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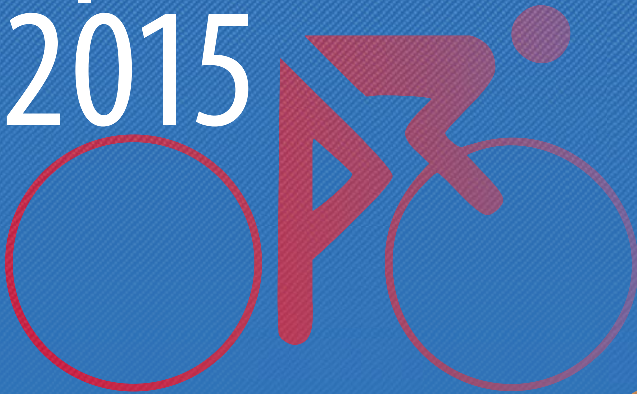
Yearbook of International Sports Arbitration 2015



Antoine Duval
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Springer

Yearbook of International Sports Arbitration 2015

Antoine Duval · Antonio Rigozzi
Editors

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Preface[1]

The publication of this inaugural issue of the Yearbook of International Sports Arbitration could not be more timely. 2015 has been a momentous year for the Court of Arbitration for Sport and international sports (law) in general, and 2016 promises to be just as eventful.

On a systemic level, just as the curtains were drawn on 2014 with the *SV Wilhelmshaven* case taking the stage,[2] 2015 was off to an explosive start with the Munich *Oberlandesgericht*'s decision in Claudia Pechstein's dispute against the International Skating Union.[3] Pechstein's challenge to the CAS system, which led to the German regional court's decision refusing to enforce a CAS award that had previously been upheld by the Swiss Federal Tribunal, has been seen as a dramatic setback for the world court of sports. The questions raised in and around the *Wilhelmshaven* and *Pechstein* cases deserve the international sports community's utmost attention and cannot be left unanswered: a point starkly illustrated, among others, by the CAS's unprecedented initiative, in March 2015, of issuing a press release stating its position in the aftermath of the OLG München's decision in the *Pechstein* case. That said, as recognized by the German court itself, the value of having a single body adjudicating international sports disputes by fast, flexible and relatively inexpensive arbitration cannot reasonably be questioned.

In light of the foregoing, it is only fitting for the YISA 2015 to open with Jan Paulsson's firm reminder of the indispensable function the CAS was set up to fulfil in the international sports arena. The CAS's usefulness and legitimacy arise from and must be assessed in the light of that very function. Professor Paulsson rightly points out that, without the CAS, the international sports community would return to the chaos that reigned before that institution's establishment. In view of this, those who call for the CAS's dismantlement bear the responsibility of putting

[1]The editors would like to thank Erika Hasler for her outstanding editorial assistance and Marine Montejo for her support in reviewing the proofs.

[2]See Duval's commentary at pp. 315–334.

[3]See Maisonneuve's commentary at pp. 335–347.

forward a valid and viable alternative. Returning to the *status quo ante* is an untenable proposition.

The fairness and usefulness of the CAS system must also be assessed in light of the (quality of) the awards rendered by its panels in the ever-growing number of cases that are adjudicated every year.[4] While commentators and the courts were busy discussing the virtues and flaws of the CAS system, CAS panels continued to play their fundamental role in interpreting sports regulations and deciding disputes. In this respect too, 2015 has witnessed many important developments. The *Juventus* case showed the importance of the interpretive approach and techniques adopted in dealing with complex regulations and confirmed that CAS is far from being a kind of rubberstamp body confirming the sports-governing authorities' decisions.[5] In this case the arbitrators showed that they were fully prepared to test the validity of sports regulations against the relevant national law as well as the broader EU law context, and to disapply any regulation or interpretation that would not meet such legality test.

Reverting to Prof. Paulsson's appraisal, more than three decades after its creation, the CAS remains above all "a fascinating example of transnational institution-building". This is apparent, inter alia, in the influence of different legal traditions upon its practice and procedures.[6] The increasing sophistication of the system was equally visible, in the past year's case law, in the panels' approach to procedural issues such as standing to appeal[7] and the impact of the amended Article R57 of the CAS Code on the admissibility of evidence,[8] but also in their jurisdictional rulings.[9]

The CAS's case law in 2015 was further marked by the sensitive questions arising from violent nationalist incidents and the attendant issues of liability.[10] More generally, football law—from transfers and so-called sell-on clauses[11] to domestic rules on the promotion and relegation of clubs[12]—has continued to generate interesting decisions.

While football disputes take up a great share of the CAS's docket, another source of complex legal questions as well as high-profile disputes is anti-doping. 2015 has seen the entry into force of the third edition of the WADA Code, and the decisions applying the WADC's new provisions have begun to emerge.

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[4]2015 was also a record-breaking year with regard to the number of new cases registered, almost 500 (see Reeb M. (2015) Message from the Secretary General. CAS Bulletin (Issue 2) 4).

[5]See Duval's commentary at pp. 155–168.

[6]See Ioannidis' article at pp. 17–38.

[7]See Zagklis' commentary at pp. 219–234 and Anderson's commentary at pp. 203–218.

[8]See Levy's commentary at pp. 169–186.

[9]See Crespo and Torchetti's commentary at pp. 275–297.

[10]See Zagklis' commentary.

[11]See Lambrecht's commentary at pp. 187–202 and Colantuoni and Devlies' article at pp. 73–91.

[12]See Haindlova's commentary at pp. 299–312.

The regulations may have changed, but the challenging questions arising from the constantly evolving doping techniques and the difficulty of integrating scientifically sound detection and analytical methods, as well as appropriate evidentiary rules and practices into a coherent (and fair) legal framework remain unabated. In the *Dutee Chand* case, one of the most sensitive decisions in 2015, science and the law have again shown their respective limits at the crossroads of eligibility rules based on gender.[13] Still in the realm of disciplinary and eligibility disputes, only months after the conclusion of the Council of Europe's Convention on the Manipulation of Sports Competitions (in September 2014), Vanessa Vanakorn's case in the wake of the 2014 Sochi Winter Olympic Games was the object of much media attention. The CAS award in the *Vanakorn* case shows that while sports-governing bodies have a legitimate interest in vigorously fighting any kind of sports fraud or manipulation, be it doping or match-fixing, the athletes' rights and fundamental principles of law cannot be overlooked.[14]

International sports arbitration is not the exclusive remit of the CAS. In addition to the important role played by the courts[15] and national sports arbitration tribunals (which will certainly be the object of future studies in this Yearbook), the Basketball Arbitral Tribunal, soon to celebrate its 10th anniversary, is undoubtedly another very successful experiment in the institutionalized resolution of sports-related disputes. The significance of the BAT can no longer be ignored by sports law practitioners and academics, which is why, after the short introduction included in the present volume,[16] the YISA will devote a specific section to the review of its case law in future issues. Finally, being seated in Switzerland, both the CAS and the BAT are subject to the supervisory jurisdiction of the Swiss Federal Tribunal. Accordingly, every volume of the YISA will include a final section providing an overview of the SFT's most significant decisions with regard to sports arbitration in the relevant year.[17]

The production of this inaugural volume would have been impossible without the dedication of our contributors, who deserve our deepest gratitude. The diversity of their profiles and backgrounds is truly remarkable, and I hope that more sports arbitration practitioners and scholars will be attracted to this new publication in the future, contributing to giving international sports arbitration its *lettres de noblesse*…

Neuchâtel, Switzerland — Antonio Rigozzi

[13]See Viret and Wisnosky's article at pp. 39–72 and commentary at pp. 235–273.

[14]See Anderson's commentary.

[15]See Blackshaw and Pachmann's article at pp. 93–110 and Maisonneuve's commentary.

[16]See Hasler's article at pp. 111–152.

[17]See Hasler and Hafner's commentary at pp. 351–388.

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Abbreviations

CAS	Court of Arbitration for Sport
CAS Code	Code of the Court of Arbitration for Sport
CC	Swiss Civil Code
CCP	Swiss Code of Civil Procedure
CHF	Swiss Franc
CJEU	Court of Justice of the European Union
CO	Swiss Code of Obligations
CONI	Comitato Olimpico Nazionale Italiano/Italian Olympic Committee
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EU	European Union
FIBA	Fédération Internationale de Basketball
FIFA	Fédération Internationale de Football Association
FIFA DC	FIFA Disciplinary Code
FIFA DRC	FIFA Dispute Resolution Chamber
FIFA PSC	FIFA Player Status Committee
FIFA RSTP	FIFA Regulations on the Status and Transfer of Players
FIFA TMS	FIFA Transfer Matching System
IBA Rules	International Bar Association Rules
ICAS	International Council of Arbitration for Sport
IOC	International Olympic Committee
ITC	International Transfer Certificate
NYC	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
OJ	Official Journal
PILA	Swiss Private International Law Act
SFT	Swiss Federal Tribunal/Tribunal fédéral suisse
SGB	Sports-Governing Body
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UCI	Union Cycliste Internationale

UEFA	Union of European Football Associations
UEFA FFP	UEFA Financial Fair Play Regulations
WADA	World Anti-Doping Agency
WADA Code	World Anti-Doping Code

Part I
General Articles

Chapter 1
Assessing the Usefulness and Legitimacy of CAS

Jan Paulsson

Abstract Disqualified athletes and their nationalistic supporters tend to be highly critical of the regime of sanctions for violations of the international law of sports, and specifically of the Court of Arbitration for Sport (CAS). The author maintains that CAS promotes public policy and favours fair competition, not the opposite, and that those who condemn CAS tend to be unacquainted with the facts and irresponsible in failing to explain how they would propose to remedy the chaos which would ensue if CAS were suddenly to disappear.

Keywords CAS · Arbitration · International sports law · Fairness · Independence

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This article is an abbreviated version of a keynote speech given by the author on 22 September 2015 in Berlin at a joint DIS/CAS conference. It was first published in the SchiedsVZ—German Arbitration Journal (Issue 6/2015). It is reprinted in this volume with the kind permission of the Verlag C.H. Beck.

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1.1 Introduction

The Court of Arbitration for Sport (CAS) often deals with sensitive disputes, which arouse powerful passions. It is therefore not surprising that CAS itself becomes a subject of controversy. My own view is that the function that CAS seeks to fulfil in the international community is indispensable. This does not mean that CAS is indispensable. But it does mean that those who raise existential criticisms of CAS have a duty to explain how they consider that this indispensable function would be fulfilled if we listened to them.

I had no part in inventing CAS. I do not have any role in running CAS. It has been ten years since I represented any party as an advocate before CAS. I have sat and continue to serve frequently as a CAS arbitrator, but I could very easily demonstrate that I would be financially better off, if I never did so. I have no role in any sports federation, and I am not even much of a sports fan. I have no favourite teams in any sport. I have never noticed that athletes care about whether I win my law cases and do not see why I should care whether they win their games.

But I have always supported CAS because I thought from the beginning, when the International Olympic Committee (IOC) took the initiative to establish it, that this was a worthwhile experiment. As things have turned out, it has in my view been very successful and continues to be a fascinating example of transnational institution-building. It has replaced the chaos that was there before, and which would have become even worse if CAS had not emerged. That is why I say that those who criticise CAS have a duty to understand what they are talking about before they start tearing things down, and to tell us what they would like to do instead.

I would like to look at our subject from three perspectives. First, the role of federations in enforcing the rules of international sports. Second, the observed behaviour of supporters of the accused. Third, the future: what would happen if we dismantled CAS?

1.2 The Role of International Federations

So let us begin with the international federations (IFs). But why? Isn't the subject CAS, rather than the IFs? That is indeed so. It has been questioned whether CAS is sufficiently independent of the IFs. As a matter of Swiss law, the supreme court of that country in the *Gundel* case (1993)[1] acknowledged CAS's legitimacy in cases, where the IOC itself is not a party to the arbitration. In reaction to *Gundel*, CAS was reformed so that the IOC was no longer involved in its management.

[1]SFT 119 II 271.

And so the Swiss Federal Tribunal is now satisfied that CAS may produce binding arbitral decisions even when the IOC is a party; it so held in the *Lazutina* case (2003).[2] But since courts in other countries might say that "what is good enough for the Swiss Federal Tribunal is not good enough for us", I propose to question whether it is really all that important whether CAS is independent of IFs. My simple point is that IFs are not the true adversaries of athletes suspected of cheating. IFs do not 'win' if suspected athletes are convicted. They do not have a desire to prove that there is cheating. It is bad for the reputation of their sport, and for their own reputation, since they are responsible for the way it is governed. IFs are the representatives of the entire body of competitors, and indirectly of the public. When someone has cheated in the context of the Olympics, his adversaries are the thousands of athletes who competed to get into the Games and the hundreds who actually made it. The same is true of every sport in which competition is organised across borders. Have you ever heard of Oscar Pereiro? I doubt it. He is the Spanish bicycle racer who won the 2006 *Tour de France*, but someone else stood on the highest podium at the finish line and had his name proclaimed throughout the world as the winner. Have you ever heard of Koji Morofushi? He made a magnificent hammer throw in the Athens Olympics on his very last attempt and should have stood on top as the Japanese national anthem was played. Instead Pereiro and Morofushi are names you might look up and see in the record books as answers to questions in a game of *Trivial Pursuit*—who was declared the winner on paper after the man who stole the spotlight was disqualified? They are the victims and the adversaries of those who competed illegitimately, and so are all other competitors. The second-place finisher is obviously not the only victim.

The victims of the cheaters are also the thousands of teenagers who have no realistic prospects of elite status in sports, but do not yet know it, and want to emulate the stars. Teenagers are impressionable, and when cheating is not suppressed they draw the conclusion that to be a champion means to ignore the rules. And so they destroy their health, and some youngsters even lose their lives doing what they think they must to succeed.

This is a matter of public health, and a matter of the gravest concern to all of us. If this is not a matter of public policy, I do not know what is. Can national laws and national law enforcement agencies deal with this problem at the international level? If so, we would not need IFs and we would not need CAS. Can anyone seriously believe that can be a solution?

Is free competition a matter of public policy? I am more than willing to say yes. But then it is a matter of public policy—is it not?—that competition should be fair. So when the IF or the IOC or CAS sanctions the cheater, it is acting in the interest of all competitors, and thus promoting public policy, not the opposite. How else is this supposed to happen? Are the victims supposed to go to the courts of the country of the cheater? Well, who can believe that Pereiro was going to go to ask the American courts to give him back what was taken from him by the American

[2]SFT 129 III 445.

cheater? How many years, how many hundreds of thousands of dollars would that involve? Who can believe that such a step would be taken by a racer who might have finished 20th and received a bonus which matters nothing to anyone else but perhaps determines whether he can continue to earn his living in the sport or not? What a fortunate thing it is that this is not how the system works! Because if it was, different courts might give different decisions, and all would be subject to appeals. And once this process was extended to a multiplicity of national court systems, including countries where the courts are susceptible to political influences and to bribery, all would be lost: total chaos.

Is it really proper and useful to say that IFs are monopolies? After all, that term was conceived to refer to profit-seeking business organisations. Would the world be a better place if each sport had 'competing' IFs? Seriously? Just consider what has happened in the world of boxing, where any number of organisations claim that they designate the world champion. And what would it mean for federations to 'compete', which is the purpose of avoiding monopolies? "Come to us because we have excellent doping controls"? Or, "come to us because we don't have any doping controls at all"? How about: "come to us because we'll give you a license which doesn't contain that nasty CAS clause"? What is the point of treating athletes as consumers who might be free to choose federations in which rules are *not* enforced in a uniform manner? And then what happens? In such chaos, surely the first thing left behind would be public policy.

And if cheaters can mobilise the support of their fans in a rich country to finance law suits that challenge every rule and every action taken by the supervisors of the sport—law suits that are beyond the budgets of most federations not involved in the glamour sports—other cheaters will do the same and simply make it impossible for those federations to play this role. Again, public policy will be defeated.

Let me make a few more observations that have some relation to this basic proposition that federations are not the adversaries of athletes.

1) One international rule of doping controls is remarkably favourable to athletes. There are protocols for the way doping samples must be identified and remain identified throughout the testing process. If any element of that protocol has been disregarded, the athlete must be acquitted. It does not matter if the protocol contains superfluous requirements, such as the use of a seal as well as a lock, and the problem is only that the seal was improperly affixed. The athlete will with absolute certainty be acquitted, even if his competitors might think this is far too indulgent. The federations insist on the discipline of an absolute reliability on the chain of custody.
2) One often-heard argument is that the athlete has been tested a multitude of times but never tested positive before. This often influences his fans a great deal. Who can forget how perhaps the most infamous of all offenders, Lance Armstrong, for so long repeated, again and again, and perfectly truthfully, that no one in his sport had ever been tested as many times as he, with never a single adverse finding. But this of course proves nothing, except perhaps that the science of testing continually follows the science of cheating at some distance.

The inventions of the cheaters come first, and the controllers must struggle to react and to do the reverse engineering. In fact three of the most prominent female runners in history retired several decades ago after having been tested innumerable times but were never ever caught—although there is surely no one left who believes that their grotesque records were obtained without performance-enhancing drugs. They (and those behind them) were simply ahead of the game.

3) Athletes often say that whatever has been found in their body was not performance enhancing. This argument has never fared well. To begin with, the criterion is not just performance-enhancement, but also the health of the athletes, and perhaps more importantly the health of young admirers, who want to copy them in every way. But even if one were only concerned with performance-enhancement, there must be legislation; lines must be drawn; standards must be set. Not everyone agrees with those standards, just as not everyone agrees with speed limits for cars or the danger of 100 ml of shampoo brought aboard an aircraft. Still, those who are subject to regulated activity cannot make up the rules for themselves, each one as it suits him or her.
4) Athletes also argue that they tested positive only because of a highly unusual natural condition which has everything to do with genes and nothing to do with cheating. Perhaps there *is* a one in a thousand chance that the positive finding was the result of a rare biochemical imbalance. If so, of course, 999 positives still do come from cheaters. What do we do—give up all attempts at fair competition because we cannot prove that there can never be a false positive? We do the best we can. Difficult questions never have to do with a single principle, such as avoiding punishment of the innocent, but with the collision of two competing principles when lines must be drawn in the general interest. Whether the cause of disqualification is that the concerned athlete has yielded to unhealthy influences or pressures, or because, just possibly, he or she has a rare genetic makeup, we do not need to make a moral judgment, only an objective legal finding in the interest of those who do manage to compete while satisfying the established standards.
5) What we should never expect is to have evidence of the actual ingestion of the prohibited substance, given how much pressure there is to deny, deny, deny. What we have is science, and science can be debated. Does the fact that one expert questions a detection method mean that the method cannot be used? Again, that would paralyse the entire effort and defeat the public interest in fair competition and public health. And sometimes we do not even have science, but simply compulsory inferences, such as the rule that an athlete who has violated the duty to give information about his or her whereabouts, so as to enable out-of-competition testing, will be deemed to have committed a doping infraction. Need I say it again? Such rules do not indicate a desire on the part of federations to exclude athletes from competition. Their goal is to have more competitors attracted to a sport that promotes instead of undermines health and fair play. And that goal is better achieved by the fair administration of proper rules of competition—which must be uniform.

1.3 The Behaviour of Supporters of the Accused

Now let us turn to the supporters of the accused. Entire nations are jubilant when their representatives win major competitions. So do the leaders of the country, and of course the national sports federations. Who can fail to remember when great Olympic champions mount the victory stand and immediately say that they dedicate their victory to the wonderful dictator of their country who offers great rewards for those who can contribute to his prestige by winning gold medals. Needless to say, such powerful people are more than annoyed when the glory turns into shame, creating enormous incentive to deny wrongdoing. Do not hope for anything from the courts of those countries.

But such effects may also result from *public* pressure. Consider the attitude of the Hungarian press and public when two Hungarian athletes won gold medals in the 2004 Athens Olympics and were promptly disqualified for doping. The two men were friends who trained together but did not compete against each other, because one participated in the hammer throw and the other threw the discus. As it happened, the finals in these two events took place on consecutive nights. On Sunday the 22 August, the hammer thrower led the competition from the very beginning. Then a strange thing happened towards the end; he left the stadium before his last throw and came back with an official some time later. The athlete was entitled to a sixth and final throw, but showed no interest in taking the opportunity to improve his record. He had gone to the doping control tent before the event was over, surprising the staff there, and quickly done a test, which was negative. After his return to the stadium, he engaged in no further competition. So he was done with the controls, and could get on the podium and receive the applause of the packed Olympic stadium. The Hungarian national anthem was played—not the Japanese—and the entire Hungarian nation watched the images in rapture.

On Monday evening, the discus thrower participated in the final of his event and he also won the gold. Dancing broke out on the streets of Budapest. But this time the officials at the control station were ready when he sprinted to the tent to be tested, and insisted on doing it punctiliously, which according to the rules means that a controller must enter the testing room and observe the urine leaving the athlete's body. Rumours had been swirling that the Hungarians were using a contraption concealed between their legs which allowed them to leave a guaranteed clean sample, namely the urine of another person. The discus thrower was very unhappy, and sat in the tent for two hours simply saying he was unable to give a sample. He was offered drinks to help the process, but refused to drink. He finally said that he found the whole business intolerably stressful and insisted on leaving. He was reminded that the refusal to provide a sample would be deemed a positive result and he would thus lose his gold medal. He ignored the warning and left the stadium knowing that he would forfeit his victory.

Since these two athletes were training partners, the doping control officials were now highly suspicious of what had happened the night before and decided to conduct a targeted test of the hammer thrower. They expected that this would

be no problem, since they could simply go to find him with the Hungarian team in the Olympic Village Tuesday morning. Indeed, he was scheduled to fly back with the whole Olympic Team one day later. But they found that instead of waiting to return to Hungary as scheduled, to meet the ovations of the public as he walked proudly off the plane, he had decided to drive all the way back to Hungary by car, and had already left at 8 o'clock that morning—just hours after his friend the discus thrower had finally left the control station knowing that he was abandoning his gold medal. It seems that the priority was not to get to Hungary, but to leave Athens.

The control officers naturally concluded that this could not be allowed. The IOC dispatched a small team of inspectors to travel immediately to the suspect's village in Hungary. They presented themselves near midnight on Thursday at the athlete's home, where they found a waiting crowd of journalists and supporters of the athlete, including muscular men straddling loud motorcycles and blocking the way. The controllers were neither trained nor disposed for combat, and retreated to make their report. The IOC then issued an official notification via the Hungarian Olympic Committee requiring the athlete to present himself for testing at a police station at 4 p.m. the following day. He never came. The consequence under the rules was that he was deemed to have committed a doping infraction, and the IOC took away his gold medal as well.

Both of these athletes appealed to CAS, asking that the IOC's decision be overturned.[3] You might think this was astonishing, but perhaps it is understandable in light of the reaction of the Hungarian media and public. Instead of feeling embarrassed by this shameful behaviour, and instead of taking the slightest interest in the true facts of the matter, they 'patriotically' and instinctively defended their athletes—who of course denied all wrongdoing. Seldom have there been as many people, Hungarian journalists and fans having travelled to Lausanne, filling the street outside the venue where the CAS hearings were held. Pushed by this national pride, the athletes told incredible stories. The discus thrower said he was a very shy person whose religious beliefs required him to be modest, and that he had been intimidated and harassed by the officials. Since the official in question was a retired doctor who came to testify and turned out to be an unusually small elderly gentleman, this was hardly convincing in the mouth of a powerful world-class discus thrower who could probably make Arnold Schwarzenegger back down. As for the hammer thrower, he could not even manage to put together a coherent story of just why he absolutely had to drive the long way back to Hungary and why he was so unwilling to be tested properly and thus to defend his gold medal, if indeed he had obtained it fairly.

Another example comes from the United States of America: the case of *Floyd Landis*, the bicycle racer who stole the 2006 *Tour de France*. He had been under the very long shadow of Lance Armstrong, and his results had been relatively modest. Even with Armstrong gone in 2006, things did not look good for Landis in

[3] CAS 2004/A/714 & 718, *Fazeckas v. IOC*, Awards of 31 March 2005.

2006 after he almost collapsed in stage 16 of the race and lost ten (10) minutes. But for the next stage he was miraculously restored. He passed every single rider on his own team and thereafter raced onwards solo without support from them in a show of spectacular dominance, climbing away from everyone as though he had a turbo attached to his wheel. And so he became the apparent surprise winner of the *Tour de France*. But the day after the race the bad news came: he had failed his test from stage 17. He swore his innocence. He referred to his strong religious beliefs, and insisted on how he had been brought up always to respect the truth, and the truth was that he had never taken illegal substances. He said that if the result was correct his genes must be to blame, or maybe he was the victim of powerful interests conspiring against another American winner. Ultimately Landis came before CAS, which held a five-day hearing in New York in 2008. He still swore he had never lied. His lawyer harshly attacked the poor staff members of the laboratory which had done the testing and were now subjected to his cross-examination. He suggested that they were guilty of all kinds of dishonesty and professional misconduct. But the Tribunal found against Landis,[4] and he promptly said that he would go to court in America and attack CAS because of its unfairness.

But in May 2010 he suddenly announced that he wished to "clear his conscience" and admit that he had been lying all along. He admitted that he had been using prohibited substances for years. He wrote a book about the pressures of being a professional athlete, and how everyone around him had continuously been guilty of doping.

It is a sad story. Its point for present purposes is simply that a multitude of nationalistic fans believed everything he said, because (one supposes) they wanted to have faith in their champion. Commentators on blogs in America repeated Armstrong's frequent complaint that the French daily newspaper *L'Equipe* was against him because they preferred to report on the success of French racers, and they must somehow have some kind of dark influence with the French laboratories. Landis also had the vocal support of experts who were happy to be in the media and immediately rushed to his side in public comments. For example, a professor of human performance at Rice University in Houston immediately said he found it unlikely that Landis had used illegal substances. He and other experts were happy to support Landis even though they were not aware of the actual off-the-scale test results, nor that there was specific evidence of 'synthetic' testosterone. No matter—Landis started something called the 'Floyd Fairness Fund', and presented his arguments again and again on his blog. American fans responded, completely convinced by his affirmations and ready to condemn everybody in sight: the French, the laboratory technicians, the international cycling federation, and of course CAS for being dishonest and anti-American (even though Landis had appointed an American arbitrator, a prominent private lawyer in New York, who today is the President of the International Bar Association and has never

[4]CAS 2007/A/1394, *Floyd Landis v. USADA*, Award of 30 June 2008.

worked for a sports federation). It is said that Landis collected over one million dollars in public contributions to his legal defence fund, and that is very likely true, because in due course he was sued by some of them and the US authorities, who were threatening him with criminal pursuit on the grounds of fraud, with the possibility of a 20-year prison sentence, in 2012 let him go on the condition that his future earnings be garnished to recompense all contributors who could be traced. Many people had given money without identifying themselves, but the traceable contributions of more than 1700 fans amounted to $ 478,000. One year later, $ 10,000 had been returned. Records for 2014 and 2015 so far show no payments at all.

So to conclude: those who support suspected offenders simply cannot be trusted when they are infused by some form of misplaced patriotic passion. And when we are talking about dictators and other potentates, anxious to protect the champions whose glory they seem anxious to share, they have a lot more than $ 478,000 to spend in the effort.

1.4 Future Directions

And now to end with a series of questions about how the critics of CAS would propose to organise the governance of international sports.

The most excellent institutions should always be conscious of the possibility of improvement and reform. CAS is no exception. All serious people acquainted with its work are likely to have their own suggestions. For example, I have ideas about how to enhance transparency and the appearance of justice. For example, it should be possible to find out easily which arbitrator has been appointed by whom and how many times. Although I have seldom found that fellow CAS arbitrators have been committed to the cause of their appointers, I do not see why full records should not be readily available to the public. Nor have I ever had the feeling that there is a cabal of federations seeking to ensure that whatever any of its members might do in a disciplinary case is upheld by CAS panels. But why should *the federations* nominate a majority of the hundreds of persons who figure on the list of arbitrators qualified to serve in CAS cases? I do not believe that prejudice is caused to the accused in individual cases. I am pretty sure the badminton people do not spend any time trying to figure out how to help the field hockey people and so on. Still, in my view any preponderant formal role of the federations is unnecessary and creates an unfortunate appearance. On the other hand, I would think twice before eliminating the CAS list system, and allowing parties to choose whomever they want as arbitrator. Neither CAS nor the other disputants are capable of performing due diligence on arbitrators from all over the world, to find out anything about unknown nominees from remote countries before their appointment is accepted.

That being said, I do not believe that persons nominated to serve on the list of hundreds of CAS arbitrators should be identified as ‘representing’ athletes or

federations. If you have been listening to me, you will understand that only a foolish 'athlete representative' will think that his duty is to defend the accused athlete, come what may. There are a few such arbitrators, who as incredible as it may seem are incapable of understanding that the huge majority of non-cheating athletes also deserve to be represented, and that in their interest it is imperative to disqualify and suspend those who obtain illicit advantage.

But how should reform come about? Should the individual legal system of every country in the world be entitled to decide that some feature or another of the CAS system is not worthy of respect? Should each legal system be given a chance to say that "what is good enough for the Swiss Federal Tribunal is not good enough for us"?

That would surely be chaos. There would be no end to what judges here or there might include in the concept of public policy. I have heard it said by the lawyers of an accused athlete that CAS is violating human rights because the proceedings are not entirely conducted in Flemish, even though their client-athlete is in the world elite and writes on a blog and conducts interviews in fluent French and English. Will CAS have to conduct its cases in 200 languages? And why should not the fundamental elements of every country's procedural code be held to constitute tests of public policy as far as due process is concerned? Are you familiar with the concept of '*amparo*' known throughout Latin America, that is to say control of the constitutional conformity of any decision affecting any individual's legal rights and obligations? It is of course a matter of public policy. Does this mean that no CAS decision involving a Latin American party could ever be final and binding, because if could be subject to judicial review in this manner?

More chaos.

And what about the special CAS formations which render decisions within 24 h in the context of the Olympic Games, or other similar multi-sport competitions? If CAS is illegitimate, how will decisions be rendered in the framework of such important international events? Just looking at the summer Olympics, does that mean that the next two Games will be subject to the decisions not of CAS arbitrators, but judgments of the courts of Brazil and Japan? How long will those judges take to decide which result should be upheld or nullified? How long before appeals are exhausted? And will the world be convinced by the legitimacy of those decisions? What will happen when they are presented for enforcement in the courts of the losing athletes? And what about cases brought by individuals who finished second or third, or missed the finals, and want their own courts to move them up, or to give damages for loss of earnings because they were deprived of the chance of a better placement in the competition? Let us not even talk about issues of eligibility to compete in the Olympics, because those disputes may arise on the day before the Games and must be decided within hours. Read my lips: *national courts cannot do it*.

More chaos again.

I really do not want to say much about the *Butch Reynolds* case, because it is an old tedious matter which takes long to explain and because I thought it was well behind us. Let me just remind you that this American sprinter, whose world

record from 1988 still stands, 27 years later, as the second-fastest time in history, tested positive for anabolic steroids two years later and started a legal process, which included the intervention of the US Supreme Court to lift his suspension, decided by the international federation, and thus allowed him to compete in the US national Olympic trials two years later. The International Association of Athletics Federations (IAAF) did not then belong to the CAS system, so there was no recourse to CAS to uphold or annul the IAAF ban. The US Olympic trials were postponed for four days until Reynolds was allowed to run. Imagine the irritation of other athletes who were ready to compete on the scheduled day. Ultimately Reynolds qualified for the relay, but the Olympics were held in Barcelona and there was no way the US Supreme Court could tell the public authorities in Spain to force the IOC to let Reynolds compete. It was an absolute mess. But it got even worse. Reynolds went back home to Ohio and somehow convinced a US federal court, no less, to award him $ 27.3 million in damages against the IAAF for having damaged his reputation. The IAAF shrugged its shoulders and declared that that judgment had no effect outside Ohio. I guess that meant the IAAF would never again allow the staging of any international events in Ohio, which is a fairly important state including the major cities of Cleveland and Cincinnati—or perhaps even in the United States. Fortunately a federal appellate court overruled the court of first instance on the basis that it had no jurisdiction over the IAAF in Ohio.

Today this could not happen, because the validity of the IAAF ban would have been tested in CAS since by now the IAAF has adopted CAS jurisdiction as the global final dispute resolution mechanism. Is the *Reynolds* scenario the kind of chaos we want to go back to? With the ever-increasing monetisation of international sports, more time would be spent in the courts, I fear, than in the stadium. New 'Reynoldses' would seek the protection of their national courts, which would be more or less effective in light of how powerful their countries might be, and their competitors would go to their own courts to seek to prevent races where they are competing—which might be more or less effective depending on how powerful *their* countries might be. And where would the Olympic Games be held to avoid being embroiled in such disputation? On Mars maybe?

One last example, more up to date. If CAS were neutralised, who would resolve controversies relating to gender? Nature is messy. In most cases, we know who is of what gender. But some women have beards, and some men have none. Beards are not a test of gender, nor is a high-pitched voice. No one has a simple definition, and that includes scientists and laboratories. The issue came up again before CAS this year in relation to a teenage Indian runner named Dutee Chand; you will have seen it everywhere in the international press. She comes from a village in a poor part of India. She began to record impressive results as a junior. A test revealed that she is hyperandrogenetic, which means she has a high level of testosterone when compared to other women. Her serum testosterone reading turned out to be ten (10) nanomoles per litre, whereas not a single woman tested at the IAAF World Championships in 2011 was at that level, and 99 % were below a reading of three (3). On the other hand, a reading of ten (10) is normal for men. And men's measureable athletic performance are on average 10–13 % superior to women's.

Under the IAAF's Hyperandrogenism Regulations, Ms. Chand was suspended on the basis of that test. Such a suspension would end her career before it ever really began. She had little if any understanding of what was happening to her, save that she had always been a girl, raised as a girl, playing with girls, and could not comprehend how it could be denied that she is female. And it was not as if she could suddenly stop something in her body from producing this excess testosterone, so the suspension effectively was exclusion for life. The case came to CAS, where it was recognised as a matter of great importance and delicacy. A panel of three very experienced arbitrators, presided by Justice Annabelle Claire Bennett of the Federal Court of Australia, reviewed numerous expert reports and last March convened a hearing of four days' duration to question the experts and hear legal arguments. In the end, in an exceptionally thorough award, 161 extremely well-written pages, which I think anyone in this room would acknowledge as remarkably serious and sober, dealing exhaustively with difficult issues of procedure and evidential standards as well as the substantive rules and the policies behind them, the CAS Tribunal lifted Ms. Chand's suspension, and declared that the IAAF Regulations *themselves* were suspended for two years to allow for further investigations into their scientific foundations. To put it in a nutshell, the CAS arbitrators found that something was missing: regulations whose purpose is to promote fair competition among women cannot find a satisfactory basis in the simple observation that men have high testosterone levels and men are on the whole stronger and faster. An obvious missing investigation, they noted, must determine whether high levels of testosterone in women really do have the result of enhancing *their* performance. Until that is done, the Regulations are simply inapplicable, as the IAAF has no legally sufficient foundation for them.

Other decision-makers might have devised different solutions. But the CAS award in the Chand case has the double merit of being a fully reasoned and rational decision, and it created a comprehensible and enforceable (provisional) regime for all international athletics competitions. We now have a ruling which is effective worldwide—unless someone interferes with it.

Who could that be? How about one of Ms. Chand's competitors, who might go to the courts of their own home countries, or perhaps some other court where events are held and where her advisors think the courts would be favourable to her, perhaps because none of their own female athletes have so far had the problem of hyperandrogenism. Ms. Chand's presence in the competitions, she might say, is a threat to the plaintiff's economic prospects as a professional athlete; this is a matter of public policy; the CAS decision is not entitled to recognition. And then Ms. Chand's advisors will remember that the Government of India itself has been alerted to the case and has (as is revealed in the CAS award) launched its own inquiry into hyperandrogenism which might reach a different result. Is this a matter for the sovereign determination by 200 States of what they believe to be public policy? Will there be 200 answers, all of them supposedly pro-athlete but some of them in favour of the few (who have abnormal results on some kind of test recognised in some country) and others in favour of the many (who test normally on some other kind of test)?

Once again, this is the road to chaos.

Ladies and gentlemen, I have freely expressed a number of opinions here today, but please note that my conclusions are not in the form of answers, but in questions. I have tried to show that we have a remarkable system in place. It is not perfect: of course it can be improved, of course it should be continuously reevaluated.

Actually, the only question I truly would like to ask is how such improvements should be conceived and implemented. But given the types of challenges that have been raised against CAS, and given that many of them are actually destructive in their nature, I feel impelled to ask many other questions, and to challenge the critics of the system to answer those questions before they run off to tear down the building. These critics are not only nationalistic courts and lawyers who specialise in defending athletes accused of cheating, and whose only objective is to invalidate disciplinary decisions. There are many federations which also find CAS very annoying indeed—an impediment to the old autocratic ways of governing sports. CAS is an institution which provides answers to a wide range of extremely challenging and time-sensitive problems that arise when sports are practiced across borders. Those who do not like the institution are entitled to their opinion, but if they want us to see things their way they have the duty to tell us what they would leave in the wake of whatever it is that they would do with CAS.

Chapter 2
The Influence of Common Law Traditions on the Practice and Procedure Before the Court of Arbitration for Sport (CAS)

Dr. Gregory Ioannidis

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.

Keywords CAS · Sports Law · Precedent · Procedure · Evidence · Jurisdiction

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2.1 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, 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, 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 CAS, it is necessary to evaluate the origins of this unique legal tradition.

2.2 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 it 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 of applying 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 twelfth century.

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[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).

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 first books on equity were published and it was not until the seventeenth 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 nineteenth 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 regard 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]

2.3 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

[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.

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 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 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

[4]Cardozo 1921, p. 113.

[5]Goodhart 1934, p. 61.