Arbitration CAS 2016/A/4817 Tetiana Gamera v. International Association of Athletics Federations (IAAF) & Ukrainian Athletic Federation (UAF), award on jurisdiction and admissibility of 1 June 2017

Panel: Prof. Ulrich Haas (Germany), Sole Arbitrator

Athletics (long-distance)
Doping (Athlete Biological Passport)
Jurisdiction of the CAS with regard to an application for reconsideration
Characteristic features of a decision
Appeals against decisions on applications for reconsideration
Receipt of a decision
Estoppel from lodging an appeal

1. **Although the arbitration clause contained in Article 42.3 of the IAAF Anti-Doping Rules (ADR) does only allow appeals to CAS against a first instance national decision and not against second instance national decisions, an application for reconsideration filed by an athlete before the body that took the first decision is not a formal appeal. It follows from the context of Article 42.3 that an (international-level) athlete shall not have an (enforceable) claim to bring his or her case before another national instance (with full cognition). The provision, however, is not designed to prevent a sports authority from revisiting – on its initiative and in its discretion – a decision already taken by it. The decision taken by a sports organisation is an administrative matter that can be revisited or amended by it, in principle, at any time. Consequently, an application by an athlete to the sports organisation inviting the latter to make use of this competence, i.e. to revisit its decision, differ substantially from the type of "review" or "appeal" prohibited by Article 42.3. Applications for reconsiderations are neither time-limited nor do they award full access to justice. Instead such applications are extrajudicial remedies that can be filed at any time and that do not follow a particular procedure. In addition and contrary to ordinary appeals, the sports federation is free to deal with such (extra-judicial) applications at its complete discretion.**

2. **The characteristic features of a *decision* may be described as follows: (a) the term "decision" must be construed in a large sense; (b) the form of the communication in question is irrelevant for its qualification; (c) in principle, for a communication to be qualified as a decision, this communication must contain a ruling, whereby the body issuing the decision intends to affect the legal situation of the addressee of the decision or other parties; and (d) a decision is a unilateral act, sent to one or more determined recipients that is intended to produce or produces legal effects.**

3. **An application for reconsideration is – because extrajudicial – outside of any legal framework. Whether the addressee of an application for reconsideration reconsiders its**

decision or not is in its sole autonomy. An athlete has no claim or right that his or her case be reconsidered. Therefore, an appeal operating under legal standards and the rule of law is – from the outset – the wrong instrument to challenge a decision taken outside of any legal context. Decisions on application for reconsideration are, thus, very similar to field of play decisions not reviewable because they cannot be measured with the yardstick of the law. Appeals lodged against such decisions are – just like appeals against field of play decisions – inadmissible.

4. **Receipt of the decision for the purposes of Art. R49 of the CAS Code means that the decision must have come into the sphere of control of the party concerned (or of his/her representative or agent authorised to take receipt). It does not imply that the party concerned actually took note of the content of the decision concerned. Instead it suffices that the party concerned had a (reasonable) possibility of taking note of the decision.**

5. **In particular circumstances a party may be estopped from availing itself of the fact that a deadline did not start to run. This is particularly so in view of the principle of good faith. Whether this is the case depends on the circumstances of the individual case. A party is estopped from lodging an appeal where the other stakeholders involved could legitimately rely on the (federation's) measure in question to be final and binding. Thus, for example, if an appellant has taken note of a decision (in some other way) the latter is under a duty to make enquiries within certain limits as far as is reasonable and within his realms of possibility. If the party fails to do so, he or she would act in bad faith when arguing that the time limit had not yet begun to run. However, the requirement that the "party entitled to appeal" make enquiries may not be overstretched.**

I. PARTIES

1. Ms Tetiana Gamera (the "Appellant" or the "Athlete") is an elite Ukrainian long-distance runner from Ukraine. She represented her country at the 2012 Olympic Games in London, finishing fifth in the women's marathon and establishing the national record. The Athlete is an "International-Level" Athlete for the purposes of the IAAF Competition Rules (the "IAAF Rules").

2. The International Association of Athletics Federations ("IAAF" or the "First Respondent") is the world governing body for the sport of Athletics. The IAAF is an association under the laws of Monaco and has its registered seat there.

3. The Ukrainian Athletic Federation ("UAF" or the "Second Respondent") is the national governing body for the sport of athletics in Ukraine affiliated to the IAAF. The UAF is headquartered in Kyiv, Ukraine.

II. FACTUAL BACKGROUND

4. Below is a summary of the main relevant facts, as established on the basis of the Parties' written submissions and the evidence examined in the course of the present arbitration proceedings. This background is set out for 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 Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, he refers in his Award only to the submissions and evidence he considers necessary to explain his reasoning.

5. On 15 September 2015, the IAAF Anti-Doping Administrator, Mr Thomas Capdevielle, informed the Executive Director of the UAF, Mr Mykhailo Medved, by email that in accordance with Rule 37.12 of the IAAF Anti-Doping Rules 2014-2015 ("IAAF ADR"), the IAAF initiated an investigation into a potential anti-doping rule violation ("ADRV") against the Athlete pursuant to the Athlete Biological Passport programme ("ABPP") ("IAAF Notice").

6. The IAAF Notice reads – *inter alia* – as follows:

> *"Dear Mr. Medved,*
>
> *In accordance with IAAF Rule 37.12, the IAAF has initiated an investigation into a potential anti-doping rule violation against the Ukrainian athlete, Ms Tetiana Shmyrko pursuant to the Athlete Biological Passport programme.*
>
> *The evidence that has triggered this investigation is a series of blood tests results collected in the course of the IAAF's blood testing programme from 2011 to 2015. Ms Shmyrko was tested on a regular basis by the IAAF during this period, for the purposes of measuring her blood variables in accordance with the IAAF Blood Testing Protocol.*
>
> *The hematological profile constituted for Ms Shmyrko and comprising five (5) blood variables measurements between 26 August 2011 and 24 April 2015 has been identified as being abnormal by the IAAF's adaptive model with a probability of 99,9% or more.*
>
> *In accordance with the IAAF Anti-Doping Regulations, Ms. Shmyrko's blood profile was submitted to an Expert Panel for an initial review on an anonymous basis. The Expert Panel includes three experts with knowledge in the fields of clinical haematology (diagnosis of blood pathological conditions), laboratory medicine/haematology (assessment of quality control data, analytical and biological variability, instrument calibration…) and sports medicine and exercise physiology specialized in haematology.*
>
> *Upon reviewing Ms. Shmyrko's blood profile, the Expert Panel unanimously expressed the opinion that it was highly unlikely that the longitudinal profile of Ms Shmyrko was the result of a normal physiological or pathological condition and that it may be the result of the use of a prohibited substance or a prohibited method.*

Moreover, the preliminary review conducted by the IAAF under IAAF Rule 37.3 did not show any TUE on file for the athlete or any departure from the IAAF Anti-Doping Regulations, the IAAF Blood Testing Protocol or the International Standard for Laboratories which could have explained this abnormal profile.

In light of the above, the IAAF is considering bringing charges against Ms Shmyrko for an anti-doping rule violation under IAAF Rule 32.2 (b) (use or attempted use of a prohibited substance or a prohibited method) and, in doing so, could be seeking an increased 4-year sanction on the grounds of aggravating circumstances (2014 IAAF Rule 40.6).

Ms Shmyrko can avoid the application of a 4-year ban by promptly admitting by no later than Tuesday 29 September 2015 an anti-doping rule violation under IAAF Rule 32.2 (b) and by accepting an effective 2-year ineligibility as from date of her acceptance (see IAAF acceptance of sanction form attached).

Before formal charges are brought against the athlete, she has an opportunity under the IAAF Anti-Doping Regulations, to provide an explanation for her abnormal profile. The athlete's explanation, if any, must be provided to me in writing, in English, no later than Tuesday 29 September 2015.

(…)

Upon receipt of Ms Shmyrko's explanation, the matter shall be referred back to the Expert Panel for further review. If, following such review, the Expert Panel concludes that it is highly likely that the athlete has used a prohibited substance or method and unlikely that the profile is the result of any other cause or, alternatively, if no explanation is forthcoming from Ms Shmyrko by the above deadline, your Federation will be required to proceed with the case as an asserted anti-doping rule violation in accordance with the disciplinary procedures set out under IAAF Rule 38 and following".

7. Attached to the IAAF Notice were the *"Acceptance of Sanction"* form and the results of the *"Athlete's Haematological Passport"*.

8. On 16 September 2015, the UAF informed the Athlete via email (sent to gamerat@ukr.net) that the IAAF initiated an investigation into a potential ADRV under the ABPP. The letter advised the Athlete to provide the UAF *"with a reasonable explanation in writing on the current matter by 28 September 2015"*. Furthermore, copies of the IAAF documents were attached to the letter.

9. On 18 September 2015, the General Secretary of UAF, Mr Medved sent a text message to the Athlete's coach, Mr Ihor Osmak. On the same day, Mr Medved received an incoming message from Mr Osmak's mobile phone. The Second Respondent alleges that Mr Osmak stated in this text message that the Athlete was not in Kyiv and that he did not know where she was.

10. On 28 September 2015, the UAF sent a reminder to the Athlete that she was required to submit written explanations by 29 September 2015.

11. No submission from the Athlete was received by the UAF Secretariat on 29 September 2015.

12. On 30 September 2015, the UAF informed the Athlete that she had failed to provide any written explanations.

13. On 1 October 2015, the UAF informed the IAAF by email that it had formally notified the Athlete of the provisional suspension starting on 30 September 2015.

14. On 6 November 2015, the UAF sent a letter to the Athlete (sent to gamerat@ukr.net) inviting her to the meeting of the UAF Executive Committee ("UAF ExCo") on 20 November 2015.

15. Pursuant to its letter to the UAF dated 11 November 2015, the IAAF confirmed the application of the provisional suspension. Moreover, the IAAF mentioned that it considered that a 4-year ban should be imposed upon the Athlete in accordance with IAAF ADR 40.6 together with a disqualification of all her results from 26 August 2011 in accordance with IAAF ADR 40.1 and 40.8. Furthermore, the IAAF requested the UAF to notify the Athlete in writing: *"that she is being charged with an anti-doping rule violation under IAAF Rule 32.2 (b) on the basis of abnormal variations of her haematological profile between 26 August 2011 and 24 April 2015; that she will be subject to the disciplinary procedure prescribed under IAAF Rules, which will have to be conducted by your Federation; that she will remain provisionally suspended pending resolution of her case; that a 4-year sanction will be sought against her pursuant to IAAF Rule 40.6 with disqualification of all her results as from 26 August 2011. This notification letter must make it clear that the athlete has the right to request a hearing in writing within 14 days of such notice in accordance with IAAF Rule 38.7. The letter must also make it clear that, if she fails to make such a request in writing, she will be deemed to have waived her right to a hearing and to have accepted that she has committed an anti-doping rule violation under IAAF Rules".*

16. On 20 November 2015, the UAF ExCo rendered its decision ("UAF Decision") at the meeting. The UAF Decision reads, *inter alia*, as follows:

> *"Haematological profile of the athlete comprising five (5) blood variables measurements between 26 August 2011 and 24 April 2015 has been identified as being abnormal by the IAAF's adaptive model with a probability of 99.9% or more. This case was reported to the Athlete by email dated 16.09.2015, where she was offered to provide explanation as to the charge brought until 29 September 2015. (…) By 29 September 2015 the UAF Secretariat had not received the athlete's explanation as to this issue. (…) Therefore in accordance with IAAF Rule 38.2 from 30.09.2015 Tetiana Shmyrko was suspended from participation in competitions until the case resolution as to the merits. (…) Until the established deadline the athlete did not inform about her will to be heard.*
>
> *(…)*
>
> *Resolved:* [by the UAF Executive Committee meeting]
>
> 1. *To suspend Tetiana Shmyrko for four years from participation in sport competitions, starting from 30.09.2015 to 29.09.2019.*
> 2. *To disqualify all competitions' results, achieved by the athlete in period from 26.08.2011 to 30.09.2015.*

> *3. The athlete is barred from any participation in athletic competitions and other athletic events during the period of ineligibility. Return to the competitive activity by an athlete is possible only under the condition of fulfillment of the IAAF Rule 40.14".*

17. On 23 November 2015, the UAF Decision was communicated to the Athlete via email (sent to gamerat@ukr.net). This communication reads as follows:

> *"Herewith we* [the UAF] *inform you that on 20 November 2015 during the UAF Executive Committee meeting your case was considered and the following decisions were made:*
>
> *1. To suspend you for four years in accordance with IAAF Rules 32.2(b) and 40.6 and to ban your participation in sport competitions, starting from 30.09.2015 to 29.09.2019.*
> *2. To disqualify all competitions' results, achieved in period from 26.08.2011 to 30.09.2015.*
> *3. You are barred from any participation in athletic competitions and other athletic events during your period of ineligibility.*
> *Return to competitive activity by an athlete is possible only under condition of fulfillment of the IAAF Rule 40.14".*

18. At the end of November 2015, the Athlete came to know about her 4-year suspension in the media. Thereafter she looked into her mailbox (gamerat@ukr.net) and retrieved the UAF Decision.

19. On 4 December 2015, the Osaka International Women's Marathon Director, Mr Takeda Satoru, sent an email to the Appellant referring to the UAF Decision and asking her how she intended to further proceed.

20. On 12 December 2015, the Athlete replied to Mr Takeda Satoru via email rejecting any accusations of using prohibited substances. In addition the Athlete wrote:

> *"However I do not have any means to go into litigations neither with WADA nor with the Federation. My coach and I decided that in such case we are only left to wait until this unfair disqualification term is over and to prove my innocence by the results".*

21. On 18 February 2016, the Athlete filed a claim against the UAF with the Darnitsa (Darnytsky) District Court of Kyiv seeking the annulment of the UAF Decision. The latter had been incorporated in the minutes of the UAF ExCo (protocol No.112). The Athlete argued – *inter alia* – that the UAF Decision must be set aside because it referred to her married name ("Shmyrko") instead to her maiden name ("Gamera").

22. On 7 March 2016, the Darnitsa (Darnytsky) District Court of Kyiv opened the proceedings in the case *"Gamera T.Y. against UAF concerning invalidation and cancellation of the protocol".*

23. On 4 April 2016, the Darnitsa (Darnytsky) District Court of Kyiv rejected the claim due to the absence of jurisdiction and closed the proceedings.

24. With letter dated 15 April 2016, the UAF informed the Athlete that on 6 April during the UAF ExCo meeting the ExCo decided to amend the UAF Decision by replacing any reference to the Athlete's married name ("Shmyrko") with the Athlete's maiden name ("Gamera").

25. On 29 April 2016, the Athlete received the Laboratory Documentation Packages for five blood samples.

26. On the same day, the Athlete submitted a letter to the UAF requesting that the UAF Decision be reviewed pursuant to Art. 6.5.2 of the UAF Statutes. By writing this letter *"the Athlete wanted to avoid further appeal and to resolve a dispute amicably at the national level"*. The letter reads – *inter alia* – as follows:

> *"I refer to you with request to re-consider the decision, made by UAF Executive Committee on 20 November 2015, by which I was suspended from participation in all sports competitions due to accusation in IAAF anti-doping rule 32.2(b) violation (hereunder ADRV) and all my competition results, achieved in period from 26.08.2011 until 30.09.2015 were disqualified.*
>
> *This application arises from the fact that I was not duly notified about commencement of an investigation in ADRV and did not have the possibility to offer my explanations about the charges and to put forward defense.*
>
> *Neither the UAF Statutes, nor any other UAF document (all those, which are available on the official UAF webpage) foresees the possibility to re-consider the case on the basis of newly discovered circumstances, there are no provisions about appealing UAF decisions on ADRV to IAAF or CAS.*
>
> *Article 6.5.2 of UAF Statutes edition as of 28.01.2015, copy of which is placed on the UAF official webpage on the day of submission of this application (http://uaf.org.ua/images/otherdocuments/Federation/Doc/Statyt_FLAU2.pdf), establishes that UAF Executive Committee is accountable to UAF Council. Article 10.4 of the Statutes establishes, that claims to activity or inactivity or decisions of UAF governing body or UAF official are considered by relevant body of higher instance. In accordance with article 6.5 of the UAF Statutes, ExCo is the body of regular governance of UAF. Nevertheless none of the UAF Statutes articles indicates the time limits to apply with appeal against the UAF Body decisions".*

27. At the UAF ExCo meeting on 11 May 2016, the members of the UAF ExCo agreed to the Athlete's request dated 29 April 2016. The letter sent to the Athlete on 23 May 2016 reads as follows:

> *"Ukrainian athletic federation expresses to You its respect and after having considered your application dated 29 April 2016 informs as follows.*
>
> *Ukrainian athletic federation understands eagerness of UAF members to be useful in discovering the truth during anti-doping investigations. Considering the fact that proceedings in your case are ended and the decision is made, Ukrainian athletic federation is ready to accept your request.*

During the meeting of the UAF Executive Committee, which took place on 11 May of this year members of the ExCo have agreed with the position of UAF Legal Commission to grant you an opportunity to be heard before the UAF's Body, which is authorised to render decisions on application of disciplinary sanctions (UAF Executive Committee) and to offer your opinion about the decision on Your suspension dated 20 November 2016.

On the grounds of the above mentioned, we offer You to consider this letter as official invitation to the next meeting of UAF Executive Committee, which will be held on 23 June this year at 10.00 at the premises of the National Olympic Committee at Khoryva street, 39-41".

28. On 24 May 2016, the Athlete requested the IAAF to provide her with the opinion of the Expert Panel and the documentation packages from Daegu Kyung-Pook National University Medical Centre, where the Athlete's blood samples of 26 and 31 August 2011 were initially analyzed.

29. On 7 June 2016, the IAAF denied the Appellant's request and explained that all documents relevant to the Athlete's ABPP had already been produced and forwarded to the UAF. The IAAF further noted that the UAF had confirmed to the IAAF that all the documents had been forwarded to the Athlete in the context of the disciplinary proceedings.

30. On 8 June 2016, the Appellant requested the UAF to be provided with the documents which were allegedly sent by the IAAF to the UAF, including the Expert Panel opinion.

31. On 23 June 2016, the Athlete attended the UAF ExCo meeting and expressed her view with regard to the alleged ADRV and the sanction imposed on her by the UAF ExCo at its meeting on 20 November 2015.

32. On 19 July 2016, the Athlete sent a reminder to the UAF with respect to her original request of 8 June 2016 to be provided with the documents.

33. On 2 August 2016, the Athlete sent another letter to the IAAF, requesting the production of the opinion by the Expert Panel and the production of documents relating to her provisional suspension.

34. On 4 August 2016, the IAAF replied via email that the UAF Decision dated 20 November 2015 was final and binding under IAAF Rules. The only procedure available under the IAAF Rules allowing a reconsideration of the case required that the Athlete provide Substantial Assistance under IAAF ADR 40.5(c).

35. On 10 August 2016, the Athlete sent another reminder to the UAF regarding the request for document production.

36. On 12 August 2016, the Athlete once again requested the IAAF to be provided with the opinion of the Expert Panel and the documents relating to her provisional suspension.

37. On 29 August 2016, the UAF informed the Athlete that the UAF ExCo decided to maintain its decision No.112 dated 20 November 2015 and that the latter is final and in conformity with the IAAF Rules ("UAF Review Decision").

38. On 5 September 2015, the Athlete sent an email to the UAF requesting a copy of the UAF ExCo meeting minutes dated 23 June 2016. Moreover, the Athlete observed that a response to her requests dated 8 June 2016 and 19 July 2016 was still outstanding.

III. THE PROCEEDINGS BEFORE THE CAS

39. On 11 October 2016, the Athlete filed her Statement of Appeal against the *"decision of the Ukrainian Athletic Federation dated 20 November 2015, which was further approved and confirmed by the second decision of the UAF dated 29 August 2016"* with the Court of Arbitration for Sport ("CAS") in accordance with Article R47 *et seq.* of the Code of Sports-related Arbitration (the "Code"). In her Statement of Appeal, the Appellant requested that this procedure be handled by a Sole Arbitrator on an expedited basis.

40. On 19 October 2016, the First Respondent rejected the Appellant's request for an expedited procedure but agreed to submit this appeal to a Sole Arbitrator. The Second Respondent did not comment or otherwise object to the Appellant's requests.

41. On 28 October 2016, the Appellant filed her Appeal Brief.

42. On 7 November 2016, the CAS Court Office acknowledged receipt of the Appellant's Appeal Brief dated 28 October 2016 and requested the Respondents to submit an answer within thirty (30) days.

43. On 21 November 2016, the First Respondent filed its Answer to the Appellant's Brief. In its Answer the First Respondent objected to the jurisdiction of the CAS and the admissibility of the appeal and, therefore, requested to bifurcate this procedure. The First Respondent also requested that its deadline to file an Answer on the merits be suspended pending a decision on the issue of bifurcation.

44. On 22 November 2016, the CAS Court Office acknowledged receipt of the First Respondent's letter dated 21 November 2016 and invited the Appellant and Second Respondent to state their position on the First Respondent's request to bifurcate the procedure.

45. By letter dated 24 November 2016, the Appellant objected to the bifurcation of the procedure.

46. On 9 December 2016, the CAS Court Office, on behalf of the President of the CAS Appeals Arbitration Division and in accordance with Article R50 of the Code, confirmed that the arbitrator appointed to decide the present matter was Mr Ulrich Haas, Professor, Zurich, Switzerland as Sole Arbitrator.

47. On 19 December 2016, the Sole Arbitrator chose to bifurcate this procedure such that the

issues of admissibility/jurisdiction would be decided as a threshold matter. Consequently, the CAS Court Office invited the Second Respondent to file its submission with respect to the above issues by no later than 23 December 2016. Furthermore, the CAS Court Office advised the Appellant that upon receipt of the Second Respondent's submission, the Appellant would be given the opportunity to respond to both Respondents' submissions.

48. On 12 January 2017, the Second Respondent filed its submission on admissibility/jurisdiction.

49. On 20 January 2017, the Parties stated that they do not consider a hearing necessary on the preliminary issue of jurisdiction and admissibility.

50. On 23 January 2017, the CAS Court Office informed the Parties that the Sole Arbitrator did not consider a hearing necessary on the preliminary matter of admissibility/jurisdiction.

51. On 31 January 2017, the CAS Court Office on behalf of the Sole Arbitrator wrote to the Parties as follows:

> *"To the Appellant: (1) Please complete the attached 'Redfern Schedule'[1] with respect to the Appellant's requests for document discovery from the First and the Second Respondent. The Appellant should be as detailed as possible when stating her requests. Upon receipt of such schedule, the Respondents will then be invited to respond accordingly; (2) The Appellant differentiates in her Appeal Brief between decisions by the UAF that are voidable and decisions that are null and void ab initio. The Appellant is invited to explain on which legal basis she draws this distinction in the present matter (applying to appropriate Swiss, Ukrainian or Monegasque law) and to provide supporting legal authorities.*
>
> *To the First and Second Respondent: Respondents submit that the Appellant was aware of the UAF Decision as from November 2015, i.e. long before she filed a petition for reconsideration (29 April 2016). Considering that the Appellant "waited nearly eleven months before filing her Statement of Appeal" with the CAS, she is precluded from filing an appeal and, consequently, the appeal is inadmissible. The Respondents are invited to explain to the Sole Arbitrator on which legal basis and upon which applicable law the question of preclusion and inadmissibility of the appeal shall be assessed.*
>
> *To the Second Respondent: Please provide an English translation of all documents attached to the submissions dated 12 January 2017. In particular, the Second Respondent is invited to provide an English translation of the text message sent on 18 September 2015 by Mr Medved to the Appellant's coach, Mr Osmak. The Second Respondent is also invited to explain why it contacted the Athlete's coach.*
>
> *The Parties shall file such responses no later than Monday, 6 February 2017".*

52. On 3 February 2017, the Second Respondent sent an email to the CAS Court Office explaining the genesis of the text message of Mr Medved. It reads as follows:

[1] The "Redfern Schedule" is a collaborative document, to which the Appellant, the Respondent and the Sole Arbitrator all contribute. It is used to organize requests for and decisions by the Sole Arbitrator on the production of documents in arbitration.

"As we stated before in our submission – On 18.09.2015 at 13:21 General Secretary of UAF Mr. Medved sent a text message to athlete coach Mr. Ihor Osmak. Unfortunately, content is not available – but was about urgent need for the athlete to check her email address and read the letter sent.

Mr. Medved contacted athletes coaches only because UAF office employees have taken all necessary measures to search for an athlete: were calling from office phones and tried to find athlete at training locations and facilities and athlete could not be found. Therefore he wanted to pass the message about the need to check an email through athletes coach as an option.

Best regards,

Fidel Tymchenko
Head of FLAU Legal Proceedings Commission

The coach stated that athlete is not in Kiev and he does not know where she is (Exhibit 3)".

53. On 6 February 2017, the First Respondent filed an additional submission with respect to the legal basis and applicable law on which the question of preclusion and inadmissibility of the appeal shall be assessed following the Sole Arbitrator's request dated 31 January 2017.

54. On the same day, the Appellant filed an additional submission explaining the legal basis for her differentiation between decisions by the UAF that are voidable and decisions that are null and void *ab initio* following the Sole Arbitrator's request dated 31 January 2017. Furthermore, the Appellant sent the completed "Redfern Schedule".

55. On 7 February 2017, the Second Respondent sent an email to the CAS Court Office submitting *"that UAF completely agree on the IAAF position regarding Applicable Law in particular, stated in letter (…) dated by 6th of February 2017".*

56. On 20 February 2017, the First Respondent filed the completed "Redfern Schedule" with the CAS Court Office.

57. On the same day, the Second Respondent filed its completed "Redfern Schedule".

58. On 10 March 2017, the CAS Court Office invited the Appellant to comment on the documents provided by the First Respondent as annexes to its completed "Redfern Schedule" insofar as they are pertinent to admissibility/jurisdiction.

59. On 16 March 2017, the Appellant sent a letter to the CAS Court Office commenting on the documents provided by the First Respondent.

60. On 20 March 2017, the CAS Court Office, on behalf of the parties, informed the parties that the Sole Arbitrator considered himself sufficiently well informed to render a decision on the preliminary issues without a hearing and based solely on the parties' written submissions.

61. With letter dated 22 March 2017, the Sole Arbitrator granted the Appellant a final opportunity to comment on the Respondents' position on admissibility and CAS jurisdiction.

62. With letter dated 31 March 2017, the Appellant submitted her comments.

IV. THE PARTIES' SUBMISSIONS

63. This section of the award does not contain an exhaustive list of the Parties' contentions, its aim being to provide a summary of the substance of the Parties' main arguments. In considering and deciding upon the Parties' claims in this award, the Sole Arbitrator has accounted for and carefully considered all of the submissions made and evidence adduced by the Parties, including allegations and arguments not mentioned in this section of the award or in the discussion of the claims below.

A. The Appellant

64. In her Statement of Appeal (11 October 2016) and Appeal Brief (28 October 2016), the Athlete filed the following prayers for relief:

> *"1. To CONFIRM that the present appeal is admissible and CAS has jurisdiction to entertain the present dispute.*
>
> *2. To REVIEW the present case as to the facts and to the law, in compliance with Article R57 of the Code of Sports-related Arbitration and Articles 13.1.1, 13.1.2 of WADA Code.*
>
> *3. To CONFIRM that the Athlete was completely deprived with the right to be heard within the investigation of the IAAF and disciplinary proceedings conducted by the UAF concerning the alleged anti-doping rule violation, and the UAF Decision was adopted with procedural flaws and manifest errors of law and is, thus, null and void.*
>
> *4. To CONFIRM that the UAF acted in violation of the IAAF rules and regulations and it shall be responsible for the UAF Decision being issued with significant violations of the Athlete's rights.*
>
> *5. To CONFIRM that the IAAF acted against its own rules and regulations and that the IAAF shall also be responsible for the UAF Decision being issued with significant violations of the Athlete's rights.*
>
> *6. To ISSUE a new decision, which sets aside the UAF Decision dated 20 November 2015 and the UAF Revision of the decision dated 29 August 2016, confirming that Tetiana Gamera has not committed an anti-doping rule violation, and that there are therefore no consequences to be imposed on her.*
>
> *7. To ORDER the IAAF to remove the Athlete from the list of athletes currently serving the period of ineligibility, to reintroduce all competition results to the Athlete achieved from*

26.08.2011 to 30.09.2015 at international level and to conduct all other relevant actions to restore the name and reputation of the Athlete as if no UAF Decision had been ever rendered.

8. *To ORDER the UAF to reintroduce all competition results to the Athlete achieved from 26.08.2011 to 30.09.2015 at national level and to conduct all other relevant actions to restore the name and reputation of the Athlete as if no UAF Decision had been ever rendered.*

9. *Alternatively, to ISSUE a new decision, which sets aside the UAF Decision dated 20 November 2015 and the UAF Revision of the decision dated 29 August 2016, REDUCING the period of ineligibility of the Athlete to two (2) years due to the lack of any aggravating circumstances under Rule 40.6 of the IAAF ADR.*

10. *Alternatively, to ISSUE a new decision, which sets aside the UAF Decision dated 20 November 2015 and the UAF Revision of the decision dated 29 August 2016, CONFIRMING that Athlete's samples 530519 of 26.08.2011, 530396 of 31.08.2011 and 838457 of 11.04.2014 shall not be taken into consideration, and therefore the period of disqualification of the competition results of the Athlete shall be from 01.11.2013 to 30.09.2015.*

11. *To ORDER the Respondents to compensate the Appellant moral damage suffered due to default and numerous omissions, committed by them within the consideration of the case in amount of USD 15'000 (fifteen thousand US dollars) and to hold both Respondents jointly and severally liable for the payment of the aforementioned amount.*

12. *To ORDER the Respondents to bear all costs and legal expenses relating to the present procedure".*

65. While the Sole Arbitrators has read and considered the Appellant's entire submission, the Sole Arbitrator only summarizes the Appellant's submissions as they relate to admissibility/jurisdiction, as follows:

1. The matter in dispute

According to the Appellant, *"this appeal is filed against a decision of the Ukrainian Athletic Federation dated 20 November 2015, which was further approved and confirmed by the second decision of the UAF dated 29 August 2016"*. The Appellant explicitly stated that *"within the current proceedings* … [she] *appealed both: the UAF decision (null and void) and the UAF Revision, pertinent to the same subject matter"*.

2. Jurisdiction

The IAAF ADR are contained in Chapter III of the IAAF Competition Rules 2014-2015 and are applicable to the dispute at hand. IAAF ADR 42 sets out the procedure for appealing decisions made under the IAAF ADR. IAAF ADR 42.1 provides that *"all decisions made under these Anti-Doping Rules may be appealed in accordance with the provisions set out below"*.

3. Exhaustion of Legal Remedies

a) According to the Appellant, *"[t]he UAF Decision is silent on any further actions that may be taken by the Athlete regarding the Decision. It does not contain or provide with any possibility to appeal the decision to CAS or to the IAAF. Neither the UAF Statutes, in accordance to which the UAF Decision was rendered, contain any provisions that the decision on the ADRV of an athlete rendered by the UAF body shall be appealed to CAS".*

b) The Appellant submits that the review process undertaken by the UAF ExCo is part of the internal legal remedies. In support of this, the Appellant asserts that

(i) The UAF is competent to review the UAF Decision. This follows from the UAF Statutes*, in particular "Article 10 … which provides with a possibility to review the decision taken by the UAF governing body. Moreover, Article 10.3 grants a power of review to the 'UAF governing body whose powers include consideration of the issues raised'".*

According to the Appellant the *"UAF Statutes empowers only two governing bodies with an authority to take the decisions in relation to the ADRV".* One of the bodies is *"the Council that 'decides on disciplinary measures for violations of the participants and UAF members of the IAAF Constitution, this Statute, the relevant rules and regulations of the IAAF, EA and UAF' (Article 6.2.4.12) and 'evaluates issues and takes decisions on suspension of the athletes, coaches, judges, professionals and other UAF members in competitions and events of the UAF' (Article 6.2.4.15)".* The other body is *"the Executive Committee that 'decides on the failure of the UAF members to comply with anti-doping rules and consider other enforcement proceedings' (Article 6.5.4.5)".* Consequently, the *"UAF ExCo had competence to reconsider the merits of the case as it was the body that issued the UAF Decision. Article 10.3 of the UAF Statutes provides with such competence".*

(ii) The Appellant also submits that *"in the UAF letter, the UAF accepted the reconsideration of the case as a result of the UAF ExCo meeting held on 11 May 2016. It was not a decision of the UAF Secretary or other administrative body or person. The body that may reconsider the case and that takes the decision in relation to the ADRVs had approved and confirmed its competence to review the Athlete's request".* It was, thus, the competent authority *"itself who decided to accept the review (accepted its jurisdiction, Kompetenz-kompetenz prinzip) and to get into merits of the case, not anyone else".* Consequently, the UAF Review decision is not – as alleged by the Respondents – *"nothing more than a confirmation that UAF decision was a final and binding".* Instead, it was a *"full-fledged process of revision as it is foreseen by the UAF Statutes".*

(iii) The UAF accepted the revision of the merits of the case, *"referring to the power of the Executive Committee to 'to take decisions on the disciplinary sanctions'. The Athlete has never been provided with an opportunity to discharge the right to be heard due to the IAAF's and the UAF's failure of proper notification. In order to cure this crucial procedural inconsistency the UAF allowed the Athlete to plead her case at the UAF ExCo's meeting. Otherwise, why to take a separate decision on this regard on 11 May 2016, to allow the Appellant to present her case, to invite her to the ExCo meeting and to explicitly refer to the ExCo's power 'to take decisions on the disciplinary sanctions'? Under such circumstances it was unambiguous and reasonably assumed that the Athlete's Request to reconsider the matter and to give her a right to be heard was granted. Particularly, given that no hearing was held before,*

the UAF actually had been considering the case within the procedure and respect to the Athlete's right to be heard for the first time".

(iv) According to the Appellant, the UAF had two options following the Appellant's request for reconsideration, i.e. *"to deny the request for reconsideration or to accept it. By choosing the second option, the UAF expressly confirmed its perception that the UAF Decision was not final, that the Athlete shall be granted with a possibility to be heard (she was not even being asked to provide written explanation only, but rather to come and to plead her case orally, as provided by Rule 38.7 of the IAAF ADR)".*

(v) The Appellant is further of the view that at *"the ExCo meeting on 23 June 2016, when the Athlete was given a right to present her case for the first time, the members of the UAF ExCo also confirmed by their perception and questions that that proceedings were reconsideration of the matter aimed on setting aside the UAF Decision; otherwise the issue would not be 'quite complex' and there would be no issue of reconsideration if the UAF from the beginning was assured that it has no competence to reconsider the matter".* This follows – according to the Appellant – in particular from statements of the UAF ExCo members Mr Velichko and Mr Bazhenkov.

(vi) It follows from all of the above – according to the Appellant – that *the "UAF ExCo has preliminary considered the Request and, as a result, accepted its jurisdiction allowing the Athlete to express her position during the next meeting. Therefore, within the ExCo meeting of 23 June 2016, when the Appellant pleaded her case for the first time being represented by a lawyer and an expert-haematologist the UAF in fact reconsidered the UAF Decision in full, getting into the merits of the case".* Furthermore, the Appellant submits that the *"UAF accepted that the Athlete has not exhausted all available remedies at the national level opening a room for reconsideration. Should the UAF be of the opinion that the Athlete has used all local remedies, including the ones provided by the UAF Statutes, it had definitely deny the Request for reconsideration. By agreeing to hear the case by the body responsible 'to take decisions on the disciplinary sanctions' the UAF confirmed its readiness, if the case might be, to take another decision".*

(vii) According to the Appellant the UAF is prevented from requalifying its decision to allow for a complete review of the matter. *"Should the UAF sustain different position in relation to its correspondence dated 23 May 2016 and its meaning, it will act in violation of the principle venire contra factum proprium. According to this well-known and recognised principle, no one may set himself in contradiction to his own previous conduct. Recognised by Swiss law, the principle provides that 'where the conduct of one party has induced legitimate expectations in another patty, the first party is estopped from changing its course of action to the detriment of the second party'. Any allegation of the UAF objecting to the above considerations would be contrary to the wording of the UAF letter of 23 May 2016 and to its behaviour".*

In case this internal review process would not be in line with the IAAF ADR *"this cannot be taken against the Athlete".* The *"post-decision review is explicitly foreseen by the UAF Statutes".* These rules are not superseded by the IAAF ADR. This is all the more true, considering that *"the IAAF has delegated its decision making to its members".*

4. Timeliness of the Appeal

a) According to the Appellant, *"in view of the fact that the UAF Revision confirming the UAF Decision was notified to the Appellant by the UAF on 29 August 2016, and that the UAF has not provided the Athlete with the reasoning of its decision although requested, the Statement of Appeal was submitted duly within the time limit (45 days) provided for under Rule 42.13 of the IAAF ADR and pursuant to Article R49 of the Code of Sports-related Arbitration, starting from the day of the receipt of the UAF Revision".*

b) The Appellant refers also to CAS jurisprudence in this respect, in particular to the decision in CAS 2002/A/362, where the Panel stated as follows: *"When a national federation issues several decisions related to the same case, any activity or decision which goes beyond stating that the previous decision is final and therefore untouchable constitutes a new decision. The last decision considered as final by the national federation starts a new time period for appeal under the IAAF Rules".*

c) In addition, the Appellant submits that the time limit for appeal is not applicable in this case, since it *"is well established under Swiss law that decisions which are null and void are challengeable at any point in time irrespective of the one-month time limit of Article 75 of the Swiss Civil Code. The same principle applies also in CAS appeals proceedings. In any event, Article R49 of the CAS Code should not prevent a party from bringing a claim requesting a declaration that a given decision is null and void if the ground for nullity is so egregious that the decision itself should be considered as constituting a violation of public policy. … Nullity of the decision implies that such decision being as never existed before. Absence of the UAF Decision due to its nullity leads to the fact that the UAF has issued only the UAF Revision in relation to the alleged ADRV by the Athlete, which is appealed hereby".*

d) In respect to her email dated 12 December 2015, the Appellant submits that it was written after the *"UAF Decision became publicly known"*. In this email she confirmed that her coach had been contacted by phone by the UAF and that the UAF has advised the coach that *"there are questions to* … [her] *regarding the alleged ADRV"*. It is only after the UAF decision was made public that she *„had understanding about the procedure that took place without her participation"*. In the view of the Appellant it does not follow from the email that she had waived her right to defend herself. The email – according to the Appellant – *"cannot influence on the validity and nullity of the UAF Decision".*

e) Finally, the Appellant submits that it *"the UAF was not so purposely slow in entertaining Athlete's request for revision, the appeal to CAS would be submitted earlier in June or July 2016"*. Thus, the First Respondent must take responsibility for the timeline of events.

5. Applicable Law

According to the Appellant the applicable regulations shall be the IAAF ADR, contained in IAAF Competition rules 2014-2015. In the Appellant's view this is also correct, given that *"in all CAS appeals involving the IAAF, CAS and the CAS Panel shall be bound by the IAAF Constitution, Rules and Regulations (including the Anti-Doping Regulations)"* (IAAF ADR 42.22).

The IAAF has also adopted the IAAF Anti-Doping Regulations and IAAF Blood Testing Protocol, which are equally applicable to the present case. Furthermore, the Appellant submits

that the International Standards and rules regulating anti-doping testing and enforcement as well as the WADC are applicable. Finally, the Appellant submits that Swiss law and Monegasque law shall apply subsidiarily. For a limited scope of issues Ukrainian law, as a law of the Athlete's and UAF's domicile, may also apply.

6. Standing to be sued

The Appellant states that it correctly brought her claim also against the IAAF. The Appellant notes in this respect that:

a) According *"to Swiss Law, the question of standing is substantive and not procedural"*.

b) The matter was *"instigated and initially investigated by the IAAF. Thus the IAAF has taken an active role in the rendering of the UAF Decision"*.

c) Furthermore, *"the IAAF has failed to provide the Athlete with the requested documents, which are important for the assessment of the case, notably the Expert Panel opinion, on the basis of which the IAAF initiated investigation, the document concerning imposition of the provisional suspension of the Athlete from 30 September 2015 and the Expert Panel opinion #2 (review)"*.

d) In addition, *"by shifting an obligation to decide on ADRVs to the national federations, the IAAF assumes supervisory powers in relation to the ADRV and to their prosecution at the national level. Should the matter involve the IAAF international-level athlete, any decision taken by the member federation has a direct impact on his/her international activity. The Athlete is at the IAAF list of athletes currently serving the period of ineligibility published on the IAAF website. In any event, the IAAF shall, at minimum, bear the responsibility of control of its members when they (in casu the UAF) investigate the ADRV at the national level, communicate with an athlete and decide on disciplinary matters initiated by the IAAF"*.

7. Procedural Failures of the IAAF

The Appellant submits that the IAAF has failed to provide her with a fair and just proceeding. The IAAF did not comply with its own regulations, in particular the IAAF breached:

a) IAAF ADR 8.31. According thereto the IAAF is *"responsible for (a) advising the Athlete and WADA that the IAAF is considering the assertion of an anti-doping rule violation against the Athlete, (b) providing the Athlete and WADA with the ABP Documentation Package and (c) inviting the Athlete to provide his own explanation, in a timely manner, of the data provided to the IAAF"*.

b) Art. 9.7 of the IAAF Blood Testing Protocol imposes a similar obligation on the IAAF. In the case at hand the IAAF sent the notice only to the UAF. Neither the IAAF Blood Testing Protocol nor the IAAF ADR provide that the IAAF may communicate the above-mentioned information to an athlete trough a national federation. Instead, it is for the IAAF to communicate with the athletes directly. Even if such duty was delegated to the national federation in virtue of any other provision or act, the IAAF remains under the obligation to ensure that the national federation duly disposed of said obligation. The UAF has failed to

notify the Athlete in an appropriate manner. The UAF sent the IAAF Notice to an old obsolete email address of the Athlete. The IAAF should have requested the UAF to confirm that the IAAF Notice had been received by the Athlete, or that the Athlete explicitly refused to provide explanations.

c) The IAAF is also responsible for the blatant violations of the Appellant's right to be heard committed by the UAF when issuing its UAF Decision. The IAAF has failed to provide the Athlete with the opinion of the Expert Panel and with other supporting documentation. IAAF ADR 38.2 requires that a provisional suspension shall be effective from the date of notification to the Athlete. The Athlete has never received any information from the IAAF or the UAF about her provisional suspension. IAAF ADR 38.8 requires that *"[w]hen an Athlete is notified that his explanation has been rejected and that he is to be provisionally suspended in accordance with Rule 38.2 above, he shall also be told of his right to request a hearing"*. The Athlete has never received such notification by the IAAF or the UAF.

d) The IAAF acted in violation of the general principle of *good faith* when it rejected the Athlete's request to provide her with the opinion of the Expert Panel.

8. Procedural Failures of the UAF

The UAF Decision was made by an unduly constituted body (UAF ExCo) and in breach of numerous procedural provisions, in particular the Appellant submits that:

a) According to Art. 6.5.1 of the UAF Statutes (2014) the UAF ExCo consists of 6 persons only. However, the minutes of the UAF ExCo meeting show that the UAF Decision was made by 12 persons.

b) The fact that the UAF Review Decision confirms the validity of the UAF Decision *per se* implies that the UAF Review Decision is wrong and must be set aside.

c) The UAF has *"completely disregarded"* the Appellant's right to be heard and thereby denied *"her any justice. She was not aware of the pending investigations initiated by the IAAF in September 2015, she was not provided with a possibility to comment on the IAAF's findings or present any written explanation to the alleged ADRV, she had no chance to request a hearing, she was not informed about or invited to the UAF hearings held in November 2015, she was totally deprived to defend herself in any possible way. The Athlete was not even duly notified about the imposed Sanction afterwards. The UAF rendered a decision without the involvement or awareness of the Athlete"*.

d) Pursuant to IAAF ADR 38, *"an athlete has a right to request a hearing. By its Request for reconsideration the Athlete expressed her will to employ this right. Given that no actual hearings or proceedings involving the Athlete have ever been held before, the UAF accepted the Athlete's Request and invited her to the next UAF Executive Committee meeting. In its reply the UAF agreed to satisfy the Request, even though the decision had been taken. The UAF accepted the review process granting the Appellant a possibility to be heard before the UAF's body responsible to take decisions on the disciplinary sanctions (UAF Executive Committee) and to express* [her] *position concerning the disqualification of 20.11.2015"*.

e) The UAF Decision was taken based on no evidence of an ADRV or factual support. The UAF Decision was made without bringing charges to the Athlete or providing any explanations of the violations allegedly committed and sanctions sought to be applied. The UAF has failed to investigate the matter at all.

9. General Considerations

While making their decisions, sport entities and sport tribunals are – according to te Appellant – bound by the fundamental principles of procedural fairness and due process in accordance with the notion of procedural public policy. In this respect the Appellant refers to the definition of public policy in the jurisprudence of the Swiss Federal Tribunal.

B. The First Respondent

66. In its Answer, dated 21 November 2016, the First Respondent requested the CAS:

> *"(…) that these matters* [lack of admissibility/jurisdiction of the appeal] *be decided by CAS on a preliminary basis.*
>
> *(…) that its deadline to file an Answer on the merits (if ultimately necessary) be suspended pending (i) a decision by the CAS/Sole Arbitrator with respect to the bifurcation request and (ii) if granted, a decision by the Sole Arbitrator with respect to those preliminary matters".*

67. IAAF's submissions concerning admissibility/jurisdiction are summarized as follows:

1. Timeliness of the Appeal

a) The Athlete lodged her appeal with the CAS some eleven months after the UAF Decision. The Appellant argues that the UAF Decision is null and void as a matter of Swiss law and that she, therefore, can challenge the UAF Decision at any time regardless of any deadlines to file an appeal. The First Respondent submits that this reasoning of the Athlete is flawed. Even if the Athlete were able to demonstrate that the UAF Decision was null and void (as opposed to merely voidable) as a matter of Swiss law, *quod non*, it is clear from CAS case law that it would nonetheless have to be appealed within the deadlines applicable for appeals (see CAS 2011/A/2360 & CAS 2011/A/2392).

b) Since the UAF Decision has not been appealed, it is a final and binding decision. The UAF Decision was rendered nearly eleven months before the Statement of Appeal was filed with the CAS on 11 October 2016. The Athlete admitted that she was aware of the UAF Decision in November 2015. Still on 12 December 2015 she had stated that she did not wish to appeal the UAF Decision. Consequently, according to IAAF the appeal is inadmissible.

c) The time limit for lodging an appeal against a decision commences on the date on which the Appellant has knowledge of the decision, regardless of any formal notification

(Commentaire romand, Code civil, vol. I, 2010, N. 26, p. 540, ad art. 75 CC and CAS 2013/A/3148). The Appellant herself claimed that she was aware of the UAF Decision in November 2015. However, she failed to appeal to CAS for a period of some eleven months. The IAAF doest not accept the Appellant's submission that void (as opposed to voidable) decisions may be challenged at any time. In any event, it is clear that decisions vitiated by procedural flaws are only voidable (as opposed to void) as a matter of Swiss law and must be appealed within the applicable appeal deadline. Even where there is a violation of substantive law, it must be particularly serious to result in a decision being void *ab initio* (Swiss Federal Tribunal 4C_57/2006 at 3.2 of 20 April 2006; FOEX B., in Commentaire romand, Code civil, vol. I, 2010, N. 36 *et seq.*, p. 543, ad art. 75 CC; CAS 2013/A/3148). The Athlete failed to meet the temporal condition stipulated in the arbitration agreement and therefore the CAS lacks jurisdiction as a matter of Swiss law. To allow the Athlete to appeal against the UAF Decision some eleven months after she became aware of it would artificially extend the applicable appeal deadline and would go against legal certainty (CAS 2013/A/3148, no. 135).

2. The nature of the UAF Review Decisions

a) The Athlete has significantly mischaracterized the nature and scope of the procedure leading to the so-called UAF Review Decision. The UAF Review Decision was, on its face, nothing more than a confirmation that the UAF Decision was final and binding.

b) The UAF Review Decision is not appealable to the CAS pursuant to the applicable IAAF Competition Rules. The relevant appeal provision for cases involving International-Level Athletes is set out at IAAF ADR 42.3. This provision reads as follows: *"In cases arising from an International Competition or involving International-Level Athletes or their Athlete Support Personnel, the first instance decision of the relevant body of the Member shall not be subject to further review at national level and shall be appealed exclusively to CAS in accordance with the provisions set out below".*

c) Even assuming that the UAF Council could review decisions of the UAF Executive Committee under the UAF Statutes, it would be in clear contravention of the IAAF Competition Rules and any resulting decision would not be a first instance decision falling within the scope of the arbitration clause at IAAF ADR 42.3.

3. Jurisdiction and Admissibility

The arbitration clause contained in IAAF ADR 42.3 does not cover an appeal against a second-instance national decision. Moreover, the IAAF submits that the UAF Review Decision does not constitute a decision at all for the purposes of Art. R47 of the Code; it did not affect the legal situation of the Appellant (CAS 2013/A/3148, no. 116). The UAF Review Decision cannot constitute a new deicision on the merits; it amounts merely to a confirmation that the matter would and could not be reopened by the UAF. Leaving aside the question of CAS jurisdiction, the scope of any appeal would be similarly limited.

4. Applicable Law

a) The appeal against the UAF Decision was filed well outside of any deadline. Even if the UAF Review Decision could somehow amount to a new decision on the merits under the UAF Statutes, it is not one that is provided for under the IAAF Competition Rules or that may be referred to CAS pursuant to such rules. The IAAF considers that both of the arguments fall within the scope of Art. 178(2) of the Swiss Private International Law Act (SPILA), which concerns the material validity and scope of the arbitration agreement.

b) The issue of the timeliness of the appeal against the UAF Decision is a question of jurisdiction *ratione temporis*.

c) The issue of whether the UAF Review Decision is covered by the arbitration agreement in the IAAF Competition Rules concerns the scope of the arbitration agreement *ratione materiae*.

d) According to Art. 178(2) SPILA the Appellant may establish the material validity of the arbitration agreement based on either the law chosen by the parties, the law governing the subject matter of the dispute or Swiss law. In this instance, the law chosen by the Parties is Monegasque law. Indeed, IAAF ADR 42.23 provides explicitly that *"in all CAS appeals involving the IAAF, the governing law shall be Monegasque law"*. Art. R58 of the Code provides that the "*Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties"*. Therefore, it is also Monegasque law (as the chosen law), which is the applicable law (albeit subsidiarily to the IAAF Competition Rules). Consequently, the Appellant may establish the material validity of the arbitration agreement pursuant to either Monegasque law or Swiss law. The Appellant has made no submissions based on Monegasque law but has made submissions (within the context of jurisdiction) based on Swiss law.

C. The Second Respondent

68. In its submission dated 12 January 2017, the Second Respondent agreed with the position expressed by the IAAF according to which the CAS should not entertain this appeal. Furthermore, the Second Respondent stated that it concurs with the submissions of the IAAF set out in its letter of 21 November 2016.

69. The Second Respondent – in essence – further submits in support of its request as follows:

a) On 16 September 2015, the UAF sent the letter informing the Athlete of the abnormal values in her ABPP. This notice was sent to the email address that the UAF had in its database for the Athlete. The IAAF had the same address in its database until 2016. The Athlete had sent emails to the UAF from this address in 2014.

b) The UAF office employees have taken all necessary measures to search for the Athlete. They were calling from office phones and tried to find the Athlete at training locations and facilities. They were also looking for the Athlete's coach. The Athlete could not be found.

c) The UAF did not receive any communication from the Athlete or her coach after the notification of the UAF Decision, which was published on the IAAF website and in the press.

d) On 6 April 2016, the UAF decided to amend the UAF Decision so as to refer to Tetiana Gamera for the sake of clarity.

e) Whereas the UAF ExCo agreed to hear the Athlete as to why she felt her case should be reconsidered, it never agreed to reopen the case or to render a new decision on the merits. Ultimately, the UAF ExCo confirmed by letter of 29 August 2016 that the decision of 20 November 2016 was final and binding and could not be reopened.

f) The UAF sent the documents to the Athlete by email. The UAF also explained the situation to her coach on the phone. It is clear from the email correspondence between the Athlete and the organizers of the Osaka marathon that the Athlete was indeed aware of the ABPP case against her before any decision was taken.

g) The Athlete admits that she was aware of the UAF Decision in November 2015. However, despite being aware of the decision and having discovered the documentation, she did not contact the UAF by email, phone or otherwise.

h) In the Second Respondent's additional submission, filed on 7 February 2017 upon the Sole Arbitrator's request, the UAF stated that it *"completely agree on the IAAF position regarding Applicable Law in particular, stated in letter (…) dated by 6th of February 2017"*.

V. JURISDICTION

70. Art. R47 of the Code reads as follows:

> *"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body"*.

71. IAAF ADR 42 sets out the procedure for appealing decisions made under the ADR. The decisions that may be appealed include *"a decision that an anti-doping rule violation was committed"* and *"a decision imposing Consequences for an anti-doping rule violation"* (IAAF ADR 42.2).

1. The objection to jurisdiction by the Respondents

72. The Respondents contest the jurisdiction of the CAS (only) with respect to the appeal against the UAF Review Decision. According to the Respondents, the arbitration clause contained in IAAF ADR 42.3 does not cover an appeal against a second-instance national decision. The Respondents, thus, submit that the appeal against the UAF Review Decision be rejected for lack of jurisdiction.

2. The view held by the Sole Arbitrator

73. In the view of the Sole Arbitrator the term "decision" within the meaning of IAAF ADR 42.2 must be construed in a broad sense because the very purpose of the arbitration clause contained therein is to prevent recourse to state courts in all doping-related matters. Thus, all declaration of will of a sports organisation imposing or confirming "Consequences" (within the meaning of the IAAF ADR) onto an athlete are covered by the arbitration clause. Therefore, CAS is competent to decide on the appeal against both decisions, i.e. the UAF Decision and the UAF Review Decision. Furthermore, IAAF ADR 42.5 provides that in a case involving an International-Level Athlete, the Athlete who is subject of the decision within the above meaning has the right to appeal to CAS (IAAF ADR 42.5(a)).

74. The view held here is not contradicted by IAAF ADR 42.3. The provision states that in cases involving International-Level Athletes, the first-instance decision of the relevant body of the Member shall not be subject to further review or appeal at national level and shall be appealed only to CAS. The provision prohibits ordinary stages of appeal on a national level if an "International-Level" Athlete is involved. However, it follows from the context of this provision that the terms "review" or "appeal" only refer to time-limited judicial remedies that award full access to justice. An (international-level) athlete shall, thus, not have an (enforceable) claim to bring his or her case before another national instance (with full cognition). The provision, however, is not designed to prevent a sports authority from revisiting – on its initiative and in its discretion – a decision already taken by it. The decision taken by a sports organisation is an administrative matter that can be revisited or amended by it, in principle, at any time. Consequently, an application by an athlete to the sports organisation inviting the latter to make use of this competence, i.e. to revisit its decision is not precluded by IAAF ADR 42.3.

75. It must be noted, however, that such applications differ substantially from the type of "review" or "appeal" prohibited by IAAF ADR 42.3. Applications for reconsiderations are neither time-limited nor do they award full access to justice. Instead such applications are extrajudicial remedies that can be filed at any time and that do not follow a particular procedure. In addition and contrary to ordinary appeals, the sports federation is free to deal with such (extra-judicial) applications at its complete discretion. The applicant has neither a claim that the sports federation accepts his or her application for reconsideration nor that the sports organisation decides the application in a specific manner. It is, thus, in the complete autonomy of the sports federation (subject to the rights of third parties) to deal with the application as it deems fit.

76. In the case at hand the request filed by the Appellant on 29 April 2016 was not an appeal within the meaning of IAAF ADR 42.3, but an application for reconsideration. This clearly follows from the Appellant's submission when she states that she *"wanted to avoid further appeal and to resolve a dispute amicably at the national level"*. The view held here is further corroborated by the language of the letter filed by the Appellant on 29 April 2016, in which she qualifies her application as *"a request to re-consider"*. Furthermore, the provision on which the Appellant bases her application does not deal with formal "appeals". Instead, the provision referred to in her letter is Article 6.5.2 of the UAF Statutes, which states that the UAF ExCo is accountable to the UAF Council. By no means does this provision give the Appellant a subjective right vis-

à-vis the UAF Council to intervene and squash the decision of the UAF ExCo. To sum up, therefore, the Sole Arbitrator finds that the Appellant deliberately did not seek legal remedies provided for by the applicable rules and regulations, but filed an informal, i.e. extra-judicial remedy thereby asking the UAF only to reconsider its decision previously taken.

77. Not only was the request filed by the Appellant not intended to be an appeal. In addition, the UAF has understood and treated the Appellant's request as a petition for reconsideration and not as a formal appeal. This follows first and foremost from the letter sent by the UAF ExCo to the Appellant on 23 May 2016. The letter clearly states that *"[c]onsidering the fact that proceedings in your case are ended and the decision is made, Ukrainian athletic federation is ready to accept your request"*. Thus, the UAF considered the act of reconsideration not as being part of the decision-making process or to be a further stage within a uniform procedure covering several instances. Instead, the UAF qualified the proceedings in the case of the Appellant as *"ended and the decision made"*. Another clear hint that the UAF did not interpret the Appellant's application as an ordinary appeal follows from the fact that the same organ of the UAF that issued the UAF Decision undertook the reconsideration. One of the typical features of an appeal, however, is its devolutive effect, i.e. that another instance that the one taking the original decision assesses the matter.

78. The view held here is not contradicted by the statements made by some of the UAF ExCo members in the course of the ExCo meeting on 11 May 2016 and quoted by the Appellant. Mr Velichko – e.g. – allegedly stated that *"it is always necessary to help an athlete"*. Such a comment is by no means proof that the UAF ExCo acted in the ambit of a well-defined appeal procedure. This is all the more true in light of the fact that Mr Velichko refers to the UAF Decision as the *"final one"*. If, however, the proceedings before the UAF ExCo were true appeals proceedings, the UAF Decision necessarily cannot be the final decision in this procedure. The comments of Mr Bazhenkov quoted by the Appellant are equally not helpful to back the Appellant's case. Mr Bazhenkov explicitly speaks of "reconsideration" and not of an appeal procedure regulated in the rules and regulations of the UAF and granting a right of access to justice.

79. To conclude, therefore, the Sole Arbitrator finds that he has jurisdiction to decide the dispute in relation to both, the UAF Decision and the UAF Review Decision and such competence is not precluded by IAAF Rule 42.3.

VI. ADMISSIBILITY

80. The appeal arbitration procedure according to Art. R47 *et seq.* of the Code is only available for disputes whose subject matter concerns an appeal against a "decision". This follows from Art. R47 of the Code which provides as follows:

> *"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body".*

81. There is abundant CAS jurisprudence in relation to what constitutes a *decision* within the meaning of Art. R47 of the Code (CAS 2004/A/659; CAS 2004/A/748; CAS 2005/A/899; CAS 2008/A/1633; CAS 2013/A/3148; CAS 2014/A/3744 & 3766). According thereto the characteristic features of a *decision* may be described as follows:

– the term "decision" must be construed in a large sense;

– the form of the communication in question is irrelevant for its qualification;

– in principle, for a communication to be qualified as a decision, this communication must contain a ruling, whereby the body issuing the decision intends to affect the legal situation of the addressee of the decision or other parties;

– a decision is a unilateral act, sent to one or more determined recipients that is intended to produce or produces legal effects.

82. In view of the above criteria the Sole Arbitrator finds that not only the UAF Decision, but also the UAF Review Decision qualifies as a *decision* within the above meaning, since the latter disposed of an application made by the Appellant to the UAF. This, however, suffices for there to be a "decision".

83. However, the Sole Arbitrator finds that the Appellant has no legal interest to challenge the UAF Review Decision. The application for reconsideration is – as previously explained – an extrajudicial remedy that can be lodged without adhering to a particular form and without observing any particular time limits. Whether the addressee of this application reconsiders its decision or not is in its sole autonomy. There are no duties imposed on a sports organisation in the context of reconsideration, since the application for reconsideration is – because extrajudicial – outside of any legal framework. Just like an athlete has no claim for pardon after a sanction issued against him has become final and binding, an athlete has no claim or right that his or her case be reconsidered. Therefore, an appeal operating under legal standards and the rule of law is – from the outset – the wrong instrument to challenge a decision taken outside of any legal context. Decisions on application for reconsideration are, thus, very similar to field of play decisions not reviewable because they cannot be measured with the yardstick of the law. Appeals lodged against such decisions are – just like appeals against field of play decisions (CAS 2006/A/1176, nos. 7 *et seq.*; see also CAS 2009/A/1860, nos. 61 *seq.*; CAS 2011/A/2525, nos. 7.1 *et seq.*) – inadmissible. Consequently, the appeal lodged by the Appellant against the UAF Review Decision must be dismissed as inadmissible. If one were to decide otherwise, it would be in the hands of the addressee of a sporting measure to reopen a case (even tough final and binding) at its discretion by filing an application for reconsideration and – depending on the outcome – appealing the decision.

VII. TIMELINESS OF THE APPEAL AGAINST THE UAF DECISION

84. Art. R49 of the Code sets a "time limit for appeal" against a decision of a sports organisation.

According thereto, in principle, *"the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against"*. However, the time limit of twenty-one days only applies subsidiarily, i.e. in absence of a time limit set in the statutes or regulation of the federation, association or sports-related body concerned, or in a previous agreement.

85. Pursuant to IAAF ADR 42.13, the Appellant shall have forty-five (45) days in which to file her Statement of Appeal with CAS starting from the date of communication of the written reasons of the decision to be appealed or from the last day on which the decision could have been appealed to the national level appeal body in accordance with IAAF ADR 42.8(b).

86. The UAF Decision was issued on 20 November 2015. The Athlete filed her Statement of Appeal to the CAS on 11 October 2016. Whether or not this appeal was lodged in time depends on when the Appellant received the UAF Decision.

87. On 23 November 2015, the UAF Decision was communicated to the following email address "gamerat@ukr.net". The communication reads as follows:

> *"Herewith we* [the UAF] *inform you that on 20 November 2015 during the UAF Executive Committee meeting your case was considered and the following decisions were made:*
>
> 1. *To suspend you for four years in accordance with IAAF Rules 32.2(b) and 40.6 and to ban your participation in sport competitions, starting from 30.09.2015 to 29.09.2019.*
> 2. *To disqualify all competitions' results, achieved in period from 26.08.2011 to 30.09.2015.*
> 3. *You are barred from any participation in athletic competitions and other athletic events during your period of ineligibility.*
>
> *Return to competitive activity by an athlete is possible only under condition of fulfillment of the IAAF Rule 40.14".*

1. Was the Athlete in "receipt" of the UAF Decision?

88. The Athlete submits that she was not in "receipt" of the UAF Decision within the meaning of Art. R49 of the Code, because the latter should have been sent to a different email address. She submits that she changed her email address in ADAMS from gamerat@ukr.net to gamera.tetiana@gmail.com in 2013. Furthermore, she states that she no longer used or checked her "old" mailbox. She concludes from the above that, therefore, the UAF Decision was not properly communicated to her and that, therefore, the time limit to file an appeal has not expired when she lodged her appeal to CAS.

89. Receipt of the decision for the purposes of Art. R49 of the Code means that the decision must have come into the sphere of control of the party concerned (or of his/her representative or agent authorised to take receipt). The Sole Arbitrator also takes note of IAAF ADR 30.7 that provides that *"Notice under these Anti-Doping Rules to an Athlete or other Person who is under the jurisdiction of a Member may be accomplished by delivery of the notice to the Member concerned. The Member shall be responsible for making immediate contact with the Athlete or other Person to whom the notice is applicable"*. Furthermore, the Sole Arbitrator is mindful of the CAS jurisprudence whereby

"receipt" does not imply that the party concerned actually took note of the content of the decision concerned (CAS 2006/A/1153, no. 40; see also CAS 2004/A/574, no. 60; MAVROMATI/REEB, CAS Code Commentary, Art. 49 no. 95). Instead it suffices that the party concerned had a (reasonable) possibility of taking note of the decision (Swiss Federal Tribunal ATF 118 II 42 at 3b; see also CAS 2004/A/574, no. 60).

90. The Sole Arbitrator notes that even though the Appellant changed her email contacts in ADAMS she kept the "old" email address. In the Athlete's letter to the UAF dated 29 April 2016 (requesting that the UAF Decision be reviewed) she admits that she did not deactivate or shut down the "old" email address after having registered a new email address and having changed her email contacts in ADAMS. Furthermore, the Athlete – in that same letter – acknowledges that she retrieved the UAF's email dated 16 September 2015 (and the documents attached to it) as well as the UAF Decision "in November 2015" when checking her "old" mailbox. The Athlete in her letter wrote as follows:

> *"About my suspension … I got to know from the press at the end of November 2015 … after what I started looking for any notice or documents … wich should have benn sent to me … At the post office … there were no letters addressed to me. After this I considered to check my old mailbox (gamera@ukr.net … which … unfortunately, I did not close down. … in November 2015 in the old mailbox gamera@ukr,net … I found notice from UAF about suspicion in violation of anti-doping rules and decision on suspension from competition …".*

91. Thus, undoubtedly, at the very latest the Athlete was in receipt of the UAF Decision within the meaning of Art. R49 of the Code when she retrieved the documents from her "old" email account at the end of November 2015. Consequently, when the Athlete lodged her Statement of Appeal in October 2016, the 45 day-deadline to file an appeal with the CAS had long elapsed.

2. The Term "Decision" ad the Principle of Estoppel

92. The Sole Arbitrator has contemplated whether an exception from the above finding is warranted in view of the fact that the term "decision" for the purposes of Art. R49 of the Code is – basically – understood to mean the complete decision. The complete decision particularly includes the reasons for the decision. In the case at hand it appears doubtful whether the communication sent to the Appellant on 23 November 2015 (and of which she was in receipt in late November) was sufficiently reasoned. It only contained the ruling and not the grounds for the suspension. However, when looking at the IAAF Notice (of which the Athlete was equally in receipt) it becomes clear to a reasonable person what the charges were on which the UAF based its decision. Be it as it is, the Sole Arbitrator finds that even if he were to assume that the Appellant did not receive a "fully reasoned" decision within the meaning of IAAF ADR 42.13, she would be estopped from claiming that she did not receive a "full" decision.

93. In particular circumstances a party may be estopped from availing itself of the fact that a deadline did not start to run. This is particularly so in view of the principle of good faith.

Whether this is the case depends on the circumstances of the individual case. A party is estopped from lodging an appeal where the other stakeholders involved could legitimately rely on the (federation's) measure in question to be final and binding. Thus, for example, if an appellant has taken note of a decision (in some other way) the latter is under a duty to make enquiries within certain limits as far as is reasonable and within his realms of possibility (in this sense for example CAS 2007/A/1413, nos. 54 *et seq.*). If the party fails to do so, he or she would act in bad faith when arguing that the time limit had not yet begun to run. However, the requirement that the "party entitled to appeal" make enquiries may not be overstretched (in this regard see also CAS 2008/A/1564, no. 63).

94. The Sole Arbitrator finds that in the case at hand the Appellant is estopped from alleging that she never received the "full" decision. The sanction was notified to her on 23 November 2015. From this point in time she had a possibility to obtain knowledge of the sanction issued against her because she had access to the email account. According to her own submissions the Athlete obtained active knowledge of the sanction through the media (Appeal Brief marg. no. 72). She then obtained knowledge of the relevant legal documents at the end of November 2015, when she retrieved them from her "old" email account. On 12 December 2015, she sent an email to the Osaka International Women's Marathon Director. The email reads – *inter alia* – as follows:

> *"After the call from the Federation my coach and I tried to find medical specialists to confirm our innocence. This took a lot of time, and meanwhile Federation issued a guilty verdict without my participation. (…) However I do not have any means to go into litigations neither with WADA nor with the Federation. My coach and I decided that in such case we are only left to wait until this unfair disqualification term is over and to prove my innocence by the results".*

95. It is clear from the above that by this time the Appellant was aware not only of the sanction, but also of the factual basis on which the sanction was based because otherwise she could not have consulted or searched for a "medical specialist". Despite the above, the Athlete did not contact the IAAF or the UAF on a single occasion over the course of the next five months. On 18 February 2016, the Appellant filed a claim against the UAF with the Darnitsa (Darnytsky) District Court of Kyiv seeking the annulment of the UAF Decision. If, however, she deemed herself sufficiently informed to file an appeal before a state court, the same must be true for an appeal prescribed by the relevant rules, i.e. an appeal to the CAS. On 29 April 2016, the Athlete received the Laboratory Documentation Packages for five blood samples, but failed to file an appeal. Instead – still on 29 April 2016 – the Athlete made an application to the UAF requesting that the UAF Decision be reviewed pursuant to Art. 6.5.2 of the UAF Statutes. Again, the Athlete deemed herself sufficiently informed to file an extrajudicial application for reconsideration. In view of all of the above, in particular considering all alternative routes in which the Appellant engaged to challenge the UAF Decision, the Sole Arbitrator finds that the Athlete violates the principle of good faith in arguing that the time limit to appeal the UAF Decision has not yet begun to run because she was not in possession of a "full" decision.

3. No extension of the time limit

96. In principle, the time limit to file an appeal within the meaning of Art. R49 of the Code cannot be extended. In the case at hand there are no special considerations to deviate from this principle. In particular, the Sole Arbitrator finds that filing an appeal before the wrong forum (i.e. before state courts) does not affect the time limit to file an appeal before CAS, since litispendence of the matter before state courts is, in principle, irrelevant with respect to the arbitral procedure (Art. 186 Ibis SPILA). This is all the more true considering that the Appellant is an "International-Level" athlete that has competed in her sport for quite some time. Furthermore, she did not submit that she erred in respect of the validity of the arbitration agreement or that she was led to believe, that the state courts were the correct forum to lodge an appeal against the UAF Decision (see for this good faith aspect also MAVROMATI/REEB, CAS Code Commentary, Art. R49 no. 108). The mere fact that the UAF Decision (or the UAF Statutes) did not provide details on the remedies available to the CAS is insufficient to assume that the Appellant was induced to file the wrong remedies in the wrong forum.

97. The Sole Arbitrator also finds that the Athlete's filing of an application for reconsideration does not affect the time limit for appeal against the UAF Decision (MAVROMATI/REEB, CAS Code Commentary, Art. R49 no. 109). A federation's refusal to reconsider cannot affect either's legal rights or 'restart the limitation clock' (CAS 2010/A/2315, no. 7.8; see also HAAS, *The 'Time Limit for Appeal' in Arbitration Proceedings before the Court of Arbitration for Sport (CAS),* SchiedsVZ 1/2011, p. 10; this is also the case for Swiss law, RIEMER, *Anfechtungs- und Nichtigkeitsklagen im schweizerischen Gesellschaftsrecht*, 1998, no. 196; BK-ZGB/RIEMER, Art. 75 no. 74). If one were to decide otherwise it would be easy for the Appellant to simply (continuously) extend the "time limit for appeal" as he or she wished by filing requests for reconsiderations and thereby undermining the purpose of the time limit for appeal, i.e. to establish legal certainty.

4. Scope of Applicability of the time limit

98. The Appellant argues in her Appeal Brief that the UAF Decision is tainted with procedural flaws and manifest errors of law and is, thus, not only voidable but null and void *ab initio*. Consequently, according to the Appellant the time limit referred to in Art. R49 of the Code (or its equivalent in the IAAF ADR) does not apply.

99. Whether a resolution or decision of a sports body is voidable or null and void is a question of the merits. The law applicable to it must be determined according to Art. R58 of the Code. In his procedural order dated 31 January 2017, the Sole Arbitrator addressed the Appellant as follows: *"The Appellant differentiates in her Appeal Brief between decisions by the UAF that are voidable and decisions that are null and void ab initio. The Appellant is invited to explain on which legal basis she draws this distinction in the present matter (applying to appropriate Swiss, Ukrainian or Monegasque law) and to provide supporting legal authorities"*. The Appellant did neither provide conclusive submissions as to the law applicable nor in respect to supporting legal authorities why – in this case – the UAF Decision must be deemed null and void. The Sole Arbitrator is well aware that, in principle, the content of the foreign applicable law shall be established by the Sole

Arbitrator *ex officio* (Art. 16(1) SPILA). However, this provision equally provides that the burden of proof on the content of the foreign law may be imposed by the court via a respective procedural order on the parties. In the case at hand the Appellant failed to discharge her burden of proof that the UAF Decision is null and void.

100. On a subsidiary basis, the Sole Arbitrator notes that Art. R49 of the Code is also applicable to appeals against decisions that are null and void. This follows from CAS jurisprudence with which the Sole Arbitrator concurs (CAS 2011/A/2360 & 2392). In said decision the Panel found – *inter alia* – as follows (nos. 96 *seq.*):

> *"Contrary to the view held by the Appellants, the Panel finds that Article R49 of the CAS Code is not limited to appeals filed against "annullable" decisions. First, nothing in the wording indicated such a limited scope of applicability of said provision. Second, in the Panel's opinion, the Appellants' argument that Article R49 of the CAS Code must be applied in light of article 75 of the SCC and the distinction made in that connection between "null and void" decisions on the one hand and "annullable" decisions on the other, simply cannot fit with what must have been the intention of the drafters of Article R49, since that provision is designed to apply to all parties appealing decisions to the CAS whatever the substantive law applicable to the dispute. In other words, subject to the parties being entitled to agree on a different time limit, Article R49 purports to place an admissibility threshold upon all appeals, without reference to the substantive law applicable to a dispute before CAS. (…) Therefore, the time limit for the commencement of claims set out in Article R49 of the CAS Code, being part of the procedural rules chosen by the parties to these arbitration proceedings, is applicable irrespective of the fact that other time limits may exist for filing appeals in front of State courts as provided for example by Article 75 of the SCC as interpreted by Swiss law".*

5. Conclusion

101. For all of the above reasons, the Sole Arbitrator finds that the Appellant's appeal against the UAF Decision is late and, therefore, cannot be entertained.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The Court of Arbitration for Sport has jurisdiction to decide the Appeal filed by the Appellant on 11 October 2016.

2. The Appeal filed by Ms Tetiana Gamera on 11 October 2016 is dismissed.

(…).