Arbitration CAS 2016/A/4697 Elena Dorofeyeva v. International Tennis Federation (ITF), award of 3 February 2017

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

Tennis
Doping
Required agreement of the parties regarding the applicable regulations
Nullity of the appealed decision due to the lack of jurisdiction of the federation upon someone outside its sphere of control

1. **Article R58 of the CAS Code refers first and foremost to the "applicable regulations". These are, in principle, in a doping-related case, the federation's anti-doping regulations. However, in order for these regulations to be qualified as the "applicable regulations", they must have been agreed by the parties, i.e. the appellant must have submitted to these rules either explicitly or implicitly.**

2. **The execution of a contract requires two concurrent declarations of intent, i.e. an offer by one party and an acceptance by the other party. Absent any specific provision to the contrary, the declaration of intent may either be expressly or tacitly. A conduct from which one might typically infer that someone agrees to be bound to a federation's rules is if the person *participates in the sport*. The term *"participation in sport"* refers to entering into the "sphere of control" of the sports organisation. Such construction is also in line with the World Anti-Doping Code (WADC). Thus, in case an athlete participates in a competition organised by a federation s/he agrees to be bound by the applicable rules in said competition in turn for being admitted to the federation's sphere of control. However, it cannot implicitly be inferred that a sports medicine specialist by participating in the disciplinary proceedings before the federation accepted to be bound by the respective provisions especially where s/he unequivocally contested the federation's jurisdiction once s/he entered the federation's sphere of control. According to WADC, assisting an athlete as such is not considered "participation in sport" and thereby agreeing to the anti-doping rules. Moreover, the contractual relationship between an athlete and a specialist does by no way mean that the latter also automatically entered into a concurrent legal relationship with a third party (the federation), thereby conferring disciplinary powers to the federation. This would only be true if – very exceptionally – the contract between the athlete and the specialist had to be qualified as a contract for the benefit of a third party. Therefore, if the sports medicine specialist never agreed to submit to the federation's anti-doping regulations, s/he cannot be bound by them.**

I. THE PARTIES

1. Ms Elena Dorofeyeva (hereinafter referred to as the "Appellant"), formerly an elite-level swimmer on the USSR national team in the 1980s, is a sports medicine specialist in the Ukraine.

2. The International Tennis Federation (hereinafter referred to as "ITF" or "Respondent") is the International Olympic Committee-recognized international sports federation for the sport of tennis, and has its headquarters in London, United Kingdom. One of its objects and purposes is to promote the integrity of tennis and to protect the health and rights of tennis players. To these ends, the ITF, a signatory to the World Anti-Doping Code (the "WADC") established by the World Anti-Doping Agency ("WADA") issued the Tennis Anti-Doping Program ("TADP") to implement the provisions of the WADC.

II. THE RELEVANT FACTS

3. Below is a summary of the main relevant facts and allegations based on the parties' written submissions and adduced evidence. Additional facts and allegations 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 this award only to the submissions and evidence he considers necessary to explain his reasoning.

4. Ms Kateryna Kozlova (hereinafter referred to as the "Athlete") is a professional Ukrainian tennis player. It is undisputed that there were contacts between the Athlete and the Appellant. However, it is disputed between the Parties how intense these contacts were.

A. Account of facts according to the Appellant

5. According to the Appellant she had only very sporadic contacts with the Athlete. A first meeting occurred in June 2013, when the Athlete was examined at a local hospital in Donetsk because of a knee injury. The Appellant spoke shortly with the Athlete and reviewed the medical records that had been drawn up by the individual specialists at the hospital. On the basis of the information before her, the Appellant concluded that the Athlete was healthy to resume training.

6. A second contact between the Athlete and the Appellant took place on 11 November 2014. The Athlete at that time had moved to Moscow because of the unstable political situation in Ukraine. The Athlete contacted the Appellant by phone to inquire whether she would advise her on – *inter alia* – questions of general health and nutrition. Following this phone conversation the Appellant sent to the Athlete her CV and requested some additional information. Between 11 and 27 November 2014, the Athlete and the Appellant communicated by e-mail. Both agreed that the Appellant would come to Moscow to meet the Athlete and her manager, Alina Moiseeva.

7. From 27 November 2014 to 30 November 2014, the Appellant flew to Moscow to meet the Athlete and her staff. The plane ticket was paid for by the Athlete. However, the meeting did not finalize into a contract. Therefore, the Appellant submits that she did not provide any research or consultancy to the Athlete. Furthermore, she did not conduct any examination on the Athlete and was not remunerated.

8. The Appellant submits that after returning home from the trip to Moscow she basically did not have any further contacts with the Athlete, since the contract with the Athlete's management had not been executed.

B. Account of facts according to the Respondent

9. The Respondent submits that the Appellant and the Athlete first met in June 2013 and that thereafter there had been constant and regular contacts between them. The Respondent submits that the purpose of the contacts was to advise the Athlete on a training and recovery program, to give her medical examinations and to advise the Athlete on general health and nutrition issues. When the Athlete was not on tour, the Appellant and the Athlete would meet about once a week. The Respondent submits that the Athlete paid the Appellant around 400 Ukrainian Hryvnia (approximately £11) for each meeting.

10. In November 2014, the Athlete moved from Donetsk to Moscow. She asked the Appellant to visit her in order to meet her new support team, including her manager, Alina Moiseeva, as well as to conduct a physical examination and to advise her on what products would be best to support her new training and competition schedule.

11. From 27 to 30 November 2014 the Appellant stayed in Moscow and met with the Athlete. She gave her vitamins and a new product called "RPM Nutrition Red Rum" ("Red Rum"), which *"she explained was an energy powder to be mixed with water and taken 30 minutes before a match"*.

12. On 9 December 2014, the Appellant sent the Athlete an e-mail with a list of products she advised her to take, including Red Rum. The Athlete continued taking these products after speaking to the Appellant over the phone. The Appellant advised her to continue taking them.

C. Undisputed account of facts as of 16 February 2015

13. On 16 February 2015, the Athlete participated in the Dubai Tennis Championships where she was selected for a doping control. The urine sample provided by the Athlete tested positive for 1,3-dimethylbutylamine (DMBA), a stimulant that is included in the WADA List of Prohibited Substances and Prohibited Methods ("WADA List").

14. After being notified of the adverse analytical finding ("AAF"), the Athlete contacted the First Moscow State Medical University ("FMSMU") to review her supplements. The FMSMU informed her that DMBA was also referred to as 2-amino-4-methylpentane (AMP) citrate. The FMSMU further confirmed the presence of DMBA within the product Red Rum.

15. On 21 May 2015, the Athlete signed an acceptance of sanction form.

16. On 27 May 2015, the ITF issued a decision confirming that she had committed an anti-doping-rule violation ("ADRV"), imposing a 6-month period of ineligibility, and disqualifying her competitive results.

17. On 2 and 29 July 2015, the ITF wrote an e-mail to the Appellant seeking her comments on the Athlete's issue. Both e-mails remained unanswered.

18. On 5 November 2015, the Appellant submitted her account of facts to the ITF.

19. On 9 June 2016, the ITF Independent Tribunal ("ITFT") issued a decision ("Appealed Decision") holding that the Tribunal:

"(73)

a. Rejects each of Dr Dorofeyeva's three Motions.

b. Upholds the Charge that Dr Dorofeyeva committed an Anti-Doping Rule Violation under Article 2.8 of the 2014 Programme, as alleged in the Notice of Charge.

c. Imposes on Dr Dorofeyeva a period of Ineligibility of four years commencing upon 1 May 2016".

20. In essence, the ITFT found that:

"(37) The ITF asserts (…) that Dr Dorofeyeva must have been aware at the relevant time of the WADA Code and of its adoption by every Olympic sport, including tennis. It also prays in aid the evidence of Ms Kozlova and Ms Moiseeva that they discussed with Dr Dorofeyeva the contents of Red Rum and the other products recommended by her, and that during that discussion Dr Dorofeyeva assured them that none contained any substances that were prohibited for use by tennis professionals (thereby, it is said, evidencing her knowledge of the existence of such prohibitions). This evidence, which I accept as accurate, does seem to me to support the ITF's assertion. However, in any event, Article 1.16.1 of the 2014 Programme specifies that it is "the responsibility of each Player Support personnel to acquaint him/herself with all the provisions of this Programme" (which includes knowing what constitutes an Anti-Doping Violation under that Programme and the identity of Prohibited Substances).

(38) Accordingly:

a. By virtue of Article 1.15 of the 2014 Programme, Dr Dorofeyeva was and is "automatically bound by and required to comply with all of the provisions of" that Programme.

b. As the Independent Tribunal appointed under the 2016 Programme, Dr Dorofeyeva is therefore subject to my jurisdiction.

(60) (…) I regard Article 2.8 of the 2014 Programme as a strict liability offence. Dr Dorofeyeva has therefore committed an Anti-Doping Rule Violation under that Article, irrespective of whether she intended to administer a Prohibited Substance to Ms Kozlova.

(65) In the light of these authorities and my findings (…) about (a) what would or should have been apparent to Dr Dorofeyeva about the product Red Rum, and (b) Dr Dorofeyeva's background and expertise, I

would if necessary have found that Dr Dorofeyeva had the necessary intent to have committed the Article 2.8 Violation with which she has been charged.

(69) I have concluded that in all the circumstances a period of Ineligibility of four years is the correct one. The ITF was keen to emphasise to me the seriousness of a doctor setting him/herself up as a sports medicine specialist and telling athletes that he/she can support them. Such a person, emphasises the ITF bears an extremely heavy responsibility because of the reliance likely to be placed by athletes (in particular, young athletes) upon his/her advice and recommendations. I agree, and doubtless that is why the minimum period of Ineligibility of four years has been specified in the WADA Code.

(72) Pursuant to Article 10.11.1(a) of the 2015 Programme, Dr Dorofeyeva is prohibited during her period of Ineligibility from assisting any Player, coaching or otherwise participating in any capacity the Events, Competitions and activities listed in subparagraphs (i) to (iv) of that Article".

III. THE PROCEEDINGS BEFORE THE CAS

21. The proceedings before the CAS can be summarized in their main parts as follows:

22. On 30 June 2016, the Appellant filed a Statement of Appeal with the Court of Arbitration for Sport ("CAS") in accordance with Article R47 *et seq.* of the Code of Sports-related Arbitration ("CAS Code").

23. Within this appeal, the Appellant filed an application for a stay of the Appealed Decision, whereby she requested to *"Suspend ITF decision against me till final appeal examination"*.

24. By e-mail dated 12 July 2016, counsels of Respondent provided the CAS Court Office with a duly signed power of attorney confirming that they were instructed to represent the ITF in these proceedings. In the same e-mail, the counsels for the Respondent requested a three-day extension of the deadline to submit a response to the Appellant's request for provisional measures and to nominate an arbitrator.

25. On 13 July 2016, the CAS Court Office informed the Parties that the extension of the deadline had been granted.

26. On 14 July 2016, the CAS Court Office received the Appellant's Brief dated 30 June 2016.

27. On 22 July 2016, the Respondent requested that all future correspondence be sent by e-mail, not facsimile.

28. On 27 July 2016, the CAS Court Office confirmed that all future correspondence from the CAS to the Respondent will be sent by e-mail.

29. On 28 July 2016, the Respondent proposed that Prof. Ulrich Haas act as the Sole Arbitrator in the case at hand.

30. On the same day, the Respondent also submitted its observations on the Appellant's request for a stay.

31. Still on the same day, the Appellant in an e-mail to the CAS Court Office commented on the Respondent's observations.

32. On 4 August 2016, the CAS Court Office confirmed the receipt of the Respondent's letter dated 28 July 2016.

33. By e-mail dated 8 August 2016, the Respondent requested that the deadline to file its Answer be extended until 12 August 2016. On the same day, the CAS Secretary General granted the extension of the deadline to file the Answer.

34. On 9 August 2016, the Appellant *"protest*[ed] *against any extension of Time for Answer given to ITF"*.

35. On 12 August 2016, the Respondent filed its Answer.

36. On 15 August 2016, since no objection was raised by the Appellant within the prescribed deadline, the CAS Court Office informed the Parties that the nomination of Prof. Ulrich Haas would be confirmed by either the President of the CAS Appeals Division or her Deputy, in accordance with Article R54 of the CAS Code.

37. By e-mail dated 24 August 2016, the Respondent informed the CAS Court Office of its preference for the Sole Arbitrator to issue an award based solely on the Parties' written submissions.

38. On 26 August 2016, the Appellant submitted an e-mail conversation with the Ministry of Justice UK.

39. By e-mail dated 26 August 2016, the Appellant informed the CAS that she does *"prefer for Sole Arbitrator to issue an award upon detailed hearing basic on all of my submissions"*.

40. By letter dated 29 August 2016, the CAS Court Office requested the Appellant to clarify her e-mail of 26 August 2016.

41. On 29 August 2016, the President of the CAS Appeals Arbitration Division issued an Order thereby dismissing the Appellant's request for a stay of the Appealed Decision.

42. By e-mail dated 30 August 2016, the Appellant in reply to the letter of the CAS Court Office dated 29 August 2016 responded *"… that there is nothing more and nothing less to say than already stated. I submitted to Tribunal entire file of this case with all correspondence and all documents since I have nothing to hide, looks a contrary to ITF. I declare my readiness to reply on all Arbitrator's questions leading to discover the truth in this ugly case in due course. Afraid that present ITF's 'interpretation request' may lead Tribunal and Sole Arbitrator to limitated possibilities to investigate and survey a case"*.

43. By e-mail dated 31 August 2016, the CAS Court Office informed the Parties that pursuant to Article R57 of the CAS Code the Sole Arbitrator would decide whether or not to hold a hearing.

44. On 2 September 2016, the Appellant requested the CAS Court Office to provide her with appeal instructions against the Order of the President of the CAS Appeals Arbitration Division dated 29 August 2016.

45. On 6 September 2016, the Appellant reminded the CAS Court Office to provide her with appeal instructions.

46. By letter dated 6 September 2016, the CAS Court Office informed the Parties of the appointment of the Prof. Ulrich Haas as the Sole Arbitrator. Furthermore, the Parties were advised that Ms Simone Schmid, assistant to Prof. Haas at the University of Zurich, Switzerland, had been appointed as *ad hoc* clerk.

47. On 11 November 2016, the CAS Court Office provided the Appellant with an original copy of the Order of the President of the CAS Appeals Arbitration Division dated 29 August 2016.

48. On 22 November 2016, the CAS Court Office informed the Appellant that no appeal is possible against the Order of the President of the CAS Appeals Arbitration Division rendered on 29 August 2016.

49. Within the same letter, the CAS Court Office, on behalf of the Sole Arbitrator, invited the Parties to provide information relating to two specific questions. Furthermore, the Parties were advised that the Sole Arbitrator would be available for a hearing on certain proposed dates.

50. On 24 November 2016, the Appellant requested an extension of the deadline to reply to the Sole Arbitrator's questions.

51. With letter dated the same day, the CAS Court Office invited the Respondent to comment on the Appellant's request for an extension of the deadline.

52. On the same day, the Respondent agreed to the request of the Appellant, *"provided that all the deadlines set out in the CAS letter of 22 November 2016, including those applicable to the ITF"* are also extended.

53. On 29 November 2016, the CAS Court Office informed the Parties that absent any objection by the Appellant all deadlines referred to in the CAS letter dated 22 November 2016 will be extended.

54. On 12 December 2016, both Parties responded to the Sole Arbitrator's questions of 22 November 2016 by e-mail.

55. On 14 December 2016, the CAS Court Office confirmed that a hearing would be held on 22 December 2016 at the CAS Court Office in Lausanne. The Parties were invited to provide the CAS Court Office with the names of all persons attending the hearing on their behalf.

56. By e-mail dated 15 December 2016, the Appellant informed the CAS that she would be available by Skype or phone on 22 December 2016, together with an English-Russian interpreter.

57. By letter dated 15 December 2016, the Respondent informed the CAS that Mr Stuart Miller (ITF, Senior Executive Director for Integrity and Development), Jonathan Taylor (Bird & Bird, counsel to the ITF) and Ms. Lauren Pagé (Bird & Bird, counsel to the ITF) will attend the hearing in person.

58. On 16 December 2016, the CAS Court Office sent the Order of Procedure to the Parties.

59. On 19 December 2016, both the Appellant and the Respondent returned the signed Order of Procedure to the CAS Court Office.

60. By e-mail dated 20 December 2016, the Appellant sent *"additional information from Associated Press concerning modus operandi of cyberhacking of mailbox (…)"* to the CAS Court Office.

61. On 20 December 2016, the Respondent invited the Sole Arbitrator to state whether he had any questions to the ITF's two witnesses and whether they would be required to provide evidence at the hearing.

62. On 21 December 2016, the Parties were advised that the Sole Arbitrator had no further questions to the Respondent's witnesses.

63. The hearing took place in Lausanne on 22 December 2016. The Appellant took part in the hearing via Skype together with a Russian-English interpreter. The ITF was represented in person by Dr Stuart Miller, Senior Executive Director for Integrity and Development, and assisted by ITS's legal counsels Mr Jonathan Taylor and Ms Lauren Pagé.

64. At the outset of the hearing, both Parties confirmed that they had no objections to the constitution of the Arbitral Tribunal, and that they did not object to the jurisdiction of CAS. At the hearing, the Parties had the opportunity to present their case, submit their arguments, and to answer the questions posed by the Sole Arbitrator. During the hearing, the Respondent cross-examined the Appellant. At the end of the hearing, both Parties expressly declared that they did not have any objections with respect to the procedure and that their right to be heard had been fully respected.

IV. THE PARTIES' RESPECTIVE REQUESTS FOR RELIEF AND BASIC POSITIONS

65. 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 nor in the discussion of the claims below.

A. The Appellant

66. In her Appeal, the Appellant requested relief as follows:

"1 Suspend ITF decision against me till final appeal examination

2 Found decision of ITF against me null and void as accusations and charges have been created on fabricated documents with simultaneous hiding key evidences by offence to present them within trial by ITF related persons

Compensatory damages in amount of EUR 150 000.00

Punitive damages in amount of 250 000.00

Declaratory judgement pursuant to Art. 6 and Art. 8 of Human Righs et seq. Declaring that ITF knowingly, willfully, deliberately and maliciously violated my human and civil rights what is a danger for community in general

A permanent injunction prohibiting ITF or related person from using my name in doping case of Ms Katherina Kozlova

Such other and further relief as may seem just and proper in the premises

Costs: I'm pensioner and migrant therefore I ask you to examine my Appeal free of charges (…)".

67. The Appellant's submissions, in essence, may be summarised as follows:

1) The Appellant submits that she is not part of the Athlete's team:
   a. Pursuant to the Appellant, there is no *"written or whatsoever"* labour or non-labour agreement between the Appellant and the Athlete which is a requirement under Ukrainian Law.
   b. Considering that the Appellant is from Donetsk (Ukraine), she argues that she has to abide by Ukrainian law.

2) The Appellant puts forward that she is not subject to the jurisdiction of the ITFT and to English law:
   a. Being a Ukrainian citizen, the Appellant argues that she is obliged to follow Ukrainian law.
   b. According to the Appellant she has never accepted *"English Law, ITF jurisdiction and ITF Sole Arbiter"*.

3) The Appellant submits that the principle of *nemo iudex in causa sua* has been violated because the arbitrator of the ITFT was *"nominated, paied off and instructed"* by the Respondent.

4) Pursuant to the Appellant, her rights to a fair trial and privacy under Articles 6 and 8 of the European Convention on Human Rights ("ECHR") have been violated *"including [her] rights to defense"*.

5) The Appellant submits that her case is based on fabricated evidence. In particular,
   a. The Appellant argues that: *"copy of fabricated correspondence from my private emailbox whereof my identity have been stolen (…)"*.
   b. Furthermore, according to the Appellant, *"Ministry of Justice of Ukraine confirms in official statement that invoice for prohibited product has been issued by person who by written confirmation with created allegations against me what was a willfull ITF decision* ***never exist as a natural person or legal entity (sic!)*** *and was bought outside Urkaine due to simple fact that product on photo does not have any Ukrainian description what is a obligation in Ukraine (…)"*.

6) According to the Appellant, the Respondent and *"also in person of ITF Sole Arbiter"* are hiding key evidence. It follows from the official player's certificate that the Appellant is not the Athlete's doctor. This document has however not been submitted by the Respondent even though the Appellant had requested the Respondent to do so.

7) The Appellant argues that the principle *alienus dolus nocere alteri non debet* has been violated.

8) Finally, the Appellant submits that her right to be heard was violated by the ITFT. The latter is evidenced by the fact that all her motions before the ITFT have been ignored and were wrongfully *"rejected without Appeal clause"*.

B. The Respondent

68. In its Answer Brief, the Respondent requests that the CAS:

"7.1.1dismiss the appeal;

7.1.2 uphold the Decision and in particular confirm that:

7.1.2.1 the Appellant has committed a violation of TADP Article 2.8; and

7.1.2.2 that the Appellant is subject to a period of ineligibility of four years (starting from 1 May 2016) in accordance with TADP Article 10.3.3; and

7.1.3 order the Appellant to pay a contribution towards the ITF's legal fees and other expenses in this matter under CAS Code Article R65.3".

69. With respect to the ADRV the Respondent submits that the ITFT correctly accepted the ITF's finding that the Appellant had committed an ADRV in the form of "Administration".

1) Article 2.8 of the TADP applies to this case.

2) The offence of "Administration" may be committed either by another Player or by a Player Support Person ("PSP").

3) The Appellant must be qualified as a PSP. It is established that the Appellant advised the Athlete to ingest Red Rum. Furthermore, it is undisputed that Red Rum contains DMBA, a Prohibited Substance under the TADP and the WADA List.

4) It is true that the term "Administration" is not defined in the applicable TADP, i.e. in the version of the TADP prior to 2015. However, the term "Administration" has always been construed by hearing panels to cover cases where a doctor recommended and/or supplied a product containing a prohibited substance to an athlete.

5) According to the Respondent the *"facts of this case satisfy all of the 'actus reus' requirements of Article 2.8 (…)"*.

6) It is true that the *"mental element is not addressed in the wording of Article 2.8, i.e., it does not say whether it is a strict liability offence or whether intent, fault or negligence is required, or (if so) what exactly is required"*.

7) However, Article 2.8 TADP must be construed as a strict liability offence. Should, contrary to the view held by the Respondent, the CAS determine that intent is required, then the Respondent submits that the threshold should not be set too high. It suffices that the Appellant acted with indirect intent. According to the Respondent this threshold is met in the given case, because *"the Appellant was on notice that there was a significant risk that Red Rum would contain a prohibited substance, and manifestly disregarded that risk, so that she is taken to have accepted that risk and so to have 'indirectly' intended to administer a prohibited substance to Ms Kozlova"*.

8) Thus, even if the ITFT arbitrator wrongfully found (*quod non*) that Article 2.8 TADP is a strict liability offence, the Appellant would nonetheless have the required intent to be charged with an ADRV according to Article 2.8 TADP.

70. The Respondent finds that none of the Appellant's arguments have any merit, nor provide sufficient basis to disturb the decision. In particular, the Respondent submits that:

1) The Appellant is bound by the TADP:
   a. According to Article 1.15 of the TADP a *"Player Support Person" is automatically bound by and required to comply with the TADP"*. The term "Player Support Personnel" is defined broadly to cover *"[a]ny coach, trainer, manager, agent, team staff, official, medical or paramedical personnel, parent or other Person working with, treating or assisting a Player in his / her sporting capacity"*. There is no doubt that the Appellant, as a medical doctor treating and assisting Ms Kozlova, falls within the definition of "Player Support Person".
   b. The submission of the Appellant that she has never been part of the Athlete's team because of lack of a written contract, as required under Ukrainian law, is without merit. In order to fall under the definition of "Player Support Person", the Appellant need not be employed by the Athlete and there is no requirement for a written contract or any formal agreement under the applicable rules.

2) Being a PSP the Appellant is subject to the jurisdiction of the ITFT and to English law. In particular, a PSP is bound by the Articles 1.3.5 and 8 TADP. These articles provide for the jurisdiction of the ITFT. Furthermore, Article 1.8 of the TADP provides for the application of English law. It is commonly held that anybody that participates in elite sports is deemed to know that strict anti-doping rules exist and that they must be complied with. This hold true irrespective of whether or not the addressee of said rules has explicitly signed up to them, or even read them.

3) By accepting jurisdiction the ITFT did not breach natural justice:
   a. The ITFT has been installed by the ITF and was expressly required under the TADP to act independently and was careful to abide by this principle. The Appellant did not object to the appointment of the ITFT arbitrator, even though she had the right to do so. Accordingly, the Appellant has waived her right to challenge the ITFT.
   b. The fact that the ITFT arbitrator is being compensated by the ITF does not make the arbitrator any less independent. Instead, what matters according to the Respondent is that the ITFT arbitrator was never instructed by the ITF.
   c. Even if there had been any procedural defects (*quod non*) in the proceedings before the ITFT, these defects are cured by a *de novo* hearing before the CAS.

4) No breaches of Articles 6 or 8 of the ECHR have occurred, since
   a. the ECHR is not applicable to these proceedings and,
   b. in any case, the Appellant's right to a fair trial has not been infringed, because the comments made by the Ukrainian Tennis Federation ("UTF") are not legally attributable to the ITF.
   c. Moreover, the ITFT is entirely independent of the ITF.
   d. Concerning the alleged violation of Article 8 ECHR, the Respondent argues that *"the Appellant does not have any right to privacy in relation to emails and documents that she sent to Mses Kozlova and Moiseeva; but even if she did, that right would be outweighed by the public interest in effective enforcement of the anti-doping rules"*.

5) The Appellant's allegations regarding fabricated evidence are wholly unsubstantiated. In particular, the Respondent argues that
   a. there is no evidence that the Appellant's e-mails were fabricated and,
   b. that *"the Appellant's argument that the principle of* alienus dolus nocere alteri non debet *(which the ITF understands translates roughly to 'no one should be charged for someone else's trick') has been violated because her emails have been fabricated must also fail"*.
   c. According to the Respondent, the documents filed by the Appellant are all entirely irrelevant to this case and do not suggest fabrication of the evidence submitted by the Respondent.

6) The Respondent rejects the Appellant's allegation that the ITF or the ITFT concealed evidence.
   a. The requirements for participating in national-level tournaments run in Ukraine under the UTF are not relevant for these proceedings as Ms Kozlova is a WTA

member who does not compete in national-level events, but rather in international-level events.

b. By not referencing the UTF player certificate in the Appealed Decision, the arbitrator of the ITFT has in no way hidden evidence, as he is not obliged to discuss all of the arguments raised by the Parties.

7) Each of the Appellant's motions in the proceedings before the ITFT was carefully considered and properly rejected

a. In particular, Respondent submits that the ITFT was right in rejecting the Appellant's motion to dismiss the case because the preliminary hearing was held more than 21 days after the notice of charge was sent.

b. It would be contrary to the public interest to dismiss an anti-doping charge without considering the merits.

c. The Respondent also argues that the wording in Article 8.4.1 of the TADP is not mandatory.

d. According to the Respondent, the Appellant did not claim or prove *"that she had suffered any prejudice from the delay in convening the preliminary hearing. Absent such prejudice, the delay gives no cause to dismiss the charge"*.

V. JURISDICTION OF THE CAS

71. Article R47 of the CAS Code 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".

72. The jurisdiction of the CAS has been expressly consented to by the Parties in their submission to the CAS, confirmed by the Parties' signing of the Order of Procedure and reconfirmed at the hearing on 22 December 2016. Accordingly, the Sole Arbitrator is satisfied that he is competent to hear this dispute.

VI. ADMISSIBILITY OF THE APPEAL

73. According to Article R49 of the CAS Code the time limit for appeal amounts to 21 days from the date of receipt of the Appealed Decision.

74. The Appealed Decision was issued on 9 June 2016 and the Statement of Appeal was filed on 30 June 2016. Consequently, the appeal was filed within the 21-day deadline set out above. The Appeal, thus, is admissible.

VII. APPLICABLE LAW

75. Article 187 of the Swiss Private International Law Act (hereinafter referred to as "PILA") provides – *inter alia* – that *"the arbitral tribunal shall rule according to the law chosen by the parties or, in absence of such a choice, according to the law with which the action is most closely connected"*. This provision establishes a regime concerning the applicable law that is specific to arbitration and different from the principles instituted by the general conflict-of-law rules of the PILA.

76. In particular, the provisions enable the parties to mandate the arbitrators to resolve the dispute in application of provisions of law that do not originate in any particular national law, such as sports regulations of an international federation (cf. KAUFMANN-KOHLER/RIGOZZI, Arbitrage international, 2nd ed. 2010, paras. 597, 636 *et seq.*; POUDRET/BESSON, Comparative Law of International Arbitration, 2007, para. 679; RIGOZZI A., L'arbitrage international en matière de sport, 2005, paras. 1177 *et seq.*).

77. According to the legal doctrine, the choice of law made by the parties can be tacit (Zürcher Kommentar zum IPRG-HEINI, 2nd ed. 2004, Art 187 para. 11; BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 3rd ed., 2015, para. 1387; KAUFMANN-KOHLER/RIGOZZI, Arbitrage international, 2nd ed. 2010, para. 609) and/or indirect, by reference to the rules of an arbitral institution (RIGOZZI A., L'arbitrage international en matière de sport, 2005, para. 1172; KAUFMANN-KOHLER/STUCKI, International Arbitration in Switzerland, 2004, p. 118 *et seq.*). Thus, in agreeing to arbitrate the present dispute according to the CAS Code, the Parties have submitted to the conflict-of-law rules contained therein, in particular to Article R58 of the CAS Code.

78. Article R58 of the CAS Code states in respect of the applicable law to the merits 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".

79. Article R58 of the CAS Code refers first and foremost to the "applicable regulations". These are, in principle the TADP. However, in order for the TADP to be qualified as the "applicable regulations", the TADP must have been agreed by the Parties, i.e. the Appellant must have submitted to these rules either explicitly or implicitly. Absent any law chosen by the Parties, the Sole Arbitrator will decide the issue whether or not the Appellant has submitted to the TADP according to the law of the country in which the ITF is domiciled, i.e. English law. In doing so, the Sole Arbitrator takes into account the submission of the Respondent in its letter to the CAS dated 12 December 2016, according to which *"the requirements of the common and civil law are effectively the same on this issue"*, i.e. whether or not there is an agreement between the Parties to apply the TADP.

VIII. SCOPE OF REVIEW

80. Article R57 of the CAS Code provides:

"The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance. (…)".

81. Thus, the Sole Arbitrator has the authority to provide a *de novo* review of the issues determined by the ITFT. As a consequence, even if the Appellant's right to a fair trial had been violated in the proceedings before the ITFT acting as a first instance tribunal, a *de novo* hearing before the CAS cures these violations. The same holds true for the Appellant's claim of an alleged violation of the procedural principle of *"nemo iudex in causa sua"*.

IX. MERITS OF THE APPEAL

82. The Appellant has filed several requests which the Sole Arbitrator will examine thereafter:

A. The request to declare the Appealed Decision null and void

83. The Appellant requests that the Appealed Decision be declared null and void. It is undisputed between the Parties that the Appellant has standing to sue and the Respondent standing to be sued with respect to the Appealed Decision. It is equally undisputed between the Parties that the Appealed Decision must be squashed or declared null and void in case the Appellant is not submitted to the disciplinary authority of the ITF, i.e. if the ITFT had no jurisdiction to sanction the Appellant. The Respondent explicitly and rightfully submitted in its letter to the CAS dated 12 December 2016 that the ITFT's disciplinary authority depends on the TADP being binding on the Appellant and that the TADP *"are binding only on those who agree to them"*. The Sole Arbitrator, therefore, must determine whether or not the Appellant accepted to be bound by the TADP and, thus, whether the Parties entered into a contract in between them. Reference is made in this respect to an article by ALAN SULLIVAN, in which the author found as follows (The World Anti-Doping Code and Contract Law, in Haas/Healey (Eds.) Doping in Sport and the Law, 2016, p 70):

"If it stands for a broader proposition that a sporting organisation's rules apply to a person who, by his or her actions, brings himself or herself within the purview of those rules, even though not contractually bound by them, then it seems inconsistent with legal principle. On what basis can it be said that "rules" are enforceable against strangers when there is no relevant contractual, proprietary or statutory power? As Denning LG, as he then was, put it colourfully but accurately: "The jurisdiction of a domestic tribunal … must be founded on a contract, express or implied. Outside the regular courts of this country, no set of men can sit in judgment on their fellows except so far as parliament authorizes it or the parties agree to it".

84. The execution of a contract requires two concurrent declarations of intent, i.e. an offer by one party and an acceptance by the other party. Absent any specific provision to the contrary, the declaration of intent may either be expressly or tacitly. No written form requirement needs to be met. Furthermore, the declarations of intent must be corresponding in order for there to

be a valid contract. Thus, the Parties must agree on the *essentialia negotii* of the contract, i.e. – in this specific case – that the TADP is applicable between them.

85. It is undisputed that there is no explicit contract between the Parties declaring the TADP applicable between them. Consequently, the Arbitrator must examine whether such contract has been entered into implicitly. In doing so, the Sole Arbitrator concurs with the view expressed by his learned colleague ALAN SULLIVAN (The World Anti-Doping Code and Contract Law, in HAAS/HEALEY (Eds.) Doping in Sport and the Law, 2016, pp 68 seq.), according to which

"What happens if … an athlete does not sign such a document but still participates in the sport? What happens when a sporting club brings in an outsider, such as a "sports scientist", as a "consultant", and that person is neither an employee of the organisation nor signs anything agreeing to be bound by its rules?

… the answer will depend on the ordinary principles of contractual formation adapted to the sporting context and applied to the facts of the specific case.

Even where there is no traditional offer and acceptance or where a person has not signed a document acknowledging to be bound by the rules, parties may become bound by a contract when they intend and contemplate becoming bound by such a contract. This is an objective inquiry that needs to be answered idiosyncratically on the facts of each case.

In the case of a contract comprising or including anti-doping rules, the need for the conduct of the parties to be capable of proving all of the essential elements of an express contract necessarily means that the relevant conduct must show, on the balance of probabilities, that a person has agreed to participate in the particular sport at least in the knowledge that anti-doping rules exist and are intended to apply in respect of such participation. Such conduct may be hard to prove absent evidence of attendance at meetings or the like where the anti-doping policy was mentioned or discussed, or evidence of the notoriety of the existence of such rules in the sport. It is notorious, for example, that anti-doping rules, the Code, apply in respect of Olympic sports. It would be easy to infer that an athlete or support person who participates in such a sport was aware that he or she was doing so in circumstances where anti-doping rules applied in respect of such participation".

86. The Sole Arbitrator notes that according to the above author a tacit declaration of will may be deduced from a conduct of a party. A conduct from which one might typically infer that someone agrees to be bound to the rules is – as the author puts it – if the person *participates in the sport*. It appears evident to the Sole Arbitrator that the term *"participation in sport"* within the above meaning refers to entering into the "sphere of control" of the sports organisation. Such construction is also in line with the World Anti-Doping Code (WADC) that states in its introduction that *"Athletes or other Persons accept these rules* [anti-doping rules] *as a condition for participation and shall be bound by these rules"*. Only a (moral or natural) person having control over a certain sphere can set up "condition for participation". Thus, in case an athlete participates in a competition organised by a federation the athlete agrees to be bound by the applicable rules in said competition in turn for being admitted to the federation's sphere of control. However, in the case at hand the Appellant never participated in any of the competitions organised and governed by the ITF. The Appellant never entered the Respondent's "sphere of control" and never had any connection to or ties with the ITF before the ITFT exercised disciplinary authority over her. Once the Appellant entered the ITF's sphere of control she clearly and unequivocally contested the ITFT's jurisdiction. Thus, it cannot implicitly be

inferred that the Appellant by participating in the disciplinary proceedings before the ITFT accepted to be bound by the respective provisions.

87. The Sole Arbitrator cannot accept Respondent's argument that merely by becoming an expert in the field of sports, e.g. by becoming a more or less renowned sports physician and treating or advising professional athletes one automatically agrees to be bound by the TADP. If one were to follow this line of argument, the Appellant – by the mere fact of becoming a sport physician – would have agreed to be bound by every existing anti-doping rule of this world. Not only does it appear completely fictitious to deduce such a will from this rather neutral conduct of the Appellant. In addition, it should be noted that one of the *essentialia negotii* of a contract is that the parties are aware of the identity of their contractual partners. If one were to follow Respondent's submission not only would the Appellant have entered (tacitly) into submission agreements with all anti-doping organisations around the world, but also ITF would have executed – tacitly – contracts with all sports physicians around the world. Such intent, however, cannot be followed from the Appellant's conduct and, therefore, the Sole Arbitrator is not willing to accept such legal construction.

88. The view held here is not contradicted by any of the reference to CAS decisions or decisions by other adjudicatory panels submitted by the Respondent. There is not a single case where the panels found that there was an implied submission agreement to the rules and regulation of a federation without the person entering or participating or being admitted to a sphere of control of the federation.

89. On a side note the Sole Arbitrator wishes to state that the construction advocated by the Respondent is also contradicted by Article 2.10 WADC. The provision reads – *inter alia* – as follows:

Association by an athlete … subject to the authority of an anti-doping organization in a professional or sport-related capacity with any Athlete Support Person who:

…

If not subject to the authority of an anti-doping organization, and where Ineligibility has not been addressed in a results management process pursuant to the Code, has been convicted or found in a criminal, disciplinary or professional proceeding to have engaged in conduct which would have constituted a violation of anti-doping rules if Code-compliant rules had been applicable to such Person. The disqualifying status of such Person shall be in force for the longer of six years from the criminal, professional or disciplinary decision or the duration of the criminal, disciplinary or professional sanction imposed.

90. This provision evidences that Athlete Support Personnel – even though being involved in sport – are not automatically bound by the anti-doping rules, i.e. have not automatically executed a submission contract with respect to the WADC. It is rather telling that the WADC and the TADP differentiate between a PSP that is subject to the authority of an Anti-Doping Organisation and a PSP who is not subject to the authority of an Anti-Doping Organisation. This highlights that assisting an athlete as such is not considered "participation in sport" and thereby agreeing to the anti-doping rules.

91. More particular, the Sole Arbitrator finds that also by providing advice and medical examination to the Athlete the Appellant has not entered into a contract with the Respondent. The Appellant denies having contracted with the Athlete. However, from the abundant evidence gathered by the Respondent, it is very clear to the Sole Arbitrator that there was a contractual relationship between the Appellant and the Athlete starting in June 2013 and continuing through to early 2015. The Sole Arbitrator is convinced that the Appellant provided medical and pharmacological support to the Athlete by conducting physical examinations and recommending various medicines and products to help her manage the workload of life on the professional tennis circuit. The Appellant was reimbursed for her expenses and paid for every consultation. Moreover, the Sole Arbitrator is convinced that the Athlete agreed to pay the Appellant 10% of any prize money she won. Whether or not such contract was in writing is irrelevant from the Sole Arbitrator's point of view.

92. This contractual relationship between the Appellant and the Athlete as shown above, however, does by no way mean that the Appellant also automatically entered into a concurrent legal relationship with a third party (the Respondent), thereby conferring disciplinary powers to the ITF. This would only be true if – very exceptionally – the contract between the Athlete and the Appellant had to be qualified as a contract for the benefit of a third party. There is, however, no evidence on file that the Athlete and the Appellant when executing the contract between them had in mind to confer upon the Respondent any disciplinary competence with respect to the Appellant.

93. In the light of the above, the Sole Arbitrator concludes that the Appellant never agreed or submitted to the TADP and thus cannot be bound by it. The Sole Arbitrator holds that the ITFT wrongly assumed jurisdiction over the Appellant and that, therefore, the Appealed Decision must be declared null and void.

B. The request for damages

94. In her Statement of Appeal, the Appellant claims compensatory damages in the amount of EUR 150,000 and punitive damages in the amount of EUR 250,000. The Sole Arbitrator notes that the claims submitted by the Appellant are completely unsubstantiated. The Appellant neither mentions a legal basis for the claims nor any conditions that must be fulfilled in order to be entitled to such damages. Furthermore, the Appellant neither submitted any evidence nor a skeleton calculation how she derived the figures claimed. Already for these reasons the claims must be dismissed.

95. In addition, the Sole Arbitrator notes that – in any event – there is no sufficient causal link between the Appealed Decision and the alleged damage suffered by the Appellant. In the hearing the Appellant argued that the damage suffered was due to the fact that she has been and still is associated with the Athlete's doping case. This – according to the Appellant – damaged her reputation and caused a loss of revenues to her. Contrary to the Appellant's explanations, the Sole Arbitrator finds that the Appellant is quite rightfully associated by the public with the Athlete's doping case. From the evidence before the Sole Arbitrator it is crystal clear that not only there was an intense legal relationship between the Athlete and the

Appellant. In addition, it is apparent from the evidence before the Sole Arbitrator that it was the Appellant who recommended and provided the product Red Rum to the Athlete, a product that ultimately led to the adverse analytical finding. The objections by the Appellant to the Respondent's detailed description of events and the evidence submitted by the latter are totally unreliable. There is no evidence on file that any of the e-mail correspondence between her and the Athlete have been fabricated. Nobody would have an interest in doing so. This is all the more true, since the Appellant picks and choses in relation to the Respondent's evidence, i.e. regards some of the e-mails as authentic and others as fabricated just as it pleases her and is beneficial to her case. From the e-mail correspondence that the Appellant admits as being authentic it is apparent that she and the Athlete had a lasting, familiar and reliable professional relationship that necessarily lasted over a longer period of time. In the context of this relationship the Appellant provided nutritional and medical advice to the Athlete. This is corroborated also by the witness statement of the Athlete and her manager, whom the Appellant chose not to cross-examine. To conclude, therefore, the Sole Arbitrator finds that it was not the Appealed Decision (despite the lack of jurisdiction) that caused the Appellant damages. Instead, it was the Appellant's ill advice to the Athlete that led the latter to ingest a product containing a prohibited substance and being sanctioned for an ADRV. The source and cause of the Appellant's damaged reputation is solely or at least predominantly to be attributed to the Appellant's shortcomings and unprofessional behaviour.

96. In the light of all of the above, the Sole Arbitrator concludes that the damage claims filed by the Appellant must be dismissed.

C. Declaratory Relief in respect to Articles 6, 8 ECHR

97. The Appellant does not state and explain why the ITF would be bound by the ECHR (which is primarily addressed to the contracting states) and inasmuch the Respondent breached the above articles. With respect to Article 6 ECHR it remains unclear to which of the several paragraphs the Appellant refers to. Also in respect to Art. 8 ECHR the claim is completely unsubstantiated. The Appellant was – even when being asked at the hearing – not in a position to give further guidance with respect to these claims. Consequently, these claims must be dismissed.

D. Request for a permanent injunction

98. The Appellant finally requested a permanent injunction that the Respondent *"or related person"* be prohibited *"from using my name in doping case of Ms Katherina Kozlova"*. With reference to the finding above, this request must fail from the outset, since – as previously established – the Sole Arbitrator is convinced that it was the Appellant that provided the Athlete with the product Red Rum which caused the ADRV of the Athlete.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The Appeal filed on 30 June 2016 by Dr Elena Dorofeyeva against the decision rendered by the Independent Tribunal of the International Tennis Federation on 9 June 2016 is partially upheld.
2. The decision rendered by the Independent Tribunal of the International Tennis Federation on 9 June 2016 is declared null and void.
3. The request for payment of damages filed by Dr Elena Dorofeyeva against the International Tennis Federation is dismissed.
4. (…).
5. (…).
6. All other or further claims are dismissed.