



**Arbitration CAS 2016/A/4770 Margarita Goncharova *et al.* v. International Paralympic Committee (IPC), award of 20 October 2017**

Panel: Mr Allan Sullivan QC (Australia), President; Mr Jeffrey Benz (USA); Mr Paul David QC (United Kingdom)

*Paralympics*

*Eligibility of paralympic athletes for the Rio 2016 Paralympic Games*

*Principle of competence-competence*

*Incompetence of CAS resulting of an absence of arbitration agreement between the relevant parties*

- 1. According to art. 186 of the Swiss Private International Law (PILA), CAS has the power to decide on its own jurisdiction. If it makes an error in so doing then art. 190(2) of the PILA confers a right of appeal to the Swiss Federal Tribunal.**
- 2. CAS is incompetent to deal with an appeal lodged by a Paralympic athlete against an International Paralympic Committee (IPC)'s decision rejecting to exercise its discretion to enter said athlete as "neutral" athlete in the Rio 2016 Paralympic Games. Paralympic athletes only become bound by the arbitration agreement contained in art. 2.8 of the IPC Handbook if and when, having submitted their respective applications for accreditation, they then are eligible to compete or participate in the Paralympic Games.**

**I. THE PARTIES**

1. All 34 Appellants are Russian para-athletes of international level who are affiliated to the Russian Paralympic Committee ("RPC"). At all material times, except as indicated below, the RPC has been a member of the IPC.
2. The Respondent (hereinafter referred to as the Respondent or "IPC" interchangeably) is the supreme authority and global governing body of the Paralympic Movement, responsible for, amongst other things, the organisation and governance of the Summer and Winter Paralympic Games which are the pinnacle of international Paralympic competitions. Unlike, for example, the International Olympic Committee (which only has individual members but not athletes), the IPC's members include the National Paralympic Committees, international organisations of sport for the disabled, international Paralympic sports federations and regional Paralympic organisations. The IPC also acts as the International Federation for ten para sports in which it is responsible for the governance of the sport, and for coordinating and supervising World Championships and other competitions.

## II. FACTUAL BACKGROUND

### A. Background facts

3. Below is the summary of the relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced. 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 Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.
4. The background to the appeal lies in the chain of events which gave rise to the decision by the IPC to suspend the RPC before the 2016 Rio Paralympic Games. Those events were started by the screening of a documentary entitled "*Top Secret Doping: How Russia Makes its Winners*" on German television on 3 December 2014. It alleged the existence of an organised State-sponsored doping program within Russian track and field that implicated that sport's national governing body. The documentary alleged that collusion was widespread, encompassing coaches, athletes, doctors, regulatory officials, and sports agencies.
5. Days later, the World Anti-Doping Authority ("WADA") formed a three-person independent commission ("WADA Independent Commission") to conduct an independent investigation into the allegations made in that documentary.
6. The WADA Independent Commission reported its findings in writing on 9 November 2015. The report confirmed "*the existence of widespread cheating through the use of doping substances and methods to ensure or enhance the likelihood of, victory for athletes and teams. The cheating was done by the athletes' entourages, officials and the athletes themselves*".
7. On the basis of its findings, the WADA Independent Commission recommended that WADA suspend the Russian Anti-Doping Agency ("RUSADA") for non-compliance with the World Anti-Doping Code ("WADC"), that WADA withdraw its accreditation of the Moscow Anti-Doping Laboratory, and that the International Association of Athletics Federations ("IAAF") suspend the Russian Athletics Federation from membership until it could demonstrate compliance with its WADC obligations. Those recommendations were carried out in November 2015.
8. Following the publication of the WADA Independent Commission's findings, on 12 May 2016, the *New York Times* published an article setting out detailed allegations by Dr Grigory Rodchenkov, the former director of the Moscow Anti-Doping Laboratory. Dr Rodchenkov alleged that the Russian government, via its Ministry of Sport, "*actively guided*" a doping program designed to deliver Olympic medals for Russia.
9. On 18 May 2016 WADA announced the appointment of Professor Richard McLaren, a Canadian law professor and CAS arbitrator, to conduct an investigation into Dr Rodchenkov's

allegations, including whether testing outside of the 2014 Sochi Winter Olympic Games was also affected. On the same day, IOC President Thomas Bach observed that:

*“Should the investigation prove the allegations true it would represent a shocking new dimension in doping with an, until now, unprecedented level of criminality”.*

10. In his report issued on 18 July 2016, Professor McLaren reported that he and his team had identified and verified substantial compelling evidence that corroborated Dr Rodchenkov’s allegations, which in his view established beyond reasonable doubt that the Russian government had developed, implemented and controlled a State-run doping program over a period from at least late 2011 until August 2015. According to Professor McLaren, Russian athletes from the majority of summer and winter Olympic sports benefited from the program, as well as Russian athletes from Paralympic sports. The primary participants in the scheme, according to Professor McLaren’s Report, included the Russian Ministry of Sport, RUSADA, the Center of Sports Preparation of National Teams of Russia, the Moscow and Sochi laboratories, and Russian’s internal intelligence service (“FSB”).
11. In particular, according to the McLaren Report, following Dr Rodchenkov’s appointment as director of the Moscow laboratory, he was tasked by the Russian government with improving Russian sports performance by, amongst other things, developing an undetectable doping program for its athletes. To facilitate this role, Dr Rodchenkov was also brought into the FSB structure, as an FSB agent. Dr Rodchenkov’s doping program included the creation of a “steroid cocktail”, which was provided to the Ministry of Sport for use by elite-level athletes in the lead up to the 2012 and 2014 Olympic Games.
12. According to Professor McLaren, the doping of the Russian athletes was covered up in one of two ways: through the so-called “Disappearing Positive Methodology” and also by the “Sample Swapping Methodology”.
13. The Disappearing Positive Methodology worked as follows:
  - (a) When the Moscow laboratory identified a prohibited substance in its initial screening of a sample, it would notify the Russian Ministry of Sport of the sample code number and the prohibited substance found. The Ministry then would identify the athlete and direct the laboratory to either “quarantine” or “save” the sample.
  - (b) A “save” sample was to be reported as negative, with the analytical data showing the presence of one or more prohibited substances wiped. In contrast, a “quarantined” sample could be processed and reported in the normal course. “Save” samples tended to be from Russian medal winners or Russian athletes of promise.
  - (c) This system proved to be a simple but effective method of covering up cheating. All of it occurred under the direction and control of the Deputy Minister of Sport. The system was used across a range of sports, and included at least 45 samples from para sports.

14. At the 2014 Sochi Winter Olympic Games and Paralympic Games, however, positive analytical results could not be covered up using the Disappearing Positive Methodology, as the IOC/IPC would be bringing international experts to work in the Sochi Anti-Doping laboratory during the games. Thus a different method of covering up the presence of prohibited substances was developed. This was known as the “Sample Swapping Methodology” which worked as follows:
- (a) The Ministry of Sport identified athletes to be protected, and collected clean urine samples from them prior to the Sochi games. These protected athletes, according to Dr Rodchenkov, were medal hopefuls under the protection of the “State Programme”. Other athletes were also protected on an *ad hoc* basis throughout the Games, based on names provided to Dr Rodchenkov.
  - (b) At the Games, on instruction from the Ministry, when protected athletes were drug tested, they photographed their copy of the doping control form that noted the code of the bottle their sample had been stored in, and sent it to the Ministry’s representative, who then sent it to Dr Rodchenkov.
  - (c) One of Dr Rodchenkov’s assistants would then intercept those urine samples when they arrived at the laboratory, and during the night those samples were passed through a “mouse hole” that had been drilled in the wall between the secure laboratory and an “operations” room outside the secure laboratory area.

Mr Blokhim, an FSB agent, would then take the bottles away and return them with the caps removed. The original urine sample was then replaced with the athlete’s clean urine which had been collected prior to the Games. That clean urine was further altered (by adding salt or water and/or creatinine) to match the specific gravity of the original sample collected from the athlete (as noted on the doping control form). The bottles were then returned back through the “mouse hole” into the laboratory for testing, and because the urine in the bottle was now “clean” that testing returned negative results.

15. Following the publication of the McLaren Report, the IPC liaised closely with Professor McLaren and his team in order to exchange and obtain further information relating to the impact of the alleged Russian State-sponsored doping scheme on para sport. That information obtained from Professor McLaren was placed before the CAS panel in CAS 2016/A/4745 as Exhibit 8 and included the following:
- (a) Professor McLaren’s team had identified further para sport samples that were subject to the Disappearing Positive Methodology (across both summer and winter para sports). These samples included Russian medal winners from the London 2012 Paralympic Games, and Russian para-athletes on the RPC’s shortlist for the Rio 2016 Paralympic Games.
  - (b) Russian para-athletes at the Sochi 2014 Paralympic Games were protected by the “Sample Swapping Methodology”. In particular, a forensic examination of a representative selection of 21 stored samples from the Sochi Games (from 7 Russian

para-athletes) by the WADA accredited laboratory in London revealed that 18 had tamper marks consistent with those found on the bottles from the Sochi Olympics, that is, marks indicating the removal and subsequent replacement of the caps (thereby further corroborating the sample swapping allegations by Dr Rodchenkov, including the original urine samples being replaced with pre-collected clean urine). The remaining three samples could not be properly examined due to leaked urine sediment. [...].

16. On 18 July 2016, following publication of the McLaren Report, the President of WADA, Sir Craig Reedie issued a statement in which he indicated that WADA would “insist” upon the imposition of the most serious consequences to protect clean athletes from the scourge of doping in sport. The statement also recommended, amongst other things, that the IOC and IPC consider declining entries, for the 2016 Rio Olympic and Paralympic Games, of all athletes submitted by the Russian Olympic Committee and the Russian Paralympic Committee respectively.
17. On 22 July 2016, the IPC notified the RPC that it had opened suspension proceedings against it, based on a list of 7, non-exhaustive facts, that it believed were established according to the McLaren Report. After a further exchange of emails between the IPC and the RPC and a hearing which took place in the IPC headquarters, the IPC, on 7 August 2016, announced its unanimous decision to suspend the RPC’s membership of the IPC with immediate effect due to its asserted inability to fulfil its IPC membership responsibilities and obligations, in particular its obligation to comply with the IPC Anti-Doping Code and the WADC.
18. As a result of its suspension, by operation of the relevant IPC rules, the RPC lost all its rights and privileges of IPC membership including the right to enter athletes in IPC-sanctioned competitions such as the Rio 2016 Paralympic Games.
19. Following the decision to suspend the RPC’s membership of the IPC, the IPC and RPC agreed that the RPC could appeal the decision directly to CAS. Pursuant to that agreement, on 18 August 2016 a CAS panel was constituted to hear the RPC appeal on an expedited basis in Rio de Janeiro. That hearing took place on 22 August 2016. Whilst the IPC expressly invited the RPC to make all potentially affected athletes parties to the CAS proceedings, that did not eventuate. The only parties before CAS were the RPC and the IPC.
20. On 23 August 2016 the CAS panel issued its Operative Award and it delivered its Reasoned Award on 30 August 2016 (CAS 2016/A/4745). The CAS panel confirmed the decision of the governing board of the IPC to suspend the RPC’s membership of the IPC and dismissed the RPC’s appeal from that decision.
21. Following the dismissal of the RPC’s appeal by the CAS panel, from around 25 August 2016 onwards, the IPC began to receive requests from individual Russian para-athletes (including all the Appellants) asking the IPC to exercise its discretion to enter them as “neutral” athletes in the Rio 2016 Paralympic Games (that is competing under the IPC flag) pursuant to the following provision which appears in a document entitled “*Rio 2016 Paralympic Games* –

*Qualification Guide, GENERAL IPC REGULATIONS ON ELIGIBILITY, IPC Membership*” at p. 7:

“Only NPCs in good standing with the IPC may enter duly qualified and eligible athletes in the Rio 2016 Paralympic Games. NPCs are reminded that the NFs must ensure that their membership with their sport’s respective IF is in good standing during the qualification period and upon close of the sport entries to the Paralympic Games so their athletes may participate.

*Addendum: The IPC reserves the right to act in an administrative capacity for the purpose of discharging eligibility and entry responsibilities for athletes whose respective NPCs are not eligible to enter teams in the Rio 2016 Paralympic Games*” (emphasis added in the original).

22. The IPC received approximately 227 individual athlete requests from Russian athletes to be entered as such neutral athletes, including requests, as stated, from each of the Appellants. None of those requests were received prior to 25 August 2016 and, as the Rio Paralympics were scheduled to start on 7 September 2016, those applications had to be considered under considerable time pressure.
23. In respect of the Appellants, they sent their written requests for the IPC to exercise its discretion to enter them as “neutral” athletes between 25 and 28 August 2016. Their requests were in substantially the same terms and carefully worded.
24. Representative of the requests made by each of the Appellants, is that made by the first named Appellant, Ms Margarita Goncharova dated 25 August 2016. In that request, Ms Goncharova writes:

*“Dear Mr President Sir Philip Craven,*

*My name is Margarita Goncharova, I’m Russian Para-athlete...*

*I was duly qualified for the Rio Paralympic Games 2016.*

*I am writing to you regarding IPC decision to suspend the Russian Paralympic Committee (RPC) confirmed by the Court of Arbitration for Sport (CAS) the day before yesterday. In result of suspension of RPC membership no Russian Paralympic athlete can participate in Rio Games...*

*(...)*

*It was really shocking to read McLaren Report as well. I strongly believe that real perpetrators of this dirty system must be punished and banned from sport. I do not want to lose to cheaters and I don’t want to compete with cheaters, even Russians.*

*However, even more strongly, I believe that innocent people should not suffer for actions of cheaters that tried to deceive clean athletes of the world, including myself...*

*I would like to reassure you that I have never been part of the dirty system described in McLaren Report. I received good anti-doping education from WADA, IPC and other anti-doping organisations. I have undergone numerous doping-control tests, and a lot of my samples were provided by me outside of Russia and, as I understand it, were analysed in many anti-doping accredited laboratories but not in the Moscow laboratory... All my samples returned negative. I always provide my whereabouts information ADAMS and try to update it as soon as it changes. So I am not in any way may be considered as "tainted" by the Russian anti-doping system in any event, irrelevant of the characteristics of this system.*

***That is why I would like to get the same fair opportunity to rebut a presumption of guilt as Russian Olympic athletes have got before – i.e. to enjoy an opportunity to prove that I am clean and that I deserve the right to participate in the Games. I think it is absolutely unfair that Olympic athletes from my country were provided such opportunity but I am not...***

*According to the special Addendum to General IPC Regulations on eligibility (see Section 3 of the Rio 2016 Paralympic Games Qualification Guide), the **IPC reserves the right to act in administrative capacity for the purpose of discharging eligibility and entry responsibility for athletes whose respective NPCs are not eligible to enter teams in the Rio 2016 Paralympic Games.***

*It is therefore evident that the IPC may enjoy this right by itself (instead of the RPC) and, acting in accordance with fundamental ethical and legal principles (including natural justice and personality rights afforded to individual para-athletes), may declare me eligible for the 2016 Rio Games.*

*I would be grateful if you review my individual request for entry to the Games in such exceptional circumstances or, alternatively, describe any conditions upon which my participation in Rio Games would be possible" (emphasis, grammar and syntax as in the original).*

25. The request then went on to note that the IPC Eligibility Code Form for the Rio Paralympic Games provided, according to Ms Goncharova, that any dispute outside the realm of the sports technical rules would be submitted exclusively to CAS and requested, in those circumstances, that the IPC sign an arbitration agreement to provide an opportunity to appeal to CAS in case of a negative response from the IPC. The letter concluded with the hope that "natural justice and fairness" in Ms Goncharova's "individual case" would prevail.
26. On 26 August 2016 at least some of the Appellants received correspondence from the IPC indicating their requests were being reviewed. Once more, representative of these responses is the letter from the IPC to Ms Goncharova dated 26 August 2016 in which Mr Mike Peters, IPC Chief of Staff, informed Ms Goncharova as follows:

*"On behalf of International Paralympic Committee (IPC) President Sir Philip Craven, I am writing to confirm receipt of your letter and appendices, dated 25 August 2016. We need time to review your letter and documents. We will come back to you early next week".*

27. It appears that the Appellants had not heard from the IPC by the middle of Tuesday, 30 August 2016. On that day, they sent emails to the IPC. Once more Ms Goncharova's email of 30 August 2016 is representative of the emails sent. Relevantly it reads as follows:

*“According to the IPC letter of 26 August 2016, the IPC promised to review my letter and documents attached and come back to me “early next week”, which is, as I understand, Monday (29 August) or at the latest, Tuesday (30 August or today).*

*Should I expect your answer today in the evening? Or should I consider the IPC's silence as a refusal?*

*The clock is ticking, and the Paralympic Games start on the next week, so I assume if the IPC is still not ready to provide an answer, we should agree on the expedited procedure in CAS, arranging parties' deadlines for the next days left before the Opening Ceremony of the Games”.*

28. It appears that the Appellants did not hear from the Respondent before some time on 31 August 2016 and, in those circumstances, given the impending commencement of the Paralympic Games, the Appellants considered the IPC's “silence” as a refusal of their requests and filed a Statement of Appeal and Appeal Brief at CAS on 31 August 2016.

29. On the same day (31 August 2016) but, apparently, after the filing of the Statement of Appeal and Appeal Brief, the Appellants, or at least some of them, received responses to their requests from the IPC. Like the requests themselves, the responses were in materially identical terms. The response to the first named Appellant, Ms Goncharova is representative of the responses to each of the Appellants. That response is dated 31 August 2016 and is signed by Mr Xavier Gonzalez, the Chief Executive Officer of the IPC. After referring to Ms Goncharova's request of 25 August 2016, Mr Gonzalez continued as follows:

*“As you may be aware, the findings made by Professor Richard McLaren (both in his “McLaren Report” and in subsequent investigations carried specifically in relation to Para sport) exposed the existence of a long standing and sophisticated State-controlled doping program in Russian sport. In addition, the McLaren Report revealed a national anti-doping system that is corrupted and entirely compromised. These same findings further expose the inability of the Russian Paralympic Committee (RPC) – which acts as the Russian national authority for all Paralympic sport – to deliver an effective anti-doping program in compliance with the World Anti-Doping Code and the IPC's Anti-Doping Code.*

*The IPC believes that Professor McLaren's findings show an unprecedented attack on the integrity of the sporting movement as a whole, including Paralympic sport and the Paralympic Games. In such unprecedented circumstances, the IPC as the global guardian of the Paralympic Movement, believes it had no choice but to take the strongest of stance and to suspend the RPC from membership”.*

30. The letter went on to inform Ms Goncharova of the decision taken on 7 August 2016 to suspend the RPC from membership and of the consequence of that suspension, namely the loss by the RPC of the right to enter athletes at the Rio 2016 Paralympic Games. Mr Gonzalez noted that the IPC firmly believed that the decision to suspend the RPC “*was vital to protect clean sport, and to retain public confidence in the credibility, integrity and values of the Paralympic Movement*”.



31. Mr Gonzalez then went on to refer to the decision of the CAS panel in CAS 2016/A/4745 referring specifically to [15]-[22] of the CAS Award in that matter which he said demonstrated that *“The CAS panel did not require the IPC to adopt the rule allowing for the participation of Russian athletes on an individual basis”*.

32. Mr Gonzalez then continued:

*“For the same reasons, and while the IPC has considered your request in full, the IPC does not consider it appropriate to exercise its discretion to enter you as a neutral athlete in the Rio 2016 Paralympic Games”*.

33. The last two paragraphs of Mr Gonzalez’s letter to Ms Goncharova (which are identical with similar paragraphs in the other letters to the other Appellants) are as follows:

*“The IPC has considerable sympathy for all of the Russian athletes who are now unable to participate in the Rio 2016 Paralympic Games. Indeed, the main goal of the IPC is to enable para-athletes to achieve sporting excellence and inspire and excite the world. Tragically, however, this situation we now all face is not about athletes cheating the system, but about a Russian State-run system that is cheating its athletes. The IPC is committed to continuing to work with the RPC to deliver the changes required, but the RPC (in cooperation with Russian government authorities) clearly needs to ensure significant modifications are made to the Russian anti-doping program and ensure long-lasting and effective changes are made to the doping culture that currently permeates sport within Russia. Once the RPC is able to meet its full membership obligations, the IPC immediately will welcome back the RPC and its athletes into the Paralympic Movement.*

*With regard to your suggestion that there should be further CAS proceedings, we disagree. The IPC already has agreed to an expedited ad hoc CAS hearing in respect of the RPC’s appeal, for the purpose of having the matter fully and finally resolved by an independent tribunal in advance of the Paralympic Games. The RPC was expressly invited by the IPC to make all of its athletes party to those proceedings, and the RPC chose not to do so. The IPC therefore respectfully suggests that you raise this matter with the RPC”*.

34. The Opening Ceremony for the Rio 2016 Paralympic Games duly took place on 7 September 2016. None of the Appellants were able to compete at those Games by reason of the inability of the RPC to enter athletes for those Games and the rejection by the IPC of each of the Appellants’ requests to be entered as “neutral” athletes.

35. The Appellants’ appeal is in respect of the refusal of the IPC to exercise its “discretion” to enter each of them as a “neutral” athlete in the Rio 2016 Paralympic Games.

## **B. No first instance decision**

36. There has been no previous hearing concerning the subject matter of this appeal. Rather, the Appellants assert that they have a direct right of “appeal” to CAS under an arbitration agreement to which they are parties from the decisions of the IPC made on or about 31 August 2016 not to exercise its discretion to enter any of them as a neutral athlete in the Rio 2016 Paralympic

Games. Whether the Appellants can bring such a claim before CAS is discussed below under the heading “Jurisdiction” below.

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

37. As noted above, the proceedings before CAS were instituted by the filing of a document entitled “Statement of Appeal and Appeal Brief” dated 31 August 2016. Whilst it is unnecessary to recite the subsequent procedural history in full, the following matters should be noted:
- (a) On 1 September 2016, the CAS Court Office wrote to the parties referring to the filing of the Statement of Appeal and inviting the IPC to respond to the Appellants’ request for an expedited procedure.
  - (b) By letter dated 2 September 2016 the IPC, through its lawyers, in a letter headed “Without Prejudice as to Jurisdiction” indicated that it did not consent to an expedited procedure in this case.
  - (c) On 12 September 2016, the IPC’s lawyers wrote to the CAS Court Office stating that it considered that the relief sought in the proceedings was moot and inviting CAS to formally terminate the proceedings.
  - (d) By letter dated 16 September 2016, the Appellants, through their lawyer, rejected the assertion of “mootness” and raised other, presently irrelevant, matters.
  - (e) By letters dated 17 and 19 September 2016 addressed to the CAS Court Office, IPC’s lawyers again submitted that the “appeal is moot as to the principal issue” and invited CAS again to strike out the proceedings on that basis.
  - (f) By letter dated 21 September 2016, IPC’s lawyers repeated their request that, once a Panel was constituted, IPC’s application to strike out the appeal on the ground of mootness be heard as a preliminary matter.
  - (g) On 9 November 2016 the Respondent filed its Answer in these proceedings.
  - (h) On 24 November 2016 both parties wrote to the CAS Court Office. The Respondent informed CAS in its letter that it did not believe there was a need for a hearing but rather that the matter could be decided on the papers. The Appellants disagreed stating that it was “extremely important” that there be an oral hearing.
  - (i) On 25 November 2016 the CAS Court Office wrote to the parties indicating it would be for the Panel, once constituted, to decide whether to hold a hearing or whether, on the other hand, to render an award on the basis of the written submissions.

- (j) On 2 December 2016 the CAS Court Office wrote to the parties informing them that a Panel had been appointed which was constituted by Mr Subiotto QC as President and Mr Benz and Mr David QC as Arbitrators.
  - (k) However, on 5 December 2016 Mr Subiotto wrote to the CAS Court Office informing him that he would have to decline to serve as President of the Panel.
  - (l) By letter dated 15 December 2016, the CAS Court Office informed the parties that Mr Sullivan QC had been appointed as President of the Panel instead of Mr Subiotto QC. None of the parties has challenged the composition of the Panel as presently constituted.
  - (m) Thereafter the Panel conferred concerning the issues of whether there should be a preliminary hearing on the Respondent's strike out application and as to whether there should be an oral hearing or whether, on the other hand, the matter should be decided on the basis of written submissions.
  - (n) On 16 January 2017 the CAS Court Office wrote to the parties to inform them of the Panel's decision in respect of these matters. He informed them that the Panel had decided not to hold a preliminary hearing but rather to hear all matters at the same time and further informed them that the Panel had decided to hold an oral hearing.
  - (o) By letter dated 23 January 2017 the CAS Court Office informed the parties that the oral hearing would take place in Lausanne on Wednesday, 15 March 2017.
38. The hearing of this Appeal duly took place in Lausanne on Wednesday, 15 March 2017. At the conclusion of the hearing, the Panel gave the parties leave to file post-hearing briefs on certain further issues raised by the parties and/or the Panel at the hearing and indicated that it would otherwise reserve its decision. The parties raised no objection on the conduct of the proceedings and confirmed that their right to be heard had been respected.
39. The Appellants submitted their post-hearing brief under cover of a letter dated 22 March 2017 and the Respondent likewise submitted a post-hearing brief entitled "The IPC's Supplemental Brief" dated 21 March 2017. The Respondent submitted a Reply to the Appellants' post-hearing brief dated 28 March 2017. The Appellants chose not to reply to the Respondent's post-hearing brief.

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

40. At the commencement of the oral hearing, the parties agreed that there were three issues to be determined by the Panel, namely:
- (a) jurisdiction;
  - (b) whether the proceedings should be struck out on the ground of mootness; and

- (c) in the event that the Panel decided it had jurisdiction and that the matter should not be struck out, whether the decisions of the Respondent to decline to permit the Appellants to compete at the Rio 2016 Paralympic Games as “neutral” athletes were erroneous and should be overturned.
41. Although both parties invited the Panel to consider and determine the issues of mootness and of the “merits” even if the Panel determined it had no jurisdiction to hear these appeals, the majority of the Panel does not think that is an appropriate course. First, as the majority of the Panel understands it, such a course would be contrary to CAS practice. Secondly, if the Panel decides it has no jurisdiction, then anything it says or determines will be of no effect. Thirdly, the majority of the Panel does not think it proper to say anything on matters over which it has no jurisdiction but which might be taken into account by, or influence, a court or tribunal which does have jurisdiction.
42. Therefore, by majority, the Panel has decided it will not discuss or decide the issues on mootness or “merits” if it decides it has no jurisdiction.

#### **Submissions on jurisdiction**

43. The Appellants submitted that jurisdiction was conferred on CAS by Article 2.8 of the IPC Handbook, Paralympic Games Chapter dated November 2013. Article 2 is headed “General Rules and principles for participation in the Paralympic Games”. Article 2.8 is headed “Dispute arbitration” and reads as follows:

*“All disputes related to sports technical rules, such as competition, field-off-play and Classification are under the authority of the respective IPSFs and IPC and shall be resolved by the IPC, whose decision on these matters is final and enforceable.”*

*Any other disputes arising on the occasion of, or in connection with, the Paralympic Games shall be submitted exclusively to the Court of Arbitration for Sports (CAS), in accordance with the Code of Sports-related Arbitration.*

*All competitors and team officials of NPC delegations who participate in the Paralympic Games by submitting their application for accreditation agree on the arbitration bodies as stipulated above”.*

44. The Appellants submitted that Article 2.8 constituted an arbitration agreement between the Appellants on the one hand and the IPC on the other to refer disputes arising from the refusal of their individual requests for entry to the Games to arbitration before CAS. They submitted that Article 2.8 should be given a broad interpretation and that they had become parties to the relevant “contract” by doing the things necessary to satisfy the eligibility requirements for the Games.
45. In their post-hearing brief, the Appellants submitted that the substantive law to be applied is German law and that since the arbitration agreement was set out in the form of a written

document prepared by the Respondent (being Article 2.8) and the same will and intention was repeated in the Eligibility Code Form drafted by Respondent which was offered to para-athletes to sign long before the Paralympic Games, it bound the parties and did not allow any party to refer such disputes to an ordinary State court in Germany for consideration, unless an ordinary court determined that the arbitration agreement was null and void or invalid or impossible to implement.

46. In the Appellants' submission it was "indisputable" that:
  - (a) a valid arbitration agreement (in the form of an arbitration clause – Article 2.8) does exist;
  - (b) CAS has jurisdiction to hear and to issue an Award for this matter; and
  - (c) the German State courts (ordinary courts) do not have jurisdiction to hear this matter, because a valid arbitration agreement exists.
47. The Respondent denied that CAS had jurisdiction. It submitted that Article 2.8 did not constitute an arbitration agreement between the Appellants in the one hand and the IPC on the other. It submitted that the Handbook in which Article 2.8 is found is a contract between the IPC and its members. Individual athletes are not members of the IPC. Individual athletes were not, therefore, bound by (or entitled to rely on) the provisions of the IPC Handbook, including Article 2.8.
48. The Respondent also submitted that it was true that the Appellants may have signed the Eligibility Code Form but that form constituted a separate agreement containing an arbitration clause referring certain disputes to CAS but that agreement only applied in respect of athletes who actually participated in the Games.
49. Thus, according to the Respondent, since the Appellants were not members of the IPC they were not bound by (or entitled to rely on) Article 2.8. Further, they did not have any rights of appeal to CAS under any separate agreement constituted by the Eligibility Code Form as they did not participate in the Games, were not issued with any validated accreditation, and in any event had no dispute "arising during the Games".

## VI. JURISDICTION

50. Article R47 of the Code of Sports-related Arbitration (“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.*

51. As noted above in paragraphs 43 to 49 the Appellants assert that CAS has jurisdiction to hear their appeal whilst the Respondent denies it.

52. The Panel has been unable to reach a unanimous decision on jurisdiction but a majority of the Panel has concluded that the Panel has no jurisdiction. The reasoning of the majority of the Panel for concluding it has no jurisdiction to hear and determine these appeals is set out in the following paragraphs.

53. According to Article 186 of PILA, CAS has the power to decide on its own jurisdiction. If it makes an error in so doing then Article 190(2) of PILA confers a right of appeal to the Swiss Federal Tribunal.

54. The parties’ submissions have been summarised in paragraphs 43 to 49 above. The Appellants submit that the provision quoted in paragraph 43 above amounts to a valid arbitration agreement between them on the one hand and the IPC on the other which confers jurisdiction upon CAS to hear this appeal. They also rely on the fact that they signed the Eligibility Code Form to support the argument that the will and intent of the parties was that they were to be parties to an arbitration agreement on the terms of Article 2.8 of the IPC Handbook.

55. The essential issue between the parties is that the Appellants assert that they were parties to an arbitration agreement with the Respondent while Respondent asserts that that the Appellants were not.

56. A majority of the Panel accepts that German law should be applied in determining this issue and in any question of the formation and construction of the asserted arbitration agreement. This is because the Respondent has its seat in Bonn, Germany, and that German law shall be the subsidiary law applicable to the present case, in addition to the Respondent’s regulations. However, there does not appear to be any material difference in principle whether German law or some other system of law is applied.

57. Under German law, a contract is formed when an offer is accepted. Acceptance is generally effected by means of a declaration directed to the offeror, but it is often sufficient if the intention to accept is manifested by conduct, or even, exceptionally, by silence or inaction. Conduct on the part of the offeree which adequately evinces his intention to accept the offer may well be sufficient to create the contract (see KÖTZ/FLESSNER, *European Contract Law*, Volume 1, Clarendon Press (2002) at p. 25-27). There is no material difference between this

approach to contractual formation and that which applies, for instance, in the common law (see, for example, *Raguz v Sullivan* (2000) 50 NSWLR 236 at 250-253 [65]-[82]).

58. Article 2.8 of the IPC Handbook has been set out above at paragraph 43 above. After referring to disputes relating to “sports technical rules” and the like which are to be resolved in a final way by the IPC, Article 2.8 states:

*“Any other disputes arising on the occasion of, or in connection with, the Paralympic Games shall be submitted exclusively to [CAS]”.*

*“All competitors and team officials of NPC delegations who participate in the Paralympic Games by submitting their application for accreditation agree on the arbitration bodies as stipulated above”.*

59. The range of disputes which would potentially fall within this clause is broad and it would as a matter of construction cover a wide range of possible claims. In general terms a claim falling within this arbitration agreement could be of a contractual or non-contractual nature as long as it satisfied the description of “[a]ny other disputes arising (...) in connection with” the Paralympic Games.
60. However, the range of claims which might be within the clause is not the issue. The jurisdictional challenge raises the question whether the Appellants can show that they were parties to an agreement which allowed them to bring their claims to CAS. The Appellants’ case focussed primarily on the simple claim that they were entitled as individual para-athletes to rely on the arbitration clause in the IPC Handbook to bring their claims before CAS. The Appellants also referred to the fact that they had signed the IPC Eligibility Code to support the claim that there was an arbitration agreement with them on the terms in Article 2.8 of the IPC Handbook.
61. As noted an agreement may be formed by the exchange of communications between the parties or by one party accepting the terms of an offer made by the other by its conduct. Also a contract may be inferred in exceptional circumstances from the silence or inaction of one party. In this case the parties took the following steps. The Appellants made a written request to the IPC to exercise its discretion to discharge eligibility and entry responsibilities for them, when RPC was not able to enter teams, so that they could compete at the Rio 2016 Paralympic Games as individual “neutral” athletes under the General IPC Regulations on Eligibility. As required by those General Regulations the Appellants signed the IPC Eligibility Code which is produced by the IPC as part of the process of applying to participate. For its part the Respondent apart from promulgating the various Guides, rules and forms – the IPC Handbook and the Rio 2016 Paralympic Games Qualification Guide and the IPC Eligibility Code – did not expressly enter into any agreement with the Appellants as regards the application of Article 2.8 of the IPC Handbook. Indeed the Respondent rejected the request made by the Appellants to be entered as “neutrals” and refused to enter into an arbitration agreement under which the rejection of the request could be challenged before CAS.
62. On this conduct the parties expressly entered into an agreement on the terms of the IPC Eligibility Code. However, it appears that there are no words, conduct or dealings evidencing

any agreement between the Appellants and the IPC for arbitration applying Article 2.8 of the IPC Handbook. Nor does the IPC Eligibility Code Form applicable for the Rio Games contain any such agreement to the application of Article 2.8:

***Acceptance of Binding Arbitration***

*I acknowledge and accept that any dispute outside the realm of the sports technical rules arising **during** the IPC Competitions shall be submitted exclusively to the Court of Arbitration for Sport (CAS). Any such dispute shall be determined in accordance with the CAS Code for Sports-Related Arbitration, save for competitions covered by the CAS Ad hoc arbitration rules where I agree that the Ad hoc rules shall govern the procedure for dispute resolution. The decisions of CAS are final, non-appealable and enforceable (emphasis added).*

63. The agreement in the IPC Eligibility Code is expressed to be in consideration of the acceptance of the athlete's participation in IPC competition. The athlete agrees if accepted into IPC competitions to, among other things, binding CAS arbitration for any dispute outside the realm of sports technical rules arising during the competition.
64. It is the view of a majority of the Panel that none of the Appellants can establish that they were parties to an arbitration agreement on the terms set out in Article 2.8 by establishing that the provisions of the IPC Handbook were part of agreements made with them. Nor does the agreement which was entered into between the athletes and the IPC by the signing of the IPC Eligibility Code change the position on Article 2.8 or create an arbitration agreement under which the Appellants can bring their claims to CAS. This position is consistent with the way in which the IPC Handbook and the Eligibility Code are clearly intended to operate together. The IPC Handbook contains general provisions which are not intended to form part of agreements with individual athletes. The Eligibility Code is intended to create agreements with the individual athletes who execute it which will operate when they are accepted to participate in the Paralympic Games.
65. Article 2.8 is contained in the IPC Handbook in the "Paralympic Games Chapter" which contains general provisions applicable to all Paralympic Games. Article 2.8 finds its place in Section 2 of the Chapter which is entitled "General Rules and Principles for **Participation** in the Paralympic Games" (emphasis added).
66. Article 2.1 which is headed "Eligibility Code Compliance" provides:

*"To be eligible for **participation** in the Paralympic Games an individual must comply with, observe and abide by the rules of IPC. Every **competitor**, team official and Games official shall observe, comply and abide by the rules and regulations outlined on the IPC Eligibility Code and shall sign off the IPC Eligibility Form.*

*All **competitors**, coaches, trainers or other team officials must comply with all provisions of the IPC Eligibility Code including – but not limited – to*



(...)

- *Accept binding arbitration of the Court of Arbitration (CAS) for matters not related to sport technical rules*” (emphasis added).

67. As the words emphasised in the quoted passages above reveal, the focus of Section 2, so far as athletes are concerned, is on those who are eligible to “participate” or “compete” at Paralympic Games. It is those individual athletes who will have to accept binding arbitration before CAS.

68. This focus is emphasised by the last paragraph of Article 2.8 itself which provides:

*“All **competitors** and team officials of NPC delegations who **participate** in the Paralympic Games by submitting their application for accreditation agree on the arbitration bodies as stipulated above”* (emphasis added).

69. The IPC Handbook itself, and in particular Section 2 of it, including Article 2.8, clearly indicates the manner and circumstances in which, and the time at which, a person who is not a member of the IPC is to become bound by its provisions and rules, including the agreement to arbitrate. In the case of athletes, they become bound by such an arbitration agreement if and when, having submitted their application for accreditation, they then are eligible to “compete” or “participate” in the Paralympic Games.

70. This is made clear when one considers the terms of the IPC Eligibility Code Form referred to in Article 2.1 which is quoted above. Each of the Appellants signed this form which is in fact entitled “Eligibility Code Form – National Paralympic Committee” and bears the Rio 2016 logo.

71. That form commences by acknowledging that the document is an important one which governs the athlete’s “participation” as a “Participant” in the Rio 2016 Games. Relevantly it then states:

*“Understanding that as a **Participant** in the Games, I am **participating in an event which has ongoing international and historical significance, and in consideration of the acceptance of my participation therein, I agree:***

1. ...
2. ...
3. ...
4. ...
5. ...
6. ...
7. ...
8. ...
9. ...
10. ...

(...)

*Acceptance of Binding Arbitration*

1. *I acknowledge and accept that any dispute outside the realm of the sports' technical rules **arising during the Games** (where no other applicable final dispute resolution procedure is set out) shall be resolved through arbitration and submitted exclusively to the Court of Arbitration for Sport (CAS) whose decisions shall be final, binding and not capable of appeal.*

(...)

2. *I shall not institute any claim, arbitration or litigation, or seek another form of relief in another court or tribunal. I acknowledge and accept that the CAS will be either physically present or contactable by telephone, facsimile or other method **during the Games**" (emphasis added).*

72. It is clear that it is the execution of this form which is contemplated by the last paragraph of Article 2.8 where it refers to athletes "submitting their application for accreditation". Further, it is clear from the terms of this Eligibility Code Form that the athlete signing it is only agreeing to CAS arbitration for a limited time and for a limited purpose. Namely, he or she is only agreeing to it in respect of his or her participation at the Games and in respect of disputes relating to that participation (outside the realm of the sports' technical rules) which arise during the Games.
73. Further, the "consideration" for the athlete making the promises, including the promise in respect of CAS arbitration, is expressly stated to be "acceptance of my participation" in the Games.
74. When these aspects of the form are considered they confirm the position that athletes would not be bound to an exclusive CAS arbitration unless and until the IPC accepted their participation in the Games and were then only agreeing to such an arbitration in respect of that participation and in respect of disputes which arose during the course of the Games.
75. Finally, the Panel has noted above (see paragraph 25 and 33) that there was an exchange of correspondence between the parties which included a request by the Appellants that the Respondent agree to an arbitration before CAS and a refusal of that request. This exchange provides evidence that there was no existing arbitration agreement between the parties.
76. As with any question of jurisdiction which depends on whether an agreement has been entered into to refer a particular dispute to arbitration, the decision of the majority of the Panel has been made in the particular context. It has been reached on the analysis of the particular contractual dealings and relevant documents, and the dispute in the case, which concerns the refusal of the IPC to exercise its "discretion" to enter each of the Appellants to participate with the status of an independent "neutral" athlete in the Rio 2016 Paralympic Games.
77. Since the jurisdiction of CAS depends upon the existence of an agreement to bring the dispute which has arisen before CAS, the absence of such agreement means that CAS has no jurisdiction

over the claims and they would have to be brought in another tribunal or court (if any) which has such jurisdiction.

78. Such conclusion is in line with the CAS case law outside the period of the (Olympic) Games, which is different from the jurisprudence and principles applicable during the period of the (Olympic) Games. In a case CAS 2012/A/2731, the CAS Panel determined that only “Olympic” athletes, *i.e.* athletes duly accredited by the International Olympic Committee, could rely on Article 61(2) of the Olympic Charter in order to submit an appeal to the CAS. On the other hand, athletes with a mere interest in taking part in the Olympic Games, [could not] rely on Article 61(2) to justify the jurisdiction of the CAS. The situation on jurisdiction is different under the regime of the CAS Arbitration Rules for the Olympic Games: the signature of the Olympic Entry Form is not a mandatory condition to establish the jurisdiction of the CAS ad hoc Division (see CAS OG 06/002 and CAS OG 14/003).
79. Applying the relevant legal principles to the dealings between the parties, a majority of the Panel concludes that it has no jurisdiction to hear or determine these appeals.
80. In these circumstances, it is unnecessary and inappropriate for the Panel to express any views upon the issues of mootness or the “merits” of the appeal.

## ON THESE GROUNDS

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

1. CAS has no jurisdiction to deal with the appeal filed on 31 August 2016 by Margarita Goncharova and the 33 other people listed in the Schedule hereto.
2. (...).
3. (...).
4. All other motions or prayers for relief are dismissed.