Arbitration CAS 2016/A/4502 Patrick Leeper v. International Paralympic Committee (IPC), award of 12 August 2016 (operative part of 26 January 2016)

Panel: Judge Conny Jörneklint (Sweden), President; Mr Luc Argand (Switzerland), Prof. Ulrich Haas (Germany)

Paralympic athletics (track and field)
Doping (benzoylecgonine)
Relationship between the right of appeal against decisions and the recognition of decisions
Right of appeal against settlement agreements
Right of appeal against first instance settlement agreements only
Parties bound by the settlement agreement
Applicability of recognition under Article 15.1 IPC Code to settlement agreements
Application of Article 10.5.2 IPC Code/WADC to social/recreational drugs

1. **The IPC Code provides some provisions in order to prevent the IPC to be bound by a decision that it does not want to be bound by: (a) a right to appeal against (certain) decisions under Article 13 of the IPC Code and (b) the rules of Article 15 regarding recognition of decisions. From the wording and structure of Article 15 of the IPC Code (according to which (non-)recognition of decisions is "subject to the right of appeal") and from the fact that Article 15 of the IPC Code only refers to "final adjudications" (*i.e.* adjudications that – because of their finality – are no longer subject to a right of appeal) it follows that under the IPC Code appeals take precedence over recognition of decisions, and that both articles are mutually exclusive. However, in circumstances where the requirements for recognition of decisions of Article 15.1 of the IPC Code are not met the IPC is not necessarily obliged to appeal the decision in question. Lastly, whatever can be the object of an appeal under Article 13.2 of the IPC Code must also be the object of (non-)recognition; this is because both provisions (Article 13.2 and Article 15.1 IPC Code) pursue a similar goal, *i.e.* to review decisions taken by an anti-doping organization in light of the principles of the IPC Code/WADC and squash the effects of such decision in case of non-compliance.**

2. **Given that Article 7.10 of the IPC Code, which addresses "notification of Results Management Decisions", stipulates that an anti-doping organization which has agreed with an athlete to the imposition of a sanction without a hearing, shall give notice thereof to other anti-doping organizations with a right to appeal, it can be concluded that the term "Results Management Decisions" in Article 7.10 of the IPC Code has to be understood in a broad sense. It follows from the above that also in the context of appeals under Article 13.2 of the IPC Code, the term "appealable decision" must, in principle, be construed in a broad sense, encompassing also agreements between an anti-doping organization and an athlete with respect to consequences in relation to an alleged anti-doping rule violation.**

3. The structure of the IPC Code allows the conclusion that the IPC Code intends to differentiate between a results management stage, including results management hearings, and an appeal stage, and that the right of appeal is only applicable to decisions emanating from the results management stage. Consequently, any decision taken at the appeal stage – *e.g.* a settlement agreement concluded between an athlete and an anti-doping organization which is designed to terminate pending CAS appeal proceedings and therefore to substitute for the appeal decision before the CAS (rather than to substitute the first instance results management decision) – is not subject to appeals within the meaning of Article 13 or Article 15.1 of the IPC Code.

4. There are no procedural reasons for which a third party would be bound by a private agreement reached outside state or arbitration proceedings, *e.g.* a settlement agreement.

5. Article 15.1 of the WADC/IPC Code obliges the signatories of the WADC to recognise *"testing, hearing results or other final adjudications"* of other signatories. Whereas the term "adjudication" used in Article 15.1 of the IPC Code is not a defined term within the meaning of the IPC Code or the WADC, when looking at the language used, the grammar and the syntax as well as taking into account the intentions of the IPC in drafting the provision it first can be noted that Article 15.1 of the IPC Code does not refer to "decisions" as the object of recognition. Instead, the provision refers to parts of the decision-making process, such as "Testing" and "hearing results". The provision, thus, makes it clear that the term "adjudication" must be construed in a broad sense and not only the final outcome of the results-management process or specific forms of decision-making may be the object of recognition, but also separate parts thereof. *E.g.* also a private agreement between an athlete and an anti-doping organization has to be considered as a "final adjudication" and the IPC cannot refuse recognition of the settlement agreement on the pure fact that the decision takes the form of an agreement.

6. The 2015 WADC does not advocate a dual approach when dealing with the consequences of social/recreational drug use depending on the kind of drug consumed by the athlete (*e.g.* cannabinoids or cocaine). To the contrary in principle there are good reasons to also apply Article 10.5.2 of the IPC Code/WADC regarding reduction of the period of ineligibility based on No Significant Fault or Negligence to cases where an athlete has knowingly ingested cocaine outside competition (but tested positive in-competition), thereby taking a harmonized approach with respect to recreational drug use. However, in circumstances where the use of cocaine was influenced by an athlete's addiction to alcohol and happened while the athlete was drunk it is not right to say that the degree of fault displayed by the athlete was "light" or "minimal". Instead, the degree of negligence displayed would have to be qualified as "normal".

I. THE PARTIES

1. Mr Patrick "Blake" Leeper (the "Appellant" or the "Athlete") is a double amputee and has competed in Paralympic track and field events for the United States, and has won Paralympic medals. Mr Leeper competes principally in sprint events in the T43 classification.

2. The International Paralympic Committee (the "IPC" or the "Respondent") is the global governing body of the Paralympic movement, and also acts as the international federation for nine para sports (including para athletics). The IPC is a German private law foundation whose headquarters and seat is in Bonn, Germany.

3. The Appellant and the Respondent are each referred to individually as a "Party" and collectively as the "Parties".

II. FACTUAL BACKGROUND

4. On 21 June 2015, Mr Leeper provided an in-competition urine sample which subsequently returned an adverse analytical finding for the prohibited substance benzoylecgonine (a metabolite of cocaine). Mr Leeper was accordingly charged by the United States Anti-Doping Agency ("USADA") with an Anti-Doping Rule Violation ("ADRV") in breach of IPC Anti-Doping Code ("IPC Code") Article 2.1 (Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample).

5. Mr Leeper's case was initially heard by an independent American Arbitration Association ("AAA") Panel. In its final award dated 6 November 2015 (the "AAA Decision"), the AAA Panel found that Mr Leeper had not met his burden under IPC Code Articles 10.4 and 10.5 of showing how the banned substance got into his system and therefore imposed a period of ineligibility of two years under Article 2.1 of the 2015 version of the WADA Code ("WADC"), starting from the date of sample collection.

6. On 25 November 2015, the Appellant submitted a Statement of Appeal against the AAA Decision to the Court of Arbitration for Sport ("CAS"). This case was attributed the file reference CAS 2015/A/4323 ("Case 4323"). The Appellant also requested a stay of the proceedings to allow the Appellant and USADA the opportunity to attempt to negotiate a settlement agreement concerning the Sanction.

7. Thereafter, the Appellant and USADA settled their dispute and agreed – among other things – that USADA would impose a one-year period of ineligibility on the Appellant and that the Appellant would accept the one-year ban, and withdraw his appeal. USADA and the Appellant executed the settlement agreement on 15 January 2016 (the "Settlement Agreement").

8. On 16 February 2016, the Appellant informed the CAS of the Settlement Agreement and requested that CAS terminate the arbitration.

9. On 19 February 2016, CAS issued a Termination Order and removed the Case 4323 from the CAS roll.

10. On 1 February 2016, the IPC was informed of the Settlement Agreement.

11. On 22 February 2016, the IPC sent an email to USADA, the World Anti-Doping Agency ("WADA"), and the United States Olympic Committee ("USOC") outright rejecting the Settlement Agreement (the "IPC Decision").

12. On 10 March 2016, Mr Leeper filed a request with the CAS to reinstate Case 4323. On 11 March 2016, the CAS Court Office acknowledged receipt of Athlete's request and advised him that such request would be treated as a new appeal and thereafter invited the Athlete to complete his statement of appeal. Upon proper filing, the new procedure was given reference number CAS 2016/A/4493 ("Case 4493").

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

13. On 14 March 2016, pursuant to Article R48 of the Code of Sports-related Arbitration (the "Code"), the Athlete filed a statement of appeal with the CAS against the IPC Decision. The Athlete appointed Mr Luc Argand as arbitrator and requested that the procedure be conducted in English.

14. On 21 March 2016, the deadline for the Appellant's appeal brief was suspended in accordance with Article R32 of the Code.

15. On 23 March 2016, the Respondent requested *inter alia* that Case 4493 should be consolidated with the current appeal.

16. On 24 March 2016, the CAS Court Office invited the Appellant to comment on the Respondent's request to consolidate the two proceedings.

17. On 1 April 2016, the Appellant rejected the Respondent's request to consolidate.

18. On 24 May 2016, the CAS Court Office on behalf of the President of the Appeals Arbitration Division informed the Parties that Case 4493 and Case 4502 had been consolidated in accordance with Article R52 of the Code and should be referred to a three-member Panel in accordance with Article R50 of the Code. The CAS Court Office noted that Professor Ulrich Haas had been nominated as arbitrator for the IPC in Case 4493 and that the Athlete and USADA jointly had agreed to nominate Mr Luc Argand as a Sole Arbitrator in Case 4493. The Athlete and USADA were asked to confirm whether they agreed to nominate Mr Argand as a jointly-nominated arbitrator in the consolidated case.

19. On 27 May 2016, the Athlete and USADA confirmed their agreement to nominate Mr Argand as their jointly-nominated arbitrator in the consolidated case.

20. On 10 June 2016, the CAS Court Office, on behalf of the President of the Appeals Arbitration Division informed the Parties that the Panel had been constituted as follows:

President:	Mr Conny Jörneklint, Former Chief Judge in Kalmar, Sweden
Arbitrators:	Mr Luc Argand, attorney-at-law in Geneva, Switzerland
	Mr Ulrich Haas, Professor in Zurich, Switzerland

21. On 14 June 2016, the Panel invited the Parties to file written submissions and in doing so, state whether they wanted a hearing and moreover, address – *inter alia* – the following questions:

    1. Does the Termination Order issued on 19 February 2016 in case CAS 2015/A/4323 Blake Leeper v. USADA have *res judicata* effect on these procedures?;
    2. To the extent the Termination Order has *res judicata* effect, do the Parties have autonomy to freely dispose of such effects?;
    3. To the extent No. 2 above is answered in the affirmative, does Mr Leeper have standing to bring a claim against the AAA Decision if such AAA Decision has been replaced by the Settlement Agreement between Mr Leeper and USADA?; and
    4. Explain the relationship between Article 15.1 of the WADC (and the corresponding rule in the IPC Code) and Article 13.2.3 (para. 1) of the WADC (and the corresponding rule in the IPC Code).

22. On the same day, the IPC informed the CAS Court Office that it was content for the CAS Panel to decide the consolidated proceedings based on the Parties' written submissions, and that it did not believe that a hearing is required in this matter.

23. On 15 June 2016, the Panel, having fully considered the impact the timing of this decision would have on the Appellant's selection to the US Paralympic Team and as a result, informed the Parties that it would render its decision within the necessary timeframe.

24. On 20 June 2016, the Athlete informed the Panel that he wished to withdraw the proceedings in Case 4493 for financial reasons. A termination order was thereafter rendered on 15 July 2016.

25. On 24 June 2016, the Appellant filed his written submission and responded to the questions posed by the Panel in its letter dated 14 June 2016.

26. On 8 July 2016, the IPC filed its answer to the Appellant's submission to the Panel's 14 June 2016 inquiry.

27. On 14 July 2016, the Panel informed the Parties, having been informed that both Parties wanted the matter to be decided without a hearing – that the Panel had decided to have one final round of written submissions in lieu of a hearing in accordance with Article R57 of the Code.

28. On 21 July 2016, the Appellant filed his reply submission.

29. On 1 August 2016, the Respondent filed its reply submission.

IV. THE PARTIES' SUBMISSIONS

A) The Appellant's Requests for Relief

30. In his statement of appeal, the Appellant requested the following relief:

(i) Setting aside the Decision of the International Paralympic Committee, dated 22 February 2016;

(ii) Ordering any such other relief as the Panel may deem appropriate;

(iii) Ordering the International Paralympic Committee to pay all the arbitration costs; and

(iv) Ordering the International Paralympic Committee to pay a substantial contribution towards the Appellant's arbitration related costs.

31. In his final submission, the Athlete clarified that his requests for relief included the following specific prayers:

(i) Ordering the IPC to recognise the Settlement Agreement of 15 January 2016 between the Athlete and USADA; and

(ii) Ordering the IPC to recognise that the Athlete's period of ineligibility expired on 20 June 2016.

B) The Respondent's Requests for Relief

32. In its answer, the IPC requested that the Panel should:

(i) dismiss the Athlete's appeal;

(ii) uphold the IPC's decision of 22 February 2016 to recognise the AAA Decision (and not to recognise the subsequent Agreement between USADA and the Athlete); and

(iii) order that each of the parties bear their own legal and other costs.

C) The Parties' Answers to the Questions from the Panel

Question 1. Does the Termination Order issued on 19 February 2016 in case CAS 2015/A/4323 Blake Leeper v. USADA have res judicata effect on these procedures?

i. The Appellant's answer

33. The Athlete submits that a CAS Termination Order does not have *res judicata* effect. Indeed, the very designation of this instrument as an "Order" speaks against such a conclusion, which is further supported by key facts including that:

(i) the Termination Order was issued by the President of the CAS Appeals Arbitration Division (i.e. not by a Panel);

(ii) the merits of the proceedings were never considered in issuing the Termination Order; and

(iii) the Parties' request to terminate the proceedings was conditional upon and directly related to the Settlement Agreement and the IPC's available right to appeal.

34. This position is further supported by legal doctrine:

> … *under Swiss law a claimant's withdrawal of its action, whereby it abandons its prayer for relief, has res judicata effect ('désistement d'action'). By contrast, there is generally no res judicata effect where the claimant merely puts an end to the court proceedings, and is thus not prevented, in principle, from bringing its action anew ('désistement d'instance').*
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> *See* SCHAFFSTEIN S., The Doctrine of Res Judicata Before International Commercial Arbitral Tribunals, Oxford University Press 2016 at 1.136.

35. In circumstances where the Parties' termination of the CAS proceedings was conditional upon, and directly linked to, the existence and enforceability of the Settlement Agreement, it is clear that the Athlete did not withdraw or abandon his prayers for relief, but merely put an end to what he believed were unnecessary court proceedings. Accordingly, the Termination Order in Case 4323 was a mere procedural order which, under Swiss law, does not have *res judicata* effect by definition and can be changed at any time.

36. While this conclusion is now largely irrelevant in view of the withdrawal of Case 4493, it is important insofar as it means that the Athlete and USADA were entitled to bring new proceedings on the merits (in order to satisfy the IPC and obtain a Consent Award) and that the IPC was entitled to intervene in such proceedings – but refused to do so.

ii. The Respondent's answer

37. In light of the withdrawal of the Athlete's (second) CAS appeal (Case 4493), the IPC considered questions 1 to 3 in the CAS letter of 14 June 2016 no longer relevant to the resolution of these proceedings.

Question 4. Explain the relationship between Article 15.1 of the WADC (and the corresponding IPC rule) and Article 13.2.3 (para. 1) of the WADC (and the corresponding IPC rule).

i. The Appellant's answer

38. Article 15.1 of the WADC obliges the Signatories of the WADC to recognise final decisions of other Signatories as follows:

> *Subject to the right to appeal provided in Article 13, testing, hearing results or other final adjudications of any Signatory which are consistent with the Code and are within that Signatory's authority, shall be applicable worldwide and shall be recognized and respected by all other Signatories.*

39. Article 13.2.1 of the WADC provides for appeals in anti-doping with respect to *"Decisions Regarding Anti-Doping Rule Violations, Consequences, Provisional Suspensions, Recognition of Decisions and Jurisdiction"*. Among those decisions subject to appeal before the CAS (for international athletes) are, *inter alia*, *"a decision imposing Consequences or not imposing Consequences for an anti-doping rule violation"* and *"a decision by an anti-doping organization not to recognize another anti-doping organization's decision under Article 15"*.

40. Article 13.2.3 (para 1) then states that:

> *… in cases under Article 13.2.1, the following parties shall have the right to appeal to CAS: (a) the athlete or other Person who is the subject of the decision being appealed; […] (c) the relevant International Federation; […] (e) the international Olympic Committee or international Paralympic Committee, as applicable, where the decision may have an effect in relation to the Olympic games or Paralympic games, including decisions affecting eligibility for the Olympic Games or Paralympic Games* […].

41. The Panel's question raises (at least) two issues in terms of the relationship between these provisions, namely (i) the IPC's obligation to appeal USADA's final adjudication of these proceedings (i.e. the Settlement Agreement); and (ii) the Athlete's right to appeal the IOC's decision not to recognise USADA's final adjudication.

(a) Final adjudication under the WADC?

42. The first question to consider in the operation of Article 15.1 of the WADC is what can properly be considered to be *"testing, hearing results or other final adjudications"* of a Signatory to the Code. In its decision not to recognise the Settlement Agreement, the IPC stated as follows:

> *The IPC is of the view that it is bound by article 15.1 of the WADC (and its own Code) to recognise the AAA Award of 6 November 2015 that imposed a two-year period of ineligibility. We are of the opinion that the Agreements subsequently reached between USADA and Mr. Leeper are not code-compliant and cannot be recognised by the IPC as a result.*
>
> *[…]*
>
> *Under Art. 8 of the WADC, USADA established a hearing process (as it was bound to do), the hearing body addressed whether an anti-doping rule violation had been committed by Mr. Leeper, and then considered, decided upon, and issued their written reasons setting out the applicable Consequences.*
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> *Once the AAA had rendered its decision on 6 November 2015, that decision was binding on all signatories, and the decision was not capable of being voluntarily set aside by USADA and Mr Leeper and substituted by another decision (emphasis by the Appellant).*

43. The IPC added to the above letter on 10 March 2016 by stating:

> *The IPC (in its capacity as the International Federation for Para Athletics) was under no obligation to appeal a decision that appears to us to have had no basis under the applicable rules, and to have been entirely out-with [sic] the authority of USADA. As you know the recognition obligation is limited to testing, hearing results or other final adjudications, that are consistent with the WADC and taken within a parties' authority.*
>
> *[…]*
>
> *Reaching a private agreement with an athlete is not a test, it is not a hearing result, nor is it a final adjudication. 'Adjudication' requires some non-court based dispute resolution where the evidence is independently examined and pronounced upon (emphasis by the Appellant).*

44. The IPC's interpretation of "testing, hearing results or other final adjudications" is wrong because it is nonsensical and inconsistent with both reality and the very rationale of the anti-doping programme. If the IPC's reasoning was followed it would be impossible for an athlete and an Anti-Doping Organisation ("ADO") to avoid lengthy and expensive proceedings by agreeing on a sanction. Notably, aside from compliance with fundamental concepts of the WADC, the only limitations on such private agreements are (as per Article 15.1) that they are within the relevant Signatory's results management authority and that they respect other interested parties' rights to appeal. The parties' autonomy to agree on a sanction is expressly set out on various occasions in the WADC and, contrary to the IPC's position, *"final adjudications"* under Article 15.1 do not require *"some non-court based dispute resolution where the evidence is independently examined and pronounced upon"*. Whilst this may be the IPC's general understanding of "adjudication", the term clearly requires a more sophisticated interpretation in order to ensure it is consistent with what was intended by the WADC. Indeed, according to CAS jurisprudence, *"the interpretation of the statutes and rules of sport associations [must] be objective and always to start with the wording of the rule. It follows that the adjudicating body has to consider the meaning of the rule, looking at the language used, the appropriate grammar and the syntax. The intentions (objectively construed) of the association including any relevant historical background may be taken into consideration"* (CAS 2011/A/2675, para 7.17).

45. In conducting a more in depth examination of the term "final adjudication", it is essential to consider the content of Articles 7 (results management), 13 (appeals), 14 (reporting) and 15 (recognition). Indeed, Article 8 (right to a fair hearing) already covers the concept of a *"non-court based dispute resolution where the evidence is independently examined and pronounced upon"*, thus we must look elsewhere to determine what amounts to a "final adjudication". Article 8 provides that *"at some point in the results management process, the Athlete or other person shall be provided the opportunity for a timely, fair and impartial hearing"*. Most relevantly, Article 7 makes it clear that Signatories are entitled to adopt their own approach to results management and that anti-doping proceedings can, most certainly, be resolved by private agreement. The comment to Article 7 notes in this respect:

> *Various signatories have created their own approach to results management. While the various approaches have not been entirely uniform, many have proven to be fair and effective systems for results management systems.*

[…]. Not all anti-doping decisions which have been initiated by an Anti-Doping Organization need to go to hearing. There may be cases where the Athlete or other person agrees to the sanction which is either mandated by the Code or which the Anti-Doping Organization considers appropriate where flexibility in sanctioning is permitted. In all cases, a sanction imposed on the basis of such an agreement will be reported to parties with a right to appeal under Article 13.2.3 as provided in Article 14.2.2 and published as provided in Article 14.3.2 (emphasis by the Appellant).

46. As indicated in the above comment, Articles 13 and 14 of the WADC set out the "ADRV decisions" which must be notified to relevant parties and are thus appealable. Such decisions include, inter alia, decisions taken by the results management authority to: assert an ADRV, withdraw the assertion of an ADRV; impose a provisional suspension; and/or *"agree with an [Athlete] to the imposition of a sanction without a hearing"*. See Articles 14.2.1 and 7.10 of the WADC. Article 13.2.1 then reiterates that *"a decision that an [ADRV] was committed [and] a decision imposing Consequences or not imposing Consequences for an [ADRV]"* are appealable to CAS. In view of this, it cannot reasonably be disputed that a private agreement between an athlete and a Signatory that has result management authority amounts to a "final adjudication" under the WADC.

47. Article 15 is also central to the concept of a final adjudication as it provides for three additional criteria that must be met before *"testing, hearing results and final adjudications"* must be recognised and respected. Two of these criteria are a non-issue in these proceedings:

    1. The testing, hearing result or other final adjudication must be within the Signatory's authority. The concept of "authority" refers to the requirement under the WADC (see Article 7) that an athlete's ADRV is dealt with by the ADO with results management authority over the case. Without doubt, the results management authority in this case was USADA.
    2. The testing, hearing result or other final adjudication must be subject to appeal by the parties set out in Article 13.2.3, which means that such parties must be given notice of the decision (see Article 14.2 of the WADC). It is indisputable that the IPC was provided with an opportunity to appeal the Settlement Agreement and simply decided not to.

(b) Consistency with WADC?

48. The third element of Article 15.1 – that the final adjudication be consistent with the WADC – is the issue in dispute in these proceedings as, according to the IPC, the Settlement Agreement was:

    "not code-compliant and [could not] be recognised by the IPC as a result".

49. With due respect to the IPC, this is incorrect. As far as fundamental matters of WADC compliance are concerned, it is indisputable that USADA – as the results management authority – rendered a final decision that was consistent with the WADC, including by: imposing a sanction consistent with the minimum and maximum sanctions permissible (see Articles 9 and

10); observing the requirements for testing and analysis of samples (Articles 6 and 7); and providing the right - but not the obligation - for the athlete to have a timely, fair and impartial hearing (Article 8). The IPC has not disputed (and cannot dispute) that a 12 month sanction for an ADRV breaches such minimum or maximum sanctions. The IPC's sole objection with respect to Code compliance is that USADA entered into a Settlement Agreement with the Athlete - following his timely appeal to CAS and on receipt of new material facts that came to light after the AAA Decision - but did not obtain a Consent Award. Such a position is inconsistent with the private autonomy of the parties under the Code (limited only by other parties' right to appeal), with the IPC's conduct in these proceedings, and with the nature of and requirements for a Consent Award in CAS arbitration.

ii. IPC's answer

50. The central question in these proceedings is whether the IPC was entitled, under the IPC Code, to recognise only the AAA Decision (and not to recognise the separate, subsequent Settlement Agreement between USADA and the Athlete). In that respect, the IPC is clear that it was perfectly entitled to do so.

51. The starting point for this question is Article 15.1 of the IPC Code (taken from Article 15.1 of the WADC), which provides as follows:

> *Subject to the right to appeal provided in Article 13, Testing, hearing results or other final adjudications of any Signatory which are consistent with the WADC and are within that Signatory's authority shall be applicable worldwide and shall be recognised and respected by the IPC and all its Members.*

52. The AAA Decision clearly falls within Article 15.1, is consistent with the WADC and within USADA's authority, and has not been appealed by any party. It therefore falls to be recognised by the IPC. In contrast, the IPC considers that the subsequent, private Settlement Agreement between USADA and the Athlete is not consistent with the WADC or within USADA's authority, and does not therefore fall to be recognised under Article 15.1. In particular:

53. Article 7 of the WADC (relied on by the Athlete) simply provides anti-doping organisations with the discretion to adopt appropriate pre-hearing results management procedures: *"[e]ach Anti-Doping Organization conducting results management shall establish a process for the pre-hearing administration of potential anti-doping rule violations that respects the following principles: …"* (emphasis added). This Article does not address the situation post-hearing, where a decision has already been issued.

54. In that respect, and contrary to the suggestions of the Athlete, the IPC has never claimed that such pre-hearing matters are incapable of being resolved by consent. Indeed, so-called 'agreed sanctions' are relatively commonplace, and are expressly provided for in the WADC:

> *[Comment to Article 7: Various Signatories have created their own approaches to results management. While the various approaches have not been entirely uniform, many have proven to be fair and effective systems for results management. The Code does not supplant each of the Signatories' results management systems. This*

Article does, however, specify basic principles in order to ensure the fundamental fairness of the results management process which must be observed by each Signatory. The specific anti-doping rules of each Signatory shall be consistent with these basic principles. Not all anti-doping proceedings which have been initiated by an Anti-Doping Organization need to go to hearing. There may be cases where the Athlete or other Person agrees to the sanction which is either mandated by the Code or which the Anti-Doping Organization considers appropriate where flexibility in sanctioning is permitted. In all cases, a sanction imposed on the basis of such an agreement will be reported to parties with a right to appeal under Article 13.2.3 as provided in Article 14.2.2 and published as provided in Article 14.3.2] (emphasis added).

55. Such consensual resolutions are, however, expressly limited to the situation where a hearing decision has not been issued. In that respect, the agreed sanction is treated (in effect) as a first instance decision, with the usual rights of appeal applying.

56. Once a hearing decision has been issued, it is clear from Articles 8.4, 13.1 and 15.1 WADC that such decision then remains in effect unless and until it is appealed. The intention behind this process is spelled out in the comment to Article 13 WADC as follows:

[Comment to Article 13: The object of the Code is to have anti-doping matters resolved through fair and transparent internal processes with a final appeal. Anti-doping decisions by Anti-Doping Organizations are made transparent in Article 14. Specified Persons and organizations, including WADA, are then given the opportunity to appeal those decisions …].'

57. In the present case, it is not disputed that the AAA Decision has not been appealed by any party. Nor do the WADC or USADA's own rules provide for USADA and the Athlete to simply set aside an AAA hearing panel decision by private agreement. Indeed, the Athlete has been unable to point to any provision whatsoever in support of that proposition. It also appears that USADA was well aware of this issue, and accordingly attempted to found a proper procedural basis for setting aside the AAA Decision by stating that it was being replaced because it 'was procured by fraud'. It is, with respect, blindingly obvious that that was not the case. To the contrary, the AAA Decision was not in any sense procured by fraud as the panel in fact found that the Athlete had not established his alleged explanation to the required standard of proof i.e. it did not believe his testimony. Indeed, the Athlete's case is no different to the very many cases where an athlete advances an explanation that is ultimately found not to be proven. It is also worth noting that the Athlete has been unable to point to any examples of cases where his suggested procedural approach has been adopted. Nor can the position properly be compared to a private law arbitration, as the harmonised global anti-doping environment means that the WADC does impose certain restrictions on the autonomy of the parties.

58. If the Athlete's interpretation is correct, it would also lead to some absurd results. For example, the Athlete says in his submissions that he *"is willing to acknowledge certain potential limitations on his right to conclude such a Settlement Agreement, such as the necessity for an appeal to have been filed against the AAA decision (so it had not obtained res judicata effect)"*. And yet that simply makes no sense. First, it is not reflected anywhere in the WADC or applicable anti-doping rules. Second, it is entirely inconsistent with the Athlete's later submission that the Parties have autonomy to freely dispose of the effects of *res judicata* even where the previous decision has become final (in which case

the Parties could simply agree to replace the AAA Decision even if no appeal had been filed). The Athlete's interpretation could also lead to further procedural difficulties, for example, if a third party appeals the original decision to CAS but the parties to the original decision then privately agree on a different resolution.

59. The Athlete also claims that if the IPC is permitted not to recognise the Settlement Agreement then *"[T]he Athlete and other anti-doping authorities would be in an untenable, legally uncertain, predicament. The fact of the matter is that USADA and the Athlete are bound by the Settlement Agreement, yet, according to the IPC it is not required to recognise or respect it despite not having appealed it. This would result in contrary approaches being taken to the Athlete's eligibility as far as USADA, the IPC and other Signatories are concerned, which is not compatible with the aims and purposes of the WADC"*. With respect, the IPC disagrees entirely. Just like the IPC, other signatories are equally free not to recognise the Settlement Agreement under Article 15.1 of the WADC (including those who, on the Athlete's case, do not have any 'appeal rights' over the Settlement Agreement itself). The Athlete would then be free to appeal any such decision(s), as in the present case. The IPC believes that is exactly how Article 15 is intended to work, and it is therefore entirely compatible with the aims and intention of the WADC. Whether USADA and the Athlete are bound by their Settlement Agreement (as between themselves) is entirely irrelevant.

60. Nor was the IPC under any obligation to appeal the Settlement Agreement, as is suggested by the Athlete:

    (1) the IPC was fully entitled not to recognise the Agreement. In that respect, the Parties' appeal rights existed only in relation to the AAA Decision (which was not appealed and which remains in full force and effect). The fact that USADA and the Athlete purported to give the IPC 'appeal rights' over their separate, private Settlement Agreement is simply irrelevant. The IPC had no such appeal rights under the WADC/IPC Code, and nor is Mr Leeper able to point to anything in support of his assertion that the IPC was in fact obliged to appeal the Settlement Agreement.

    (2) As to the relationship between Article 15.1 and 13.2.3 (para 1) of the IPC Code, Article 15.1 simply provides that testing, hearing results and other final adjudications that are consistent with the WADC and within the signatory's authority will be recognised as such, subject to any appeals under Article 13. To put it another way, such a hearing result (here, the AAA Decision) must be recognised subject to any appeals under Article 13 (of which there were none). The relationship between Article 15.1 and 13.2.3 certainly does not impose any obligation to appeal, and if the requirements of Article 15.1 are not met then there is simply no obligation for signatories to recognise.

    (3) If the Athlete is correct that the only option for the IPC was to appeal the Settlement Agreement, then that would require the IPC to bear the (significant) costs of an appeal to CAS (as unlike the present case, such an appeal would not be free). It should not fall to the IPC to bear that burden.

61. As somewhat of an afterthought, the Athlete also claims that the IPC is somehow estopped from refusing to recognise the Settlement Agreement (citing no authorities but stating that this

'general principle' applies). To the extent that this submission is not dealt with above, the IPC notes that it has acted in good faith throughout this matter. It has also taken the necessary action under the IPC Code to recognise the AAA Decision and to communicate that to the Parties (which decision the Athlete has now appealed). Accordingly, the estoppel argument does no more than beg the question (dealt with above) as to whether or not the IPC was entitled not to recognise the Agreement.

62. Had USADA and the Athlete wished to agree on a different resolution of the case in light of facts that came to light following the AAA Decision, the proper procedure should have been for them to appeal the decision to CAS and seek a consent award. That process ensures transparency and also has the important function of allowing the Panel to verify the bona fide nature of the agreement reached (see CAS 2014/A/3498, para 35). In addition, had the IPC been properly and timely notified of the Athlete's initial CAS appeal it may well have wished to participate (in particular given the Athlete's wish to compete in the 2016 Paralympic Games).

63. The IPC strongly objects to the Athlete's suggestion that its conduct in this matter *"falls well short of what is expected from a reputable International Federation"*. As discussed above, the IPC has acted responsibly and in good faith throughout these proceedings, and has given USADA and the Athlete every opportunity to explain the process that they chose to follow, and to address the IPC's concerns in that respect. Indeed, if this case had concerned one of the Athlete's competitors, from another country, who had entered into a similar private arrangement with his National Anti-Doping Organisation ("NADO"), then no doubt the Athlete would have expected the IPC to exercise the same degree of scrutiny.

D) The Nature of Anti-Doping Disputes

i. The Athlete's submissions

64. The Athlete submits that ADOs are – according to the express terms of the WADC – perfectly able to finally adjudicate proceedings by way of private agreement. Indeed, the private nature of anti-doping proceedings has been consistently recognised by the CAS:

> *"The WADA Code is neither a law nor an international treaty. It is rather a contractual instrument binding its signatories in accordance with private international law"* (See CAS 2011/O/2422).

65. The only remaining question is whether parties can agree on a sanction after a first instance decision – which the IPC disputes. Mr Leeper is willing to acknowledge certain potential limitations on his right to conclude such an Agreement, such as the necessity for an appeal to have been filed against the AAA Decision (so it had not obtained *res judicata* effect) and the necessity to allow parties such as the IPC an opportunity to appeal the Settlement Agreement. In the present case, not only was the Settlement Agreement finalised in the context of a timely appeal to CAS, it was based on new material facts that had arisen after the AAA Decision (specifically Mr Leeper's alcoholism and the impact of same on his degree of fault). It is noted in this respect that USADA had access to, and the ability to evaluate, additional material facts that came to light only after the AAA Decision was rendered. In such cases it would be

ridiculous to suggest that the Parties were not free to agree on an alternative sanction on the basis of such facts. To suggest that the mere existence of a first instance decision, rendered on the basis of incorrect and/or incomplete facts and duly appealed within the relevant time limit, could inhibit the express ability in the WADC to agree to sanctions that *"the [ADO] considers appropriate where flexibility in sanctioning is permitted"* is inconsistent with the WADC and with common sense. In the event that the Parties were prohibited - in the WADC or even in the Code - from settling their proceedings by mutual consent, the Athlete's position would clearly be different. However the fact is that no such restriction exists, whereas the ability to agree on a sanction (provided the right to appeal is respected) is an express and fundamental right of any Code Signatory. It is also worth briefly addressing the IPC's misguided suggestion that the Settlement Agreement amounts to:

> … *[a]n illegitimate act that could lead to all manner of abuse if permitted to stand, and would have the effect of undermining the effectiveness of the anti- doping efforts of WADA and the International Federations. The method that Mr. Leeper and USADA wish to adopt and to have endorsed by the CAS means that hearing panel decisions rendered under Article 8 of the WADC are mere whimsy should the parties to the ADRV hearing not like the outcome.*

66. The IPC further suggests that it:

> … *has an obligation to scrutinize a private agreement to reduce an ADRV sanction imposed by a lawfully appointed hearing panel.*

67. Such submissions are untenable. Mr Leeper and USADA acted in full compliance with their obligations by informing the IPC that they had reached an agreement finally adjudicating the case and inviting the IPC to appeal such final adjudication. Whilst the IPC certainly had an obligation to "scrutinize" the Settlement Agreement (and to appeal it if unhappy) it elected not to do so based on its (mis)understanding of the WADC. Thus, if any action undermined the effectiveness of the anti-doping efforts of International Federations - or allowed for abuse - it was the IPC's negligent and abstinent refusal to avail itself of the opportunity to appeal the Parties' final adjudication of the ADRV. At the end of the day, what the Athlete wishes to have "endorsed" is the IPC's obligation to either recognise a final adjudication of a Signatory or take concrete legal action where it disputes such final adjudication, rather than sit on its hands and complain (or, even worse, abuse the recognition of the decision in a way that is not consistent with the wording and purpose of Article 15.1 of the WADC). Finally, it must be noted that contrary to the IPC's apparent belief, parties that do not "like the outcome" of a first instance decision are always entitled to take action. In this case, the first instance decision was inconsistent with the newly revealed facts and the Athlete took action by timely appealing to CAS and concluding a *bona fide* settlement. Such approach is perfectly consistent with the Code, and the issuance of a Consent Award would not have materially changed the nature of the Settlement Agreement as a "final adjudication", it would merely have provided for easier enforcement of the parties' agreement. Thus, if the IPC "did not like the outcome" of the Parties final adjudication - it was welcome, able, and invited, to appeal. The fact is that it did not prohibits the IPC from raising any objection whatsoever to this final adjudication.

ii. The IPC's submissions

68. The IPC does not explicitly make any comment on this issue but one can understand from its reasoning that it recognises the private nature of anti-doping proceedings.

E) The Background of the Athlete's ADRV

i. The Athlete's submission

69. The Athlete submits that his use of cocaine was neither "intentional" within the context of the WADC nor "intentional" in the common use of the term when one considers the effect of his alcoholism on his decision-making. As to the veracity of the Athlete's alcoholism, although he is now in recovery and committed to maintaining his sobriety, the Athlete has been, and will continue to be, an alcoholic. Indeed, several third parties have recognized the Athlete's past problems with alcohol, including the US Olympic Committee (USOC), a medical professional caring for the Athlete, and the Athlete's sponsor in Alcoholics Anonymous. As early as December 2011, the USOC was aware of the Athlete's struggles with alcohol. On 6 December 2011, Cathy Sellers, the High Performance Director of Paralympic Track & Field, wrote to Mr Leeper:

> *I will need you to leave the OTC by Friday, 9 December 2012, for violation of the Olympic Training Center Alcohol Policy. You may return after 1 January 2013 but you will be in a probationary period for 90 days upon your return. Where I do not like having to inform you of this, I must abide by the OTC policies as we wish to continue having our resident program in Chula Vista. I might have been able not to take this step, but since this is your second offense for the same violation-I did not have a choice. I appreciate your being honest with me in regards to this incident, but the policy is a no-alcohol policy, so the presence of an empty bottle in your room violates the policy. Coach Cruz and I definitely want you to come back and train and go to school in January. I understand that mistakes are made and mistakes are also correctable, unfortunately in this case we did not have an option.*

70. On 15 July 2016 the Athlete's doctor, Dr David Bresler, prepared a statement concerning his care and diagnoses of the Athlete, which began on 2 February 2016. In relevant part, Mr Bresler stated:

> *As a result of being born without legs, Mr Leeper suffered severe anxiety and post-traumatic stress as a child due to this major disability and the unwanted attention and ridicule of other children. He states that his mother was also bi-polar, and he also suffered profound anxiety and fear inside the home as a result of her unpredictable behaviour. Through my interviews and psychological testing, I have additionally concluded that Mr Leeper suffers from two major learning disorders, dyslexia and attention deficit disorder ("ADD"), which have not been previously diagnosed. If he were identified as a child with these conditions, he could have been treated with appropriate medications to improve his academic performance and alleviate much of his anxiety. This, in turn, could have minimized his need and desire to use alcohol to numb his anxiety.*

Mr Leeper began drinking at the age of 15. It was his grandfather who suffered from alcoholism who gave him his first drink. His drinking increased throughout high school, college and thereafter. According to Mr Leeper, he never used recreational drugs unless he was first intoxicated from drinking alcohol.

In my opinion, Mr Leeper is not addicted to drugs nor does he have a drug problem. Like most alcoholics, beer and alcohol are his "favourite choice" and it was always his alcoholism that led him to the occasional use of recreational substances.

In the two to three years leading up to 14 October 2015 (when Mr Leeper began his sobriety), his drinking largely dominated and controlled his life and decision-making processes. When he drank, which was almost daily, he could not control his impulses or make good decisions. He did not seek out recreational drugs, but when they were presented to him or made available, he would often not say "no". Alcoholism is a disease that renders the person powerless to make correct and proper decisions when inebriated.

Mr Leeper's alcoholism led to his ingestion of a recreational drug for which he tested positive.

71. It is important to note that Mr Bresler is not simply a physician plucked off the street to help the Athlete. Mr Bresler is the Founder and Executive Director of the Bresler Center (a highly specialized center treating addictive disorders). He has numerous academic and professional qualifications and was a former White House Commissioner. Mr Bresler has been specifically charged with Blake's treatment to make sure that instances such as his cocaine ingestion never happen again.

72. Finally, on 17 July 2016 the Athlete's Alcoholics Anonymous former sponsor, Cliff Lovick (who has consented to the use of his name in this procedure) prepared a statement concerning the Athlete's alcoholism and recovery. In relevant part, Mr Lovick stated:

I met Patrick Blake Leeper at an Alcoholics Anonymous meeting late last year at or about the beginning of November 2015 …. When I met Patrick at the AA meeting we sat together and discussed his alcoholism in great detail. He told me he had been suspended from competing as an athlete in his sport of track and field. I realized he needed help from a sponsor who would care for him and invest the time necessary to guide him through the AA program and help monitor his process of recovery for his alcoholism. As a result of my meeting Patrick I had the privilege of being his near full time sponsor for 6 months until he permanently moved to Los Angeles. It was a joy to be able to work with him and go through the 12 steps of Alcoholic Anonymous program. It was especially gratifying to watch him grow spiritually, physically and emotionally. The disease of alcoholism plagues many young men and women and I truly believe working the 12 step social model of recovery creates a healing and strength to move forward in life. My wife Mary and [I] deeply miss seeing Patrick regularly but we appreciate having been able to contribute to his life and recovery.

73. The record thus reflects both that the Athlete is, and has been, an alcoholic, and that he is now committed to, and supported in, maintaining his sobriety. As such, any suggestion by the IPC that the Athlete's alcoholism does not exist is baseless and should not be considered. As a final note, the IPC had every opportunity to test the evidence of Mr Leeper's alcoholism by intervening in CAS 2015/A/4323 or appealing the Settlement Agreement. Instead, and as with each element of these proceedings, the IPC chose simply to make baseless allegations through improper means.

74. The Athlete notes in this regard that the documents referenced therein are a mere selection of evidence and that they confirm, as the IPC suggests is necessary, the Athlete's diagnosis as an alcoholic and the fact that his past drinking interfered with his decision-making in sport. Furthermore, the IPC has presented a one-sided and outdated presentation of relevant jurisprudence. The Athlete submits – *inter alia* – the following

(a) The 2015 WADC allows a Panel to take into account whether the use of cocaine is related to the Athlete's sporting performance.

75. The IPC fails to consider that the 2015 WADC was expressly drafted by WADA to provide *"more flexibility with regards to sanctioning … in certain circumstances where the athlete can demonstrate that he or she was not cheating"*. Given that the 2009 WADC already provided for a maximum sanction of 2 years for cocaine offences, it is difficult to see how a reduction from 4 years to 2 years on the basis of intention could satisfy this fundamental aim of the 2015 WADC. Furthermore, the 2015 WADC specifically defined cannabis use that was unrelated to sport performance as an automatic ground for No Significant Fault or Negligence. In considering whether such definition should also extend to cocaine, it has been suggested that:

> *46. Following the above line of thinking it appears - at least at first sight - open to debate how to treat cases of recreational drug use, i.e. the use of drugs (prohibited in-competition only) in a social context unrelated to sport. One could argue here that the threshold for NSF should be rather high, since the athlete engaged in particular dangerous conduct by intentionally ingesting a substance that he or she knew is prohibited in-competition. However, there are also arguments in favour of a more nuanced approach, because recreational drug use - unlike the other dangerous conducts previously mentioned - clearly can be dissociated from the sporting sphere of the athlete. The WADC 2015 - at least for cannabinoids - opted rightfully for the second approach and provides that the mere fact that cannabinoids are consumed in a recreational/social context unrelated to sport performance qualifies as NSF.*
>
> *47. The only question remaining, thus, is, whether the WADC 2015 advocates a dual approach when dealing with the consequences of social/recreational drug use depending on the kind of drug consumed by the athlete (cannabinoids or cocaine). This question must be answered in the negative. First, it is to be noted that a dual approach does not make much sense. Second, also the legislative history of the current version of the WADC 2015 does not warrant a dual approach. In an initial version of the WADC 2015 (version 2.0) both drugs were being treated together as "Substances of Abuse" making it clear that recreational drug use merits "special treatment". The (draft) provision dealing with "Substances of Abuse" (that provided a sanction in the range of a reprimand up to one year) was criticized by stakeholders in the revision process in particular because it suggested rehabilitation at the expense of the athlete. Stakeholders feared that requiring an athlete to foot the bill for a rehabilitation program would result in discriminatory treatment among athletes with different financial means. Thus, the original concept of "Substances of Abuse" was dropped in the final version of the WADC 2015 with the consequence that the general provisions on fault-related reductions would apply to recreational drug use. It is to be noted that the final draft of the WADC 2015, which was circulated prior to the World Anti-Doping Conference in Johannesburg, did not contain any special provision relating to recreational drug use. In particular, the final draft of the WADC 2015 did not contain today's comment (in the definition section) relating to cannabinoids.*

48. The problem related to recreational drug use was only tabled once again a couple of days prior to the World Anti-Doping Conference by some stakeholders. The latter felt that under the general rules relating to fault-related reductions recreational drug users would end up under the new WADC 2015 with much harsher sanctions than under the WADC 2009, which was not in line with the overall concept and purpose of the revision process to provide for more flexibility for "non-cheaters". It appeared, thus, that a solution had to be found quickly. Initially, a broad and cohesive concept dealing with recreational drug use was contemplated in the context of fault-related reductions of the periods of ineligibility. However, in view of the fact that there was no further consultation window available to get any feedback from stakeholders at this late stage, it was decided to keep changes to the final version of the text to a minimum. Thus, a comment was inserted in the definition of NSF dealing with the most relevant recreational drug use in practice, i.e. the use of cannabinoids. To conclude therefore, the Tribunal finds that neither the legislative history, nor the rationale of the WADC 2015 or of the comment in the definition section preclude this Tribunal to apply the carve out for cannabinoids by analogy also to the recreational use of cocaine. This is all the more true in order to avoid any inconsistencies with art. 10.2.3 WADC 2015/ADR. The provision provides that the recreational use of a drug (that is only prohibited in-competition) does not constitute "intentional doping". If this, however, is the case it would be contradictory to prevent the same athlete from recourse to the concept of NSF (enshrined in WADC 2015/ADR) by pointing to his alleged intentional consumption of the drug. Consequently, the Tribunal finds that in the case at hand the Rider may establish NSF by clearly demonstrating that the context of the use of cocaine was unrelated to sport performance. In the Tribunal's view it is uncontested between the Parties and corroborated by the expert testimony of Prof. Saugy and Prof. Pieraccini that the Rider consumed cocaine unrelated to his sporting performance. Thus, the Tribunal finds that the Rider qualifies for a reduction under NSF.

76. Finally, the above decision is even supported by a pre-2015 WADC decision in which the CAS Panel accepted an agreed sanction of 14-months on the basis of No Significant Fault or Negligence where the athlete's friend put cocaine in his drink and *"established that he had no intent to enhance his sport performance, and nor was his sport performance enhanced by his unknowing ingestion of cocaine"* (See CAS 2014/A/3590).

(b) The 2015 WADC allows for a 12-month sanction for ADRVs involving cocaine.

77. The question remaining, thus, is the possible reduction of the sanction based on the athlete's degree of fault. Notably, in the above case the athlete received an 18-month sanction. However, in the above case, unlike here:

(i) The athlete had not alleged, nor proven, an addiction that - as per the athlete's diagnosis *"render[ed] him powerless to make correct and proper decisions when inebriated"*;

(ii) The athlete had not proven that such addiction had in the past negatively impacted his ability to perform in his sporting career (or that he had even been suspended from the Olympic Training Center as a result);

(iii) The athlete had no desire nor intention to voluntarily enter a rehabilitation program (i.e. the initially proposed response to substances of abuse in the 2015 WADC); and

(iv) The relevant results management authority with discretion to agree a sanction did not agree to a 12-month reduction (with no intervention or appeal from other interested parties despite the opportunity for same).

78. Furthermore, the IPC has referred solely to cases concerning the prior version of the WADA Code in its footnotes and fails to acknowledge other relevant cases such as (by way of example only):

(i) The 2015 Decision in *The Football Association v. Jake Livermore* (which was not appealed by any other ADO);

(ii) CAS 2014/A/3590;

(iii) CAS 2008/A/1490 in which the Panel dismissed WADA's appeal for an increase to a 12-month sanction for cocaine use in circumstances where the athlete committed: *"an act of youthful exuberance and represented a momentary, albeit serious, indiscretion in a desire to join with his peers at a high school graduation party. He had no knowledge that cocaine was a prohibited substance in sport because of its potential stimulant effect and did not take the cocaine with any intention to influence his performance at the championship. The scientific evidence was clear that Mr. Thompson's ingestion of cocaine could not possibly have acted as a stimulant to enhance his performance. In the Panel's view, Mr. Thompson clearly lacked the knowledge and experience to understand the risk consuming cocaine at his graduation party represented in respect of his participation has been at the championship"*.

79. Finally, Mr Leeper considers it offensive that the IPC would:

(i) minimize his alcoholism and its effects by comparing his case to another athlete who, according to the relevant panel, *"was not limited in his sporting activities by reason of the events within his family. He merely felt 'down' personally"*; and

(ii) submit a video into evidence - and cast dispersions on the Athlete's character - while openly admitting that it had not even bothered to verify the background to the video nor its creator.

ii. The IPC's submissions

80. The IPC submits that Mr Leeper has changed his explanation for his positive test, now accepting that the explanation provided to the AAA panel (by himself and by his two supporting witnesses) was entirely false and fabricated. Instead, Mr Leeper stated that he had in fact used cocaine intentionally a few days before his positive test, while drunk, and that his behaviour had been caused by his longstanding alcoholism. Aside from Mr Leeper's own account, no supporting evidence was provided for his new explanation.

81. The IPC had and continues to have grave concerns as to the highly unorthodox procedure adopted in Mr Leeper's case (for which no explanation has ever been forthcoming, either from USADA or Mr Leeper). As a result, on 22 February 2016 the IPC informed USADA, USOC

and WADA that it did not consider the private agreement reached between USADA and Mr Leeper to be compliant with the IPC Code (noting, in particular, that the AAA Decision was not in any sense 'procured by fraud' as claimed). Further to Article 15.1 of the IPC Code, the IPC therefore confirmed that it would recognise only the undisturbed AAA Decision and not the later Settlement Agreement.

82. The IPC's procedural concerns are further compounded by separate concerns as to the substance of the Settlement Agreement reached. In particular:

(i) While Mr Leeper now says that 'new facts' were discovered following the AAA Decision, the reality is that Mr Leeper simply changed his own account of events, without providing any supporting evidence. That new account was apparently then assumed to be true, despite Mr Leeper's admitted lies and behaviour before the AAA panel.

(ii) Mr Leeper was stated to bear No Significant Fault or Negligence for his violation, and then afforded the maximum possible reduction in sanction, despite the fact that (on his own case) he exercised no care whatsoever to avoid committing an anti-doping rule violation (let alone the 'utmost caution' required). As to his contention that his behaviour was caused by his longstanding alcoholism, no medical diagnosis (or other evidence) was provided, and nor was there any consideration of the effect (if any) on his behaviour (in particular in relation to the specific circumstances of his violation). Indeed, Mr Leeper was apparently able to function and compete at the very highest levels of his sport throughout the duration of the relevant period (See e.g. CAS 2005/A/873 para 11.12; CAS 2010/A/2307, para 163; CAS 2008/A/1473; USADA v Jelks, AAA No. 77 19000074 12, para 7.11).

(iii) In assessing Mr Leeper's degree of fault, USADA appears to have taken into account the fact that Mr Leeper's cocaine use took place out of competition and 'was not intended to and did not enhance performance'. Yet the fact that the violation allegedly had no relationship with Mr Leeper's sporting performance is simply not relevant to the fault analysis (See e.g. UKAD v Cleary, NADP decision dated 5 January 2016, para 37).

(iv) The IPC believes that the above concerns must also be viewed in the context of Mr Leeper's maximum reduction in sanction, allowing him to return to competition just in time for the 2016 Rio Paralympic Games.

(v) Equally, it remains entirely unclear to the IPC why no action has been taken against Mr Leeper in respect of his deliberate attempt to subvert the proceedings before the AAA panel (by providing false and fabricated evidence, by suborning perjury from multiple witnesses, and by allegedly attempting to prevent a hair test from being carried out as ordered). In that respect, the IPC has also been provided with a video from Mr Leeper's former manager, Mr Steven Barber, titled 'Blake Leeper rehearses crying as he prepares to lie to the USADA'. While the purpose for which this (unsolicited) video was created is unclear, it appears to show Mr Leeper forcing himself to cry before being interviewed about his case (then pending before the AAA panel).

F) Reply Submissions

(i) The Appellant's submissions

83. The Athlete also responds to the following arguments of the IPC:

> *(ii) "The AAA Decision clearly falls within Article 15.1, is consistent with the WADC and within USADA's authority, and has not been appealed by any party. It therefore falls to be recognized by the IPC".*

84. The Athlete, of course, does not dispute that when the AAA Decision was in force - i.e. prior to the time at which it was replaced with the Settlement Agreement - the IPC could have recognized the AAA Decision. However, it is manifestly wrong of the IPC to suggest that the AAA Decision was not appealed and that it thus remains in force. The Athlete appealed the decision to CAS in accordance with the WADC, and within the relevant time limit (i.e. CAS 2015/A/4323). The IPC and WADA did not intervene in such proceedings, despite being aware of same and despite being aware of the Athlete and USADA's intention to terminate the proceedings by way of Settlement Agreement. Accordingly, the AAA Decision was validly appealed and settled in the scope of the valid CAS appeal (and legitimately so in view of the IPC and WADA's election not to become involved in the proceedings).

> *(iii) "… the subsequent, private Agreement between USADA and the Athlete is not consistent with the WADC or within USADA's authority, and does not therefore fall to be recognised under Article 15.1".*

85. The IPC then suggests that while an anti-doping organization can agree to a sanction prior to a hearing, that same anti-doping organization, in the context of new facts and in the interests of avoiding the unnecessary time and costs of a CAS appeal, cannot settle its dispute at CAS by way of an agreement to a WADC-compliant sanction. This restriction on the autonomy of the relevant results management authority is not only absurd (and would result in excessive costs and time devoted to resolving anti-doping disputes in the future), the IPC yet again fails to acknowledge that it did not intervene in the very proceedings in which the Athlete appealed the sanction and the Parties agreed to settle the dispute. The IPC, notably, has not provided any actual reference for its assertion that *"consensual resolutions are, however, expressly limited to the situation where a hearing decision has not been issued"*. The IPC instead refers to the fact that parties have an opportunity for a final appeal in all results management proceedings. This is, of course, correct and unfortunately it is apparently necessary to again emphasize that:

(i) the Athlete appealed the AAA Decision; and

(ii) The IPC had an opportunity to intervene in that CAS appeal or to file its own final appeal against the Settlement Agreement and elected not to.

86. While the IPC suggests that the Athlete has not *"point[ed] to any provision"* which would allow the only two parties to a CAS appeal to settle such appeal (while respecting the rights of other parties under the WADC to appeal such settlement), the IPC fails to recognize that no provision

restricts the parties' right to do so. Indeed, insofar as it suggests that all that was needed was a Consent Award, the IPC acknowledges that parties can resolve CAS proceedings by way of settlement. Contrary to the IPC's suggestion, however, no provision requires parties to a CAS appeal to obtain a Consent Award in order to settle their proceedings by way of agreement. Finally, the IPC has provided absolutely no response whatsoever to the Athlete's submissions concerning the nature and effect of a Consent Award. Furthermore, and as explained in the Athlete's submission of 24 June 2016 the settlement of anti-doping proceedings in the context of a CAS award is fully consistent with the general approach to results management in the WADC and, in any event, the settlement here respected all of the expressed conditions of Article 15.1 of the WADC (i.e. the proceedings were under USADA's results management authority, the sanction was compatible with the WADC, and jurisprudence and all relevant parties with a right to appeal were invited to appeal).

(iv) "Mr Leeper has been unable to point to any examples of cases where his suggested procedural approach has been adopted. Nor can the position properly be compared to private law arbitration, as the harmonized global anti-doping environment means that the WADC does impose certain restrictions on the parties".

87. In view of this submission, the Athlete takes this opportunity to highlight that not only USADA, but also other governing bodies have in fact resolved anti-doping proceedings in precisely this manner. By way of only two examples, USADA has resolved (through settlement agreements) the following proceedings that had been subject to an AAA Decision and appealed to CAS:

- USADA v. Phil Zajicek (AAA No. 77 190 00386 10 JENF; and
- USADA v. Michelle Collins (AAA No. 30 190 00658 04).

88. Moreover, other international federations have taken the same approach - for example, the UCI in CAS 2012/A/3044. It is also notable that the very fact that cases such as these are resolved with a Termination Order rather than a published award makes it difficult to determine the number of cases in which such settlements occur, however the Athlete expects that there are many other examples. Mr Leeper, thus, considers the IPC's suggestion that his interpretation of the WADC would lead to *"absurd results"* to be entirely without merit. To the contrary, the IPC's interpretation would lead to absurd results, as it would mean that each case (including the above cited cases) resolved by way of settlement agreement in the scope of CAS proceedings could no longer be recognized as valid. This would require all international federations to go through their records to determine whether previously recognized sanctions must, in view of the IPC's (meritless) opinion, be dismissed or amended. It would also mean that even where two parties comply with the express conditions for recognition in the WADC (i.e. that the ADO has results management authority, that the sanction be consistent with the WADC, and that other parties be permitted to appeal), the parties would still be required to waste unnecessary resources in order to obtain a CAS award. Such resources, however, would be better focused elsewhere in the (real) fight against anti-doping. The Athlete and USADA were more than willing to, and did, comply with the express conditions for recognition in the WADC. Ultimately, the IPC was perhaps negligent in failing to intervene in CAS 2015/A/4323, but this does not make the

legitimate settlement of those proceedings invalid in any way. Finally, the Athlete refers in full to his prior submission of 24 June 2016 with respect to the IPC's unfounded submission that it had no obligation to appeal the Settlement Agreement (even following its intentional failure to intervene in CAS 2015/A/4323).

(v) The IPC "should not have to bear the burden [of CAS appeal costs]", "acted responsibly and in good faith throughout these proceedings" and *"may well have wished to participate [in CAS 2015/A/4323]".*

89. Each of these contentions is incorrect and the Athlete is content to end his submission on this point (noting, of course, that anything in the IPC's Answer that is not expressly dealt with is denied and/or without merit). Regardless of whether the IPC takes "great offence", the reality is that the IPC acted neither responsibly nor in good faith throughout these proceedings. The IPC elected not to intervene in CAS 2015/A/4323. It also decided to refuse to appeal or recognize the Settlement Agreement (despite the latter meeting the requirements of Article 15 of the WADC). Its actions seemed solely intended to complicate these proceedings and cause considerable costs to the Athlete following the IPC's own failure to intervene. The Athlete does not understand how the IPC's approach to these proceedings could possibly have been either responsible or in good faith. Notably, it was extremely irresponsible of the IPC to submit a video as purported evidence solely in an effort to defame the Athlete and without bothering to verify the origin and purpose of the video or the character of the person who submitted it. The IPC's actions were particularly egregious given that, as Mr Leeper set forth in his declaration dated 11 July 2016, the IPC apparently had previous "run-ins" with the person who submitted the video, which resulted in the IPC banning this person from all IPC events. The IPC, moreover, should not insist that the Athlete bear appeal costs when the Athlete and USADA purposefully sought to minimize appeal costs by legitimately agreeing to resolve the proceedings. Furthermore, if the IPC had actually decided to intervene in CAS 2015/A/4323 it would have been requested to pay an advance of costs. The Athlete truly hopes that the IPC will not suggest that it would have refused to do so (particularly in light of the fact that Mr Leeper and USADA - the relevant results management authority with discretion to agree a sanction - were in total agreement as to the appropriate sanction). Finally, the IPC cannot seriously contend that it *"may well have wished to participate [in CAS 2015/A/4323)".* It irrefutably had the opportunity to do so, it chose not to, and that is the end of the matter.

(ii) The IPC's submissions

90. The IPC considers that the agreement between USADA and Mr Leeper is not consistent with the WADC or within USADA's authority, and does not therefore fall to be recognised by the IPC under Article 15.1 of the IPC Code. In particular, once a hearing decision has been issued it is clear from Articles 8.4, 13.1 and 15.1 of the WADC that such decision remains in effect unless and until it is appealed. In that respect, neither the WADC nor USADA's own rules make any provision for USADA and the Athlete to simply set aside an AAA hearing panel decision by private agreement. Indeed, that is presumably why USADA and the Athlete endeavoured to find a proper procedural basis for setting aside the AAA Decision, by stating that it was being

replaced on the grounds that it *'was procured by fraud'*. As explained in the IPC's Answer Brief, that is simply not the case. The IPC also noted in its Answer Brief that the Athlete was unable to point to any examples of cases where his suggested procedural approach had been adopted. In response, the Athlete now relies on two USADA cases (USADA v. Phil Zajicek, AAA No. 77 190 00386 10 JENF, and USADA v. Michelle Collins, AAA No. 30 190 00658 04) and one UCI case (CAS 2012/A/3044). However, as the Athlete has failed to provide any of the decisions or agreements from those cases, it is simply impossible to know what approach was adopted and why. In any event, two of the decisions were taken by USADA (the very entity whose procedure is challenged in the present case). Accordingly, those decisions do not in any way change the IPC's view as to the proper procedure to be followed.

V. JURISDICTION

91. 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.*

92. The Parties agreed that Article 13.2 of the WADC, which is incorporated by reference into the USADA Protocol, confers jurisdiction on the CAS to resolve this dispute. The Panel shares the Parties' agreement and confirms that CAS has jurisdiction.

VI. ADMISSIBILITY

93. 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.*

94. Article 13.7.1 IPC Code states as follows:

> *"13.7.1 Appeals to CAS*
>
> *The time to file an appeal to CAS shall be twenty-one days from the date of receipt of the decision by the appealing party …".*

95. The Appellant has asserted that he did not receive the IPC Decision at all. The IPC sent the IPC Decision on 22 February 2016 by e-mail to USADA, WADA and the USOC. The Appellant stated that the IPC Decision was not received by USADA or the Appellant until 3 March 2016. In any event, the Appellant filed his Statement of Appeal on 14 March 2016 and, thus, timely.

VII. APPLICABLE LAW

96. 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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".*

97. The Decision was issued under the IPC Code, and there is no dispute as to the applicability of the IPC Code in the present matter. According to its Article 22.2, the IPC Code shall be interpreted as an independent and autonomous text and not by reference to existing laws or statutes, except for the WADC. Since the IPC is based in Bonn, Germany, the Panel shall apply German law subsidiarily.

98. As to procedural issues, the procedural rules of the CAS Code, supplemented by Swiss procedural law and principles enshrined in chapter 12 of the Swiss Private International Law Act ("PILA") are applicable as the CAS has its seat in Switzerland, pursuant to Article R28 of the Code and at least one of the parties had its seat/domicile outside Switzerland at the time of the execution of the arbitration agreement.

VIII. MERITS

A. OVERVIEW AS TO THE RULES

99. The IPC Code provides some provisions in order to prevent the IPC to be bound to a decision that it does not want to be bound of.

(i) a right to appeal against (certain) decisions (Article 13)

Article 13.2 which concerns *"Appeals from Decisions Regarding Anti-Doping Rule Violations, Consequences, Provisional Suspensions, Recognition of Decisions and Jurisdiction"* expressly mentions

"… and (k) a decision by the IPC not to recognize another Anti-Doping Organisation's decision under Article 15, may be appealed exclusively as provided in Articles 13.2 – 13.7".

(ii) The Rules of Article 15 *Applications and recognition of decisions.*

Article 15.1 states as follows:

Subject to the right to appeal provided in Article 13, Testing, hearing results or other final adjudications of any Signatory which are consistent with the Code and are within that Signatory's authority, shall be applicable worldwide and shall be recognized and respected by the IPC and all its Members.

B. DISCUSSION

100. The Athlete has appealed a decision by the IPC not to recognize the Settlement Agreement. This Appealed Decision would have to be annulled, if one of the prerequisites in Article 15.1 IPC Code is not fulfilled.

1. Relationship between Article 15.1 IPC Code and Article 13 IPC Code

101. Non-recognition is only available to IPC, if it did not have the right to appeal the Settlement Agreement to the CAS. According to the Panel it follows from the structure of Article 15 IPC Code, that appeals take precedence over Article 13 IPC Code and that both articles are mutually exclusive. This follows from the wording in Article 15 IPC Code which states that (non-) recognition is "subject to the right of appeal" and from the fact that Article 15 IPC Code only refers to "final adjudications", i.e. adjudications that – because of their finality – are no longer subject to a right of appeal.

2. Is there a Right of Appeal within the meaning of Article 13.2 IPC Code against the Settlement Agreement?

102. According to the Panel the mere fact that the decision takes a form of an agreement – i.e. that it is consensual – does not prevent the applicability of Article 13.2 IPC Code as such. This follows from Article 7.10 IPC Code, which addresses "notification of Results Management Decisions". The provision provides – *inter alia* – as follows:

> *"In all cases where an anti-doping organization has asserted the commission of an anti-doping rule violation, withdrawn the assertion of an anti-doping rule violation, imposed a Provisional Suspension, or agreed with an athlete or other Person to the imposition of a sanction without a hearing, that anti-doping organization shall give notice thereof as set forth in Article 14.2.1 to other anti-doping organizations with a right to appeal under Article 13.2.3"* (emphasis added).

103. It follows from the above that the term "appealable decision" within the meaning of Article 13.2 IPC Code must, in principle, be construed in a broad sense encompassing also agreements between an ADO and an athlete with respect to consequences in relation to an alleged ADRV.

104. However, despite of the above the Panel is of the view that there was no right to appeal the Settlement Agreement. In coming to this conclusion the Panel first and foremost looked at Article 13.2 IPC Code. This provision establishes whether decisions are subject to appeal before CAS or not. Agreements executed between an ADO and an athlete at the appeal stage before the CAS are not expressly mentioned in Article 13.2 IPC Code. This fact speaks against the possibility of an appeal against the Settlement Agreement, since Article 13.2 IPC Code – at least at first sight – appears to list the decisions subject to a right of appeal in an exhaustive manner.

105. Furthermore, also a systematic interpretation of the respective rules speaks against a possibility to appeal the Settlement Agreement. When comparing Articles 7, 8 and 13.2 IPC Code it appears that the authors of these regulations clearly differentiated between the results

management process, including results management hearings, and the appeal stage and that the appeal process is only applicable to decisions emanating from the results management stage. Consequently, any decision taken at the appeal stage – from the Panel's perspective – is not subject to appeals within the meaning of Article 13 or Article 15.1 IPC Code. In the view of the Panel the Settlement Agreement (coupled with the Termination Order by CAS) is not designed to substitute the results management decision (i.e. the first instance decision). Instead, the Settlement Agreement (in conjunction with the Termination Order) substitutes for the appeal decision before the CAS. Consequently, no appeal is available at this stage of the proceeding.

106. If no appeal is available because of the relationship between Article 13 and Article 15 IPC Code it would mean that Article 15 applies in the case at hand.

3. Duty of Recognition

107. The question in this case is, whether IPC is under a duty to recognise the Settlement Agreement. The latter is the case either if

- the IPC is prevented from raising any non-compliance issues with the IPC Code, because it is bound to it for some reason (*i to iv*) or
- if the previous question is answered in the negative, if the Settlement Agreement is in compliance with the IPC Code (*v*).

(i) Is the IPC bound to the Settlement Agreement for contractual reasons?

108. If the IPC had signed the Settlement Agreement it would be bound by it and, consequently, prevented from raising non-compliance issues. However, the latter is – undisputedly – not the case. Absent any express agreement by the IPC the Panel sees no (contractual) basis to extend the binding effect of the Settlement Agreement also to the IPC. The Panel is comforted in its view by the fact that – quite obviously – USADA and the Athlete when entering into the Settlement Agreement also assumed that IPC was not bound by it. The Panel here refers to section 9 (b) of the Settlement Agreement where it is stated that *"USADA will: … provide best efforts to support the Athlete's efforts to obtain … IPC's approval of this Agreement and/or … IPC's agreement not to appeal the one (1) year sanction to the CAS"*. Thus, it seems to have been clear for the Athlete and USADA that IPC was not bound by the Settlement Agreement as such. The Panel also wants to refer to Annex 2 of the Settlement Agreement, entitled Acceptance of Sanction, page 2, third paragraph, where the Athlete says that he is aware of his obligation to investigate the effect of the sanction on him by other entities as e.g. the IPC. The Panel concurs with the view of USADA and the Athlete that the IPC is not bound by the Settlement Agreement for contractual reasons.

(ii) Is the IPC bound by the Settlement Agreement for procedural reasons?

109. The Settlement Agreement is not the outcome of an arbitration agreement or a consent award, but of a private agreement reached outside state or arbitration proceedings. Consequently, the Panel sees no reason on what procedural ground the Settlement Agreement could bind also the IPC. This is all the more true, since the IPC was not a party to the proceedings before the CAS (which was terminated by a Termination Order following the execution of the Settlement Agreement).

(iii) Is the IPC bound by the Settlement Agreement for other reasons?

110. One could think of other possibilities by which the IPC could be bound by the Settlement Agreement. This could be i.e. *venire contra factum proprium*, good faith and similar circumstances. The Athlete has pointed out that such grounds exist, because IPC could have participated in the proceedings in Case 4323 that eventually resulted in the execution of the Settlement Agreement.

111. In the view of the Panel, the IPC could not have appealed the AAA Decision and thereby participate as a party in the Case 4323. The simple reason for this is that the IPC was not aggrieved by the AAA Decision. A party has no legal interest to file an appeal "against" a decision of a sports organisation in an Appeal Arbitration procedure requesting that the decision of said sport body be left untouched or be upheld. However, once the Athlete had filed an appeal against the AAA Decision, the IPC could have intervened in the arbitration proceedings opposing USADA and the Athlete in the Case 4323 in accordance with Article R41.3 of the Code.

112. The Panel has considered if there was a duty of the IPC to intervene in the Case 4323 and if failing to do so results in being bound by the Settlement Agreement executed between the Athlete and USADA. The Panel's answer to this question is no. There is no such duty. In particular, no such duty arises from Article 15.1 IPC Code. According thereto (non-)recognition is subject to the right of appeal, but not subject to a right to intervene in an arbitration proceeding. Furthermore, the Athlete could – if he wanted the IPC to be bound by the outcome of the proceeding – file his appeal also against the IPC. It follows from the above that the fact that the IPC did not intervene does not bar it from raising criticism against the Settlement Agreement entered into by the two Parties to the procedure at the appeal stage in the recognition stage.

113. The position of the Panel is further backed by the fact that even if the IPC had intervened in the Case 4323, the IPC could not have prevented the execution of the Settlement Agreement and the issuance of the Termination Order from occurring. The latter would only be true, if the Athlete's withdrawal of his appeal filed with the CAS in Case 4323 was subject to the consent of the other parties to this procedure (including the intervenor's consent). This, however, is not (at least not in all instances) the case. The Code is silent whether or not a party can unilaterally withdraw its appeal filed with the CAS. However, it is constant practice with CAS (and most other arbitral institutions, see BSK-IPRG/WIRTH M., 3rd ed. 2013, Article 189 No. 55;

COURVOISIER M., in ARROYO (Ed), Arbitration in Switzerland, Biggleswade 2013, Article 34 Swiss Rules No. 22) that a claimant/appellant can unilaterally withdraw his appeal/request for arbitration before an appeal brief/statement of claim has been filed (without renouncing his claim altogether). Thus, in light of the above it appears rather questionable if an intervention by the IPC in the Case 4323 could have prevented the Athlete from entering into a separate out-of-arbitration settlement with USADA and a subsequent (unilateral) withdrawal of the appeal with CAS.

114. It follows from all of the above that the IPC is not barred from reviewing the Settlement Agreement by applying Article 15.1 IPC Code.

(iv) Is the Settlement Agreement a "final adjudication"

115. The IPC submits that it is not under a duty of recognition because the Settlement Agreement cannot be qualified as a "final adjudication" within the meaning of Article 15.1 IPC Code. However, IPC's position on this legal question is not totally clear. In the Appealed Decision the IPC wrote:

> *"The IPC is of the view that it is bound by article 15.1 of the WADC (and its own Code) to recognise the AAA Award of 6 November 2015 that imposed a two-year period of ineligibility. We are of the opinion that the Agreements subsequently reached between USADA and Mr. Leeper are not code-compliant and cannot be recognised by the IPC as a result".*

116. As the IPC, thus, discussed the code compliance you could get an impression that the IPC accepted that the Settlement Agreement is a "final adjudication". However in a letter of 10 March 2016 the IPC expressed the following view:

> *"Reaching a private agreement with an athlete is not a test, it is not a hearing result, nor is it a final adjudication. 'Adjudication' requires some non-court based dispute resolution where the evidence is independently examined and pronounced upon".*

117. Thus, it is clear that the IPC does not consider the Settlement Agreement as a "final adjudication".

118. The Athlete has argued that the Settlement Agreement is a "final adjudication". As has appeared of the foregoing the Athlete has referred to the Comment to Article 7 WADC where it is said that not all anti-doping decisions which have been initiated by an ADO need to go to hearing. The Comment further says that there may be cases where the athlete or other person agrees to the sanction which is either mandated by the Code or which the ADO considers appropriate where flexibility in sanctioning is permitted. In all cases, a sanction imposed on the basis of such an agreement will be reported to parties with a right to appeal under Article 13.2.3 as provided in Article 14.2.2 and published as provided in Article 14.3.2. The Athlete continues:

> *"As indicated in the above comment, Articles 13 and 14 of the WADC set out the 'ADRV decisions' which must be notified to relevant parties and are thus appealable. Such decisions include, inter alia, decisions taken*

by the results management authority to: assert an ADRV, withdraw the assertion of an ADRV; impose a provisional suspension; and/or 'agree with an [Athlete] to the imposition of a sanction without a hearing'. See Articles 14.2.1 and 7.10 of the WADC. Article 13.2.1 then reiterates that 'a decision that an [ADRV] was committed [and] a decision imposing Consequences or not imposing Consequences for an [ADRV] 'are appealable to CAS. In view of this, it cannot reasonably be disputed that a private agreement between an athlete and a Signatory that has result management authority amounts to a "final adjudication" under the WADC".

119. The Panel notes that the term "adjudication" is not a defined term within the meaning of the IPC Code or the WADC. The term is only used in Article 15.1 of the IPC Code and in the definition of the term "substantial assistance". Thus, the WADC/IPC Code only provides little guidance with respect of the meaning of the term. In addition, the Panel has found the question if a private agreement (executed at the appeal stage) between an athlete and an ADO should be considered as a "final adjudication" has never been examined in CAS jurisprudence so far. It is therefore very important for the Panel to in depth dissect this question.

120. According to CAS 2011/A/2675, para 7.17 the interpretation of the statutes and rules of sport associations must be objective and always start with the wording of the rule. It follows that the adjudicating body has to consider the meaning of the rule, looking at the language used, the appropriate grammar and the syntax. The intentions (objectively construed) of the association including any relevant historical background may be taken into consideration.

121. According to a dictionary the word "adjudication" means "the act of pronouncing judgment based on the evidence presented". Referring to the wording this tells against that a private agreement could pass as a "final adjudication". The wording of Article 15.1 that *"final adjudications of any Signatory … shall be applicable worldwide and shall be recognized and respected by the IPC and all its Members"* indicates that the "final adjudication" is some kind of decision made by the Signatory. On the other hand the argument of the Athlete that such an agreement between an athlete and a results management authority should be reported to parties with a right to appeal clearly is a good argument for the position that such an agreement should be considered as a "final adjudication".

122. The Panel notes that Article 15.1 IPC Code does not refer to "decisions" as the object of recognition. Instead, the provision refers to parts of the decision-making process, such as "Testing" and "hearing results". The provision, thus, makes it clear that not only the final outcome of the results-management process may be the object of recognition, but also separate parts thereof. The term "final adjudication" must be seen in light thereof. The term, in particular, does not wish to limit the object of recognition to specific forms of decision-making. If the term "Decision" in Article 7.10 IPC Code must be construed in a broad sense (including agreements between an ADO and an athlete), nothing different can apply to Article 15.1 IPC Code. Whatever can be the object of an appeal must also be the object of (non-)recognition, because both provisions (Article 13.2 and Article 15.1 IPC Code) pursue a similar goal, i.e. to review decisions taken by an ADO in light of the principles of the IPC Code/WADC and squash the effects of such decision in case of non-compliance. It follows from the above that the IPC cannot base its decision not to recognise the Settlement Agreement on the pure fact

that the latter is *"not a hearing result"* or the result of *"some non-court based dispute resolution where the evidence is independently examined and pronounced upon"*.

(v) Is the Settlement Agreement in compliance with the WADC/IPC Code?

123. In the case at hand it is undisputed between the Parties that the cocaine consumption by the Athlete was not intentional within the meaning of Article 10.2.3 IPC Code/WADC. Consequently, the maximum period of ineligibility in the case at hand is two years. However, it is disputed between the Parties if and to what extent a further reduction of the otherwise applicable period of ineligibility applies in light of the circumstances of this case. In particular, the dispute between the Parties pivots around the application of Article 10.5.2 IPC Code/WADC.

124. The Panel finds that, in principle, there are good reasons to apply Article 10.5.2 IPC Code/WADC also to a case where an athlete has knowingly ingested cocaine outside competition (but tested positive in-competition). The reasons exposed in the decision of the UCI Anti-Doping Tribunal (case ADT 02.2015 (13.4.2016)) that allow for a harmonized approach with respect to recreational drug use appear persuasive. Furthermore, the Panel notes that this reasoning of the UCI Anti-Doping Tribunal has – in the meantime – also been adopted by the CAS (cf. CAS 2016/A/4416).

125. Despite of the above, the Panel does not concur with the Settlement Agreement with regards to the length of the period of ineligibility. Irrespective of whether or not the yardstick of "consistency" referred to in Article 15.1 IPC Code/WADC allows for some discretion or not, the Panel finds that imposing the minimum sanction on the Athlete under the specific set of circumstances clearly exceeds the frame of the applicable rules. Even if the Panel accepts all the facts presented by the Athlete the lowest possible sanction is not warranted. This means that even if you accept that the use of Cocaine was influenced by the addiction to alcohol and happened while the Athlete was drunk it is – according to the Panel – not right to say that the degree of fault displayed by the Athlete was "light" or "minimal". Instead, the Panel finds – also when looking at the cases of reference – that the degree of negligence displayed by the Athlete was "normal" and that, thus, a considerably higher period of ineligibility was warranted. The period of ineligibility imposed on the Athlete in the Settlement Agreement was clearly dictated first and foremost by the (understandable, however not justifiable) desire to allow the Athlete to compete at the Paralympics.

126. Considering all aspects of this case the Panel finds that the IPC was in its right according to Article 15.1 IPC Code/WADC not to recognize the Settlement Agreement. The appeal by the Appellant shall therefore be dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Mr Patrick Leeper against the International Paralympic Committee on 14 March 2016 is dismissed.

2. The International Paralympic Committee has no obligation to recognize the Settlement Agreement between Mr Patrick Leeper and the United States Anti-Doping Agency dated 15 January 2016.

(…)

5. All other motions or prayers for relief are dismissed.