Court of Arbitration for Sport (CAS)[12] was created in 1983 by the International Olympic Committee and it became operational in 1984. It is an international *quasi-judicial* body, established to settle sporting disputes. Its seat is in Lausanne, Switzerland and its courts are located in Lausanne, New York and Sydney. The CAS also has *ad hoc* divisions in the host cities for the Olympic Games that take place every four years. Its current list comprises 328 ~~has nearly 300~~ arbitrators from 87 countries and such arbitrators are chosen subject to their specialist knowledge of sports law and international arbitration. The CAS hears nearly 300 matters every year.

The main reason for the creation of the CAS lies in the increasing need for specialist expertise in the handling of complicated and controversial sporting disputes. This expertise included the need to settle any dispute, beforehand, via the method of arbitration and/or mediation. As Matthieu Reeb explains: *"The idea of creating an arbitral jurisdiction devoted to resolving disputes directly or indirectly related to sport had been launched. Another reason for setting up such an arbitral institution was the need to create a specialised authority capable of settling international disputes and offering a flexible, quick and inexpensive procedure. The initial outlines for the concept contained provision for the arbitration procedure to include an attempt to reach a settlement beforehand. It was also intended that the IOC should bear all the operating costs of the court."*[13]

In the premises, it is submitted that the practice of sports law before the CAS, over the years, also demonstrates one of the most significant developments in this legal discipline of expertise; that is, an attempt to harmonise not only the procedural framework leading to the resolution of disputes arising from different sports, but also to create a framework of judicial decision making, capable of bridging the gap between different decisions from different disciplinary panels around the world. A harmonisation and consistency in the process of sporting dispute resolution, is the most remarkable achievement of the CAS and a testament of the argument that self-regulation cannot function without an independent, specialist and fast-track type of judicial process. The CAS procedure and application of the disciplinary law, on which the relationship between parties to a sporting dispute is based, have helped not only the procedural economy of the court, but they have also created a framework of uniformity in the application of general principles of law, specific principles of sports law and principles of penal law.

[12] In French: *Tribunal arbitral du sport*, TAS.

[13] M. Reeb, Secretary General, CAS, 'The Role and Functions of the Court of Arbitration for Sport (CAS), International Sports Law Journal 2 (2002), 21, 23-25.

This process of harmonisation and consistency in the application of law and justice to sporting disputes did not commence smoothly. In the first ten years of its existence, the CAS operated with one single contentious procedure irrespective of the dispute in question. The claimant would submit a 'request' before the CAS and a panel of arbitrators would rule on its admissibility and, subsequently, would be called to rule upon the matter. The parties, therefore, were free to continue with their action elsewhere should they wished to do so and if they were not happy with the decision.

In 1991, the CAS published an arbitration Guide, which included several arbitration clauses. One of such arbitration clauses was created for inclusion in the rules and regulations of different sporting governing bodies. It read: *"Any dispute arising from the present Statutes and Regulations of the ... Federation which cannot be settled amicably shall be settled finally by a tribunal composed in accordance with the Statute and Regulations of the Court of Arbitration for Sport to the exclusion of any recourse to the ordinary courts. The parties undertake to comply with the said Statute and Regulations, and to accept in good faith the award rendered and in no way hinder its execution."*

This specific clause was the beginning of the creation of a series of similar clauses that were to be included in the regulatory framework of different sports. Not only self-regulation and governance was changing dramatically, in terms of the judicial process, but the CAS was paving the way for its judicial supremacy in the world of sporting dispute resolution. Such arbitration clauses became 'compulsory' in the regulatory framework of sporting governing bodies and from 1992 the Appeals Arbitration division of the CAS (as we know it today) was formed. This section was assigned to hear appeals from the decisions of disciplinary panels of sports bodies. In essence, the decisions re-entered by disciplinary panels were deemed to be decisions at first instance that were appealable to the Appeals Arbitration division of the CAS. Sporting judicial process was shaping up!

The Reforms of 1994

The major reform occurred in 1994 and it was as a result of an important appeal submitted to the CAS in February 1992, by a horse rider named Elmar Gundel. The rider submitted the appeal against the decision rendered at first instance by his federation on charges of horse doping. The initial decision included a ban against the rider and a fine. The CAS issued an Award in October 1992 and it found, partly, in favour of the rider.[14] The rider disagreed with the decision of the CAS and appealed further to the Swiss Federal Tribunal, on the grounds that the CAS Award was not valid and the CAS was not a proper court and it lacked impartiality and independence. In March 1993, the Swiss Federal Tribunal

[14]CAS 92/63 G. v/ FE

delivered its judgement[15]recognising the CAS as a true court of arbitration. The Federal Tribunal, however, made a crucial point with regards to the independence of the CAS. It stated in its judgement that there were several links between the CAS and the IOC, serious enough to call the CAS' independence into question. Such links made reference to the fact that the CAS was financed almost exclusively by the IOC, the IOC President had enormous power to appoint the CAS arbitrators and the IOC, overall, had the power to modify the CAS statutes. All these facts, the Federal Tribunal argued, were serious enough to create questions of independence and impartiality.

The *Gundel* decision led the CAS to re-structure itself and create a more efficient and appropriate mechanism, whereby, all sporting disputes submitted to it could be dealt with more appropriately. *The International Council of Arbitration for Sport (ICAS)* was created and it took over from the IOC the financial management ~~ng~~ of the CAS and the overall running of the Court. In addition, two different divisions of hearing disputes were created, the Ordinary Arbitration Division for sole (first) instance disputes and the Appeals Arbitration Division, hearing disputes arising out of decisions taken by sports organisations. This transformation was confirmed with the introduction of the *Code of Sports-related Arbitration (The Code)*, which now forms the procedural guide for practising sports law before the Supreme Court for sport.

The significance of The Code

The Code is perhaps the most significant document of the CAS. It governs the organisation of the Court as well as the procedure, including the pre-trial process. It is a 70-article document which is divided into the relevant statutes of bodies working for the settlement of sport-related disputes[16] and the Procedural Rules[17] which govern the Procedure before the CAS.

One of the important functions of the CAS, which was established in 1999, is the creation of the mediation process, whereby parties have the choice, via negotiation and the use of a mediator, to settle their dispute, without the need for a full hearing. The relevant mediation rules set the ground for the mediation process and explain that such process is non-binding and informal. It is a process, however, which observes confidentiality, reduces the parties' costs considerably and offers an expedited procedure.

In the premises, it is submitted that the CAS has the following ~~four (4) different~~ procedures[18]:

[15] Published in the *Recueil Officiel des Arrêts du Tribunal Fédéral* [Official Digest of Federal Tribunal Judgements] 119 II 271
[16] Articles S1-S26.
[17] Articles R27-R70.
[18] The History of the CAS: http://www.tas-cas.org/en/general-information/history-of-the-cas.html

- the ordinary arbitration procedure;
- the appeals arbitration procedure;
- ~~the advisory procedure, which is non-contentious and allows certain sports bodies to seek advisory opinions from the CAS;~~
- the mediation procedure.

The proceedings before the CAS are usually two-fold, as procedure involves, first, the exchange of written statements and then the oral and live hearing. The Appeals Arbitration procedure also offers the parties the use of Provisional and Conservatory Measures, which, in modern legal systems, are the equivalent of a stay of execution, usually against a decision re-rendered by a sport governing body.

In addition and in essence, there are usually two types of disputes submitted before the CAS, those of a commercial nature and disputes of a disciplinary nature. The former types of disputes may include contractual relationships, such as contracts between players and clubs, sponsorship disputes and even television rights. On the field injuries (civil liability) disputes may even come under this category. The latter type of disputes includes appeals on decisions taken by disciplinary panels of sports governing bodies and are heard before the Appeals Arbitration Division of the CAS. Here, anti-doping disputes have a dominant presence.

Finally, it is not uncommon for the 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 by the procedural rules of CAS, or according to the time-limit the rules of the appropriate sporting body prescribe. Most importantly, they 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.[19]

1.5 Common Law or Civil Law?

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.[20]

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.

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

[19] This was evident in four football Appeals the author was involved in before the CAS. See ***Iraklis Thessaloniki FC v Hellenic Football Federation & Greek Super League CAS 2011/A/2483.***

[20] 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).

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.[21] 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."* [22]

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 existence of a true stare decisis doctrine within the field of sports arbitration"*[23], 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."*[24] 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

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

[22] At paragraph 14, page 28.

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

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

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***[25] 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"*.[26] 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."*[27] 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 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."*[28]

The above analysis suggests that in the CAS procedure there is no *de ~~facto~~ jure* 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

[25] ***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.
[26] At paragraph 40.
[27] At paragraph 73.
[28] At paragraph 55.

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*[29] 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.[30] 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 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 an important 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 a~~A~~rchive where older Awards are stored. This, in essence, creates a useful tool of actual l~~L~~aw r~~R~~eporting, similar to 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.

[29] Supra 21.
[30] *Redfern and Hunter on International Arbitration,* Blackaby et al, 2009.

In the premises, reference needs to be made to statutory interpretation employed by the CAS, which over the years, has assumed an important 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 sStatutes 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. Such is the importance of the CAS statutory and regulatory interpretation, that practitioners are now able to determine, to a great extent, the outcome of the litigation and advise their clients accordingly.

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~~ number of CAS Awards ~~that~~ where 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 disregard~~avoid [disregard?]~~ 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. In essence, 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*. 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.[31] In the case of ***IAAF v RFEA & Josephine Onyia***[32] 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[33], 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 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.[34]

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.[35]

The common law civil standard of proof, obviously, is determined on the balance of probabilities. In ***Miller v Minister of Pensions [1947]***[36] 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]***[37] 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.[38]

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[31] 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.***

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

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

[34] See ***IAAF v SEGAS, Kenteris & Thanou CAS 2005/A/887*** [unreported].

[35] ***Miller v Cawley [2002] EWCA Civ 1100, The Times 6 September 2002.***

[36] 2 All ER 372, at p. 374.

[37] UKHL 47, [2003] 1 AC 153 at 55.

[38] See the leading judgement of Richards LJ in the case of ***R (N) v Mental Health Review Tribunal (Northern Region) [2005] EWCA Civ 1605, [2006] QB 468 at 60.***

The common law civil standard of proof, however, 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.[39] Although this position has now been rejected[40], 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.

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]***[41] 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 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."*

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

[39] See Denning LJ in ***Bater v Bater [1951] P 35 at p.37.***
[40] Supra 33. See also Baroness Hale in ***Re B (Children) (Care Proceedings): Standard of Proof [2008] UKHL 35, [2009] 1 AC 11, at 70-72:*** *"Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where, relevant, in deciding where the truth lies."*
[41] Supra 27.

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 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.[42]

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 Cc~~C~~ounsel, 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***[43] *"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."* [44]

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.

1.6 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

[42] ***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.
[43] 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].
[44] This much is also supported by the new version of the WADA Code 2015.

in the common law meaning. The reader of this work will probably arrive at the same conclusion, which indicates a synthdesis 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.

For reasons of clarity and legal certainty, the author would recommend some form of declaration, on behalf of the ICAS, to the effect that previous decisions would be followed, where appropriate, particularly when facts and the law of present matters, appear to be in harmony with previous ones. In the author's respectful opinion, this is the silent operation of precedent before the CAS. Such declaration may even be incorporated into the CAS Code and become a binding feature of procedure and practice before the CAS.

Although 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 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.

It is also true that some problems will always arise with the application of the doctrine of binding precedent. As A. Rodger suggests: *"Because, even in the highest courts, judges will change their minds from time to time. This is nothing to be ashamed of: indeed there is divine precedent for it. As Pope Innocent III remarked in 1215, in a decree issued during the Fourth Lateran Council changing the rules*

on the impediments to marriage by reason of affinity, 'in the new Testament even God himself made some changes to what he had laid down in the Old'".[45]

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.[46] 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

[45] A. Rodger, "A Time for Everything Under Law: Some Reflections on Retrospectivity", 2005, 121 Law Quarterly Review 57, 79.

[46] 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.

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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