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THE PRINCIPLE OF *STARE DECISIS* OF CAS AWARDS

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Introduction

The *Court of Arbitration for Sport* (thereafter CAS) has now been established as the supreme court for sport-related disputes. Over the years CAS has witnessed a significant development of a body of jurisprudence and has created a wealth 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 (*stare decisis*) is applied and declared before CAS. Although CAS does not apply (at least officially) a system of binding judicial 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[1] 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[2]. Nevertheless, it remains a freedom, upon which the doctrine operates and exercised for the efficient development of the law.

It is also arguable that this freedom has not stretched the boundaries of judicial creativity. Although one would think that common law remains judge-made law, the critical examination and evaluation of the doctrine of binding precedent suggests that there is a fine balance between case law and statute. Notwithstanding the remarkable elements of stability and certainty the doctrine creates, as practitioners can determine, to a great extent, 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 must submit that the relationship between case law and statute has been remarkably unexplored. It is submitted that such relationship is evident even in civil law systems, where statute plays a primary role in the determination of a legal principle. Although previous decisions do not have a binding effect on judges, in civil law systems reference to such previous decisions is exercised and has a strong persuasive effect.

It is this unexplored relationship that forms the basis for a future international system of judicial decision making, in the sphere of the sports law discipline that the author wishes to promote

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

[2] 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."* [3]

International Commercial Arbitration v Sport Arbitration

The general rule in international commercial arbitration is that its awards do not create binding results, therefore, there is no system of stare decisis. In practice, it is arguable that arbitrators in international commercial arbitration do not generally follow previous awards and they may even completely ignore them. A closer look at the database of the *International Chamber of Commerce* (ICC), may indicate that in most of the Awards arbitrators tend not to look at previously decided Awards. This is also true in the analysis of substantive elements of a case, where arbitrators in commercial arbitration would hardly ever look at previous awards on similar substantive elements. Then again, the purpose of the primary purpose of the stare decisis is to assist the judge not only on previous substantive points, but mostly, on similarities of the actual facts of such previous cases.

In the premises, it worth contrasting this *lex mercatoria* with the established *lex sportiva*. Our research methodology focused on the quantitative data examined from the body of jurisprudence of CAS and considered two different points in time: 1986 – 2003 and 2007 – 2021. The results are rather illuminating of the fact that CAS is rapidly developing an undeclared system of *stare decisis*!

In the first period of 1986 – 2003, the analysis of the CAS Awards indicates that only one out of six CAS Awards makes reference to previous Awards.[4]In contrast, the following Table, which refers to the second period of 2007 – 2021 produces a remarkable result were almost four out of five CAS Awards make reference to previous Awards! This is indicative of the

[3] Lord Justice Laws, "Our Lady of the Common Law", ICLR Lecture, 1st March 2012, p. 3.
[4] *Digest of CAS Awards 1986–1998* (2001) and M. Reeb (ed.), *Digest of CAS Awards II 1998–2000* (2002).

developing trend of the arbitrators' reliance on previous Awards and creates a well desired legal consistency for this supreme court for sport.

CAS AWARDS 2007 – 2021		
Year	No of cases	No of cases with citation of previous CAS awards
2021	37	34
2020	98	88
2019	87	81
2018	171	160
2017	196	174
2016	232	202
2015	171	158
2014	159	135
2013	147	104
2012	144	126
2011	126	109
2010	91	64
2009	94	72
2008	135	107
2007	88	49

The above referenced quantitative data gains further acceptance if one considers the premise that arbitrators almost indiscriminately refer to and follow previous awards in anti-doping law, and more specifically in cases of strict liability and/or no significant negligence cases. The latter, in particular, forms a prime example of the development of this silent form of *stare decisis* in *lex sportiva*, where arbitrators interpret the rules of sport governing bodies and *lex*

sportiva is then developed via such awards, in a very similar manner the Supreme Court in the UK interprets and develops the law. It follows, that a silent form of *stare decisis* exists and develops in sport arbitration, where CAS arbitrators tend to follow previous decisions, in the name of legal certainty and consistency.

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.

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.

[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).

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 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*

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

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

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 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]

[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.

[12] At paragraph 55.

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

[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 always observed 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 similar 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

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[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***

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.[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, especially when applications for Provisional & Conservatory Measures are concerned, the examination of material 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.[21]

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

[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] 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.

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.[22]

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***[23] *"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."* [24]

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.[25]

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[22] ***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.

[23] 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].

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

[25] 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. In the premises, 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

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 (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

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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 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."*

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.[26] 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

[26] 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.

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 World Athletics, 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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