

CAS 2017/O/5389 International Association of Athletics Federations (IAAF) v. Russian Athletic Federation (RUSAF) & Kseniya Agafonova

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

Sitting in the following composition:

Sole Arbitrator: Raphaëlle Favre Schnyder, Attorney-at-Law in Zurich, Switzerland

in the arbitration proceedings between

INTERNATIONAL ASSOCIATION OF ATHLETICS FEDERATIONS (IAAF),

Monaco

Represented by Ross Wenzel and/or Nicolas Zbinden, Kellerhals Carrard, Lausanne, Switzerland

Claimant

and

RUSSIAN ATHLETICS FEDERATION (RUSAF), Moscow, Russian Federation

First Respondent

KSENIYA AGAFONOVA, Yaroslavl, Russian Federation

Second Respondent

* * * * *

I. BACKGROUND

A. THE PARTIES

1. The International Association of Athletics Federations (“IAAF” or the “Claimant”) is the world governing body for Athletics, recognized as such by the International Olympic Committee. One of its responsibilities is the regulation of track and field, including the running and enforcing of an anti-doping programme consistent with the World Anti-Doping Code (“WADC”). It has its registered seat in Monaco.
2. The Russian Athletics Federation (“RUSAF” or the “First Respondent”) is a member, currently suspended, of the IAAF as the national athletics federation for Russia. It has its registered seat in Moscow.
3. Kseniya Agafonova (the “Athlete” or the “Second Respondent”) is a Russian middle- and long-distance runner.
4. RUSAF and the Athlete together are referred to as the “Respondents”, the Claimant and the Respondents together as the “Parties”.

B. FACTS

5. A summary of the most relevant facts and the background giving rise to the present dispute is based on the Parties’ written submissions and the evidence filed with these submissions. Additional facts and allegations found in the Parties’ written submissions, pleadings and evidence are set out, where relevant, in connection with the legal discussion that follows. The Sole Arbitrator refers in her Award only to the submissions and evidence she considers necessary to explain her reasoning. The Sole Arbitrator, however, has considered all the factual allegations, legal arguments, and evidence submitted by the Parties in the present proceedings.
6. On 15 August 2009, the Athlete underwent an in-competition doping control during the 12th IAAF World Championships in Athletics in Berlin, Germany. The sample did not reveal the presence of any prohibited substance.
7. Upon request of the IAAF, the sample was re-analysed for long term metabolites of anabolic steroids by a World Anti-Doping Agency (“WADA”) accredited laboratory located in Cologne, Germany (Deutsche Sporthochschule Köln - Institut für Biochemie; hereinafter the “Cologne laboratory”).
8. On 11 September 2017, the Cologne laboratory reported that the Athlete’s A-Sample produced an adverse analytical finding for the substance Exogenous AAS/dehydrochloromethyl-testosterone metabolite 4-chloro-17-hydroxymethyl-17-methyl-18-nor-5-androst-13-ene-3-ol (“DHCMT”).
9. DHCMT is an exogenous anabolic agent and is a prohibited substance included in section S1.1.a (Anabolic Agents, Anabolic Androgenous Steroids [AAS], Exogenous AAS) of the 2009 WADA Prohibited List.

10. On 18 September 2017, the IAAF notified the Athlete of her adverse analytical finding and the alleged anti-doping rule violation, informing her, inter alia, about (i) her right to provide the IAAF by 28 September 2017 with an explanation for the adverse analytical finding; (ii) her right to request the analysis of her B Sample; (iii) her right to attend the opening of the B Sample and the subsequent analysis; and (iv) her right to request copies of the Laboratory Documentation Packages for the A and B Samples.
11. In the same correspondence, the IAAF raised the Athletes attention to the fact that a waiver of her right to the B Sample analysis would be deemed an acceptance of the adverse analytical finding in her A Sample and that she would not be able to contest these results in the later disciplinary procedure.
12. As no response or explanation had been received from the Athlete within the fixed deadline, the IAAF informed her by letter dated 29 September 2017 that as she had not requested the opening of her B Sample, she therefore was considered having accepted the A Sample's adverse analytical finding. Further the IAAF informed her as follows:

“Therefore, in accordance with IAAF Rule 38.2, you are provisionally suspended from all competitions and activities in athletics pending resolution of your case. This suspension shall take effect immediately.

Therefore, please note the following:

- (i) *that you are being charged with an anti-doping rule violation under IAAF Rule 32.2 (a) and (b);*
- (ii) *that you are provisionally suspended pending resolution of your case;*
- (iii) *that you have now the right to request a hearing in writing within 14 days (i.e. **Friday 13 October 2017**) of this notice in accordance with IAAF Rule 38.2. Should you fail to make such a request in writing, you will be deemed to have waived your right to a hearing and to have accepted that you have committed an anti-doping rule violation under IAAF Rules.*
- (iv) *that the IAAF has taken over responsibility for coordinating the disciplinary proceedings involving Russian international-level athletes and, as a result, your case will be referred to the Court of Arbitration for Sport (CAS) in Lausanne (Switzerland) for adjudication. As such, you have until Friday **13 October 2017** to inform us for which one of the following two procedures you opt:*
 - (a) *Before a Sole Arbitrator of the CAS sitting as a first instance hearing panel pursuant to IAAF Rule 38.3. The case will be prosecuted by the IAAF and the decision will be subject to an appeal to CAS in accordance with IAAF Rule 42;*
or
 - (b) *Before a CAS Panel as a single hearing, with the agreement of WADA and any other anti-doping organisations with a right of appeal, in accordance with IAAF Rule 38.19. The decision rendered will not be subject to an appeal (save to the Swiss Federal Tribunal).*

- (v) *that you can alternatively decide to forego a hearing by admitting the anti-doping rule violation and accepting a period of Ineligibility of two (2) years starting on the date of your provisional suspension (namely on 29.09.17). If you decide to accept this proposal, please return the attached Acceptance of sanction form signed by no later than **Friday 13 October 2017**.*

*Thank you for confirming in return your decision at your earliest convenience and **by no later than the above deadline**. In the absence of an answer from you as to the preferred option, your case will be referred to CAS under IAAF Rule 38.3.”*

13. By email dated 20 October 2017, RUSAF informed the IAAF that the Athlete had duly received all letters but as she claimed that she had not used any prohibited substances, she refused to sign the acceptance of sanction.

II. THE ARBITRAL PROCEEDINGS

14. On 3 November 2017, IAAF filed a request for arbitration with the CAS pursuant to the Code of Sports-related Arbitration (the “CAS Code”) against the RUSAF and the Athlete.
15. In its request for arbitration, IAAF requested that the matter be heard by a sole arbitrator acting as a first instance body, and that, pursuant to Rule 38.3 of the 2016-2017 IAAF Rules, the CAS procedure would be governed by the CAS appeal arbitration rules. In that regard, IAAF indicated that its request for arbitration should be considered its statement of appeal and appeal brief for the purposes of the CAS Code.
16. On 10 November 2017, the CAS Court Office transmitted the request for arbitration to the Respondents and specified that, as requested by the Claimant, it had been assigned to the CAS Ordinary Arbitration Division but would be dealt with according to the Appeals Arbitration Division rules. With respect to the Second Respondent, more specifically, the request for arbitration and its exhibits were sent by courier to the address of the First Respondent for forwarding to the Second Respondent as soon as possible. Furthermore, the CAS Court Office requested the Parties to communicate the personal postal address of the Second Respondent at their earliest convenience. The cover letter accompanying the request of arbitration was also sent by email to the email address (ramashanty@yandex.ru) provided by IAAF for the Second Respondent.
17. By email dated 16 November 2017, IAAF confirmed that it had liaised with RUSAF to obtain the Athletes postal address and that RUSAF was currently making inquiries in that regard. By email dated 1 December 2017, IAAF provided the CAS Court Office with a postal address for the Athlete.
18. By letter of 6 December 2017 delivered by e-mail and by DHL to the Second Respondent, the CAS Court Office informed the Parties that unless an objection will be submitted by one of the Parties within four (4) days, it will be considered that the Parties agree that any future communications by the CAS Court Office to the Second Respondent will be sent by e-mail to the Second Respondent’s e-mail address and to her personal address.

19. On 5 January 2018, the CAS Court Office sought from the Respondents confirmation before 10 January 2018 that the CAS letter of 10 November 2017 had been delivered to the Second Respondent and requested the First Respondent to provide any document confirming such delivery (see para. 16 above).
20. By communication dated 12 January 2018, the CAS Court Office informed the Parties, on behalf of the President of the CAS Ordinary Arbitration Division, that the Panel had been constituted as follows: Raphaëlle Favre Schnyder, Sole Arbitrator.
21. On 18 January 2018, the CAS Court Office resent, by e-mail and courier, a copy of the CAS letter of 10 November 2017, together with its enclosures, and invited the Second Respondent to submit, within 30 days from receipt of the present letter by courier, an answer containing her statement. Additionally, the CAS Court Office noted that unless the CAS would be informed otherwise by the Second Respondent within the 30-day time limit, it would be considered that she has chosen not to file any written submissions in this matter. Finally, and inter alia, the Parties were invited to inform the CAS Court Office by 25 January 2018 whether they wished a hearing to be held in this matter. This letter was duly delivered by DHL to the Second Respondent, who however failed to submit any answer.
22. In an email of 25 January 2018, the Claimant confirmed that it did not consider a hearing necessary in this case.
23. On 5 March 2018, the CAS Court Office on behalf of the Sole Arbitrator issued an order of procedure (the “Order of Procedure”), which was accepted and signed by IAAF on 5 March 2018. In the Order of Procedure, the Parties were advised that the Sole Arbitrator, deeming herself sufficiently informed, had decided to issue an Award without a hearing.

III. THE POSITION OF THE PARTIES

24. The following outline of the Parties’ positions is illustrative only and does not necessarily comprise every submission advanced by the Claimant and the Respondents. The Sole Arbitrator has nonetheless carefully considered all the submissions made by the Parties, whether or not there is specific reference to them in the following summary.

a) THE POSITION OF THE CLAIMANT

25. The IAAF submits that Rule 32.2(a) of the IAAF Competition Rules (the “2009 IAAF Rules”) forbids the presence of a prohibited substance or its metabolites or markers in an athlete’s sample.
26. The presence of DHCMT has been found in the Athlete’s A Sample. DHCMT is prohibited in- and out-of-competition under Section S1.1.a. of the 2009 Prohibited List. DHCMT is a non-specified substance.
27. It is therefore established that the Athlete committed an anti-doping rule violation.
28. Pursuant to Rule 40.2 of the 2009 IAAF Rules, *„the period of Ineligibility imposed for a violation under Rules 32.2(a) [...] unless the conditions for eliminating or reducing*

the period of Ineligibility as provided for in Rules 40.4 and 40.5, or the conditions for increasing the period of Ineligibility as provided in Rule 40.6 are met, shall be as follows:

Two (2) years “Ineligibility”.

29. Therefore, considering that DHCMT is a non-specified substance, the IAAF requests that the Athlete be sanctioned with a two-year Ineligibility period.
30. In addition, the IAAF requests that the Athlete be disqualified for two years from sample collection, i.e. until 14 August 2011 by application of Rule 40.8 of the 2009 IAAF Rules pursuant to which “*[i]n addition to the automatic Disqualification of the results in the Competition which produced the positive sample under Rules 39 and 40, all other competitive results obtained from the date the positive Sample was collected (whether In-Competition or Out-of-Competition) or other anti-doping rule violation occurred through to the commencement of any Provisional Suspension or Ineligibility period shall be Disqualified with all of the resulting Consequences for the Athlete including the forfeiture of any titles, awards, medals, points and prize and appearance money.*”
31. As the positive test was conducted on 15 August 2009, the principle is that all results obtained by the Athlete from 15 August 2009 until her provisional suspension on 29 September 2017 shall be disqualified. However, the IAAF is willing to accept, as a matter of fairness, that the period of disqualification be limited to two years from the sample collection, i.e. until 14 August 2011. The Athlete would have been declared ineligible for such period had the positive finding arisen at the 12th IAAF World Championships in Athletics in Berlin, Germany.
32. In light of the above, the IAAF submits the following prayers for relief in the Request for Arbitration:
 - “(i) *CAS has jurisdiction to decide on the subject matter of this dispute;*
 - “(ii) *The Request for Arbitration of the IAAF is admissible.*
 - “(iii) *The Athlete is found to have committed an anti-doping rule violation.*
 - “(v) *A period of Ineligibility of two years is imposed upon the Athlete, commencing on the date of the CAS Award. Any period of provisional suspension imposed on, or voluntarily accepted, by the Athlete until the date of the CAS Award shall be credited against the total period of Ineligibility to be served.*
 - “(iv) *All competitive results obtained by the Athlete from 15 August 2009 until 14 August 2011 are disqualified, with all resulting consequences (including forfeiture of any titles, awards, medals, profits, prizes and appearance money).*
 - “(v) *The arbitration costs are borne entirely by RUSAF or, in the alternative, jointly and severally by the Respondents.*
 - “(vi) *The IAAF is awarded a contribution to its legal costs.*”

b) THE POSITION OF THE RESPONDENTS

33. Although duly invited, neither of the Respondents filed an Answer to the IAAF’s Request for Arbitration, to be regarded as its combined Statement of Appeal and Appeal Brief, within the prescribed time limit or thereafter.

34. Pursuant to Article R55 of the CAS Code, the Sole Arbitrator can proceed to make an award in relation to IAAF's claims.
35. Despite the lack of any formal answer from the Respondents, the legal analysis below will take into account all available relevant information, and it is not restricted to the submissions of the IAAF.

IV. LEGAL ANALYSIS

A. JURISDICTION

36. The IAAF contends that the CAS has jurisdiction to hear as a first instance hearing body the dispute concerning the commission by the Athlete of an anti-doping rule violation as contemplated by application of Rule 38.3 of the 2016-2017 Rules, which provides as follows:

“if a hearing is requested by an Athlete, it shall be convened without delay and the hearing completed within two months of the date of notification of the Athlete’s request to the Member. Members shall keep the IAAF fully informed as to the status of all cases pending hearing and of all hearing dates as soon as they are fixed. The IAAF shall have the right to attend all hearings as an observer. However, the IAAF’s attendance at a hearing, or any other involvement in a case, shall not affect its right to appeal the Member’s decision to CAS pursuant to Rule 42. If the Member fails to complete a hearing within two months, or, if having completed a hearing, fails to render a decision within a reasonable time period thereafter, the IAAF may impose a deadline for such event. If in either case the deadline is not met, the IAAF may elect, if the Athlete is an international-level Athlete, to have the case referred directly to a single arbitrator appointed by CAS. The case shall be handled in accordance with CAS rules (those applicable to the appeal arbitration procedure without reference to any time limit for appeal). The hearing shall proceed at the responsibility and expense of the Member and the decision of the single arbitrator shall be subject to appeal to CAS in accordance with Rule 42. A failure by a Member to hold a hearing for an Athlete within two months under this Rule may further result in the imposition of a sanction under Rule 45.

37. RUSAF's suspension of its membership with the IAAF was confirmed during the IAAF Council meeting in Monaco on 26 November 2015 and remains in place as on several occasions the IAAF Council maintained RUSAF's suspension, lastly on 6 March 2018.
38. As a result, no entity has jurisdiction in the Russian Federation to conduct a hearing in the Athlete's case and IAAF took over the responsibility for coordinating the relevant disciplinary proceedings. In its letter to the Respondents dated 29 September 2017, the IAAF informed that the case of the Athlete would be referred to the CAS under Rule 38.3 of the 2016-2017 IAAF Rules.
39. The Sole Arbitrator further notes that the Athlete is an international-level athlete as defined in Rule 1.9 of IAAF Anti-Doping Rules effective from 3 April 2017 (the “IAAF ADR”) and that, therefore, the conditions for the CAS jurisdiction under Rule 38.3 of the 2016-2017 IAAF Rules are met.

B. ADMISSIBILITY

40. The request for arbitration, to be considered as a combined statement of appeal and appeal brief, complies with the formal requirement set by the CAS Code. The admissibility of the request for arbitration is not challenged by the Respondents.
41. Accordingly, the request for arbitration is admissible.

C. ORDINARY PROCEEDINGS

42. As these proceedings are based on a request for arbitration for the conduct of a first instance hearing and do not involve an appeal against a decision rendered by a sports-related body, they are considered as ordinary arbitration proceedings, within the meaning and for the purposes of the CAS Code.
43. However, in accordance with Rule 38.3 of the 2016-2017 IAAF Rules and as announced in the CAS Court Office's letter of 10 November 2017, the present arbitration has been assigned to the Ordinary Arbitration Division but will be dealt with according to the Appeals Arbitration Division rules (Articles 47 *et sec* of the CAS Code and Article S20 CAS Code).

D. APPLICABLE LAW

44. The IAAF submits that the IAAF rules and regulations are the applicable rules in this case. In the IAAF's view, the procedural aspects of these proceedings shall be subject to the 2016-2017 edition of the IAAF Rules. The IAAF further submits that for the substantive matters, the Athlete's anti-doping rule violation is subject to the rules in place at the time of the alleged anti-doping rule violation, i.e. the 2009 IAAF Rules. To the extent that the IAAF Rules do not deal with a relevant issue, Monegasque law shall be applied (on a subsidiary basis) to such issue.
45. Neither RUSAF nor the Athlete submitted any specific position in respect of the applicable law.
46. Article R58 of the CAS Code provides as follows:
- “The Panel shall decide the 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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.”*
47. This provision is in line with Article 187, paragraph 1 of the Swiss Private International Law Act (PILA), which in its English translation states as follows: *“The arbitral tribunal shall rule according to the rules of law chosen by the parties or, in the absence of such choice, according to the law with which the action is most closely connected.”*
48. The relevant parts of Article 1.7 of the IAAF ADR read as follows:

“These Anti-Doping Rules also apply to the following Athletes, Athlete Support Personnel and other Persons (...)

(b) all Athletes, Athlete Support Personnel and other Persons participating in such capacity in Competitions and other activities organized, convened, authorized or recognized by (i) the IAAF (ii) any National Federation or any member or affiliate organization of any National Federation (including any clubs, teams, associations or leagues) or (iii) any Area Association, wherever held (...)”

49. Article 13.9.4 of the IAAF ADR states as follows:

“In all CAS appeals involving the IAAF, the CAS Panel shall be bound by the IAAF Constitution, Rules and Regulations (including the Anti-Doping Rules and Regulations). In the case of conflict between the CAS rules currently in force and the IAAF Constitution, Rules and Regulations, the IAAF Constitution, Rules and Regulations shall take precedence.”

50. Article 13.9.5 of the IAAF ADR further provides as follows:

“In all CAS appeals involving the IAAF, the governing law shall be Monegasque law and the appeal shall be conducted in English, unless the parties agree otherwise.”

51. The transitional provisions of Article 21.3 of the IAAF ADR read as follows:

*“Any case pending prior to the Effective Date, or brought after the Effective Date but based on an Anti-Doping Rule Violation that occurred before the Effective Date, shall be governed, with respect to substantive matters, by the predecessor version of the anti-doping rules in force at the time the Anti-Doping Rule Violation occurred and, with respect to procedural matters, by the version of the anti-doping rules in force immediately prior to the Effective Date save that (i) Article 10.7.5 of these Rules shall apply retroactively; (ii) Article 18 of these Rules shall also apply retroactively, unless the statute of limitations applicable under the predecessor version of the Rules has already expired by the Effective Date; and (iii) the relevant tribunal may decide it appropriate to apply the principle of *lex mitior* in the circumstances of the case.”*

52. Based on the above and considering that the applicable law is not in dispute, the applicable laws in this arbitration are the IAAF rules and regulations and, in particular, the IAAF Rules as well as Monegasque law.

53. Accordingly, procedural matters are governed by the version of the IAAF Rules in force immediately prior to the Effective Date (as defined in Article 1.13 of the IAAF ADR, i.e. 3 April 2017). Therefore, the 2016-2017 IAAF Rules in force as from 1 November 2015 are applicable to procedural matters.

54. With respect to the rules applicable to the substantive aspects of the case, the Sole Arbitrator notes that the Athlete’s violation occurred in August 2009. Consequently, pursuant to Article 21.3 of the IAAF ADR, the 2009 IAAF Rules shall apply to the substantive matters of the case, subject to the possible application of the principle of *lex mitior*.

55. As for the sanctions to be applied, the provisions concerning Ineligibility in the 2009 IAAF Rules are clearly *lex mitior* in comparison to the IAAF ADR. Rule 40.2 of the 2009 IAAF Rules allow the Sole Arbitrator to order a period of Ineligibility of two years for an intentional use of a prohibited substance, whereas the IAAF ADR set a standard sanction of four years for such violation.
56. With regard to the commencement of the Ineligibility period, where there have been substantial delays in the hearing process or other aspects of doping control not attributable to the athlete, Article 10.10.2 (c) IAAF ADR allows a disciplinary panel to deem that the period of Ineligibility shall start as early as the date the anti-doping rule violation occurred. The 2009 IAAF Rules do not in itself enable such outcome. It follows that, in principle, the IAAF ADR lead to a more lenient outcome for the athlete in this respect. However, it has been accepted in CAS case law that if an athlete intentionally administers substances that make analysing the sample time-consuming, the delay is attributable to the athlete (CAS 2010/A/2041). Such a finding is also consistent with the comment concerning Article 10.11.1 of the 2015 World Anti-Doping Code, which generally underlines that discovering and substantiating a doping offence may require a long time, in particular if the athlete endeavours to prevent the detection. In conclusion, the IAAF ADR are not generally *lex mitior* in comparison to the 2009 IAAF Rules in this respect either.
57. As to the disqualification of results, both the 2009 IAAF Rules (Rule 40.8) and the IAAF ADR (Article 10.8) require the annulment of all competitive results of the athlete obtained from the date the sample in question was collected through to the commencement of any provisional suspension or Ineligibility period, unless fairness requires otherwise.
58. Based on the above considerations, the most favourable version of the IAAF rules for the Athlete are the 2009 IAAF Rules, which shall be applied in the substantive aspects of the matter at hand.

E. MERITS

59. The case before this Sole Arbitrator concerns the commission by the Athlete of the anti-doping rule violation contemplated by Rule 32.2(a) of the 2009 IAAF Rules and, in the event such violation is found, the determination of the consequences thereof. The Claimant requests that the Sole Arbitrator sanctions the Athlete, found responsible of that anti-doping rule violation, with a period of Ineligibility of two years. The Respondents expressed no view on the Claimant's requests.
 60. The Sole Arbitrator shall examine separately the issues of the commission by the Athlete of an anti-doping rule violation and, if the case, of the consequences thereof.
- a) HAS THE ATHLETE COMMITTED AN ANTI-DOPING RULE VIOLATION?**
61. Rule 32.2(a) of the 2009 IAAF Rules essentially reads as follows: "*Athletes or other Persons shall be responsible for knowing what constitutes an anti-doping rule violation and the substances and methods which have been included on the Prohibited List. The following constitute anti-doping rule violations:*

(a) Presence of a prohibited substance or its metabolites or markers in an athlete's sample.

- (i) it is each Athlete's personal duty to ensure that no Prohibited Substance enters his body. Athletes 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 Athlete's part be demonstrated in order to establish an anti-doping rule violation under Rule 32.2(a).*
- (ii) sufficient proof of an anti-doping rule violation under Rule 32.2(a) is established by either of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A Sample where the Athlete waives analysis of the B Sample and the B Sample is not analysed; or, where the Athlete's B Sample is analysed and the analysis of the Athlete's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Athlete's A Sample.*
- (iii) except those Prohibited 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 an Athlete's Sample shall constitute an anti-doping rule violation.*
- (iv) as an exception to the general application of Rule 32.2(a), the Prohibited List or International Standards may establish special criteria for the evaluation of Prohibited Substances that can also be produced endogenously."*

62. With regard to the burden and standard of proof, as well as to the methods of establishing facts and presumptions, Rules 33.1, 33.2, and 33.3 of the 2009 IAAF Rules, so far as material, stipulate the following:

"1. The IAAF, Member or other prosecuting authority shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the IAAF, the Member or other prosecuting authority has established an anti-doping rule violation to the comfortable satisfaction of the relevant 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.

2. Where these Anti-Doping Rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability, except as provided in Rules 40.4 (Specified Substances) and 40.6 (aggravating circumstances) where the Athlete must satisfy a higher burden of proof.

3. Facts related to anti-doping rule violations may be established by any reliable means, including but not limited to admissions, evidence of third Persons, witness statements, experts reports, documentary evidence, conclusions drawn from longitudinal profiling such as the Athlete Biological Passport and other analytical information.

The following rules of proof shall be applicable in doping cases:

(a) WADA-accredited laboratories are presumed to have conducted Sample analysis and custodial procedures in accordance with the International Standard for Laboratories. The Athlete or other Person may rebut this presumption by establishing that a departure from the International Standard for Laboratories has occurred which could reasonably have caused the Adverse Analytical Finding. If the Athlete 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 IAAF, the Member or other prosecuting authority shall have the burden of establishing that such departure did not cause the Adverse Analytical Finding.

(b) The hearing panel in a hearing on an anti-doping rule violation may draw an inference adverse to the Athlete or other Person who is asserted to have committed an anti-doping rule violation based on the Athlete's or other Person's refusal, after a request made in a reasonable time in advance of the hearing, to appear at the hearing (either in person or by telephone as directed by the hearing panel) and to answer questions from the hearing panel or the IAAF, Member or other prosecuting authority asserting the anti-doping rule violation."

63. In order to establish the Athlete's anti-doping rule violation, the IAAF relies on the adverse analytical finding in the Athlete's A Sample collected on 15 August 2009 as well as on the facts that the Athlete has waived her right to the analysis of the B Sample and thus is deemed to have accepted the A Sample finding.
64. Rule 32.2(a) of the 2009 IAAF Rules forbids the presence of a prohibited substance or its metabolites or markers in an athlete's body tissues or fluids.
65. The IAAF has produced a report issued by the Cologne laboratory on 11 September 2017 confirming the presence of DHCMT metabolites in the Athlete's A Sample.
66. Considering that the Athlete has not disputed the laboratory's finding, the Sole Arbitrator is comfortably satisfied that the Athlete has violated Rule 32.2(a) of the 2009 IAAF Rules and thus has committed an anti-doping rule violation.

b) WHAT ARE THE CONSEQUENCES TO BE IMPOSED ON THE ATHLETE?

67. As a result, it is for the Sole Arbitrator to determine the consequences to be imposed on the Athlete for the anti-doping rule violation that she is found to have committed.

i) *The Duration of the Ineligibility Period*

68. Rule 40.2 of the 2009 IAAF Rules reads as follows:

"The period of Ineligibility imposed for a violation of Rules 32.2(a) (Presence of a Prohibited Substance or its Metabolites or Markers), 32.2(b) (Use or Attempted Use of a Prohibited Substances or Prohibited Method) or 32.2(f) (Possession of Prohibited Substances and Prohibited Methods), unless the conditions for eliminating or reducing

the period of Ineligibility as provided in Rules 40.4 and 40.5, or the conditions for increasing the period of Ineligibility as provided in Rule 40.6 are met, shall be as follows:

First violation: Two (2) years' Ineligibility.

69. DHCMT is a non-specified substance. Furthermore, neither RUSAF nor the Athlete have filed any submissions with the CAS with regard to the length of the ban or any other consequence for the anti-doping rule violation. In particular, the Athlete has not submitted to the CAS that the period of Ineligibility should be mitigated for some reason. In addition, the Athlete has not provided any explanation for the presence of DHCMT in her sample.
70. Therefore, the Athlete shall be sanctioned with a two-year period of Ineligibility under the 2009 IAAF Rules.

(ii) *The Commencement of the Ineligibility Period*

71. The IAAF requests that a period of Ineligibility of two years be imposed upon the Athlete, commencing on the date of the CAS Award. Any period of provisional suspension imposed on, or voluntarily accepted, by the Athlete until the date of the CAS Award shall be credited against the total period of Ineligibility to be served.
72. The rule indicating the starting moment of the period of Ineligibility is set by Rule 40.10 of the 2009 IAAF Rules, according to which:

“Except as provided below, the period of Ineligibility shall start on the date of the final hearing decision providing for Ineligibility or, if the hearing is waived or there is no hearing, on the date the Ineligibility is accepted or otherwise imposed. Any period of Provisional Suspension (whether imposed or voluntarily accepted) shall be credited against the total period of ineligibility to be served.

73. Considering that the Athlete has been imposed a provisional suspension as from 29 September 2017 and that such period shall be credited against the total period of Ineligibility, the Sole Arbitrator finds that the period of Ineligibility shall start on the date of the provisional suspension, i.e. 29 September 2017.

(iii) *Disqualification of Results*

74. Pursuant to Rule 40.8 of the 2009 IAAF Rules:
75. *"In addition to the automatic Disqualification of the results in the Competition which produced the positive sample under Rules 39 and 40, all other competitive results obtained from the date the positive sample was collected (whether In-Competition or Out-of-Competition) or other anti-doping rule violation occurred through to the commencement of any Provisional Suspension or Ineligibility period shall be Disqualified with all of the resulting Consequences for the Athlete including the forfeiture of any titles, awards, medals, points and prize and appearance money".*

76. The positive test was conducted on 15 August 2009. Accordingly, the principle is that all results obtained by the Athlete from 15 August 2009 until her provisional suspension on 29 September 2017 should (retroactively) be disqualified.
77. However, the IAAF as a matter of fairness, has limited its request for disqualification to two years from sample collection, i.e. until 14 August 2011, in view of the fact that the Athlete would have been declared ineligible for such period had the positive finding arisen at the 12th IAAF World Championships in Athletics in Berlin, Germany. The Respondents have not addressed the issue in these proceedings.
78. The Sole Arbitrator notes that it is the IAAF's policy in retesting cases to connect the disqualification period to the length of the ban (CAS 2016/O/4463 para. 138). Any other shortened period of disqualification would also be arbitrary in the circumstances of the case.
79. Based on the above considerations, the Sole Arbitrator finds it justified to disqualify all of the Athlete's results obtained within two years from the collection of the sample in question, i.e. from 15 August 2009 to 14 August 2011.

F. CONCLUSION

80. In light of the foregoing, the Athlete is found responsible for the anti-doping rule violation contemplated by Rule 32.2(a) [Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample] of the 2009 IAAF Rules. The sanction of Ineligibility for two years starting from the date on the date of the provisional suspension, i.e. 29 September 2017. Furthermore, all of the Athlete's results obtained from 15 August 2009 until 14 August 2011 shall be disqualified.

G. COSTS

(...).

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The Request for Arbitration filed by the International Association of Athletics Federations (IAAF) on 3 November 2017 is upheld.
2. Ms Kseniya Agafonova, is responsible for the anti-doping rule violation contemplated by Article 32.2.(a) of the 2009 IAAF Competition Rules.
3. Ms Kseniya Agafonova, is imposed the sanction of Ineligibility for two (2) years starting from 29 September 2017.
4. All competitive results of Ms. Kseniya Agafonova, from 15 August 2009 to 14 August 2011 are disqualified, with all resulting consequences (including forfeiture of any titles, awards, medals, profits, prizes, and appearance money).
5. (...).
6. (...).
7. All other motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland
Date: 27 April 2018

THE COURT OF ARBITRATION FOR SPORT



Raphaëlle Favre Schnyder
Sole Arbitrator