4-15-2012

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Recommended Citation
Annie Bersagel, Is There a Stare Decisis Doctrine in the Court of Arbitration for Sport? An Analysis of Published Awards for Anti-Doping Disputes in Track and Field, 12 Pepp. Disp. Resol. L.J. Iss. 2 (2012) Available at: https://digitalcommons.pepperdine.edu/drlj/vol12/iss2/1

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Is There a Stare Decisis Doctrine in the Court of Arbitration for Sport? An Analysis of Published Awards for Anti-Doping Disputes in Track and Field

Annie Bersagel*

I. INTRODUCTION

The Court of Arbitration for Sport (CAS) provides a unique example of a private international legal regime that has almost entirely displaced domestic adjudication of certain types of disputes.1 Based in Lausanne, Switzerland, the CAS exercises jurisdiction over commercial and disciplinary disputes in connection with the Olympic Games, as well as disputes involving international sporting federations that have consented to CAS jurisdiction.2 In contrast to the practice in the overwhelming majority of arbitral tribunals, CAS panels rely heavily on previous arbitral awards in reaching their decisions.3 CAS panels’ liberal use of citations to previous CAS awards has led legal scholars to recognize the practice as evidence of

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3. See infra notes 35-46 and accompanying text (discussing the CAS’s unique reliance on precedent, as compared to most arbitral tribunals).
an emerging lex sportiva, defined by CAS interpretations of a growing body of international sporting codes and regulations.

While the importance of precedent in CAS awards is by now a matter beyond dispute, a more controversial claim concerns whether the CAS applies a de facto principle of stare decisis—a hallmark of the common law system—in its jurisprudence. In practice, application of stare decisis may be difficult to distinguish from that of jurisprudence constante, the civil law doctrine that courts should not depart from a line of past decisions “unless clear error is shown and injustice will arise from continuation of a particular rule of law.” Thus, in contrast to the doctrine of stare decisis, there is no strict requirement to follow past precedent under jurisprudence constante.

This article adopts an empirical approach to the debate over the use of precedent in the CAS by analyzing a sample of CAS awards issued between 2000 and 2010—namely, all published awards involving disciplinary violations related to anti-doping for the sport of track and field. The results of this analysis are consistent with previous scholarship noting the CAS’s tendency to follow past precedent. Nevertheless, CAS panels’ explicit rejection of a doctrine of stare decisis suggests the practice is better characterized as a doctrine of jurisprudence constante. This study supports


5. See, e.g., Canadian Olympic Comm. (COC) v. Int’l Olympic Comm. (IOC), CAS 2002/O/373, ¶ 14 (Dec. 18, 2003) (“CAS jurisprudence has notably refined and developed a number of principles of sports law . . . which might be deemed part of an emerging ‘lex sportiva.’”).


8. See, e.g., BLACKSHAW, supra note 6; Foster, Lex Sportiva and Lex Ludica, supra note 4, at 12; Kaufmann-Kohler, Arbitral Precedent, supra note 6.


https://digitalcommons.pepperdine.edu/drlj/vol12/iss2/1
the hypothesis that the use of precedent depends on panel composition. Most panels in this study consisted of both common law and civil law arbitrators, and those comprised of solely civil law jurists were just as likely to cite precedent as common law panels. Further research is needed to clarify how the use of precedent in the CAS interacts with the institution’s default rules for choice of law.

Part I of this article outlines a brief history of the CAS and its procedural rules. Part II describes the debate over whether the CAS follows a doctrine of stare decisis. Part III sets out the methodology used. Part IV describes the results of the analysis, including an in-depth look at two awards that touch directly on the relevance of past arbitral awards. Part V concludes by discussing the implications of the results of this study and suggesting avenues for future research.

II. OVERVIEW OF CAS HISTORY AND PROCEDURE

The International Olympic Committee (IOC) established the CAS in 1984 to create a uniform body of rules for international sports disputes, and to avoid the problem of athletes pursuing complex and costly litigation in national courts. Two different arbitration divisions comprise the CAS: Ordinary and Appellate. The CAS has also established ad hoc tribunals for the Olympic Games and other major international sports competitions, such as the Fédération Internationale de Football Association (FIFA) World Cup soccer tournament. The CAS Ad Hoc Division hears disputes on-site and render decisions within twenty-four hours. The Ordinary Arbitration

10. See infra Part IV.
11. BLACKSHAW, supra note 6, at 151-52.
12. Since 1994, the CAS has been organized under the International Council of Arbitration for Sport, rather than the IOC, but the IOC still funds a major portion of the CAS budget. Id. at 152.
13. Id. at 152.
16. The first CAS Ad Hoc Tribunal was established for the 1996 Summer Olympic Games in Atlanta, Georgia. See generally GABRIELLE KAUFMANN-KOHLER, ARBITRATION AT THE OLYMPICS: 191
Division handles disputes referred by the parties directly to the CAS; most often, commercial cases or disputes between sports federations. The Appeals Arbitration Division hears appeals from decisions of international and national federations, usually involving disciplinary cases. Both divisions review questions of law and fact de novo, and CAS awards are final and binding.

The Code of Sports-Related Arbitration, the CAS’s governing statute, designates Lausanne, Switzerland as the arbitral seat for any CAS arbitration proceeding. Regardless of whether the actual hearing takes place in Switzerland, parties may only petition to set aside a CAS award through the Swiss Federal Tribunal (Supreme Court). For courts outside of Switzerland, the

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18. Id.


20. Although the name suggests otherwise, awards rendered by the Ordinary Arbitration Division may not be appealed to the Appeals Arbitration Division unless “such appeal has been expressly provided by the rules applicable to the procedure of first instance.” CAS CODE, supra note 19, at R47.

21. Id. at R28.

22. In the case of Raguz v Sullivan, an Australian athlete challenged a CAS award made in Sydney, Australia in connection with the 2000 Summer Olympic Games on the grounds that the New York Convention did not apply to an arbitral proceeding held in Australia involving Australian parties. Raguz v Sullivan [2000] NSWCA 240 (Aust.). The Court of New South Wales upheld the award, holding that designation of Switzerland as the arbitral seat rendered the award “non-domestic” for purposes of the New York Convention. Id.


grounds for resisting enforcement in domestic courts are limited to those found in the New York Convention.25

Each of the two main CAS divisions has its own set of default rules for the applicable substantive law.26 Both rely primarily on international sporting codes and the Olympic Charter, but the choice of subsidiary law varies by division.27 For the Ordinary Arbitration Division, the CAS Code provides that: “The Panel shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to Swiss law.”28 In contrast, the default rule for subsidiary law in the Appeals Arbitration Division is: “[T]he law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate.”29 Since most international sports federations are located in Switzerland, both divisions usually apply the same law.30 For track and field, however, since the International Association of Athletics Federations (IAAF) headquarters are in Monaco,31 the subsidiary law applicable to disputes is either Swiss or Monegasque law, depending on whether the Ordinary or Appeals Arbitration Division hears the dispute.32

An athlete becomes a party to an agreement to arbitrate disputes at the CAS through two possible avenues: (1) through the bylaws of national sporting federations, of which athletes are members,33 and (2) through signing the entry form required for participation in the Olympic games,

25. New York Convention, supra note 23, art. 5.
26. CAS CODE, supra note 19, at S3.
27. Id.
28. Id. at R45.
29. Id. at R58.
30. Forty-seven international sports federations are based in Switzerland, compared to five in Monaco, the next most popular federation host country. Samuel Jaberg, How Switzerland Champions Champions, SWISSINFO.CH (Julia Slater trans., Jan. 25, 2010, 1:17 PM), http://www.swissinfo.ch/eng/specials/switzerland_for_the_record/world_records/How_Switzerland_champions_champions.html?cid=8149794.
32. CAS CODE, supra note 19, at R45, R58.
which contains an agreement to arbitrate disputes according to the Olympic Charter and Swiss law.  

III. LITERATURE REVIEW

A. Precedent in Arbitration

In general, arbitral awards do not have precedential value. This follows from the practice of keeping international arbitral awards confidential. Nevertheless, certain arbitral tribunals do ascribe precedential value to past arbitral awards—for example, in international maritime and construction arbitration. Proponents of using arbitral precedent justify the practice as a means for the parties to reap the benefits of the arbitrators’ industry-specific knowledge and expertise. Reliance on precedent also promotes legal uniformity and consistency.

Both of these arguments apply to the use of arbitral precedent in the international sports context. In establishing the CAS, the IOC aimed to provide a “level playing field” for competitors from different countries and to create a uniquely specialized sports dispute resolution forum. There are also practical reasons that may explain the CAS’s reliance on previous arbitral awards. Since the CAS exercises near exclusive appellate jurisdiction over disputes in Olympic sports, national courts no longer have occasion to interpret international sports charters or codes. This lack of judicial precedent grows even more pronounced as these charters and codes

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34. Id.
35. See, e.g., NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION § 1.113 (student version, 5th ed., 2009) (“There is no system of binding precedents in international arbitration . . . .”).
37. Blackshaw, supra note 6, at 159 (stating that “the CAS is able to grant parties in dispute very valuable, relevant and generally effective kinds of interim protection and relief at an early stage in the proceedings; and these measures deserve to be better known and more widely used”).
38. Born, supra note 36, at 1059.
39. Id.
40. See Blackshaw, supra note 6, at 155.
41. See id. (one-fifth of the arbitrators are chosen with a view to safeguarding the interests of the athletes).
42. See id. at 154. Submission forms required for athletes to participate in the Olympic Games include a standard arbitration clause which states: “I agree that any dispute . . . shall be submitted exclusively to the Court of Arbitration for Sports (CAS).” Id.
are amended or replaced. As a result, domestic judicial interpretations of international sports regulations may be practically unavailable.

Other scholars have identified more cynical motives for the emergence of a \textit{lex sportiva}—namely, as “a cloak for continued self-regulation by international sports federations.”\footnote{43 Foster, \textit{Is There a Global Sports Law?}, supra note 1, at 2-18.} Under this interpretation, the use of arbitral precedent arises as a means of avoiding national legislation altogether. Indeed, CAS decisions are generally self-enforcing within international sports bodies.\footnote{44 See \textit{BLACKSHAW}, supra note 6, at 174 (“[T]he CAS decisions are legally effective and can be enforced internationally.”).} For disciplinary violations, the sanctions often include disqualification or ineligibility for participation in international sports.\footnote{45 See infra notes 71-77 and accompanying text (discussing cases involving challenges to sanctions imposed for disciplinary violations).} Thus, even if a national sports federation wished to evade enforcement of a CAS award, the athlete involved would still remain ineligible for international competition. As a result, the CAS rarely requires the assistance of national authorities for enforcement of its awards.\footnote{46 One possible exception in which the CAS might require the assistance of national authorities would be for provisional relief measures; however, this question remains a matter of debate. \textit{BLACKSHAW}, supra note 6, at 158-59.}

\textbf{B. Stare Decisis or Jurisprudence Constante?}

Regardless of the reasons for the CAS’s reliance on precedent, there is little doubt that the practice occurs.\footnote{47 See, e.g., Kaufmann-Kohler, \textit{Arbitral Precedent}, supra note 6 (noting the CAS’s frequent citations to precedent).} The question remains, however, whether CAS case law constitutes binding or persuasive authority. No CAS panel has gone so far as to explicitly recognize a principle of stare decisis, but panels’ frequent citations to previous CAS awards suggests a de facto doctrine of stare decisis may already be in operation.\footnote{48 See, e.g., Anderson v. Int’l Olympic Comm. (IOC), 2008/A/1545 (July 16, 2010) (containing over twenty citations to previous CAS awards).} More precisely, the question is whether the CAS applies a doctrine of \textit{horizontal} stare decisis, “the doctrine that a court . . . must adhere to its own prior decisions, unless it finds compelling reasons to overrule itself.”\footnote{49 \textit{BLACK’S LAW DICTIONARY} 1537 (9th ed. 2009).} Alternatively, what appears to be a doctrine of stare decisis from the perspective of a common law scholar may be more accurately described as a doctrine of \textit{jurisprudence constante},

\begin{itemize}
\item[43.] Foster, \textit{Is There a Global Sports Law?}, supra note 1, at 2-18.
\item[44.] See \textit{BLACKSHAW}, supra note 6, at 174 (“[T]he CAS decisions are legally effective and can be enforced internationally.”).
\item[45.] See infra notes 71-77 and accompanying text (discussing cases involving challenges to sanctions imposed for disciplinary violations).
\item[46.] One possible exception in which the CAS might require the assistance of national authorities would be for provisional relief measures; however, this question remains a matter of debate. \textit{BLACKSHAW}, supra note 6, at 158-59.
\item[47.] See, e.g., Kaufmann-Kohler, \textit{Arbitral Precedent}, supra note 6 (noting the CAS’s frequent citations to precedent).
\item[49.] \textit{BLACK’S LAW DICTIONARY} 1537 (9th ed. 2009).
\end{itemize}
in which the CAS generally follows the weight of past precedent, but remains free to depart from previous awards in the interests of justice.50

C. Departures from Precedent in the CAS

Scholars have identified at least one counterexample to the CAS trend of following past awards.51 A commonly cited example of lex sportiva is the principle of strict liability for doping cases.52 That is, the existence of a positive doping test is itself sufficient to establish a violation, regardless of the athlete’s state of mind.53 Nevertheless, in both A. v. Federation Internationale de Luttes Associees (FILA)54 and Q. v. Union Internationale de Tir (UIT),55 CAS panels declined to recognize a general principle of strict liability. In the Q. case, decided in 1995, the panel concluded that the international shooting federation’s (UIT)56 doping regulations did not create a rule of strict liability.57 Thus, subsequent cases recognizing a general principle of strict liability for all sports conflict with the panel’s decision in Q., which held instead that the relevant sporting code must clearly establish a standard of strict liability.58

In the Fritz Aanes case, the panel acknowledged that previous CAS awards recognized a general principle of strict liability, but decided instead to treat a positive doping test as presumptive evidence of guilt and allow the athlete to rebut the presumption.59 Janwillem Soek observes that the panel in the Fritz Aanes case was comprised of lawyers from the civil law tradition, whereas panels comprised of common law jurists issued previous

50. Id. at 933 (defining jurisprudence constante as the “doctrine that a court should give great weight to a rule of law that is accepted and applied in a long line of cases . . . unless clear error is shown and injustice will arise from continuation of a particular rule of law.”).


53. Id.


57. Id.

58. Id. ¶ 34-35.

59. A., CAS 2000/A/317, at ¶ 39 (“[T]he Panel is conscious of the fact that there have been CAS decisions where the Panel was prepared to apply a strict liability standard with respect to suspensions and was not willing to take into account the subjective elements of the case in questions.”).
decisions on strict liability.\textsuperscript{60} Likewise, three civil law jurists served as arbitrators in the \textit{Q.}\ case.\textsuperscript{61} This suggests the use of precedent may vary depending on the backgrounds of the arbitrators.\textsuperscript{62}

IV. METHODS

The sample analyzed consists of published awards for track and field involving doping allegations.\textsuperscript{63} These include decisions on individual doping violations and the consequence of doping violations for relay eligibility.\textsuperscript{64} Within a single sport and type of dispute there should be less variation in the amount of applicable precedent than would be the case if a greater variety of cases were examined.\textsuperscript{65} As a result, variations in the use of precedent in the cases sampled should be more likely to result from panel decision making than the lack of applicable precedent for a certain type of case.\textsuperscript{66}

There are two main sources of published awards: the three-volume print Digest of CAS Awards,\textsuperscript{67} and the CAS website, which includes a searchable database of awards.\textsuperscript{68} Neither source is comprehensive. The editors of the print volumes selected cases they considered noteworthy.\textsuperscript{69} Although the CAS has announced its intention to publish on its website all

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{60} SOEK, supra note 51, at 167. The arbitrators in the \textit{A.}\ case were German, Norwegian, and Swiss. \textit{Id.}
\item \textsuperscript{61} Two of the arbitrators in the \textit{Q.}\ case were from Switzerland and the third was from France. \textit{Id.}
\item \textsuperscript{62} \textit{Id.}
\item \textsuperscript{63} \textit{See infra} note 71.
\item \textsuperscript{64} \textit{See e.g.}, U.S. Olympic Comm. (USOC) v. Int’l Olympic Comm. (IOC), CAS 2004/A/725 (July 20, 2005).
\item \textsuperscript{65} \textit{See e.g.}, Canadian Olympic Comm. (COC) v. Int’l Olympic Comm. (IOC), CAS 2002/O/373, ¶ 14 (Dec. 18, 2003).
\item \textsuperscript{66} \textit{See, e.g.}, Ohuruogu v. U.K. Athletics Ltd. (UKA), CAS 2006/A/1165, ¶ 17 (Apr. 3, 2007).
\item \textsuperscript{68} \textit{Welcome to the “Jurisprudence” Database!}, CT. ARB. FOR SPORT (July 10, 2009, 11:24 PM), http://jurisprudence.tas-cas.org/sites/caselaw/help/home.aspx.
\item \textsuperscript{69} CAS DIGEST I, supra note 47, at XXIII.
\end{itemize}
\end{footnotesize}
nonconfidential awards issued since the tribunal was first established, the database is still under construction.\(^{70}\)

A total of twenty-three awards were examined.\(^{71}\) These include two awards from ad hoc panels for the Olympic Games, three awards made in Ordinary Arbitration Division proceedings, and eighteen awards rendered on appeal from national or international federation decisions.\(^ {72}\) The awards were issued between 2000 and 2010.\(^ {73}\)

Each arbitral award was analyzed according to the following criteria: (1) whether it included citations to previous CAS awards; (2) whether the panel followed, distinguished, or rejected precedent; (3) the proposition which the cited award(s) stands for; and (4) whether the panel was comprised of common law jurists, civil law jurists, or a mix of the two. The author expected that panels would cite frequently to past awards and tend to follow precedent, and when panels did in fact depart from precedent, they were more likely to be comprised of civil law jurists than jurists from common law backgrounds or a mix of the two.

\(^{70}\) “As of January 2009, the awards issued after 2003 are gradually being added to the database so that in the long term . . . there will be a complete coverage of the CAS awards.” Welcome to the Database of CAS Awards, CT. ARB. FOR SPORT, http://www.tas-cas.org/jurisprudence-archives (last visited Mar. 26, 2012).

\(^{71}\) See supra note 51.

\(^{72}\) See, e.g., Anderson, CAS 2008/A/1545; Baumann, CAS 00/006.
There are a few main limitations to this study. First, not all CAS decisions are published. While publication remains the default rule, parties may opt to keep the award confidential. This may lead to selection bias if parties prefer to avoid disclosing awards that deviate from past CAS jurisprudence. Another potential source of bias is the lack of access to the parties’ briefs. In their awards, panels might refer only to previous arbitral awards that the panel believes were rightly decided. Thus, panels might ignore contrary citations in a party’s submissions that would reveal the panel’s divergence from past precedent. Lastly, this study addresses only disciplinary cases. The CAS also hears commercial disputes, which most likely involve greater overlap with existing domestic and international regulation—such as European Union competition rules. As a result, the findings in this study may not apply to commercial cases.

V. RESULTS

A. Frequency and Use of Precedent

Of the twenty-three awards analyzed, seventeen contain at least one citation to a previous CAS award. In each award that contained a citation to precedent, the panel either followed or distinguished previous CAS awards. None of the awards explicitly departed from precedent. For

75. Proceedings Confidential, supra note 54 (“Generally speaking, unless the parties agree otherwise, the award may be published by the CAS.”).
76. Id. (“The parties, arbitrators and CAS staff are obliged not to disclose any information connected with the dispute.”).
77. See What Kinds of Dispute Can Be Submitted to the CAS?, CT. ARB. FOR SPORT, http://www.tas-cas.org/en/20questions.asp/4-3-217-1010-4-1-1/5-0-1010-13-0-0/ (last visited Mar. 26, 2012) (writing that CAS accepts “disputes of a commercial nature (e.g. a sponsorship contract”)”.
78. See infra Table 1.
79. See supra note 51.
81. Id.
awards that did not contain references to past precedent, the panel appeared to find the applicable sporting codes dispositive.82

An example from two disputes with nearly identical facts illustrates the CAS panels’ approach to previous awards. In United States Olympic Committee (USOC) v. International Olympic Committee (IOC), the panel was asked to determine whether the members of the United States 4x400 meter relay team from the 2000 Summer Olympic Games in Sydney, Australia would be allowed to keep their gold medals following the revelation that one of the team members, Jerome Young, had been found guilty of a doping offense prior to the Olympic Games and was therefore ineligible to compete.83 The International Amateur Athletic Federation (IAAF) Rules in force in 2000 did not expressly address the consequences of doping offenses for relay teams, only for individual athletes.84 The IAAF cited to previous CAS awards from team sports to argue that a single team member’s ineligibility should nevertheless result in disqualification of the entire team.85 The panel rejected the IAAF’s argument, ruling that previous awards in other sports were not applicable; the plain language of the IAAF Rules omitted any sanctions for relay teams.86 Instead, the panel cited Q.87 for the proposition that there is no liability unless an offense is clearly stated in the relevant code.88 In other words, sanctions must be predictable. As a result, the panel allowed the athletes to keep their medals.89

Four years later, a CAS panel again faced a nearly identical set of facts in Andrea Anderson v. International Olympic Committee (IOC).90 The dispute arose following United States sprinter Marion Jones’s admission that she had taken performance-enhancing drugs before, during, and after the 2000 Summer Olympic Games.91 Jones had competed in two relay races in Sydney, Australia, winning the bronze medal in the 4x100 meter relay and the gold medal in the 4x400 meter relay.92 Despite the CAS ruling in the

82. See, e.g., Gatlin v. U.S. Anti-Doping Agency (USADA), CAS 2008/A/1461 (June 6, 2008) (holding that the plain language of the IAAF rules regarding a second doping offense determined the length of United States sprinter Justin Gatlin’s suspension from competition).
84. Id. ¶ 14.
85. Id. ¶ 8.
86. Id. ¶ 7.
88. Id. ¶ 21.
91. Id. at 2.
92. Id. at 3.
Jerome Young case, the IOC Disciplinary Commission demanded that Jones’s teammates return their medals. The athletes appealed to the CAS, arguing that the Young award was dispositive for their case. The panel agreed that the Young case was directly on point, but rejected the appellants’ contention that a doctrine of stare decisis must apply: “This does not automatically entail that the Panel is bound to decide in the same way as in CAS 2004/A/725 on the basis of either the ‘stare decisis’ or the ‘collateral estoppel’ principles, as advocated by the Appellants.”

While the panel ultimately followed the Young award by overturning the IOC Disciplinary Commission’s decision, it was careful to explain that the Young award constituted persuasive, rather than binding precedent: “[A]lthough 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.” Thus, while in practice, the CAS did not depart from precedent in this sample of awards, CAS panels explicitly defend their authority to do so should the need arise.

B. Types of Propositions Advanced

The type of proposition advanced fell into four general categories: (1) use of a particular testing method or procedure as evidence of a doping violation; (2) substance of parties’ right to be heard; (3) rules of evidence; and (4) general principles of equity.

In the first category, awards cited to precedent to support the use of a specific type of technical evidence to confirm a doping violation. The athletes involved had each attempted to discredit a positive doping test on the grounds that the testing methods were somehow scientifically unproven.

93. Id.
94. Id. ¶ 50.
95. Id. ¶ 52.
96. Id. ¶ 55.
or illegitimate. In the three awards examined, CAS panels dismissed these allegations by citing to past awards that found doping violations based on the same testing methods. For example, in International Association of Athletics Federations (IAAF) v. Fédération Royale Marocaine d’Athléïsme (MAR), the Moroccan Track and Field Federation and the world record holder in the steeplechase, Brahim Boulami, challenged the results of an in-competition doping test conducted on Boulami in Zurich, Switzerland, which detected the presence of the blood booster erythropoietin (EPO). The Moroccan Track and Field Federation argued that the testing method used was scientifically suspect and not “internationally recognized.” The CAS panel dismissed this claim, noting that the same testing method had been used in previous cases arbitrated at the CAS in connection with the 2002 Winter Olympic Games in Salt Lake City, Utah.

The second category of precedent involves disputes in which one of the parties claimed that irregularities in the initial national or international disciplinary hearing violated the party’s right to be heard. For example, in A. v. International Olympic Committee (IOC), Adrian Anus, a Hungarian hammer thrower, challenged the IOC’s decision to strip him of his gold medal after Anus failed to submit to drug testing. Annus claimed, inter alia, that the IOC’s disciplinary hearing was invalid because he did not attend, due to poor health. The panel rejected Annus’s claim—as did the panels in the three other cases in the sample involving violations of the right to be heard—on the ground that the CAS’s de novo standard of review cures any deficiencies in the initial disciplinary proceedings.

An example from the third category, rules of evidence, is the rule that a tribunal may—but is not required to—draw adverse inferences from a party’s silence. In United States Anti-Doping Agency (USADA) v. M., the panel considered how it should address United States sprinter Tim Montgomery’s refusal to testify in response to allegations that Montgomery

used performance-enhancing drugs obtained through the Bay Area Laboratory Cooperative (BALCO). Although the panel noted that previous CAS awards permitted a panel to draw “certain adverse inferences” in this context, the panel concluded that the case against Montgomery was strong enough that no adverse inference was needed.

Lastly, CAS panels rely on previous awards to establish general equitable principles. For example, in International Association of Athletics Federations (IAAF) v. U.S.A. Track & Field (USATF), the panel faced a dispute over whether USATF was required to disclose to the IAAF the identities of athletes who were exonerated in USATF disciplinary hearings. Over a four-year period, USATF responded to IAAF requests for this information by citing the USATF confidentiality policy and asking the IAAF to point to the specific IAAF rule that required disclosure. The IAAF did not respond to USATF’s repeated requests. The CAS panel resolved the issue by citing to previous cases for the proposition that, “[W]here the conduct of one party has led to legitimate expectations on the part of a second party, the first party is estopped from changing its course of action to the detriment of the second party.” Since the IAAF did not respond to USATF’s requests, and the athletes in question had received USATF’s contractual assurances that their identities would not be released, the CAS panel ruled that the IAAF was equitably estopped from requesting this information. Revealing the athletes’ identities would conflict with both the legitimate expectations of USATF and the athletes involved.

C. Panel Composition

This study provides no support for the theory that an arbitrator’s background determines a panel’s approach to precedent. Of the twenty-three

108. Id. ¶ 11.
109. Id. ¶ 9.
111. Id. ¶ 42-52.
112. Id. ¶ 53.
113. Id. ¶ 68.
114. Id. ¶ 72-77.
115. Id.
total awards, five were issued by panels comprised of exclusively common law jurists, three by exclusively civil law jurists, and fourteen by a combination of the two. Of the five awards from common law panels, three included citations to precedent, and two of the three civil law panels did as well. Thus, the percentage of awards that cited previous arbitral awards was actually slightly higher for civil law panels than for common law panels. For mixed panels, twelve of fourteen cited to past precedent.

VI. CONCLUSION

The results of this study lend further support to the view that the CAS is developing its own body of private international legal precedent outside the purview of domestic legislation. Although CAS panels unambiguously reject the notion that they apply a doctrine of stare decisis, this study illustrates panels’ de facto adherence to precedent. As long as CAS panels continue to assert their authority to depart from past precedent, the CAS approach appears more akin to one of jurisprudence constante than stare decisis. For parties, the practical implication is perhaps the same under either doctrine—claims that run contrary to previous CAS awards are

120. BLACKSHAW, supra note 6, at 155.
unlikely to succeed. CAS panels are extremely reluctant to depart from precedent. In the interest of fairness to the parties, it is therefore critical that the CAS publish all nonconfidential awards, and refrain from allowing parties to rely on confidential awards.

The application of *jurisprudence constante* to CAS arbitration also raises questions with respect to the parties’ choice of law. For example, CAS awards sometimes cite precedent from a different division. Since the Ordinary and Appeals Arbitration Divisions follow different default rules for the applicable subsidiary law, reliance on precedent across divisions runs the risk of a conflict with the applicable subsidiary law. Admittedly, the difference between interpreting international sports regulations under Swiss as opposed to Monegasque law is perhaps of no practical import. Nevertheless, citing to precedent without reference to the applicable law runs contrary to the principle of party autonomy in arbitration. One CAS panel attempted to evade this quandary by arguing that the parties implicitly chose *lex sportiva* as their governing law: “Since CAS jurisprudence is largely based on a variety of sports regulations, the parties’ reliance on CAS precedents in their pleadings amounts to the choice of that specific body of case law encompassing certain general principles derived from and applicable to sports regulations.”

That is, when parties refer to precedent in their briefs, the panel may rely on past awards as a means of honoring the principle of party autonomy. This doctrine could create a problematic dilemma for parties, however. Considering the CAS tends to follow past awards, claims that run contrary to precedent have little chance of succeeding. Thus, a party would be remiss to avoid citing to CAS awards that favor her position. On the other hand, panels may treat citations to precedent as evidence of the party’s acquiescence to the choice of *lex sportiva* as a source of substantive law.

121. See supra note 51; Ohuruogu, CAS 2006/A/1165, at ¶ 17 (rather than departing from prior precedent, the Panel distinguished the case from prior precedent).
122. See Anderson, CAS 2008/A/1545, ¶ 55 (“[I]t 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 . . . .”).
123. See Mitten & Opie, supra note 3, at 291.
124. See CAS Code, supra note 19, at R45.
125. See id.
127. Id.
governing the arbitration. If only one party cites to CAS precedent, what then? The award in Anderson confirms that parties may at least “in theory” plead based on the lex sportiva, provided the content of the law asserted is sufficiently clear and predictable. Future research on the CAS is needed to determine the means by which parties “opt in” or “opt out” of the use of CAS precedent.

In sum, while this study does not attempt to provide a definitive answer to the debate over whether the CAS follows a doctrine of stare decisis, to the extent that the sample is representative of CAS jurisprudence more generally, it suggests that the use of precedent approximates the civil law doctrine of jurisprudence constante rather than stare decisis. CAS panels follow past awards, but do not regard precedent as binding. At a minimum, the CAS’s exclusive jurisdiction over disciplinary cases involving international-level Olympic athletes, as well as the emergence of a body of CAS jurisprudence independent of national legislation, has already led to the emergence of a distinctively autonomous system of global private regulation.

128. See, e.g., LATTY, supra note 1.
130. See BLACKSHAW, supra note 6, at 155.
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