



**Arbitration CAS 2015/A/4174 Fawcett (Kimberly) Smith v. International Triathlon Union (ITU), award of 13 January 2016 (operative part of 11 September 2015)**

Panel: Prof. Matthew Mitten (USA), Sole Arbitrator

*Paratriathlon*

*Appeal against ITU Executive Board denial of request for handler*

*Appealable decision*

*Obligation to provide reasons or notice of an athlete's right to appeal*

*Calculation of deadlines*

*Deadline for filing the statement of appeal*

1. A letter by the Executive Board of an International Federation may be considered a “decision” pursuant to Article R49 of the CAS Code (the Code) provided it contains a clear, unequivocal, final and official ruling by the International Federation which aims at affecting the legal situation of the athlete. This is the case regardless of the form of the letter and regardless of the absence of any reasons or notice of any right to appeal the ruling to CAS.
2. Although best practice would be for a federation to provide reasons for its decisions and notice of an athlete’s right to appeal to CAS in a written ruling that affects an athlete’s legal rights or situation, neither of the two is a requirement established by Article R49 of the Code or any other provision of the Code.
3. The term *natural days* contained in a federation’s regulations regarding the calculation of deadlines may be construed to be synonymous with “calendar days” rather than “business days”.
4. Article R32 of the Code expressly forbids an extension of the time limit for the filing of the statement of appeal, *i.e.* the time limit for filing an appeal is absolute and strict and there is no discretion provided under the Code to extend the time limit for filing a notice of appeal.

**I. PARTIES**

1. Ms. Fawcett (Kimberly) Smith (the “Athlete” or “Appellant”) is a Canadian citizen and an international-level athlete competing in the sport of Paratriathlon.

2. The International Triathlon Union (the “ITU” or “Respondent”) is the international governing body for the sports of Triathlon and Paratriathlon.

## II. FACTUAL BACKGROUND

3. Below is a summary of the relevant facts and allegations based on the parties’ written submissions, pleadings and evidence. Additional facts and allegations found in the parties’ written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, he refers in his Award only to the submissions and evidence he considers necessary to explain his reasoning.
4. The Athlete is a Military Officer in the Regular Force, Canadian Armed Forces whose right leg was amputated above the knee as a result of an injury suffered during active duty in 2006. She is a PT2 paratriathlete who has competed in ITU World Paratriathlon events since 2008, winning a bronze medal twice (2008 and 2010). She placed first in the Canadian National Championships, PT2 Women in 2014.
5. The Athlete contends she requires the use of a “handler” during Paratriathlon competitions because she is a multiple limb impaired athlete with permanent impairments in her left leg and ankle as well as only partial functioning in her right arm and shoulder. According to the TriathlonBC website, “Handlers are individuals who can help paratriathletes in transition (without propelling them forward). A handler might help lift an athlete into a handcycle or pass an athlete their equipment. Handlers are typically selected by the athlete, and are often family or friends” (See TriathlonBC website at <http://www.tribc.org/paratriathlon-awad>).
6. In a 27 February 2015 email, the ITU Approval Panel informed Triathlon Canada, the national federation for the sport of Paratriathlon in Canada, as well as the Athlete, of its rejection of her request for a handler as follows:

*Please note that the request for a personal handler for Kimberley Fawcett has been denied.*

*For you to understand the rationale, there needs to be a clear reason to get a handler in terms of being able to continue the race. If someone is simply requesting a handler to ‘save’ time, we will not grant it. We understand this can pose some perceived advantage or disadvantage amongst impairments in the same class, but this is a different discussion.*

*As a general approach, no impaired unilateral lower or upper limb athlete will have a handler granted.*

*The purpose of this rule is to enhance and promote the abilities of the athlete and it has been discussed with NFs since 2012.*

7. On 7 April 2015, the Athlete appealed the ITU Approval Panel’s denial of her request for a handler because it “determined that all PT2 athletes were ‘unilateral’ impaired” who “could either train

*and/or practice to conduct themselves throughout the race without handler assistance” but that she “[does] not meet the definition of ‘unilaterally impaired’ athlete to justify the denial of the use of a handler” because of her multiple limb impairments.*

8. On 30 April 2015, the day before the CAMTRI Continental Championships in Monterrey, Mexico in which the Athlete would be competing, an Appeal Body comprised of Colin Grove, Shana Harrington, Candice Stapleton, and Eric Angstad, which was constituted by the ITU Executive Board in response to her appeal, examined and assessed the Athlete’s condition for potential re-classification. After examining the Athlete and observing her performance during this Paratriathlon competition, the Appeal Body concluded she was able to perform transition actions without the need of a handler. Subsequently, Ms. Harrington, Mr. Grove, and Ms. Stapleton, individually prepared written documentation of their observations and findings (dated 4 May 2015, 7 May 2015, and 29 August 2015, respectively), which apparently were not provided to the Athlete prior to the institution of this proceeding but that the Respondent submits were provided to the ITU Executive Board “*as a formal report on the re-assessment of the athlete*”.
9. In a 24 June 2015 letter from Loreen Barnett, Secretary General, International Triathlon Union, addressed to “*Luc Landreault, President Triathlon Canada, and Kimberly Fawcett Smith, Appellant*”, the ITU Executive Board unanimously rejected the Athlete’s appeal:

*Re: Kimberly Fawcett Smith Appeal, PT2 Handler*

*I am writing to you as the Secretary General of the International Triathlon Union (ITU), the world governing body for the sport of Triathlon, in response to Kimberly Fawcett Smith’s appeal to the ITU Executive Board regarding the denial of access to a handler during ITU Triathlon events.*

*The Appeal Panel recommended to the ITU Executive Board that the appeal be denied and that the rule regarding handlers be applied to Kimberly Fawcett Smith. The ITU Executive Board agreed with the recommendation and rejected the appeal unanimously.*

*We trust that this ruling meets with your understanding.*

*Sincerely yours,*

*Loreen Barnett, Secretary General  
International Triathlon Union*

10. In a 25 June 2015 email to the Athlete and Mr. Landreault on which others were copied, Ms. Barnett informed them of the ITU Executive Board’s denial of her appeal and attached a copy of her 24 June 2015 letter:

*Dear Luc, dear Kimberly,*

*Please find attached the outcome of your appeal to the ITU Executive Board.*

*I trust this will meet with your understanding.*

*Kind regards,*

*Loreen Barnett, Secretary General  
International Triathlon Union*

The Athlete acknowledged that she received both this email and attached letter on 25 June 2015.

11. In a 13 July 2015 email to Tim Wilson (CEO Triathlon Canada), Curtis Smith, the Athlete's spouse and a Canadian attorney who was advising and/or representing her in connection with ITU Executive Board's denial of her appeal, stated:

*Dear Tim,*

*My spouse (Kim Fawcett Smith) has asked me to respond on her behalf to this letter from Loreen Barnett. Frank Christie recommended that this come to you.*

*Unfortunately, contrary to the final line of Ms. Barnett's letter, this ruling does not meet our understanding.*

*First, this appeal did not follow any of the guidelines detailed in the Appeal chapter (Chapter 13) of the Competition Rules ...*

*Second, basic procedural fairness dictates that there has to be some back and forth between decision makers and appellants. It seems that this decision was made in isolation from a key player in the issue - Kim. While Kim was re-examined by Classifiers at the Monterrey race, I am fairly certain that these Classifiers did not constitute the Appeal Panel.*

*Third, decisions in discretionary matters like these have to be communicated in a more fulsome manner than just 'no' - reasons should be given.*

*In my experience, any one of these failings would be enough for a decision to be over-turned or sent back for reconsideration. Triathlon Canada's appeal processes are clear and, by experience, we know that you follow them. For whatever reason, the ITU has chosen not to act similarly. We would prefer to avoid having to go to the Court of Arbitration for Sport, but it seems that we have no other choice. ...*

### **III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT**

12. On 12 August 2015, the Athlete filed her Statement of Appeal, which states it is an appeal against "the decision of the ITU's Appeal Panel" and requested an expedited procedure and decision by 15 September 2015 in accordance with Articles R47 *et seq.* and R44.4 of the Code of Sports-related Arbitration (the "Code"). The Athlete also suggested that this matter be referred to a Sole Arbitrator and nominated Ms. Carol Roberts. Moreover, the Athlete named the International Paralympic Committee and Triathlon Canada as interested parties.

13. In her Appeal Brief, the Athlete requested the following relief:
  - a. *this appeal to be upheld, or partly upheld; and*
  - b. *this appeal be heard in an expedited manner as she is desirous of competing in the World Championships Grand Final in Chicago, starting September 15<sup>th</sup>, 2015; and*
  - c. *the Decision be set aside and a handler allowed/permitted in all sanctioned ITU Paratriathlon races for athletes with multiple impairments; and/or*
  - d. *her name be placed on the start list for the aforementioned 2015 ITU World Paratriathlon Championships Grand Final in Chicago; and*
  - e. *costs be awarded to her, in whole or in part.*
14. On 17 August 2015, the International Paralympic Committee informed the CAS Court Office that it did not wish to participate in this proceeding as an interested party. Triathlon Canada did not respond.
15. On 18 August 2015, the parties mutually agreed to conduct this procedure in an expedited fashion and confirmed a briefing schedule thereto.
16. On that same day - 18 August 2015 - the Respondent confirmed its agreement to refer this case to a Sole Arbitrator, but suggested that Mr. Denis Oswald be appointed in lieu of Ms. Roberts.
17. On 19 August 2015, the Appellant objected to the appointment of Mr. Oswald as Sole Arbitrator and suggested therefore that the President of the Appeals Arbitration Division appoint a Sole Arbitrator.
18. On 21 August 2015, the Athlete filed her Appeal Brief in accordance with Article R51 of the Code.
19. On 25 August 2015, the CAS Court Office notified the parties that the President of the CAS Appeals Arbitration Division appointed Matthew J. Mitten, Professor of Law, Milwaukee, Wisconsin, USA as the Sole Arbitrator in this proceeding in accordance with Article R50 of the Code.
20. On 31 August 2015, the Respondent filed its Answer in accordance with Article R55 of the Code, and requested the following relief:
  1. *Terminate the process due to late presentation of the Appeal;*
  2. *Dismissal of the Appeal;*
  3. *Dismiss the Claim of the Appellant to be entered in the 2015 ITU World Paratriathlon Championships Grand Final in Chicago;*

4. *Appellant to cover the associated Costs of this Appeal for ITU.*

21. Pursuant to the parties' request, the CAS Court Office scheduled a hearing for 14 September 2015 in Chicago, Illinois.
22. On 9 September 2015, the Respondent requested that, prior to the scheduled hearing, the Sole Arbitrator rule on its request to terminate this proceeding for lack of admissibility pursuant to Article R49 of the Code because the Athlete's Statement of Appeal was filed after expiration of the "thirty natural days" time limit in Article 13.2 (c) of the ITU Competition Rules. Consequently, if such request was granted, this appeal would be dismissed and the hearing cancelled.
23. On 10 September 2015, the Athlete, at the invitation of the Sole Arbitrator, filed her response to the Respondent's request to dismiss this case for lack of admissibility.
24. Later that same day - 10 September 2015 - the CAS Court Office confirmed the parties' agreement to allow the Sole Arbitrator to decide the preliminary question on the admissibility of the appeal on written submission only in advance of the hearing such that if the Respondent's request to dismiss was granted, the hearing would be cancelled and her case dismissed.
25. On 11 September 2015, the Sole Arbitrator issued the operative part of this Award dismissing as inadmissible the Athlete's appeal against the 24 June 2015 decision of the ITU Executive Board.

#### **IV. SUBMISSIONS OF THE PARTIES**

26. In her Statement of Appeal and Appeal Brief, the Appellant asserts the following regarding the admissibility of her appeal:
  - *The Appellant appeals against the decision of the ITU's Appeal Panel (the "Decision").*
  - *The only communication that the Appellant received concerning the Decision is [the 25 June 2015 email from Ms. Barnett which informed her of the ITU Executive Board's denial of her appeal and attached a copy of her 24 June 2015 letter]. In it, the Appellant is informed (second hand) that her appeal was denied.*
  - *The Decision was never provided to the Appellant.*
  - *Worse still, the Appellant was not permitted to make submissions before that Panel, nor did she receive the ITU's submissions or know any of the evidence put against her. It was a complete denial of natural justice. In fact, the Appellant did not – and still does not – even know Panel's composition. These are serious breaches of procedural fairness that, in and of themselves, require amelioration by this Court.*
27. In its Answer, the Respondent asserts the appeal is inadmissible for the following reasons:

- *The appellant filed the Statement of Appeal on 12<sup>th</sup> August, received by ITU 14<sup>th</sup> August, outside the thirty natural days from the ITU Executive Board's Decision, which was communicated to the appellant on 25<sup>th</sup> June 2015 and therefore, the deadline for appealing this decision was 25<sup>th</sup> July 2015. So this appeal is invalid and should not be accepted by CAS.*
- *The Respondent, according to Rule R49 of the Statutes of the Court requests the President of CAS and/or the Arbitrator to terminate this process since the Statement of Appeal has been presented after expiration of the prescribed time, as it has been proven.*

28. In her Response, the Appellant contends her appeal is admissible for the following reasons:

- *[The 25 June 2015 email from Ms. Barnett informing her of the ITU Executive Board's denial of her appeal and attached a copy of her 24 June 2015 letter] neither contained the "decision" nor does it have the hallmarks of a "decision".*
- *Neither the E-mail nor the Outcome contained any legal instruction on how to appeal to this Court. There was therefore never any communication of a "decision" to the Appellant. The 21 day window set out in R49 cannot be invoked as a procedural bar to this proceeding, as the time limit has not expired.*
- *In the alternative, even if it could be argued that the E-mail and/or the Outcome constitute a "Decision", they still do not constitute a motivated decision. In the absence of a motivated decision an athlete (and her counsel) are simply unable to discern the merits of an appeal.*
- *The appeal was not filed in an untimely manner.*

## V. APPLICABLE LAW

29. Article R58 of the 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, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.*

30. Article 34 of the ITU Constitution (September 2014) provides: *The governing law of the ITU shall be Swiss law.* Appendix D (Definitions) of the ITU Constitution further provides:

*International Triathlon Union (ITU): The world governing body of triathlon, duathlon, aquathlon, winter triathlon and all other related multisport, a non-profit corporation domiciled and residing at Maison du Sport International, Av de Rhodanie 54, CH-1007 Lausanne, Switzerland.*

31. Paragraph 13 of the 2015 ITU Athletes' Agreement, which the Athlete signed on 12 March 2015, provides:

*Dispute: The Athlete accepts that any dispute arising from the regulations of ITU, which cannot be considered by its existing appeal procedure, as set out in the ITU Competition Rules, shall be finally settled by the Court of Arbitration for Sport in Lausanne, Switzerland (CAS), to the exclusion of recourse to ordinary courts. The applicable law in relation to the interpretation of this agreement and any such disputes shall be the law of Canton de Vaud, Switzerland.*

32. Based on the foregoing, the Sole Arbitrator confirms that Swiss law applies to this procedure.

## VI. JURISDICTION

33. Article R47 of the Code provides as follows:

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

34. CAS jurisprudence provides:

*According to CAS case law, the three conditions of Article R47 are the following (cf. CAS 2004/A/748 no. 83):*

- there must be a ‘decision’ of a federation, association or another sports-related body,*
- the parties must have agreed to the competence of the CAS and*
- the (internal) legal remedies available must have been exhausted prior to appealing to CAS.*

*See CAS 2009/A/1781, para. 5.4; CAS 2015/A/3925, para. 46.*

### a. Was there a “decision” rendered by the ITU?

35. Regarding the first condition, the parties dispute whether Ms. Barnett’s 25 June 2015 email and attached 24 June 2015 letter informing the Athlete of the ITU Executive Board’s denial of her appeal of the 27 February 2015 decision of the ITU Approval Panel rejecting her request for a handler constitute a “decision”. The Sole Arbitrator finds the following CAS jurisprudence interpreting the term “decision” relevant in resolving this issue.

36. In CAS 2012/A/2750, paras. 93-94, the CAS Panel explained:

*[T]he Swiss Federal Supreme Court established the following definition of a “decision”: “[T]he decision is an act of individual sovereignty to an individual, by which a relation of concrete administrative law, forming or stating a legal situation, is resolved in an obligatory and constraining manner. The effects must be directly binding both with respect to the authority as to the party who receives the decision” (cf. ATF 101 Ia 73).*



*According to CAS jurisprudence, a decision is a unilateral act sent to one or more determined recipients and is intended to produce legal effects. Or in other words, “an appealable decision of a sport association is normally a communication of the association directed to a party and based on an “animus decidendi”, i.e. an intention of a body of the association to decide on the matter, being also only the mere decision on its competence (or non-competence)”.*

37. In CAS 2009/A/1781, para. 5.4.2, the Panel observed that *CAS Panels have interpreted the term “decision” within the meaning of Article R47 of the Code broadly.* For example, in CAS 2011/A/2474, para. 111, the Panel provided the following summary of CAS jurisprudence:

*The Panel agrees with the definition of “decision” and the characteristic features of a “decision” stated in those CAS precedents:*

- *“the form of the communication has no relevance to determine whether there exists a decision or not. In particular, the fact that the communication is made in the form of a letter does not rule out the possibility that it constitute a decision subject to appeal” (CAS 2005/A/899 par. 63; CAS 2007/A/1251 par. 30; CAS 2004/A/748 par. 90; CAS 2008/A/1633 par. 31).*
- *“In principle, for a communication to be a decision, this communication must contain a ruling, whereby the body issuing the decision intends to affect the legal situation of the addressee of the decision or other parties” (CAS 2005/A/899 par. 61; CAS 2007/A/1251 par. 30; CAS 2004/A/748 par. 89; CAS 2008/A/1633 par. 31).*
- *“A decision is thus a unilateral act, sent to one or more determined recipients and is intended to produce legal effects” (2004/A/659 par. 36; CAS 2004/A/748 par. 89; CAS 2008/A/1633 par. 31).*
- *“an appealable decision of a sport association or federation” is normally a communication of the association directed to a party and based on an ‘animus decidendi’, i.e. an intention of a body of the association to decide on a matter [...]. A simple information, which does not contain any ‘ruling’, cannot be considered a decision”. (M. Bernasconi, “When is a ‘decision’ an appealable decision?” in: *The Proceedings before the CAS*, ed. by Rigozzi/Bernasconi, Bern 2007, p. 273; CAS 2008/A/1633 par. 32).*

38. Moreover, in CAS 2008/A/1705, para. 5.2.2, the Panel determined that a federation’s written ruling that has the purpose of affecting an athlete’s legal rights is a “decision” for purposes of Article R47 of the Code even if it does not provide any reasons:

*Although FIFA’s letter sent to the parties on 31 July 2008 does not address the grounds on which the decision was passed, it clearly shows all formal and material characteristics of a “decision” in the sense of Art. R47 of the Code. On a material level it states the outcome of the deliberations regarding the issue of the training compensation owed for the Player. The content of this letter thus represents a “unilateral act” which aims at affecting the legal situation of the addressees – or at least, in the present case and under the concrete circumstances of this case, could be interpreted as aiming at doing so. On a formal level the letter carries the heading “decision”, was passed by an organ of FIFA (the DRC) and was signed by the FIFA General Secretary, who is awarded this competence in Art. 68(3) lit. b of the FIFA Statutes. Furthermore, FIFA’s letter of 31 July 2008 contains legal instructions on how to appeal against it, thus bearing all the elements ascribed to a “decision”.*

*The fact that the decision is not motivated can, as such, not affect it being a “decision” (cf. CAS 2004/A/748, no. 91).*

39. Applying this well-settled CAS precedent, the Sole Arbitrator determines that the 24 June 2015 ITU Executive Board letter, which was emailed to and received by Appellant on 25 June 2015, is a “decision” pursuant to Article R49. It clearly and unequivocally states that the ITU Executive Board, the ITU’s highest authority, agreed with the Appeal Panel’s recommendation that the Athlete be denied access to a handler during ITU Paratriathlon events and unanimously rejected her appeal. This letter is a final and official ruling by the ITU *which aims at affecting the legal situation* of the Athlete, which is communicated by its Secretary General, and constitutes a “decision” regardless of its form and absence of any reasons or notice of her right to appeal its ruling to CAS.
40. Although best practice, which the Sole Arbitrator recommends be used by the ITU in the future, would be for a federation to provide reasons for its decision and notice of an athlete’s right to appeal to CAS in a written ruling that finally affects an Athlete’s legal rights or situation. Neither suggestion, however, is a requirement established by Article R49 or any other provision of the Code. The ITU Constitution, which does not define the term “decision”, does not create any such requirements.
41. The Athlete cites CAS 2011/A/2439 as well as a Canadian Supreme Court case and Canadian sports arbitration awards noting the benefits of providing reasoned decisions, but none of these authorities consider, much less conclude, that a final internal resolution of a dispute by a federation must provide grounds, motivations, or reasons to constitute a “decision” for purposes of Article R47. Moreover, Swiss law - not Canadian law - governs the interpretation of the Code. The Athlete relies on the following statement in CAS 2011/A/2439, para. 14 in support of her contention that only a reasoned final determination by a federation is a “decision”: *The deadlines for filing any appeal or any action to negate the claim shall start to run with such notification of the full decision with reasons.* However, this isolated language, when considered in context, does not support this broad proposition regarding Article R47 of the Code. In CAS 2011/A/2439, the Sole Arbitrator ruled only that the Appellant’s Statement of Appeal challenging an unreasoned FIFA Appeal Committee decision is untimely and inadmissible because it did not request its underlying reasons within ten days, which was expressly required by FIFA rules to prevent its decision from becoming enforceable and not appealable to CAS.
42. In CAS 2008/A/1705, *supra*, the Panel stated that *FIFA’s letter of 31 July 2008 contains legal instructions on how to appeal against it, thus bearing all the elements ascribed to a “decision”*. However, considering the context of this statement, which is at the end of the Panel’s analysis of the necessary elements of a “decision” pursuant to CAS precedent, the Sole Arbitrator construes it as simply a full description of the contents of the federation’s letter in that case rather than a determination that providing notice of an athlete’s right to appeal to CAS is a required element of a “decision” under Article R47 of the Code.
43. Contrary to the Athlete’s assertion, CAS 2009/A/1974 did not determine, for purposes of the requirements of a “decision” pursuant to Article R47 of the Code, that an international

federation's highest authority must provide notice and instructions concerning a party's right to appeal its final decision to CAS if it is unreasoned. Rather, the CAS panel held that a disciplinary committee's noncompliance with its national federation's rule, which required written notice that a party must request the reasons for an adverse decision as a condition of it being appealable to the international federation's appeals commission, violates the party's right to appeal and be heard by the appeals commission. This procedural deficiency was remedied by the CAS Panel's *de novo* review of the party's appeal, which was admissible because its Statement of Appeal was filed within the applicable 21-day deadline after receipt of the appeals commission's refusal to hear its appeal. The holding of this case is inapplicable because its facts are readily distinguishable: 1) neither the ITU Constitution nor Competition Rules require the ITU Executive Board to issue a reasoned final decision or to provide notice and instructions concerning a party's right to appeal to CAS if it does not do so; and 2) the Athlete did not file its Statement of Appeal within the applicable 30-natural day deadline, as discussed *infra*.

**b. Did the parties agree to the competence of CAS?**

44. Regarding the second condition that *the parties must have agreed to the competence of the CAS*, the Sole Arbitrator determines that it is satisfied based on para. 13 of the 2015 ITU Athletes' Agreement as well as the following Articles of the ITU Constitution and ITU Competition Rules, respectively. Article 41 of the ITU Constitution (September 2014) provides: *In the case of a dispute between an athlete and ITU, this dispute may be submitted directly to the Court of Arbitration for Sport (CAS).* Article 13.2 (c) of the ITU Competition Rules (December 2014) provides: *Level 3: The decision of the ITU Executive Board may be appealed, as a final and last resort, to the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland, to the exclusion of any recourse to ordinary courts, within thirty natural days from the ITU EB decision. Any decision taken by the said court (CAS) shall be without appeal and shall be binding on the parties concerned.*

**c. Were the internal legal remedies exhausted?**

45. Regarding the third condition that *the (internal) legal remedies available must have been exhausted prior to appealing to CAS*, there is no dispute that the ITU Executive Board's 24 June 2015 decision constitutes the final resolution of this dispute under the ITU Constitution and ITU Competition Rules and that the Athlete exhausted all available legal remedies thereunder prior to filing this CAS appeal.
46. Therefore, the Sole Arbitrator has jurisdiction to determine the admissibility of this appeal.

**VII. ADMISSIBILITY**

47. Article R49 of the Code provides as follows:

*In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt*

*of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late.*

48. Article 13.2 (c) of the ITU Competition Rules provides:

*Level 3: The decision of the ITU Executive Board may be appealed, as a final and last resort, to the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland, to the exclusion of any recourse to ordinary courts, within thirty natural days from the ITU EB decision. Any decision taken by the said court (CAS) shall be without appeal and shall be binding on the parties concerned.*

49. The 24 June 2015 ITU Executive Board letter, which was communicated to and received by the Appellant on 25 June 2015, is a “decision” pursuant to Article R49 of the Code that triggered the beginning of the *thirty natural days* period of time within which her Statement of Appeal was required to be submitted to CAS pursuant to Article 13.2 (c) of the ITU Competition Rules. Neither the ITU Competition Rules nor the ITU Constitution defines *natural days* (which is not terminology used in the Code). The Sole Arbitrator construes this term to be synonymous with “calendar days” rather than “business days”. Thus, the Athlete was required to file her Statement of Appeal with the CAS no later than 25 July 2015, which the Respondent acknowledges is the deadline because the Athlete was not notified of the ITU Executive Board’s 24 June 2015 decision until 25 June 2015.
50. The Athlete did not file her Statement of Appeal until 12 August 2015, which is seventeen days beyond the deadline set forth in Article R49 of the Code.
51. In this regard, Article R32 of the Code expressly precludes the Sole Arbitrator from extending “the time limit for the filing of the statement of appeal” CAS 2011/A/2327, paras. 7.7 and 7.9 (“*the time limit for filing an appeal is absolute and strict*” and “*there is no discretion provided under the Code to extend the time limit for filing a notice of appeal*”). Moreover, neither the ITU Constitution nor the ITU Competition Rules provide any authority or discretion to extend the time limit for the Athlete to file her Statement of Appeal.
52. The Athlete does not assert that the ITU caused or induced her to miss the deadline for filing the Statement of Appeal to her detriment; for example, by suggesting its decision was not final and would be reconsidered within the thirty day time limit for filing a CAS appeal, but not doing so before this deadline has expired. Although no notice of the Athlete’s right to appeal to CAS is given in the 24 June 2015 ITU Executive Board letter or 25 June 2015 email transmitting it, para. 13 of the ITU Athletes’ Agreement clearly and expressly states that “*any dispute arising from the regulations of ITU, which cannot be considered by its existing appeal procedure, as set out in the ITU Competition Rules, shall be finally settled by the [CAS]*”. Article 13.2(c) of the ITU Competition Rules clearly and expressly provides that a “*decision of the ITU Executive Board may be appealed, as a final and last resort, to the [CAS] within thirty natural days from the ITU EB decision*”. Moreover, the Athlete had timely actual and constructive notice of her right to appeal the ITU Executive Board’s 24 June 2015 decision to the CAS as evidenced by the 13 July 2015 email to Tim Wilson (CEO Triathlon Canada) from Curtis Smith (her spouse and an attorney advising and/or representing her in connection with ITU Executive Board’s decision), which states “*We would prefer to avoid*

*having to go to the Court of Arbitration for Sport, but it seems that we have no other choice*". Therefore, the Appellant simply did not comply with the deadline for filing her appeal for reasons that are not part of the record in this case.

53. Accordingly, the Athlete's appeal is dismissed as inadmissible, and the Sole Arbitrator expresses no opinion on the merits of her claims challenging the 24 June 2015 ITU Executive Board's decision.

## **ON THESE GROUNDS**

### **The Court of Arbitration for Sport rules that:**

1. The appeal filed by Fawcett (Kimberly) Smith on 12 August 2015 against the decision of the International Triathlon Executive Board on 24 June 2015 is dismissed as inadmissible.
- (...)
4. All other motions or prayers for relief are dismissed.