ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr Lars Halgreen, attorney-at-law, Copenhagen, Denmark

Arbitrators: Mr Conny Jörneklint, former chief judge, Kalmar, Sweden

The Hon. Michael J. Beloff, MA. QC, London, the United Kingdom

in the arbitration between

Ms. Blaza Klemencic, Menges, Slovenia

Represented by Mr Gorazd B. Juzina, attorney-at-law, Ljubljana, Slovenia

Appellant

and

Union Cycliste Internationale (UCI), Aigle, Switzerland

Represented by Mr. Antonio Rigozzi, attorney-at-law, Geneva, Switzerland

Respondent

I. THE PARTIES

1. Ms. Blaza Klemencic (hereinafter referred to as the "Appellant" or the "Rider") is a Slovenian mountain-bike cyclist affiliated with the Slovenian Cycle Federation. She has been a professional rider since 2006 and participated in the 2008 and 2012 Olympic Games. She has continuously been a licence holder within the meaning of the UCI Anti-Doping rules (hereinafter referred to as the "UCI ADR") throughout the period relevant for these proceedings. At the time of the doping control test in 2012, she was under contract with the team Felt Oetztal X-Bionic. Since 2015, she has been contracted to the team Habitat Mountain Bike.

2. The Union Cycliste Internationale (hereinafter referred to as the "UCI" or the "Respondent") is the international federation for cycling. The UCI is the world governing body for the sport of cycling recognised by the International Olympic Committee ("IOC"). The UCI is headquartered in Aigle, Switzerland.

3. The Appellant and the Respondent are hereinafter referred to jointly as the "Parties".

4. The appeal concerns the decision (hereinafter referred to as ''the Appealed Decision') of the UCI Anti-Doping Tribunal (hereinafter referred to as ''the UCI ADT '') that the Appellant was guilty of an anti-doping rule violation (hereinafter referred to as an "ADRV'') and imposing in consequence sanctions upon her.

II. FACTUAL BACKGROUND

5. Below is a summary of the main relevant facts, as established on the basis of the Parties' written and oral submissions and the evidence examined in the course of the present proceedings both before and during the hearing. This background is set out with the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be set out where relevant, in connection with the legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments, and evidence submitted by the Parties in the present proceedings, the Panel refers in this award only to the submissions and evidence that the Panel considers necessary to explain its reasoning.

6. On 27 March 2012, the Rider was tested out-of-competition in Selca, Slovenia. She provided a urine sample (sample No. 2692211) to a doping control officer, who carried out the control on behalf of UCI.

7. The Rider confirmed on the doping control form that the urine sample had been in accordance with the applicable regulations (WADA International Standard for Testing 2012 (IST2012)), and that the only medication she had taken over the last seven days preceding the control, was a contraception tablet.

8. In April 2012, the urine sample provided by the Rider was analysed by the WADA accredited laboratory in Cologne, Germany, ("The Cologne Laboratory") and the analysis was conducted in accordance with the WADA Technical Document on the analysis and reporting of erythropoietin (hereinafter referred to as "EPO") in force at that time (TD 2009 EPO).

9. The Cologne Laboratory did not report any presence of EPO or any other prohibited substance in the Rider's A sample.

10. On 1 September 2014, the previous Technical Document (TD 2009 EPO) was replaced by a new Technical Document (TD 2014 EPO) in order to reflect recent scientific developments in the detection of EPO.

11. On 3 August 2015, the Cycling Anti-Doping Foundation (hereinafter referred to as "CADF") acting on behalf of UCI, informed the Rider that her urine sample collection from 27 August 2012 would be subject to further analysis. At the same time, the Rider was informed that as there was insufficient urine remaining in the original A sample, her B sample would be opened and a sufficient quantity would be taken to perform the analysis. The rest of the B sample would be resealed for storage.

12. The Rider was invited by the CADF to attend the retesting procedure or to appoint a representative to attend on her behalf.

13. On 15 August 2015, the CADF informed Mr Pintaric, who is the Rider's partner and coach, that the retesting was part of a standard procedure in anti-doping testing/analysis, when methods were approved, and because there was insufficient volume of urine in the A sample, the B sample would be used and the Rider would therefore have the right to attend the splitting of the B sample.

14. On the same day, Mr Pintaric on behalf of the Rider informed the CADF by e-mail that neither she nor any of her representatives would attend the opening and splitting procedure of her B sample. In his e-mail, Mr Pintaric expressly stated: "We believe Koln laboratories has enough knowledge experts – so they do not need Blaza's presence on B sample opening. We have trust in their work."

15. On 19 August 2015, the Cologne Laboratory opened the Rider's B sample and transferred an aliquot of approximately 15 ml of urine into a new laboratory vessel and then sealed the B-sample in the presence of an independent witness appointed by the Cologne Laboratory. To avoid confusion about the various samples, the two bottles containing urine from the B sample (namely the new vessel and the remaining urine of the B sample) shall hereinafter be referred to as the "First Bottle" and "Second Bottle" respectively.

16. During the remaining part of August 2015, the Cologne Laboratory performed an analysis of the Rider's urine in the First Bottle according to the new Technical Document (TD 2014 EPO).

17. On 2 September 2015, the Cologne Laboratory informed the CADF that the analysis of the First Bottle showed the presence of recombinant EPO, which is a Prohibited Non-Specified Substance both in- and out-of-competition under class S.2 of the 2012 and 2015 WADA Prohibited Lists adopted by UCI.

18. On 18 September 2015, UCI informed the Rider of the analysis results. Considering that the EPO found in the Rider's sample was a Non-Specified Substance, the Rider was also informed by UCI of the mandatory provisional suspension imposed on her with immediate effect. Furthermore, she was invited to inform UCI whether she wished to have the urine sample in the Second Bottle opened and analysed in her own presence or in the presence of a representative.

19. On 25 September 2015, the Rider requested the analysis of the Second Bottle as well as a copy of the respective documentation packages of the analysis of the original A sample and the First Bottle.

20. Following various communications between UCI and the Rider's representatives, the analysis of the Second Bottle took place in the Cologne Laboratory between 24 and 26 November 2015. The Rider had appointed a representative, Prof. Dr. Curin Serdec, who was present during the testing in the laboratory.

21. On 30 November 2015, the Cologne Laboratory informed UCI that the analysis of the Second Bottle also confirmed the presence of the EPO in the Rider's sample.

22. On 1 December 2015, UCI informed the Rider of the results of the analysis of the Second Bottle and offered her a second opportunity to submit explanations and/or provide substantial assistance. At the same time, UCI asserted that the Rider had committed an ADRV for the Presence and Use of EPO under Articles 21.1 and 21.2 of UCI ADR 2012.

23. On 2 December 2015, the Rider requested a copy of the documentation package regarding the Second Bottle analysis.

24. On 14 December 2015, the Rider's legal counsel, Mr Juzina, submitted preliminary explanations on behalf of the Rider and stated that the Rider's explanation would be supplemented after receiving the requested documentation package of the Second Bottle analysis.

25. On 15 December 2015, UCI forwarded the Second Bottle documentation package analysis to the Rider.

26. On 30 December 2015, the Rider's counsel filed the Rider's supplementary explanations as well as additional observations by Prof. Dr. Curin Serdec.

27. On 8 March 2016, UCI informed the Rider after having considered and examined her arguments that an ADRV had been established by reliable evidence as required by the WADA Code and the UCI ADR. As a result hereof, UCI offered the Rider to sign a so-called "Acceptance of Consequences" form pursuant to Article 8.4 of the UCI ADR 2015. The Rider was also advised of the consequences in case she would not agree to the proposed form.

28. On 17 March 2016, the Rider informed UCI that she did not wish to sign the "Acceptance of Consequences" form offered to her.

29. On 7 April 2016, UCI accordingly initiated proceedings before the UCI ADT.

30. On 20 May 2016, the UCI ADT, represented by the Single Judge, Mr Andreas Zagklis, having examined the Parties' petitions and arguments, issued the Appealed Decision in the following terms

    1. *"Ms. Blaza Klemencic has committed an Anti-Doping Rule Violation (Article 21.2 UCI ADR).*

    2. *A period of ineligibility of two (2) years, commencing on 18 September 2015, is imposed on Ms Blaza Klemencic.*

    3. *The results obtained by Ms Blaza Klemencic from 27 March 2012 until 31 December 2012 are disqualified.*

    4. *Ms Blaza Klemencic is ordered to pay the UCI the amount of* [redacted] *as monetary fine.*

5. *Ms. Blaza Klemencic is ordered to pay to the UCI:*

   a. *The amount of CHF 2,500 for costs of the results management;*
   b. *The amount of CHF 1,500 for costs of the Out-of-Competition Testing;*
   c. *The amount of EUR 2,100 for costs of the Second Bottle analysis; and*
   d. *The amount of EUR 1,900 for costs of the two documentation packages.*

6. *All other and/or further reaching requests are dismissed.*

7. *This Judgement is final and will be notified to:*

   a. *Ms Blaza Klemencic;*
   b. *The Slovenian National Anti-Doping Agency;*
   c. *UCI; and*
   d. *WADA."*

31. The Appealed Decision was communicated to the Parties on the same day, i.e. 20 May 2016. However, on 2 June 2016, the Single Judge issued a correction to the decision to the effect that the amount of the fine was [redacted] and not [redacted].

III. PROCEEDINGS BEFORE THE CAS

32 On 9 June 2016, the Rider filed her Statement of Appeal dated 6 June 2016 with respect to the Appealed Decision rendered by the UCI ADT on 20 May 2016. The Rider nominated Mr Conny Jörneklint, former chief judge in Kalmar, Sweden, as arbitrator in this matter.

33 On 22 June 2016, the Rider filed her Appeal Brief dated 16 June 2016.

34 On 24 June 2016, UCI informed the CAS Court Office that it nominated Mr. Michael Beloff, QC, London, United Kingdom, as arbitrator in this matter.

35 On 14 July 2016, the CAS Court Office granted a two-day extension to the Respondent to file its Answer in the present proceedings.

36 On 14 July 2016, the Respondent filed its Answer, which included a Cross-Appeal as to the reasoning for establishment of an ADRV in the Appealed Decision.

37 On 18 July 2016, the CAS Court Office acknowledged receipt of the Respondent's Answer dated 14 July 2016 and took note of the Cross-Appeal filed by the Respondent with its Answer. With reference to the requirements of Article R48 of the CAS Code, the Respondent was invited to complete its Appeal within four days of receipt of the letter from the CAS office by courier.

38 On 22 July 2016, the Respondent confirmed that the CAS Court Office fee of CHF 1,000 had been paid and that the appointment of Mr Michael Beloff QC as arbitrator was reconfirmed.

39 On 21 July 2016, the Rider objected to the Cross-Appeal on the basis of a lack of legal standing in accordance with present CAS Jurisprudence and asserted that the deadline for filing an appeal had expired according to Article R49 of the CAS Code. The Rider reconfirmed Mr Conny Jörneklint as arbitrator for the Cross-Appeal.

40 On 25 July 2016, the CAS Court Office on behalf of the President of Appeals Arbitration Division confirmed the appointment of the Panel in this procedure as follows:

President:	Mr Lars Halgreen, attorney-at-law, Copenhagen, Denmark,
Arbitrators:	Mr Conny Jörneklint, former chief judge, Kalmar, Sweden,
	The Hon. Michael J Beloff, M.A. QC, Barrister, London, UK.

41 On the same day, the CAS Court Office informed the Respondent/Cross-Appellant that pursuant to Article R51 of the Code, the Respondent/Cross-Appellant should file with the CAS a brief stating the facts and legal arguments giving rise to the Cross-Appeal. If the Cross-Appeal dated 14 July 2016 was to be considered as the Appeal Brief, the Respondent/Cross-Appellant should inform the CAS Court Office accordingly within the same deadline, failing which the Cross-Appeal should be deemed withdrawn. Moreover, the CAS Court Office took note of the Appellant's/Cross-Respondent's objection to the admissibility of the Respondent's/Cross-Appellant's Cross-Appeal filed on 14 July 2016, and in view thereof invited the Respondent/Cross-Appellant to provide its observations on or before 2 August 2016. In the meantime, the Respondent/ Cross-Appellant's deadline to file its Appeal Brief was suspended until further notice from the CAS Court Office.

42 On 2 August 2016, the Respondent filed its observations with respect to the issue of admissibility of its Cross-Appeal dated 14 July 2016.

43 On 6 September 2016, the CAS Court Office informed the Parties that the Panel had decided to hold a hearing in this matter. The CAS Court Office informed the Parties that the Panel, after review of the file regarding the issue of admissibility of the Respondent's

Cross-Appeal, had determined that it would decide the issue of admissibility at the hearing itself.

44 On 30 September 2016, following various correspondence between the Parties and the CAS Court Office, the CAS Court Office confirmed that the hearing would be held on 4 October 2016 at 8.15 a.m. at the Lausanne Palace in Lausanne, Switzerland.

45 On 3 October 2016, the CAS Court Office sent the Order of Procedure, which was signed and returned by the Appellant on 3 October 2016 and by the Respondent on 4 October 2016.

46 On 4 October 2016, a hearing was held at the Lausanne Palace in Lausanne, Switzerland. The Panel was assisted by Ms. Andrea Zimmermann, CAS Counsel, and joined by the following:

For the Appellant:	Ms Blaza Klemencic (the Rider) Mr Robert Pintaric (witness) Mr Gorazd B. Juzina (counsel) Prof. Dr. Curin Serdec (expert witness)
For the Respondent:	Mr. Antonio Rigozzi (counsel) Ms Brianna Quinn (counsel) Mr. Justin Lesaard (UCI representative) Prof. Dr. Saugy (expert witness).

47 At the beginning of the hearing, the Parties confirmed that they had no objection to the constitution of the Panel.

48 The Panel heard evidence from Mr. Pintaric as well as the expert witnesses, Prof. Dr. Curin Serdec and Prof. Dr. Saugy. The Respondent decided not to call Dr. Gmeiner via telephone to give evidence as an expert witness. The two expert witnesses referred to and confirmed their written expert witness statements. All witnesses were invited by the President of the Panel to tell the truth subject to sanctions of perjury under Swiss law. Both Parties and the Panel had the opportunity to question the witnesses in person.

49 After the testimony of the witnesses, the Rider also gave a statement.

50 The Parties were given the opportunity to present their case, submit their arguments, and answer the questions posed by the Panel.

51 Before the hearing was concluded, both Parties expressly stated that they did not have

any objections with the procedure adopted by the Panel that they had been treated equally and that their right to be heard had been respected.

52 At the end of the hearing, the President of the Panel invited the Parties to submit their statements of costs to the CAS Court Office, and on 11 October 2016 the Respondent submitted such a statement. The Appellant has not to date submitted a statement of costs.

IV. SUBMISSIONS OF THE PARTIES

A. The position of the Appellant/Rider

53 In her request for relief the Rider seeks as follows:

1. *"Based on the foregoing, the Rider respectfully moves and requests the CAS Panel to find Ms. Klemencic not guilty of committing an Anti-Doping Rule Violation and annul the judgement of the UCI ADT.*

2. *In the event, however, that the CAS Panel finds the Rider guilty of alleged Anti-Doping Violation, we respectfully ask the Panel to consider all the circumstances and especially the duration of the proceedings and also the long time (more than four years) since the alleged Anti-Doping Violation occurred and 18 tests for Anti-Doping that took place from March 2012, all the results of them being negative and finally poor financial situation of the Rider and decide that the period of ineligibility should start at the date the sample of the Rider was collected or alternatively on 3 September 2014, when the TD 2014 EPO Document was adopted and the test could be performed in accordance with new technical rules, and in any case release the Rider of payment of mandatory fine and costs of the proceedings or alternatively to lower the quantum from the judgement of UCI ADT."*

54 The Rider's submissions, in essence, may be summarised as follows:

Presence pursuant to Article 21.1.2 of the UCI ADR 2012

- The Rider submits that the UCI ADT was correct in dismissing the application of Article 21.1.2 of the UCI ADR 2012 to this case. This provision does not allow the re-analysed B sample alone (with the split into two bottles or not) to form the basis of an ADRV for "Presence". Such interpretation lacks legal foundation and was rightfully rejected by the UCI ADT.

Use pursuant to Article 21.2 of the UCI ADR 2012

- The Rider also submits that there is no legal basis to establish "Use" pursuant to Article 21.2 of the UCI ADR 2012 and that the UCI ADT applied a wrongful interpretation of the provision in this matter. In support hereof, the Rider asserts that the understanding of facts established by "any reliable means" in Article 23 of the UCI ADR 2012 has been wrongly interpreted by the UCI ADT.

- The Rider argues that if "reliable analytical data" which was found inadequate to prove a person guilty for "Presence" can simply be redeployed successfully to prove an ADRV under the provision for "Use" (Article 21.2), this would make redundant the provision of Article 21.1 regarding "Presence". Such consequence in reliance on the Commentary to Article 2.2. in UCI ADR 2015 is not appropriate, nor well founded, because it is not proportionate to the legitimate goal of the legislator in 2015.

- The Rider further submits that her A sample was *de facto* analysed and found negative in 2012. Therefore, it is doubtful, whether the results of "double-testing" of a B sample, which is what the testing of the First and the Second Bottle in fact amounts to, actually provide facts established by "reliable means" pursuant to Article 23 of the UCI ADR 2012.

- The Rider denies that the commentary to Article 2.2 of UCI ADR 2015 (which corresponds to Article 21.2 of UCI ADR 2012) is applicable to the present case, since it is substantive and therefore cannot be applied retroactively to previous anti-doping rules. In the opinion of the Rider, "Use" can and may be established by "other reliable means" such as admissions, witness statements, etc., but not by reference to facts inadequate to found presence.

- The fact that UCI decided to add the "Comment to Article 2.2" in UCI ADR 2015, itself shows that the UCI ADR 2012 did not have this additional scope with the consequence that the UCI ADR 2012 is not to be understood and/or employed in a manner proposed by the 2015 Comment to UCI ADR 2012 since this would infringe the prohibition against retroactivity.

- As a final argument, the Rider asks why such an explicit comment to an otherwise allegedly self-explanatory provision such as Article 21.2 of UCI ADR 2012 ('Use") would be necessary unless to alter the law prospectively

Alleged departures from Rules, International Standards, and Technical Documents

- The Rider submits that the UCI ADT was wrong to dismiss all the Rider's substantial and substantiated departures from the Applicable Anti-Doping Rules, International Standards, and Technical Documents which could reasonably have caused the Adverse Analytical Findings ("AAF").

- In this respect, the Rider claims that the UCI ADT failed to address all the admissions and violations of Applicable Rules, nor to address the number of departures from good laboratory practices of the Cologne Laboratory, pointed out by Prof. Dr. Curin Serdec. These departures were rejected as irrelevant essentially on the basis that there was no "interconnectivity" between them and so could not be examined collectively. The Rider objects to this overall dismissal by the UCI ADT and maintains that the very quantity of these departures, omissions, and serious technical failures and other relevant circumstances attain "a level which may call into question the entire doping control process at the Cologne Laboratory".

- The Rider refers to the expert report by Prof. Dr. Curin Serdec, supplemented by three independent relevant scientific articles, which establish beyond reasonable doubt, that the tests in the Cologne Laboratory in 2015 departed from Applicable Rules, especially common laboratory standards, and thus directly resulted or very likely resulted in false analytical findings (false positive results).

- The Rider alleges that the following important issues have not been dealt with sufficiently and correctly by the UCI ADT:

  i. The UCI ADT completely has avoided any comment or reasoning regarding precipitates in the sample listed and red-flagged in the expert report of Prof. Dr. Curin Serdec.

  ii. The UCI ADT completely ignored the same expert's observations about problems of so-called "positive control" and "anti-bodies". These questions are of utmost importance to the question whether the AAF was caused by omissions of due laboratory standards.

  iii. The sample in question (B sample) was obviously compared with inappropriate positive controls which contained low concentrations of endogenous EPO; this constituted a serious technical mistake on the part of the Cologne Laboratory, since the concentration of endogenous EPO in tested samples was falsely low, i.e. endogenous EPO was "lost" in precipitates.

  iv. The uncertainty regarding the Cologne Laboratory testing of the B sample is further enhanced by the fact that the result of the testing show low levels of

endogenous EPO in the Rider's sample, despite the fact that she had slept in a high-altitude room (Hypoxic) the night before the sample was taken. Further, the Rider claims that the Cologne Laboratory was unable to answer Prof. Dr. Curin Serdec's questions with regard to how the sample was transported to the lab. If the transport of a sample is conducted in an inappropriate manner, the sample may be irreparably damaged.

v. Overall, the answers to Prof. Dr. Curin Serdec's questions to the personnel in charge of the testing in the Cologne Laboratory were evasive and, full of contradictions, illustrating non-compliance with normal laboratory procedures, all of which could lead to a false positive result. For other relevant comments and observations, the Rider refers to the expert opinion of Prof. Dr. Curin Serdec.

- Moreover, the Rider maintains that Dr. Reichel from the Cologne Laboratory has a conflict of interest in the pronouncement of the AAF, since he took an important "if not key part in the manufacturing of a computer software programme, which is essential for understanding of the obtained laboratory data". The participation in the process of determining the AAF, of Dr. Reichel, who had written the code to the software programme, cast a reasonable doubt about the correctness and the reliability of the result obtained by use of his own software.

- Finally, the Rider overall submits that the Cologne Laboratory in charge of the analysis did not comply with the International Standard for Laboratories and that there had been serious departures from other anti-doping rules or policies, all of which could have caused the AAF in the Rider's sample.

Consequences of ADRV

- The Rider submits that the UCI ATD unfairly did not apply the rule of Article 315 of UCI ADR 2012, pursuant to which the commencement of the ineligibility period may start at a date as early as that of the sample collection, if there had been substantial delays in the hearing process or other aspects of doping control not attributable to the licence holder.

- The Rider contends that "exceptional circumstances" exist in this case, as the doping control took place more than four years ago. This is one of the first cases dealing with re-testing of the samples that were taken several years ago. It is important to guarantee fair and harmonious applications of UCI ADR between the cases where an athletes' sample had already been tested once and the test proved negative, and those, where an athletes' sample was tested for the first time several years after an event..

- As for the monetary fines and other economic costs, which the Rider was obligated to pay as a result of the Appealed Decision, the Rider points out that in the year 2012 she earned less that [redacted] and that she at present only receives approximately [redacted] monthly. On this basis, the monetary fine and costs are not justified and should be significantly reduced. In this context, the Rider submits that Article 10.10 of UCI ADR 2015 should be applied using the principles of "*lex mitior*", given that this provision enables the Panel to be more flexible, in terms of reduction of the fine than Article 326 UCI ADR 2012.

B. The position of the Respondent/UCI

55 UCI has submitted the following requests for relief:

"(i) Dismissing Ms Klemencic's appeal and all prayers for relief.

(ii) Upholding the Decision of the Single Judge of 20 May, 2016 in its entirety (safe for any reasoning related to the Presence of EPO).

(iii) Declaring that Ms Klemencic has committed an Anti-Doping Rule Violation of the Presence of EPO.

(iv) Condemning Ms Klemencic to pay a significant contribution towards UCI's legal fees and other expenses."

56 UCI's submissions, in essence, may be summarised as follows:

UCI's Cross-Appeal

- UCI submits that its request made in its Answer to the CAS Panel to confirm the Appealed Decision, but also to hold that the Rider committed an ADRV for "Presence" is not a counterclaim, and in any event cross appeals are expressly permitted under the UCI ADR.

- With respect to the Appellant's submission that the Request is an inadmissible counterclaim, UCI argues that the identical wording is used to describe a violation of both Article 21.1.1 ("Presence") and Article 21.1.2 ("Use") and that the sanction for the offence under both articles is exactly the same.

- Thus, UCI maintains that the question, whether the violation was established

through "Presence" or "Use" goes to the reasoning of the Appealed Decision rather than to its operative part. As such the UCI was entitled to request confirmation of the ADRV on the basis of both "Presence" and "Use", which does not amount to a counterclaim. It is obvious that UCI would not have had standing to file an appeal by claiming that the Appealed Decision applied the wrong paragraph to reach the same result.

- With respect to the admissibility of the Cross-Appeal, UCI refers to the substantive rules of the UCI ADR, which were in effect during the result management of the ADRV, i.e. the UCI ADR 2015.

- In accordance hereto, UCI's Cross-Appeal has been filed together with the Answer of UCI, which makes it admissible pursuant to UCI ADR 2015, to be considered as *lex specialis* for the cases falling under the scope of the WADA Code.

Establishment of Presence

- The UCI disagrees with the UCI ADT's ruling that provisions of the UCI ADR 2015 cannot be applied to establish Presence and that the UCI ADR 2012 did not provide for the establishment of Presence on the basis of a split B sample.

- The UCI submits that Article 2.1.2 of the UCI ADR 2015 is applicable to the case at hand since this provision and the equivalent Article 21.1.2 of the UCI ADR 2012 are not substantive, but rather adjectival rules.

- The UCI maintains that the UCI ADR 2012 should always be read and construed in conjunction with the relevant International Standards for Laboratories ("ISL"). Article 5.2.2.12.1.2 of the ISL 2012 specifically provided for the splitting of a B sample and a confirmation procedure to be carried out with the two B sample bottles, where insufficient urine remained in the A sample for the purposes of retesting of a sample. Thus, Article 21 of the UCI ADR 2012 cannot be read without reference to the relevant testing provision in the ISL 2012 which is part of its context.

- The UCI ADR 2015 contains exactly the same violation as in Article 21 of the UCI ADR 2012. However, in addition to providing for the split B samples in the ISL, the UCI ADR 2015 has directly incorporated the same procedure as a means of proof.

- On the premise that Article 21.1.2 of the UCI ADR 2012 as well as its equivalent Article 2.1.2 of the UCI ADR 2015 amounts to an adjectival, including evidentiary, rule, UCI maintains, consistently with CAS Jurisprudence (CAS 2000/A/2071 S. v. FINA at para 205) that the prohibition on retroactivity is inapplicable.

- In support of the view that the splitting of the B sample as a mean of proof is evidentiary, UCI furthermore maintains that a substantive violation in Article 21.1 of the UCI ADR 2012 is "Presence" of a prohibited substance in a rider's bodily specimen. How such "Presence" is established through the A or the B sample together or through the splitting of a B sample is only a matter of evidence.

- The UCI thereby maintains that the actual "ratio and very intention" behind the A sample and B sample system is to allow the athlete to attend and observe the opening and analysis of his or her sealed samples and by such means to enable the athlete to verify that the sample container has not yet been opened or interfered with after it was sealed and, that the urine sample belongs to him/her as well as to observe the testing of the sample so that he/she can record and dispute allegedly inadequate testing techniques. In terms of the present case, given that the Rider was invited to attend the opening of her B sample before it was split, but declined to attend, none of the Rider's "basic and fundamental rights" have been infringed or denied.

- Finally, UCI maintains that it is clear that not only did the UCI ADR 2012 – when read in conjunction with the ISL 2012 – provide for the reanalysis and the splitting of the B sample, but more importantly provided for a confirmation procedure equivalent to that provided in A and B sample testing.

Establishment of Use

- Notwithstanding UCI's arguments in support of the application of the provision on "Presence" and not "Use", consistently with the Appealed Decision, UCI dismisses the Rider's arguments that there is no legal basis for "Use".

- The UCI specifically denies the contention that UCI should have the right to reanalysis samples "*ad infinitum*" as suggested by the Rider. The UCI points out that Article 368 of the UCI ADR 2012 expressly provides for a statute of limitations of eight years from the date the violation occurred. The Rider's sample was provided in March 2012, and the Rider was advised that it would be retested on 3 August 2015, and therefore the retesting and prosecution of this case fell well within the relevant permissible time limits.

- The UCI submits that both under the UCI ADR 2012 and the UCI ADR 2015 an ADRV for Use can be established by "any reliable means", as the Single Judge in the Appealed Decision also held in paragraphs 73–74.

- The UCI considers that all the evidence presented during the proceedings before the

UCI ADT and the CAS is highly reliable and can prove, to the comfortable satisfaction of the Panel, that the Rider used EPO. In support thereof, UCI points out that no departures from the relevant standards have been identified by the Rider and the use of split B sample to establish the EPO in the Rider's specimen or sample has not interfered with any of the Rider's basic or fundamental rights. Moreover, a number of highly esteemed WADA Accredited Laboratories both in Cologne and Lausanne have without any doubt confirmed that the Rider's samples contained EPO, and nothing in the Rider's brief or expert report invalidates the finding of exogenous synthetic EPO.

- In view of all of the above, UCI therefore maintains that it has met its burden of proof to establish an ADRV for Use provided under Article 21.2 of the UCI ADR 2012 to the comfortable satisfaction of the CAS Panel.

Alleged Departures from the Rules, International Standards, and Technical Documents

- The UCI dismisses all the allegations of the Rider that the Cologne Laboratory committed departures from the applicable Rules, International Standards, and Technical Documents, which could reasonably have caused the AAF.

- The UCI notes that the Single Judge in the Appealed Decision without exception has found - and correctly - that the Rider's allegations were baseless and without any legal merits.

- In relation to the assessment of possible alleged departures from the Applicable Rules, standards, and Technical Documents, UCI emphasises that the WADA Accredited Cologne Laboratory is presumed to have conducted sample analysis in accordance with the relevant standards and other documents, and the Rider may only rebut this assumption by establishing that a departure from the ISL occurred which could reasonably have caused the AAF. A mere hypothetical suggestion that a sample may have been affected is insufficient to meet this burden of proof.

- Referring to the findings at paragraph 93 in the Appealed Decision, UCI stresses once more that no less than three WADA Accredited Laboratories have reviewed the documentation and found it consistent with a valid AAF for EPO.

- Moreover, UCI submits that the Rider's allegations that the Single Judge in the Appealed Decision did not consider certain of her arguments, is manifestly wrong. The UCI refers to the thorough and very detailed description and analysis of the Rider's

alleged departures, all of which the Single Judge dismisses as groundless in paragraph 89–97 in the Appealed Decision. The sole new arguments of the Rider, i.e. those at paragraph 47–50 of the Appeal Brief, are conclusively addressed and rejected in the latest report of the Swiss laboratory attached as exhibit UCI 45.

- As regards the Rider's allegation that there was a "conflict of interest" concerning the key person involved in pronouncement of the AAF, UCI rejects this as a meritless allegation. The UCI submits that Dr. Reichel from the Cologne Laboratory was not the creator of the software, but merely provided and provides scientific input in the further development of the software only when needed. The GASepo software does not interpret the data, nor contain an algorithm, upon which an AAF could per se be detected. To make a finding of an AAF, expert interpretation is required, which in this case was carried out by the Cologne Laboratory. For those reasons, UCI rejects the notion that a conflict of interest ever existed, nor that it has any influence on the AAF.

- Finally, UCI concludes that the Single Judge's findings on the alleged departures were both comprehensive and sound. The Rider has not met the necessary standard established by CAS Jurisprudence to demonstrate that any relevant departure could have caused a false positive result.

Sanctions and Consequences

- The UCI submits that the sanctions and consequences imposed by the Single Judge in the Appealed Decision are both appropriate and largely consistent with the UCI ADR.

- As for the period of ineligibility, the standard period pursuant to Article 293 of the UCI ADR 2012 for a first violation of Article 21.2 of the UCI ADR is two years, unless the conditions for eliminating or reducing this period of ineligibility or the conditions for increasing the period of ineligibility are met.

- As the Rider neither objected to the period of ineligibility, nor suggested that she meets any of the criteria to eliminate or reduce the relevant period, UCI holds that the two-year period of ineligibility should be upheld.

- As for the commencement date of the period of ineligibility and possible credit for provisional suspension, UCI finds that the Rider's assertion that the Single Judge did not consider, nor apply Article 315 of the UCI ADR 2015 to be manifestly wrong. In the Appealed Decision, paragraphs 104–107, the Single Judge carefully consid-

ered this issue and did not agree with the Rider's request that the period of ineligibility should start in March 2012. On the contrary, in the absence of any other relevant delay, the Single Judge held that the period of ineligibility should commence on 18 September 2015 and expire on 17 August 2017. The UCI respectfully submits that this evaluation should not be interfered with by the CAS Panel.

- As for the Rider's disqualification, UCI maintains that since an ADRV clearly has been established, the Rider should also be sanctioned with disqualification of results and the Single Judge's decision should not been interfered with by the CAS Panel on this point either.

- With respect to the mandatory fine and costs under the UCI ADR, UCI agrees with the Single Judge's exercise of his discretion to impose a fine equivalent to 50 % of the Rider's income in 2012, whereby the Single Judge applied Article 10.10 of the UCI ADR 2015 as *lex mitior* (since it provides the Panel greater flexibility than in the previous Article 326 of the UCI ADR 2012, when it comes to the possibility of reducing the fine.)

- Overall, UCI does not support a further reduction of the fine, because of the need to deter other riders from believing that they can employ doping methods and not face any significant (economic) consequences.

- Finally, UCI respectfully requests the CAS Panel to award a significant contribution to its legal and expert costs according to Article R65.3 of the CAS Code.

V. JURISDICTION

57 The jurisdiction of CAS, which is not disputed in this matter, derives, *inter alia*, from Article 13 of the UCI ADR 2015 and Article 30 of the UCI ADT Rules.

58 The Jurisdiction of CAS is further confirmed by the Parties by means of their signature on the Order of Procedure.

59 It follows accordingly that CAS has jurisdiction to adjudicate on and decide the present dispute.

VI. ADMISSIBILITY

(i) The Appeal

60 The Statement of Appeal was filed by the Rider on 9 June 2016. The Appeal complied

with all the requirements of Article R48 of the CAS Code including the payment of the CAS Court Office fee.

61 Article 13.2.5.1 UCI ADR 2015 provides as follows:

"Unless otherwise specified in these rules, appeals under Articles 13.2.1 and 13.2.2 from decisions made by the UCI Anti-Doping Tribunal or UCI Disciplinary Commission shall be filed before the CAS within 1 (one) month from the day the appealing party receives notice of the decision appealed."

62 The Appealed Decision was communicated to the Parties on or about 20 May 2016. Thus, it follows that the Appeal is admissible.

(ii) The Cross-Appeal

63 With its Answer on 14 July 2016, UCI requested the CAS Panel to confirm the Appealed Decision in the extent that it found the Rider guilty of an ADRV for "Use", but also to hold that the Rider committed an ADRV for "Presence".

64 In support hereof, UCI has submitted that this request is not an inadmissible counter-claim and the UCI ADR expressly provide for cross-appeals that may be filed under Article 13 of the UCI ADR 2015 at the latest with the Party's Answer.

65 The Rider has objected to this request of UCI on the grounds that the counterclaim is inadmissible for the lack of legal standing and as provided for by the pertinent rules of the CAS Code, as the time limit to appeal the decision of the UCI ADT has expired on 22 June 2016 in accordance with Article R49 of the CAS Code.

66 Based on the foregoing, the Panel has carefully evaluated the Parties' submissions in order to reach a decision, whether UCI's request would be admissible in the present proceedings. The starting point for the Panel's analysis on this issue has been that the Single Judge in the Appealed Decision ruled that the Rider had committed an ADRV, which offence led to a sanction period of ineligibility of two years.

67 Thus, in the Panel's opinion it is important to emphasise that both Article 21.1 ("Presence") and Article 21.2 ("Use") of the UCI ADR 2012 as well as the corresponding provisions under the UCI ADR 2015 involve the same fundamental violation, which is the Rider's breach of her fundamental duty to ensure that no prohibited substance enters her body. The identical wording is used to describe the very violation of the provisions on "Presence" and "Use", and the sanction for an offence under both articles is exactly

the same.

68 According to the WADA Code and the equivalent provisions in the UCI ADR both in 2012 and 2015, the Rider can never be subject to "a double punishment", i.e. that she would be sanctioned two times for having committed two different ADRV both for "Presence" and for "Use" pursuant to Article 21.1 and Article 21.2 of the UCI ADR 2012. This has never been the objective of UCI's request and this very fundamental principle must therefore be the guideline for the Panel's analysis, whether to allow it.

69 For that same reason, any "hypothetical" appeal that might have been filed by UCI against the Appealed Decision would clearly have been held inadmissible for lack of legal standing in accordance with consistent CAS Jurisprudence, cf. CAS 2010/A/291 as well as CAS 2009/A/1880 and CAS 2009/A/1881. The Panel agrees with UCI that UCI would not have had standing to bring an appeal against the Appealed Decision based on the claim that the Single Judge applied a "wrong" provision, when the Rider nevertheless was found guilty of an ADRV based on an identical offence and with an identical sanction period.

70 Hence, it is the Panel's view that it is questionable, whether it is here dealing with a cross-appeal within the true meaning of the definition in the CAS Code. In CAS 2015/A/4215, the CAS Panel ruled that Article 75.4 of the FIFA ADR, which is equivalent to Article 13 of the UCI ADR 2015, did not allow a party to file a cross-appeal challenging a certain part of a decision rendered by the lower instance body without adhering to the usual procedural requirement set forth under Article R47 *et seq.* of the CAS Code about the cross-appeal. That panel dismissed the cross-appeal for those reasons.

71 That Panel stated the following about the true interpretation of the FIFA provision equivalent to Article 13 of the UCI ADR 2015 in the award in para 161: *"So what is the true meaning of Article 75.4 FIFA ADR (and Article 13.2.4 2005 WADC)? In the Panel's view, these articles do nothing more that extend the time period, in which a party to a doping appeal may file a cross-appeal (or any subsequent appeal). In such cases, the time limit for a party to submit its cross or subsequent appeals is extended until the moment it submits its answer. This time limit can thus be longer than the filing period of 21 days. This possibility is perfectly in line with Article R49 of the CAS Code, which gives preference to the time limits, set forth in a federation's regulations. The standard 21-day deadline remains the default situation otherwise."*

72 Contrary to the situation in the case referred to above, UCI has in fact in these proceedings followed the requirements according Article R47 et seq. of the CAS Code including the timely filing of the Cross-Appeal together with the Answer, made the payment of

the CAS Court fee and as well as the appointment of an arbitrator. However, as explained in the Panel's opinion stated below, these procedural steps may not have been necessary, for the Panel to take into consideration the request made by UCI regarding the application of the provision on "Presence" to the ADRV in this case.

73 Be that as it may, the Panel finds that the question, whether the ADRV was established through Article 21.1 ("Presence") or Article 21.2 ("Use") goes to the reasoning of the Appealed Decision, rather than to its operative part. Both arguments were presented by UCI before the Single Judge in the UCI ADT proceedings, but as the Appealed Decision reveals, the Single Judge only found that the provision concerning "Use" in Article 21.2, would be applicable in this matter.

74 Under this CAS Panel's scope of review pursuant to Article R57 of the CAS Code, the Panel has the full power to admit new prayers for relief and new evidence and to hear new arguments. A so-called *"de novo"* hearing is "a completely fresh hearing of the dispute between the Parties, any allegation of denial of natural justice, or any defect or procedural error even in violation of the principle of due process, which may have occurred in the first instance, whether in the sporting body or by the ordinary division, CAS Panel, would be cured by the arbitration proceedings before the appeal panel, and the appeal panel is therefore not required to consider any such allegations", cf. CAS 2008/A/1574, para 42, and CAS 2012/A/2702 at para 122.

75 Pursuant to Article R57 of the CAS Code, a CAS Panel is thus given a broad power of review in a *de novo* hearing, which is one of the cornerstones of the CAS Code. With respect to the request in question by UCI also to ask the Panel to confirm the decision by holding that the Rider committed an ADRV for "Presence", it is the Panel's opinion that this request is not even to be considered a "new legal argument" by UCI, since the very same submission was presented – but rejected – by the Single Judge in the Appeal decision. Hence, this CAS Panel has – regardless of the Cross-Appeal filed by UCI - the power to assess any legal arguments based on an alleged violation of the "Presence" provision under Article 21.1 of the UCI ADR 2012 in accordance with the Article R57 of the CAS Code, when it adjudicates in this matter.

76 Based on the foregoing, the Panel therefore rules that the request by UCI that the Panel confirms the Appealed Decision, but also that the Rider committed an ADRV for "Presence" is admissible, as it falls under the Panel's general scope of legal review pursuant to Article R57 of the CAS Code, regardless of the Cross-Appeal, filed or not. In the Panel's opinion, the Cross-Appeal can therefore not be entertained.

VII. APPLICABLE LAW

77 Article R58 of the CAS Code provides the following:

"The Panel shall decide a dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the Parties or, in the absence of such a choice, according to the 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. In the latter case, the Panel shall give reasons for its decision."

78 Since the Rider's original sample was collected in an out-of-competition testing in March 2012, but the ADRV was not discovered until the retesting of the B sample took place in 2015, it is necessary for the Panel to outline the transitional provisions of the UCI ADR.

79 Article 25.1 of the UCI ADR 2015 provides as follows:

"These Anti-Doping Rules shall apply in full as of 1 January 2015, (the "Effective Date").

80 Article 25.2 of the UCI ADR 2015 provides as follows:

"The retrospective periods in which prior violations can be considered for purposes of multiple violations under Article 10.7.5 and the statute of limitations set forth in Article 17 are procedural rules and should be applied retroactively; provided, however, that Article 17 shall only be applied retroactively if the statute of limitation period has not already expired by the Effective Date.

Otherwise, with respect to any anti-doping rule violation case which is pending as of the Effective Date and any anti-doping rule violation case brought after the Effective Date based on an anti-doping rule violation which occurred prior to the Effective date, the case shall be governed by the substantive anti-doping rules in effect at the time the alleged anti-doping rule violation occurred, unless the panel hearing the case determines the principle of "lex mitior" appropriately applies under the circumstances of the case."

81 The Panel notes that both Parties agree that the present case is thus governed by the substantive law of the anti-doping rules in effect at the time the ADRV occurred, i.e. according to the UCI ADR 2012 and by the procedural law at the time the retesting took place, i.e. according to the UCI ADR 2015. In the following paragraphs the Panel will

therefore outline the relevant provisions in the UCI ADR 2012 (and the equivalent provisions in the UCI ADR 2015 for comparison).

82 Articles 19 – 21.8 of the UCI ADR 2012 provides as follows:

"19.
Doping is defined as the occurrence of one or more of the anti-doping rule violations set forth in article 21.

20.
Licence-Holders shall be responsible for knowing what constitutes and anti-doping rule violation and the substances and methods which have been included on the Prohibited List.

21.
The following constitute anti-doping rule violations:

1. *The presence of a Prohibited Substance or its Metabolites or Markers in a Rider's bodily Specimen.*

   1.1. It is each Rider's personal duty to ensure that not Prohibited Substance enters his body. Riders are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their bodily Specimens. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Rider's part be demonstrated in order to establish an antidoping violation under article 21.1.

   Warning:
   1) Riders must refrain from using any substance, foodstuff, food supplement or drink of which they do not know the composition. It must be emphasized that the composition indicted on a product is not always complete. The product may contain Prohibited Substances not listed in the composition.
   2) Medical treatment is no excuse for using Prohibited Substances or Prohibited Methods, except where the rules governing Therapeutic Use Exemptions are complied with.

   1.2. Sufficient proof of an anti-doping rule violation under article 21.1 is established by either of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Rider's A Sample where the Rider waives analysis of the B Sample and the B Sample is not analyzed; or, where the Rider's B Sample is analyzed and the analysis of the Rider's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Rider's A Sample.

1.3. Excepting those substances for which a quantitative threshold is specifically identified in the Prohibited List, the presence of any quantity of a Prohibited Substance or its Metabolites or Markers in a Rider's Sample shall constitute an anti-doping rule violation.

1.4. As an exception to the general rule of article 21.1, the Prohibited List or International Standards may establish special criteria for the evaluation of Prohibited Substances that can also be produced endogenously.

1.5. The presence of a Prohibited substance or its Metabolites or Markers consistent with the provisions of an applicable Therapeutic Use Exemption issued in accordance with the present Anti-Doping Rules shall not be considered an anti-doping rule violation.

Comment: see Chapter IV on Therapeutic Use Exemptions.

2. Use or Attempted use by a Rider of a Prohibited Substance or a Prohibited Method.

2.1. It is each Rider's personal duty to ensure that no Prohibited Substance enters his or her body and that he does not Use any Prohibited Method. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Rider's part be demonstrated in order to establish an anti-doping rule violation for Use of a Prohibited Substance or a Prohibited Method.

2.2. The Success or failure of the Use of a Prohibited Substance or Prohibited Method is not material. It is sufficient that the Prohibited Substance or Prohibited Method was Used or Attempted to be Used for an anti-doping rule violation to be committed.

2.3. The Use or Attempted Use of a Prohibited Substance or a Prohibited Method consistent with the provisions of an applicable Therapeutic Use Exemption issued in accordance with the present Anti-Doping Rules shall not be considered an anti-doping rule violation.

Comment: see chapter IV on Therapeutic Use Exemptions

[...]

83 Articles 23 to 28 of the UCI ADR 2012 reproduce Article 3.2 of the WADC 2009 and read in relevant part as follows:

"23. Facts related to anti-doping rule violations may be established by any reliable means, including admissions.

24. WADA – accredited laboratories or as otherwise approved by WADA are presumed to have conducted Sample analysis and custodial procedures in accordance with the International Standard for Laboratories. The Licence-Holder may rebut this presumption be establishing that a departure from the International Standard for Laboratories occurred which could reasonably have caused the Adverse Analytical Finding.

If the Licence-Holder rebuts the preceding presumption by showing that a departure from the International Standard for Laboratories occurred which could reasonably have caused the Adverse Analytical Finding, then the UCI or the National Federation shall have the burden to establish that such departure did not cause the Adverse Analytical Finding.

25. Departures from any other International Standard, these Anti-Doping Rules, the Technical Documents set by the UCI or any other applicable anti-doping rule or policy or technical document which did not cause an Adverse Analytical Finding or the factual basis for any other anti-doping rule violation shall not invalidate such findings or results. If the License-Holder established that any such departure which could reasonably have caused the Adverse Analytical Finding or factual basis for any other anti-doping rule violation occurred, then the UCI or its National Federation shall have the burden to establish that such a departure did not cause the Adverse Analytical finding or the factual basis for the anti-doping rule violation."

84 The comment to the equivalent Article 21.2 regarding "Use" in the 2009 WADA Code provided as follows:

"It has always been the case that Use or Attempted Use of a Prohibited Substance or Prohibited Method may be stablished by any reliable means. As note in the Comment to Article 3.2 (Methods of Establishing Facts and Presumptions), unlike the proof required to establish an anti-doping rule violation under Article 2.1, Use or Attempted Use may also be established by other reliable means such as admissions by the Athlete, witness statements, documentary evidence, conclusions drawn from longitudinal profiling, or other analytical information which does not otherwise satisfy all the requirements to establish "Presence" of a Prohibited Substance under Article 2.1. For example, Use may be established based upon reliable analytical data from the analysis of an A Sample

(without confirmation from an analysis of a B Sample) or from the Analysis of a B Sample alone where the Anti-Doing Organization provides a satisfactory explanation for the lack of confirmation in the other Sample".

85 In comparison, the UCI ADR 2015 provides for the same violations ("Presence" and "Use") as follows:

"The following constitute anti-doping rule violations:

2.1 Presence of a Prohibited Substance or it Metabolites or Markers in a Rider's Sample.

2.1.1 It is each Rider's personal duty to ensure that no Prohibited Substance enters his or her body. Riders are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, Fault, Negligence or knowing Use on the Rider's part be demonstrated in order to establish an anti-doping rule violation under Article 2.1.
[...]

2.1.2 Sufficient proof of an anti-doping rule violation under Article 2.1 is established by any of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Rider's A Sample where the Rider waives analysis of the B Sample is analyzed and the analysis of the Rider's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found the Rider's A Sample; or where the Rider's B Sample is split into two bottles and the analysis of the second bottle confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the first bottle.
[...]

2.1.3 Excepting those substances for which a qualitative threshold is specifically identified in the Prohibited List, the presence of any quantity of a Prohibited Substance or its Metabolites or Markers in a Rider's Sample shall constitute an anti-doping rule violation.

2.1.4 As an exception to the general rule of Article 2.1, the Prohibited List or other International Standards, or UCI Regulations incorporated in these Anti-Doping Rules may establish special criteria for the evaluation of Prohibited Substances that can also be produced endogenously.

2.2 Use or Attempted Use by a Rider of a Prohibited Substance or a Prohibited

Method.

2.2.1 It is each Rider's personal duty to ensure that no Prohibited Substance enters his or her body and that no Prohibited Method is Used. Accordingly, it is not necessary that intent, Fault, Negligence or knowing Use on the Rider's part be demonstrated in order to establish an anti-doping rule violation for Use of a Prohibited Substance or Prohibited Method.

2.2.2 The success of failure of the Use or Attempted Use of a Prohibited Substance or Prohibited Methods is not material. It is sufficient that the Prohibited Substance or Prohibited Method was Used or Attempted to be Used for an anti-doping rule violation to be committed.

[Comment to Article 2.2: It has always been the case that Use or Attempted Use of a Prohibited Substance or Prohibited Method may be established by any reliable means. As noted in the Comment to Article 3.2, unlike the proof required to establish an anti-doping rule violation under Article 2.1, Use or Attempted Use may also be established by other reliable means such as admissions by the Rider, witness statements, documentary evidence, conclusions drawn from longitudinal profiling, including data collected as part of the Rider Biological Passport, or other analytical information which does not otherwise satisfy all the requirements to establish "Presence" of a Prohibited Substance under Article 2.1. For example, Use may be established based upon reliable analytical data from the analysis of an A sample (without confirmation from an analysis of a B Sample) or from the analysis of a B Sample alone where the Anti-Doping Organisation provides a satisfactory explanation for the lack of confirmation in the other sample.]"

86 As for the regulations concerning further analysis on samples and the splitting of B samples, both the 2012 and 2015 UCI ADR contain the following regulations:

87 Article 120 and 200 of the UCI ADR 2012 provided as follows:

"120.
Samples may be collected and analysed under these Anti-Doping Rules:

1) To detect the Presence and/or Use of a Prohibited Substance or Prohibited Method; and

2) For profiling relevant parameters in a Rider's urine, blood, or other matrix, including DNA or genome profiling, for anti-doping purposes ("athlete passport"), including as a means for establishing the Use of a Prohibited Substance or a Prohibited Method; and

3) To detect substances as may be directed by WADA pursuant to the Monitoring Program described in article 4.5 of the Code; and

4) For screening purposes.

No Sample collected under these Anti-Doping Rules may be used for any other purpose without the Rider's written consent.
[...]

200.
Any Sample may be reanalyzed for the purpose described in article 120 at any time exclusively at the direction of UCI or WADA."

88 In comparison Articles 6.2 and 6.5 of the UCI ADR 2015 provides as follows:

89 *"6.2*
Samples shall be analyzed to detect Prohibited Substances and Prohibited Methods identified on the Prohibited List and other substances as may be directed by WADA under the Monitoring Program pursuant to Article 4.5, or to assist an Anti-Doping Organization in profiling relevant parameters in a Rider's urine, blood, or other matrix, including DNA or genomic profiling, or for any other legitimate anti-doping purpose. Samples may be collected and store for future analysis.
[...]

6.5 Further Analysis of Samples.

6.5.1 Any Sample may be subject to further analysis by the UCI at any time before both the A and B Sample analytical results (or A Sample result where B Sample analysis has been waived or will not be performed) have been communicated by the UCI to the Rider as the asserted basis for an Article 2.1 anti-doping rule violation.

6.5.2 Samples may be stored and subjected to further analyses for the purpose of Article 6.2 at any time exclusively at the direction of the UCI or WADA. Any Sample storage or further analysis initiated by WADA shall be at WADA's expense. Further

analysis of Samples shall conform with the requirements of the International Standard for Laboratories and the UCI Testing & Investigations Regulations."

90 With respect to the procedures for reanalysis of a sample, where insufficient urine remained in the Rider's A sample, it is important to outline the relevant provisions in the International Standards for Laboratories both in 2012 and 2015.

91 Article 5.2.2.12.1.2 of the ISL 2012 provides as follows:

"5.2.2.12.1.2 Cases in which no urine remains of "A" Sample for possible re-testing.

The opportunity shall be offered to the Athlete, or to the representative of the Athlete to be present at the opening of the sealed "B" Bottle. If the Athlete declines to be present or the Athlete's representative does not respond to the invitation or if the Athlete or the Athlete's representative does not respond to the invitation or if the Athlete or the Athlete's representative continuously claim not to be available on the date of the opening, despite reasonable attempts by the Laboratory and Testing Authority to accommodate their dates, the Laboratory shall appoint an independent witness to verify the opening of the sealed "B" Sample.

At the opening of the "B" Sample, the Laboratory shall ensure that the Sample is adequately homogenized (i.e. invert bottle several times) before splitting the "B" Sample. The Laboratory shall divide the volume of the "B" Sample into two bottles (using Sample collection equipment compliant to IST provision 6.3.4) in the presence of the Athlete or the Athlete's representative(s) or an independent witness. The splitting of the "B" Sample shall be documented in the chain of custody. The Athlete or the Athlete's representative will be invited to seal one of the bottles using a tamper evident method. If the analysis of the first bottle reveals an Adverse Analytical Finding, a confirmation shall be undertaken, if requested by the Athlete or his/her representative, using the second sealed bottle."

92 In comparison Article 5.2.2.12.10 of the ISL 2015 provides as follows:

"5.2.2.12.10 Further Analysis on long-term stored Samples shall proceed as follows: [..] Where confirmation is not completed in the A Sample the Laboratory, at the direction of the Testing Authority shall appoint an independent witness to verify the opening and splitting of the sealed "B" Sample (which shall occur without requirement that the Athlete be notified or present) and then proceed to analysis based on the "B" Sample which has been split into 2 bottles.

At the opening of the "B" Sample, the Laboratory shall ensure that the Sample is adequately homogenized (e.g. invert bottle several times) before splitting the "B" Sample. The Laboratory shall divide the volume of the "B" Sample into two bottles (using Sample collection equipment compliant to ISTI provision 6.3.4) in the presence of the independent witness. The splitting of the "B" Sample shall be documented in the chain of custody. The independent witness will be invited to seal one of the bottles using a tamper evident method. If the analysis of the first bottle reveals an Adverse Analytical Finding, the Testing Authority shall use reasonable efforts to notify the Athlete as provided in Article 7.3 of the Code. A confirmation shall be undertaken, using the second sealed bottle, if requested by the Athlete or his/her representative, or if the Testing Authority's reasonable efforts to notify the Athlete have not been successful or at the Testing Authority's election. If the Athlete or his/her representative is not present for the confirmation, then the Laboratory shall appoint an independent witness to observe the opening of the second sealed bottle."

93 With respect to burdens and standards of proof in anti-doping cases, both the UCI ADR 2012 and the UCI ADR 2015 provide for similar approaches, however, with the notable additions to the UCI ADR 2015 highlighted in bold.

3.1 Burdens and Standards of Proof
The UCI shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the UCI has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Anti-Doing Rules place the burden of proof upon the Rider or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.

[Comment to Article 3.1: This standard of proof required to be met by the UCI is comparable to the standard which is applied in most countries to cases involving professional misconduct.]

3.2 Methods of Establishing Facts and Presumptions
Facts related to anti-doping rule violations may be stablished by any reliable means, including admissions. The following rules of proof shall be applicable in doping cases:

[Comment to Article 3.2: For example, the UCI may establish an anti-doping rule violation under Article 2.2 based on the Rider's admissions, the credible testimony of third Persons, reliable documentary evidence, reliable analytical data

from either an A or B Sample as provided in the Comments to Article 2.2, or conclusions drawn from the profile of a series of the Rider's blood or urine Samples, ***such as data for the Athlete Biological Passport.]***
(...)

3.2.2 WADA-accredited laboratories, ***and other laboratories approved by WADA****, are presumed to have conducted Sample analysis and custodial procedures in accordance with the International Standard for Laboratories. The Rider or other Person may rebut this presumption by establishing that a departure from the International Standard for Laboratories occurred which could reasonably have caused the Adverse Analytical Finding.*

If the Rider or other Person rebuts the preceding presumption by showing that a departure from the International Standard for Laboratories occurred which could reasonably have caused the Adverse Analytical Finding, then the UCI shall have the burden to establish that such departure did not cause the Adverse Analytical Finding.

[Comment to Article 3.2.2: The burden is on the Rider or other Person to establish, by a balance of probability, a departure from the International Standard for Laboratories that could reasonably have caused the Adverse Analytical Finding. If the Rider or other Person does so, the burden shifts to the UCI to prove to the comfortable satisfaction of the hearing panel that the departure did not cause the Adverse Analytical find.]

3.2.3 Departures from any other rule set forth in these Anti-Doping Rules, or any International Standard or UCI Regulation incorporated in these Anti-Doping Rules which did not cause an Adverse Analytical Finding or other anti-doping rule violation shall not invalidate such evidence or results. If the Rider or other Person establishes a departure from any other rule set forth in these Anti-Doping Rules, or any International Standard or UCI Regulation incorporated in these Anti-Doping Rules which could reasonably have caused an anti-doping rule violation based on an Adverse Analytical Finding or other anti-doping rule violation, then the UCI shall have the burden to establish that such departure did not cause the Adverse Analytical Finding or the factual basis for the anti-doping rule violation."

94 Finally, with respect to the applicable statute of limitations, the Panel notes that UCI ADR 2012 in Article 368 provides as follows:

"No action may be commenced under these Anti-Doping Rules against a Licence Holder

for a violation of an "Anti-Doping Rule" contained in these Anti-Doping Rules, unless such action is commenced within 8 (eight) years from the date the violation occurred."

VIII. MERITS

A. The Main Issues

95 The main issues to be resolved by the Panel are as follows:

i) Has UCI been time-barred according to the statute of limitations in Article 368 of the UCI ADR 2012 from commencing any action against the Rider in 2015, when her alleged offence occurred in March 2012?

ii) Did the Rider commit an ADRV pursuant to Article 21.1 of the UCI ADR 2012 for Presence and/or pursuant to Article 21.2 of the UCI ADR 2012 for Use of a Prohibited Substance?

iii) Is the Panel comfortably satisfied that UCI has discharged the burden of establishing that an ADRV has occurred according to Article 3.1 of the UCI ADR 2012, and if so, has the Rider rebutted this presumption by establishing that a departure from the International Standards for Laboratories has occurred, which could reasonably have caused the AAF pursuant to Article 3.2.2 of the UCI ADR 2012?

iv) In case the Panel finds that an ADRV has occurred and the Rider has not been able to fulfil the burden of proof according to Article 3.2.2 of the UCI ADR 2012, which sanctions and other consequences should be the result hereof?

Analysing Question i)

96 The Panel is well aware that this case is one of the first retesting cases, where a previously collected urine sample has been tested in accordance with a new Technical Document, *in casu* (TD 2014 EPO), after a WADA Accredited Laboratory had not in the first test reported any presence of EPO or any other Prohibited Substance in the urine sample in accordance with the WADA Technical Document in force at that time (TD 2009 EPO), when the sample was collected in March 2012.

97 The retesting of the Rider's urine sample, which at the time, when the first analysis was conducted in 2012, led to the conclusion that no Prohibited Substance was present in the sample, opens up to a number of discussions regarding the safekeeping of the basic and fundamental rights of the athletes in the testing pool, which will be addressed in the

legal analysis that follows. However, one of the first issues that the Panel needs to resolve is obviously, whether the statute of limitations in the UCI Anti-Doping Rules that applied when the doping violation occurred, i.e. the UCI ADR 2012, would have time-barred any action to be commenced against the Rider as a Licence Holder in 2015.

98 According to Article 368 of the UCI ADR 201, no action may be commenced under these Anti-Doping Rules against a Licence Holder for a violation of an "Anti-Doping Rule" contained in these Anti-Doping Rules, unless such action is commenced within 8 (eight) years from the date the violation occurred.

99 Since the Rider's urine sample was collected in March 2012, through which a possible doping violation must be established, and the retesting under the new Technical Document from September 2014 took place on 3 August 2015, the Panel finds that any action in accordance with Article 268 of the UCI ADR is not time-barred, since the action took place approximately 3½ years after the possible violation occurred.

100 Accordingly, UCI has had the right to bring actions against the Rider pursuant to Article 368 of the UCI ADR 2012.

Analysing Question ii)

101 As the Panel has ruled that the request by UCI that the Panel also considers, whether the Rider committed an ADRV for Presence as well as for Use is admissible in accordance with the Panel's general scope of review under Article R57 of the CAS Code, the Panel will first deal with the legal question, whether the Rider has committed an ADRV for Presence pursuant to Article 21.1 of the UCI ADR and following that analysis, whether an ADRV for Use pursuant to either the UCI ADR 2012 has been committed.

Establishment of Presence

102 In order for the Panel to decide, whether the provision on Presence in Article 2.1.2 of UCI ADR 2015 is applicable to the case at hand, the point of departure must be a thorough analysis of the term "substantive anti-doping rules", which is found Article 25.2 of the UCI ADR 2015, see para 80 above.

103 As the Panel noted in para 81 above, both Parties agree that on the basis of Article 25 of the UCI ADR 2015, the present case is governed by the "substantive law of the anti-doping rules in effect at the time the ADRV occurred", i.e. according to the UCI ADR 2012 and by the procedural law at the time the retesting took place, i.e. according to the

UCI ADR 2015. However, the answer to this question, whether the provisions on Presence pursuant to Article 21.1 of the UCI ADR 2012 may be applicable, lies in the proper understanding and determination of what "substantive anti-doping rules" actually means in the context of Article 25.2 of the UCI ADR 2015.

104 This important question was thoroughly analysed by the Single Judge in the Appealed Decision in para 52:

"The question of retroactivity is regulated in the transitory provision of Article 25 of the UCI ADR 2015 quoted above in para 35. The Single Judge has been unable to find a definition or list of "substantive rules" despite the fact that the definitions contained in the UCI ADR 2012 and 2015 or in the respective lists of the World Anti-Doping Code (hereinafter referred to as "WADC") 2009 or 2015 for that matter, are particularly long. The distinction between substantive and non-substantive – i.e. procedural – rules varies in doctrine and jurisprudence, while different legal systems may adopt different approaches especially as regards evidentiary rules. Article 25 only refers to the time periods of Article 10.7.5 (multiple violations) and 17 (statute of limitation) as procedural rules. So far CAS Panels have dealt with the issue of burden and standard of proof (CAS 2011/A/2384 & 2386, UCI & WADA v. Contador & RFEC, para 245; CAS 2013/A/3256, Fenerbahçe v. UEFA, para 274), or with guidelines for decision limits in threshold substances (CAS 2014/A/3488 World Anti-Doping Agency v. Mr Juha Lalluka, para 110 et seq.) The nature of Article 2.1.2 appears to be a rather novel issue, since the new sentence was introduced less than 18 months ago. The UCI did not provide any case law either, with the exception of an IOC disciplinary case that can be of limited use, since the athlete admitted the ADRV and did not challenge the reanalysis of her sample as the basis of Presence."

105 Based on the inconclusive definitions in the WADA Code and CAS Jurisprudence as to the exact distinction between substantive and non-substantive/procedural rules, the Single Judge was, however, persuaded by the "useful guidance" in the Comments to Article 2.2 and 3.2 of the WADC 2009 respectively, which led the Single Judge to the following conclusion in para 59:

"Mindful of the fact that the Comments are not mandatory and their objective is primarily to assist in the interpretation of the WADC, the Single Judge finds the reference to "requirements" as quite telling. The WADC opens door to an ADRV of Use in cases where the analytical information is reliable, but "does not otherwise satisfy all the requirements to establish" Presence. The fact that the only analytical "requirement" found in Article 2.1 of the WADC 2009 (= 21.1 of the UCI ADR 2012) are the ones set forth in Article 2.1.2 of the WADC 2009 (= 21.2 of the UCI ADR 2012), leads the Single

Judge to the conclusion that the evidence at hand, even if the Rider's technical challenges against the reanalysis were to be rejected – do not constitute sufficient proof to establish Presence."

106 It was on the basis of this analysis that the Single Judge held that the WADC 2015, which contained the same wording as in Article 2.1.2 of the UCI ADR 2015, introduced a novelty by allowing to exploit such retesting results for the purposes of Presence. Hence, the Single Judge ruled that the introduction of the wording "or where the Rider's B sample is split into two bottles and the analysis of the Second Bottle confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the First Bottle" in the UCI ADR 2015 constituted "substantive law" within the meaning of Article 25.2 of the UCI ADR 2015 and consequently rejected UCI's claim for lack of legal foundation.

107 After having carefully read the Single Judge's opinion on this matter as well as the Parties' submissions in these appeal proceedings, this Panel firstly concurs with the Single Judge that no exact definition of the distinction between "substantive law and procedural law" can be found in the WADA Code, the UCI ADR, or in any relevant CAS Jurisprudence. The distinction between substantive and procedural (also called adjectival) law may therefor only be found through the application of normal interpretation rules and principles, in particular, the overall purpose of the rule not allowing sanctions to be applied retroactively for violations, which occurred prior to the effective date.

108 When reading and analysing the wording of the provisions on Presence both in the UCI ADR 2012 and 2015, including the comments to Article 2.2 and 2.3 of WADC 2009, on which the Single Judge put particular emphasis, this Panel concludes that the Single Judge did not apply the correct legal interpretation of the term "substantive anti-doping rules", when he dismissed the application of Article 21.1.2 of the UCI ADR 2012 for lack of legal foundation.

109 The Panel's findings are based on the following rationale: The Single Judge did not refer to or mention the relevant Applicable Rules regarding retesting and splitting procedures, which were found in the International Standards for Laboratories 2012 (ISL 2012). As noted in the Introduction, Scope, and References Section of the ISL 2012, the WADA Code – and therefore also the UCI ADR – cannot be considered in isolation. To the contrary, the following is stated to underscore that the two set of rules must be read in conjunction with each other:

"The World Anti-Doping Programme encompasses all of the element needed in order to ensure optimal harmonisation and best practice in international and national anti-

doping programmes. The mail elements are: The Code (level 1), International Standards (level 2), and Models of Best Practice (level 3)."

110 In Article 5.2.12.1.2. of the ISL 2012, rules were specifically addressing cases, in which no urine remained in an A sample for possible retesting purposes. In this provision in the ISL 2012, the procedure in connection with the splitting of the "B" sample in case no urine sample remained in the "A" sample for possible retesting is meticulously described including the important guarantees for safeguarding the Athlete's/Rider's fundamental and basic rights to a fair and due process. Accordingly, the opportunity shall be offered to the Athlete/Rider or to the representatives of the Athlete/Rider to be present at the opening of the sealed "B" bottle, and if the Athlete/Rider declines to be present, or the Athlete's/Rider's representative does not respond to the invitation or is not available on the date of opening, the laboratory shall appoint an independent witness to verify the opening of the sealed "B" sample. At the opening of the "B" sample the laboratory shall ensure that the sample is adequately homogenised before splitting the "B" sample, and it shall divide the volume of the "B" sample into two bottles in the presence of the Athlete/Rider/representative or an independent witness. The splitting of the "B" sample shall be documented in the chain of custody, and the Athlete or the Athlete's representative shall be invited to seal one of the bottles using a tamper-evident method. If the analysis of the First Bottle reveals an AAF, a confirmation shall be undertaken if requested by the Athlete/Rider using the second sealed bottle.

111 When the Panel examines the detailed description of the procedures that have to be followed in accordance with the ISL 2012 and compares these steps with the procedure that was initiated, when the Rider's sample *in casu* was selected for retesting in 2015, the Panel is more than comfortably satisfied that UCI was in full compliance of the rules and procedures applicable under the UCI ADR 2012, read in conjunction with the ISL 2012.

112 The fact that the equivalent provision on Presence in the UCI ADR 2015 specifically mentions in the last paragraph of Article 2.1.2 that sufficient proof of an anti-doping rule violation under Article 2.1 is established also in cases, where the Rider's B sample is split into two bottles, cannot therefore in the Panel's opinion be considered as a "novelty" or as a new substantive rule impermissible under the ban of retroactivity. In fact, the Panel clearly finds that this is an evidentiary rule, which merely confirms how sufficient proof of anti-doping rule violation may be established. The adding of the last paragraph in Article 2.1.2 in the UCI ADR 2015 must correctly be construed as an implementation of an evidentiary rule, which was already available under the UCI ADR 2012 read in conjunction with the ISL 2012, in cases where no urine remained of the A sample for possible retesting, cf. Article 5.2.12.1.2. of ISL 2012. Thus, for these reasons the retesting and the splitting of the B sample, which took place in 2015, cannot be

regarded in legal terms as an application of a "substantive rule" that was not already available as a purely evidentiary rule in the ISL 2012, in a case just as this one, where no (or no sufficient) urine remained of the A sample for possible retesting.

113 In conclusion, the Panel wishes to emphasise that the substantive anti-doping rule violations both in the UCI ADR in 2012 and 2015 evolved the Rider's personal duty to ensure that no Prohibited Substance entered his or her body, and that the Rider was responsible for any Prohibited Substances or its Metabolites or Markers found to be present in her sample. This ADRV was exactly what the Cologne Laboratory concluded had occurred, when both the First and the Second Bottle were analysed for the presence of EPO. Therefore, the Panel finds that an ADRV pursuant to Article 21.1. of the UCI ADR 2012 has been established to the comfortable satisfaction of the Panel, regardless of the fact that the method of retesting and splitting of the "B" Sample was not specifically mentioned in the UCI ADR 2012 provision, as the UCI ADR 2012 must be read in conjunction with the ISL 2012, which specifically addressed the case, in which no urine remained in A samples for possible for retesting.

114 Consequently, this Panel concludes that UCI to the comfortable satisfaction of the Panel has established that the Rider committed an ADRV for Presence pursuant to Article 21.1 of the UCI ADR 2012.

Establishment of Use

115 The Panel has carefully examined the rationale behind the Single Judge's reasoning to determine that the Rider committed an ADRV for Use pursuant to Article 21.2 of the UCI ADR 2012 and compared these findings with the submissions of the Parties in these appeal proceedings.

116 In this respect, the pivotal point surrounding the Panel's legal analysis goes to the understanding of especially Article 23 of the UCI ADR 2012, which reproduces Article 3.2 of the WADC 2009 and reads as follows:

117 *"Facts related to anti-doping rules violations may be established by any reliable means ..."* [emphasis added].

118 In the Rider's submission both before the UCI ADT and in these appeal proceedings, it has been argued that the Single Judge's understanding of facts established by "any reliable means" in Article 23 of the UCI ADR 2012 was wrongly interpreted by the UCI ADT. The Rider's argument is simple – if "reliable analytical data that was found inadequate to determine a Rider guilty for Presence, can simply be used successfully when

proving an ADRV under the Use provision, this would via redundancy lead to the extinction of the provision regarding Presence". The Rider argued that the comment to Article 2.2, which states that Use may be established based upon reliable analytical data and provides as an example "from the analysis of B sample alone, where the Anti-Doping Organisation provides a satisfactory explanation for the lack of confirmation in the other sample", may not be applicable to the present case, as the comment to Article 2.2 did not exist in 2012 and only became valid in 2015.

119 This Panel concurs with the Single Judge's dismissal of the Rider's argument, as both comments clearly existed under Article 2.2 and 3.2 respectively of the WADC 2009, and they were repeated *verbatim* under the same articles in the WADC 2015. From an analysis of the pertinent provisions on Use both in the WADC 2009 and the comments hereto, which must be used for the purposes of interpretation of the UCI ADR both in the 2012 and 2015 versions, this Panel agrees fully with the Single Judge's findings that the term "any reliable means" is not supposed to be limited in any way through the examples contained in the Comments, and there is no indication whatsoever that these "means" should exclude analytical data.

120 In this context, the Panel stresses that all the evidence presented during the proceedings before the UCI ADT and the CAS was considered to be highly reliable and so to prove to the comfortable satisfaction of the Panel that the Rider used EPO. The fact that a number of highly esteemed WADA Accredited Laboratories both in Cologne and Lausanne without a doubt confirmed that the Rider's sample contained EPO is obviously "reliable means" within the meaning of Article 23 of the UCI ADR 2012 that can and may be used as facts to establish an ADRV for Use.

121 Consequently, the Panel must dismiss the Rider's submission that the application of Article 21.2 of the UCI ADR 2012 lacks legal foundation.

122 In conclusion, the Panel finds to its comfortable satisfaction that UCI has discharged its burden of proof to establish that the Rider has committed an ADRV both pursuant to Article 21.1 for Presence and Article 21.2 for Use in the UCI ADR 2012.

Analysing Question iii)

123 As discussed above, both the UCI ADR 2012 and the UCI ADR 2015 provide for similar approaches with respect to the burdens and standards of proof in anti-doping cases, (with however, a few additions to the UCI ADR 2015, which in the Panel's opinion have no relevance to the case at hand, since it is not dealing with data for the Athlete's Biological Passport or sample analysis from other laboratories approved by WADA. Only in these

cases would there be a substantive change in the rules in Article 3 in the UCI ADR 2012 and 2015 versions).

124 According to Article 3.1 of the UCI ADR 2012, UCI shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether UCI has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel, bearing in mind the seriousness of the allegation, which is made. This standard of proof in all cases is greater than a mere balance of probability, but less than proof beyond reasonable doubt. According to Article 3.2, facts related to the anti-doping rule violations may be established by any reliable means, including admissions. In the comments to Article 3.2 it is stated, for example, that UCI may establish an anti-doping rule violation under Article 2.2 based on "... reliable documentary evidence, reliable analytical data from either an A or a B sample...".

125 Moreover, it is stated in Article 3.2.2. that WADA Accredited Laboratories are presumed to have conducted sample analysis and custodial procedures in accordance with the International Standards for Laboratories. In the present case, both the splitting of the B sample into two bottles (the First and the Second bottle) and the subsequent analysis of the urine sample in the First and in the Second bottle was conducted by the WADA Accredited Laboratory in Cologne.

126 On the basis hereof, the Panel finds that UCI has proven to the comfortable satisfaction of the Panel that an ADRV has occurred under the presumption in Article 3.2.2 of the UCI ADR that the sample analysis of the Cologne Laboratory has been conducted in accordance with the International Standards for Laboratories (ISL 2012).

127 Subsequently, the Panel will now evaluate, whether the Rider's submissions that the results of the First Bottle and Second Bottle analysis are unreliable, because of alleged departures from the ISL or other applicable anti-doping rules in the Cologne Laboratory and that these departures could have reasonable caused the AAF.

128 Again, the Panel refers to the burden and standard of proof set out in Article 3.1 of the UCI ADR 2012. In the last paragraph, it is stated that *"where these anti-doping rules place the burden of proof upon the Rider or Other Person alleged to have committed an Anti-Doping Rule Violation to rebut a presumption or establish specific facts or circumstances, the standard proof shall be a balance of probability."* In addition, Article 3.2.2 (second paragraph) states the following: *"The Rider or Other Person may rebut this presumption by establishing that a departure from the International Standards for Laboratories occurred, which could reasonably have caused the Adverse Analytical Finding."*

129 Both before the UCI ADT and during these CAS proceedings, the Rider has claimed that the Cologne Laboratory committed departures for the Applicable Rules, International Standards, and Technical Documents, which could reasonably have caused the Adverse Analytical Finding. In particular, the Rider has referred to the findings in the expert reports produced by Prof. Dr. Curin Serdec, which has been presented as evidence during these proceedings.

130 In relation to the many allegations of departures from the Applicable Rules, International Standards, and Technical Documents, which are found in Prof. Dr. Curin Serdec's reports, the Panel notes that the Single Judge in the Appealed Decision has outlined and assessed each and every one of Prof. Dr. Curin Serdec's alleged departures very precisely. The Panel finds this assessment and analysis to be both thorough and detailed in its description of the allegations made by the Rider and supported by the expert reports by Prof. Dr. Curin Serdec.

131 At the hearing, both Prof. Dr. Curin Serdec and Prof. Dr. Saugy from the WADA Accredited Laboratory in Lausanne confirmed their written expert witness statements and were able to elaborate on their findings and answer questions from the representatives of the Parties as well as the Panel. In light of the CAS Jurisprudence in CAS 2013/A/3112 (WADA v. Lada Chernova & RUSADA), the Panel agrees in the evaluating of these departures that a mere reference to a departure from the ISL is insufficient in the absence of a credible link of such departure to a resulting Adverse Analytical Finding.

132 Having carefully examined the legal analysis by the Single Judge of the alleged departures presented by the Rider in para 89 – 95 of the Appealed Decision, combined with the testimonies given by the expert witnesses at the hearing, the Panel therefore cannot come to another conclusion than the one expressed by the Single Judge in the Appealed Decision.

133 As the Single Judge concluded in the above paragraphs in the Appealed Decision, this Panel concurs with the view that the Rider – on the basis of Prof. Dr. Curin Serdec's expert reports – has not been able to fulfil her burden of proof in order to rebut the assumption that the sample analysis has not been conducted in accordance with the International Standards for Laboratories at the Cologne Laboratory.

134 On the contrary, it is the opinion of the Panel after having read the reports from no less than three WADA Accredited Laboratories and heard the evidence of Prof. Dr. Saugy

that none of the alleged departures could in any way explain the occurrence of the Adverse Analytical Finding for EPO in the Rider's urine sample. Thus, the Panel can to its comfortable satisfaction conclude that the Rider has not been able to prove that any departure – even if they may have been established – could have caused the Adverse Analytical Finding.

135 In addition hereto, the Panel must also dismiss the Rider's argument that the accumulation of the alleged deviations may have caused "false positive" results based on the evidence at hand as groundless.

136 The same conclusion must also be reached with respect to the arguments and allegations presented in paragraph 47–50 in the Rider's Appeal Brief, which were new and had not been presented before the UCI ADT. Once again, the Panel based on the testimony of Prof. Dr. Saugy and the latest report from the Swiss laboratory (exhibit UCI 45) must dismiss these accusations as being without merits.

137 Finally, the Panel must dismiss the Rider's allegations directed against the reliability of the analytical findings in the Cologne Laboratory, because of an alleged conflict of interest by Dr. Reichel. The Panel finds that this "conflict of interest" claim has no legal basis, as the Rider has not proven or even remotely substantiated any relevant connection between the alleged conflict of interest of Dr. Reichel and the AAF. In the Panel's view, such connection simply does not exist. The Panel accepts and adopts UCI's submissions on this point.

138 In conclusion, the Panel must therefore dismiss all of the Rider's claims for alleged departures from Applicable Rules, International Standards, or Technical Documents, which could reasonably have caused the Adverse Analytical Finding. Consequently, the Panel's conclusion in relation to question ii) remains the same, namely that UCI to the comfortable satisfaction of the Panel has proven that the Rider has committed an ADRV pursuant to both Article 21.1 for Presence and pursuant to Article 21.2 for Use of a Prohibited Substance in accordance with the UCI ADR 2012.

Analysing Question iv)

Period of Ineligibility

139 Since the Panel has found that the Rider has committed an ADRV both for Presence and Use pursuant to the relevant articles in the UCI ADR 2012, the Panel must now determine what sanctions and other consequences shall follow from the Rider's offence.

140 Pursuant to Article 293 of the UCI ADR 2012, the period of ineligibility imposed for a first-time Anti-Doping Rule Violation under Article 21.1 "Presence" or Article 21.2 "Use" shall be two years of ineligibility, unless the conditions for eliminating or reducing the period of ineligibility as provided in Articles 295–304, all the conditions for increasing the period of ineligibility as provided in Article 305 are met.

141 The Panel notes that this offence is the first ADRV that the Rider has committed. Neither the Single Judge in the Appealed Decision, nor UCI during these proceedings have maintained that conditions for eliminating, reducing, or increasing the period of ineligibility can be found in this case, hence UCI has submitted that the decision of the Single Judge in the Appealed Decision sanctioning the Rider with a two-year period of ineligibility shall be confirmed by this CAS Panel.

142 The Panel has not identified submissions directed by the Rider to the period of ineligibility itself. Therefore, the Panel holds that the Rider as a first-time offender having committed an ADRV shall be sanctioned with a period of two years' ineligibility.

Commencement of the Period of Ineligibility

143 The Panel notes that Articles 314-319 of the UCI ADR 2012 provide specific provisions regarding the commencement of the period of ineligibility for a convicted rider.

144 Pursuant to Article 314, the period of ineligibility shall start on the date of the hearing panel's decision or, if the hearing is waived, on the date ineligibility is accepted or otherwise imposed, except as provided under Article 315-319.

145 Since this case is one of the first retesting cases, where the period between the sample collection and the AAF has been unusually long (more than three years), the Panel has to determine which influence this period of time may have on the commencement of the ineligibility period.

146 In this context, Article 315 of the UCI ADR 2012 provides as follows:

"Delays not attributable to the licence-holder

Where there have been substantial delays in the hearing process or other aspects of doping control not attributable to the Licence-Holder, the hearing body imposing this sanction may start the period of ineligibility at an earlier date commencing as early as the date of sample collection or the date, on which another Anti-Doping Rule Violation

last occurred."

147 Based on the retesting of the Rider's urine sample collected in 2012, the Rider has submitted that "exceptional circumstances" exist in this case, because it is important to guarantee fair and harmonious applications of the UCI ADR between the cases where an athletes' sample had already been tested once and the test proved negative, and those, where an athletes' sample was tested for the first time several years after an event. Contrary to this view, UCI has stated that there have been no substantial delays in the hearing process and the so-called "other aspects" only have arisen due to the improved Technical Documents, which have made it possible for the Anti-Doping Organisations better to detect the EPO in a rider's urine sample.

148 Therefore, UCI submits that the start date ought to be no earlier than the date the Rider was advised that her sample would be reanalysed.

149 In addition to Article 315, the Panel finds that Article 317 regarding credit for provisional suspension is also of relevance in this matter. According to this provision, the Licence-Holder shall receive credit for such period of provisional suspension or provisional measures against any period of intelligibility that may ultimately be imposed, if a provisional suspension or provisional measure pursuant to Article 235-245 is imposed and respected by the Licence-Holder.

150 In the Appealed Decision, the Single Judge recognised that the situation as regards the delay in other aspects of doping control was "somewhat exceptional" because of the retesting of the Rider's sample. The period that elapsed between the sample collection in March 2012 and the provisional suspension in September 2015 was very long and was affected by parameters beyond the Rider's control such as the change in the Technical Document for EPO on 1 September 2014 and the subsequent decision of UCI to have the Rider's sample retested in the summer of 2015. However, against this background the Single Judge found that the Rider had not been adversely affected by this long period, since she had continued to compete and obtain financial gains for her results as a rider. Therefore, the Single Judge did not agree with the Rider's request that the period of ineligibility should start in March 2012 and, in the absence of any other relevant delay, the Single Judge held that the period of ineligibility should commence on 18 September 2015 and expire on 17 September 2017.

151 Having carefully analysed the original intent behind the provision regarding delays not attributable to the Licence-Holder and possible credit for provisional suspension, the Panel concurs with the findings of the Single Judge, since it cannot be the purpose of Article 315 to fix the commencement of the period of ineligibility to the date of sample

collection in 2012, which in effect would render the sanction for the ADRV meaningless, since the Rider would already have passed the two-year sanction period in March 2014. That result would not sit well with the possibility of retesting an athlete's urine sample under an improved testing regime for the detection of EPO. Consequently, the Panel confirms that the period of ineligibility must be held to commence on 18 September 2015 and expire on 17 September 2017.

Disqualification

152 In the Appealed Decision, the Single Judge found, considering all the circumstances of the case and exercising his discretion under Article 313 of the UCI ADR 2012, that the athlete's results from 27 March 2012 until 31 December 2012 should be disqualified. Consequently, the Rider's results in the years 2013, 2014 and between 1 January 2015 – 17 September 2015 shall stand.

153 Before these CAS proceedings, the Rider's sole argument with respect to the disqualification of her result has been that no ADRV has occurred and therefore the sanction of disqualification of result should be annulled. The UCI has submitted that the Single Judge's decision on disqualification should not be interfered with.

154 Since the Panel has ruled that the Rider did commit an ADRV both for Presence and for Use, the Rider's main argument must be dismissed.

155 Having analysed Article 313 of the UCI ADR 2012 and the fact that this case is extraordinary given the long lapse of time between the sample collection in March 2012 and the retesting in September 2015, this Panel agrees with the Single Judge that a disqualification which effectively would amount to the Rider having no sporting results for a five and half year period would seem unfair. By applying the principle of fairness embedded in Article 313 of the UCI ADR 2012, this Panel finds that the decision of the Single Judge in the Appealed Decision should stand.

Mandatory Fine and Costs

156 As a point of departure in the Panel's review of the Appealed Decision's operative part regarding the additional sanction of a fine, the Panel notes that both UCI and the Single Judge agreed that Article 10.10 of the UCI ADR 2015 should be applicable as *lex mitior*, given the flexibility which it confers as to a reduction of any fine. The Panel agrees with this interpretation in favour of the Rider.

157 According to Article 10.10.1.1. of the UCI ADR 2015, a fine shall be imposed in case of Rider or other Person exercising a professional activity in cycling is found to have committed an intentional ADRV within the meaning of Article 10.2.3. As this case concerns an ADRV for a Non-Specified Prohibited Substance, the Panel considers the offence to be "intentional" within the meaning of this provision.

158 In the Comments to the article it is stated that the amount of the fine shall be equal to the net annual income from cycling that the Rider was entitled to for the whole year, in which the ADRV occurred. Furthermore, the term "net income" is described as being deemed to be 70 per cent of the corresponding gross income.

159 In the comments to Article 10.10, it is also stipulated that the quantum of the fine may be reduced, where the circumstances so justify bearing in mind the seriousness of the offence. The following circumstances are mentioned in the comment:

> *"1. Nature of Anti-Doping Rule Violation and Circumstances giving rise to it;*
> *2. Timing of the commission of the Anti-Doping Rule Violation,*
> *3. Rider or Other Person's financial situation.*
> *4. Cost of living in the Rider's or Other Persons' place of residence;*
> *5. Rider's or Other Persons' cooperation during the proceedings and/or substantial assistance as per Article 10.6.1".*

160 With respect to the calculation of the fine, the Single Judge determined that based on the evidence at hand, 70 per cent of the Rider's alleged annual gross income in 2012 would equal [redacted]. Before the UCI ADT and in these appeal proceedings the Rider has maintained that this amount was wrongly calculated and that the Rider only received in total less than [redacted] in 2012.

161 It is undisputed that the Rider's income has decreased significantly from the year when the ADRV occurred. Indeed, the Single Judge notes in the Appealed Decision that the Rider in 2016 was entitled to an annual gross income of [redacted], which represents a difference of almost 40 per cent of the Rider's annual income in 2012. Based on this reduction of income and by applying Article 10.10 as *lex mitior*, the Single Judge held that the fine should be equal to 50 per cent of the Rider's 2012 relevant annual income, i.e. [redacted]

162 This is, as already noted, one of the first retesting cases, and the jurisprudence regarding the fixation of a fine under these circumstances is not clearly established. In light of the sharp decline in the Rider's annual income from 2012 to 2016, the Panel is of the opinion that a fine which is closer to 80 per cent of the Rider's annual income in 2016 appears

to be too harsh and disproportionate. Therefore, given the Rider's present financial situation, the Panel holds that the fine should reflect the Rider's reasonable financial capacity today and thus it reduces the fine to [redacted] equivalent to 50 per cent of the annual gross income of the Rider in 2016.

IX. CONCLUSION

163 Based on the foregoing and after taking into due consideration all the evidence produced and all arguments made the Panel finds that:

I. The UCI's actions against the Rider have not been time-barred in accordance with Article 368 of the UCI ADR 2012.

II. The Rider has committed an ADRV pursuant to both Article 21.1 for Presence and Article 21.2 for Use of a Prohibited Substance in accordance with the UCI ADR 2012.

III. The Panel has been satisfactorily convinced that UCI has carried the burden of establishing that ADRV has occurred and the Rider has not been able to rebut this assumption by establishing that departure from the International Standards for Laboratories has occurred, which could reasonably have cause the AAF pursuant to Article 3.2.2 of the UCI ADR 2012.

IV. The Panel confirms all of the consequences of the ADRV found in the Appealed Decision except for the mandatory fine, which will be reduced to [redacted] in accordance with Article 10.10 of the UCI ADR 2015.

X. COSTS

164 Article R65.1 of the CAS Code provides as follows:

"This Article R65.1 applies to appeals against decisions, which are exclusively of a disciplinary nature, and which are rendered by an international federation or sports body. In case of objection by any party concerning the application of the present provision, the CAS Court Office may request that the arbitration cost be paid in advance pursuant to Article R64.2 pending a decision by the Panel on the issue."

165 Article R65.2 of the CAS Code reads as follows:

"Subject to Articles R65.2. paragraph 2, and R65.4, the proceeding shall be free. The

fees and costs of the Arbitrators, calculated in accordance with the CAS f(r?)ee scale, together with the costs of CAS are borne by CAS.

Upon submission of the Statement of Appeal, the Appellant shall pay a non-refundable Court Office fee of CHF 1,000 – without which CAS shall not proceed and the Appeal shall be deemed withdrawn.

If an arbitration procedure is terminated before the Panel has been constituted, the Division President shall rule on costs in the termination order. He may only order the payment of legal costs upon request of a party and after all parties have been given the opportunity to file written submissions on costs."

166 Article R65.3 of the CAS Code reads as follows:

"Each party shall pay for the costs of its own witnesses, experts and interpreters. In the Arbitral Award, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and the outcome of the proceedings as well as the conduct and the financial resources of the parties."

167 Since these CAS proceedings concern an appeal against a decision rendered by the UCI ADT, the proceedings shall be free pursuant to Article R65.1 and R65.2.

168 Having taken into account the outcome of this arbitration, in particular the fact that the Rider's Appeal has almost been fully dismissed, the Panel finds it reasonable and fair that a contribution to the considerable expenses of UCI during these appeal proceedings be made. However, considering that the Cross-appeal was declared unfounded, the Panel, furthermore, realises that there is an obvious and profound gap between the resources available to the Rider and UCI as a major international sports federation. The Panel will therefore reconcile these competing factors by ordering a contribution of CHF 1,000 (one thousand Swiss francs) to be paid by the Rider to UCI taking into consideration her limited financial means pursuant to Article R65.3 of the CAS Code.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 9 June 2016 by Blaza Klemencic against the decision issued on 20 May 2016 by the UCI Anti-Doping Tribunal is partially upheld.

2. The decision issued on 20 May 2016 by the UCI Anti-Doping Tribunal is confirmed and upheld, except that the reference to Article 21.2 of the UCI ADR in Section 1 of the decision is deleted and the monetary fine in Section 4 of the decision is reduced to [redacted].

3. The costs of the arbitration shall be free and the fee and costs of the Arbitrators shall be borne by CAS.

4. Ms. Blaza Klemencic shall pay CHF 1,000 (one thousand Swiss francs) in contribution to UCI's costs in connection with the present arbitration.

5. All other prayers and motions for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland
Date: 3 March 2017

THE COURT OF ARBITRATION FOR SPORT

Lars **Halgreen**
President of the Panel