

CAS 2017/A/4974 Lei Cao v. International Olympic Committee

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Sole Arbitrator: Dr. Christoph Vedder, Professor of Law, Munich, Germany

in the arbitration between

Lei Cao, Jinan, China

Represented by Ms Qiong Xie, attorney-at-law, Tianjin Chenyi Law Firm, Tianjin, China
Appellant

and

International Olympic Committee (IOC), Lausanne, Switzerland

Represented by Jean-Pierre Morand, attorney-at-law, Kellerhals Carrard, Lausanne,
Switzerland

Respondent

I. THE PARTIES

1. Ms Lei Cao (hereinafter: the Athlete or the Appellant) is a 34 years old professional weightlifter who participated in the Olympic Games 2008 in Beijing (hereinafter: the Beijing Games).
2. The International Olympic Committee (hereinafter: the IOC or the Respondent) is the international non-governmental organization leading the Olympic Movement under the authority of which the Olympic Games are held. The IOC has its seat in Lausanne, Switzerland.

II. FACTUAL BACKGROUND

3. Below is a summary of the relevant facts and allegations based on the Parties' written submissions and evidence adduced. Additional facts and allegations found in the Parties' written submissions and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, he refers in his Award only to the submissions and evidence he considers necessary to explain his reasoning.

A. The Facts

4. The Athlete participated in the Women's 75 kg Weightlifting competition at the Beijing Games which took place on 13 August 2008 and was awarded the gold medal.
5. On 28 July 2008, at Beijing the Athlete had been submitted to a doping control performed at the request of the IOC.
6. The Athlete's A sample no. 1844210 was analysed by the WADA-accredited laboratory in Beijing during the Beijing Games. The analysis did not result in an Adverse Analytical Finding (AAF), at that time.
7. On the order of the IOC, the Athlete's sample, together with other samples collected at the Beijing Games, was transferred to the WADA-accredited laboratory in Lausanne for long-term storage and possible later re-analysis.
8. The IOC decided to submit a number of samples collected at the Beijing Games including the Athlete's sample to a re-analysis which was conducted by the Lausanne laboratory in the spring of 2016 in advance of the Olympic Games 2016 in Rio de Janeiro.
9. In accordance with the applicable provisions of the International Standards for Laboratories (ISL), the re-analysis of the samples was performed as follows. An "*initial analysis*" was conducted on the remains of the A-sample. For the transport from the Beijing laboratory to the Lausanne laboratory the A-samples, in accordance with the requirements of the then applicable ISL 2008, were not individually resealed or transported in sealed containers. That is why, as a "*first phase*" of the re-analysis, the B sample was opened and split into a B1 sample and a B2 sample which latter was resealed

with the B1 sample analysed. Although, according to the applicable ISL, for this first phase the presence of the athletes was not required the athletes were offered the opportunity to attend the first phase of the B sample opening and analysis whenever this was practically possible.

10. The initial analysis of the remains of the Athlete's A sample resulted in a Presumptive AAF (PAAF) which indicated the potential presence of a prohibited substance: GHRP-2 and its metabolites.
11. On 11 July 2016, the Athlete, through the Chinese NOC, was informed of these findings and of the possibility of attending the opening and splitting of the B sample and the analysis of the B1 sample.
12. On 14 July 2016, through the Chinese Weightlifting Federation, the Athlete forwarded the completed PAAF Notification Appendix to the IOC. She declared that she would be represented at the B sample opening by the Deputy Secretary General of the Chinese Weightlifting Association, Mr. Peng Zhao.
13. As notified to the Athlete the opening and splitting of the B sample and the analysis of the B1 sample took place in the Lausanne laboratory on 25 July 2016 in the presence of Mr. Peng Zhao and, as required by the ISL, of an independent witness.
14. The analysis of the Athlete's B1 sample revealed the presence of the metabolites of GHRP-2, a growth hormone releasing factor, a prohibited substance according to the 2008 Prohibited List and constituting an AAF.

B. Proceedings before the IOC Disciplinary Commission

15. The AAF was reported to the IOC on 27 July 2016 and after the verification process according to Article 7.2.2 of the IOC Anti-Doping Rules Applicable to the Games of the XXIX Olympiad Beijing 2008 (hereinafter: IOC ADR) a Disciplinary Commission was established by the IOC President pursuant to Article 7.2.4 IOC ADR, in order to hear the case.
16. On the same day, on 27 July 2016, the Athlete, through the Chinese NOC, was notified of the AAF and of the initiation of disciplinary proceedings to be conducted by the IOC Disciplinary Commission (IOC DC). Furthermore, the Athlete was informed about the right to request and attend the analysis of the B2 sample.
17. On 1 August 2016, the Athlete, through the Chinese NOC, transmitted to the IOC the completed AAF Notification Appendix indicating the she did not accept the AAF and requested to analyse her B2 sample. She further communicated that she would not attend that event either personally or through a representative.
18. As notified to the Athlete, the opening and analysis of the B2 sample was performed on 9 August 2016 by the Lausanne laboratory in the presence of an independent witness and confirmed the presence of GHRP-2. This result was reported to the IOC on 11 August 2016.

19. On 16 August 2016, the IOC notified the results of the B2 analysis to the Athlete and, *inter alia*, invited her to attend the hearing before the IOC DC which would be scheduled for September 2016, or later.
20. On 19 August 2016, through the Chinese NOC, the Athlete forwarded to the IOC the completed Disciplinary Commission Form and announced, *inter alia*, that she would not attend the hearing personally but would be represented and that she would submit a defence in writing.
21. On 16 and 27 September 2016, the Athlete was provided with the laboratory documentation packages of the B1 sample and of the B2 sample analyses and additional documents related to the handling of the sample in Beijing and its transfer to the Lausanne laboratory.
22. On 11 October 2016, the IOC informed the Athlete of the date of the hearing before the IOC DC which was scheduled for 4 November at the IOC Headquarters in Lausanne.
23. On 19 October 2016 the Chinese NOC informed the IOC that the Athlete had appointed Mr Mike Morgan and Mr Simon Yianyue Bai, attorneys-at-law, as her representatives.
24. After various extensions of deadlines granted by the IOC, the Athlete's counsels, on 2 December 2016, informed the IOC that the Athlete did not have the necessary funds for an adequate defence and was therefore not in a position to submit a defence and to appear or be represented at the hearing. It was submitted that the Athlete had not committed an ADRV and that GHRP-2 was not listed on the Prohibited List until 2015.
25. The IOC filed an exchange of communication between the IOC Medical and Scientific Director and the WADA Senior Executive Director according to which GHRP-2 would fall under the 2008 Prohibited List under "*S2 Growth Hormone (hGH) and their releasing factors*".
26. On 9 December 2016, the IOC DC determined that it would render its decision based on the file. No observations were filed by the Chinese NOC, the Chinese Weightlifting Association or the Athlete herself.
27. On 10 January 2017, the IOC DC issued its decision which is appealed before the Sole Arbitrator.
28. On the merits, the IOC DC was satisfied that the analyses conducted on the Athlete's sample collected on 13 August 2008 revealed the presence of a prohibited substance and/or their metabolites, namely GHRP-2.

“66. *As its name indicates (“Growth Hormone Release Peptide-2”), the substance detected in the Athlete’s samples is a releasing factor of human growth hormone (hGH).*

67. *The Disciplinary Committee observes that the releasing factors of hGH are expressly mentioned in the WADA 2008 Prohibited List (under S2) and in all subsequent lists. This clearly covered the substance at stake.*

68. *The fact the subsequent Prohibited Lists may have more specifically mentioned “GHRP-2“, as part of a non-exhaustive (“including”) list of examples of the substances falling under the listed category does not mean that such substance was not covered prior to its express mention.*
69. *The substance at stake clearly falls within the category described in the Prohibited List 2008 and that is sufficient to find that it was a Prohibited Substance in 2008.*
70. *The Disciplinary Commission is further satisfied that the sample in which such substances was detected is unequivocally linked to the Athlete and that no relevant departure from the WADA International Standards occurred.*
71. *Based on the above, the Disciplinary Commission finds that the Athlete has in any event committed an anti-doping rule violation pursuant to Art. 2.1 of the Rules consisting in the presence of a Prohibited Substance in her body.”*

29. The operative part of the appealed decision reads as follows:

I. The Athlete, Lei CAO:

- (i) is found to have committed an anti-doping rule violation pursuant to the IOC Anti-Doping Rules applicable to the Games of the XXIX Olympiad in Beijing in 2008,*
- (ii) is disqualified from all events in which she participated upon the occasion of the Olympic Games Beijing 2008, namely, the Women’s 75 kg weightlifting event, and*
- (iii) has the medal, the medallist pin and the diploma obtained in the Women’s 75 kg weightlifting event withdrawn and is ordered to return the same.*

II. The IWF is requested to modify the results of the above-mentioned event accordingly and to consider any further action within its own competence.

III. The Chinese Olympic Committee shall ensure full implementation of the decision.

IV. The Chinese Olympic Committee shall notably secure the return to the IOC, as soon as possible, of the medal, the medallist pin and the diploma awarded in connection with the Women’s 75 kg weightlifting event to the Athlete.

V. This decision enters into force immediately.”

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

30. The Athlete filed a Statement of Appeal, dated 29 January 2017 against the IOC with respect to the appealed decision. The Athlete requested a sole arbitrator to be appointed to which the Respondent did not object.
31. By letter of 7 February 2017, the Parties were notified that, pursuant to Article S20 of the Code of Sport-related Arbitration (2017 edition) (hereinafter: the Code), the dispute was assigned the Appeals Arbitration Division and, therefore, shall be dealt with in accordance with Article R47 *et seq.* of the Code.
32. After various extensions of the relevant time-limit agreed upon by the IOC, the Athlete filed her Appeal Brief dated 6 March 2017 within the deadline finally set.
33. Within the time-limit, the Answer of the Respondent was filed on 28 March 2017.
34. By letters of 30 and 31 March 2017, respectively, the Parties agreed not to hold a hearing.
35. The CAS Court Office, by letter of 28 April 2017, notified the Parties that Dr Christoph Vedder had been appointed as Sole Arbitrator by the President of the CAS Appeals Arbitration Division. The Sole Arbitrator confirmed that he deemed himself sufficiently well-informed to render an award on the basis of the Parties' written submissions, without holding a hearing.
36. On 16 May 2017, the Order of Procedure was forwarded to the Parties. It was signed and returned by the Respondent on the same day and by the Appellant on 22 May 2017. Both Parties expressly confirmed that their right to be heard in the present proceedings had been respected.

IV. SUBMISSIONS OF THE PARTIES

1. The Appellant

37. The Appellant did not challenge the results of the analysis. She rather claimed that (1) the substance GHRP-2 was not listed on the applicable 2008 Prohibited List, (2) there had been no consideration of the inconsistency of the results found in two different laboratories, (3) the re-analysis after almost 8 years would be against principles of law, and (4) that the applicable WADA Code did not provide for the re-analysis of samples.
38. First, the Athlete submitted that the substance found in her samples, namely GHRP-2,

“would not have appeared on the WADA Prohibited List until 2015 and thus was not expressly included in the WADA 2008 Prohibited List. The Athlete shall not be penalized as a result on the basis of an alleged substance that was not expressly mentioned in the WADA Prohibited List.”
39. The Appellant further states that the retroactive application of a Prohibited List is excluded pursuant to Article 25.2 of the WADA Code “2008” [the Sole Arbitrator is of the opinion that the Appellant meant the WADA Code 2009].

40. Second, the Athlete states that her samples were tested negative by one WADA-accredited laboratory in 2008 and the analysis by another WADA-accredited laboratory in 2016 indicates otherwise and, hence, puts forward that

“it appears unfair that the inconsistency or contradiction between WADA-accredited laboratories shall be used to the disadvantage of the Athlete, insofar as in the absence of identifying and establishing the reason for the contradiction such as, among others, fault, negligence, mistake, technical failure or restraint of technical level of the time. Inability of the facility of the then WADA-accredited laboratory that conducted the analysis back in 2008.”

41. By reference to the purposes of the ISL, set forth in the “Introduction and Scope” of the ISL 2003, i.e. harmonization among Anti-Doping Organizations and establishment of mandatory standards, the Athlete claims that

“the inconsistency or contradiction between WADA-accredited laboratories shall be reviewed in a way giving due consideration to the principles of respect for human rights, proportionality, and other applicable legal principles.”

42. Third, with reference to the statute of limitation, it is submitted by the Athlete that

“(a)s a matter of fact, it has become next to impossible to establish the reason or source of the alleged prohibited substance. In essence, due to the lapse of such a long time, the Athlete finds herself helpless and unable to build a proper defence as most otherwise obtainable evidences have been lost or impossible to retrieve.”

From that, the Athlete concludes that “such an IOC Decision against the Athlete, in effect has more cruelty than justice” which, as the Athlete suggests, should be avoided by a statute of limitation.

43. Fourth, the Athlete refers to the fact, that, contrary to the WADA Code 2009 which under its Article 6.5 allows the re-analysis of samples, the applicable WADA Code 2003 “does not provide any provision expressly authorizing reanalysis ...”

44. Finally, the Athlete requests, with reference to Article R51 of the Code, to order the IOC or WADA

“to produce evidence or proof to the satisfaction of the ... Panel ...that the samples of the Appellant have been properly transferred, transported and stored in temperatures in line with WADA requirements and standards.”

45. The Athlete shows herself

“concerned that mishandling, tampering or inappropriate measures used during transit, transportation or storage could have caused the adverse analytical finding ...”

and is of the view that

“it shall be the obligation of the IOC to establish to the satisfaction of ... the Panel ... that there has not been any departure from the WADA [ISL] ...”

46. The Athlete’s requests for relief are as follows:

“the repeal of the above-mentioned IOC Decision, or alternatively, without prejudice,

the Appellant is ready to accept a much less harsh disciplinary sanction by the Respondent, provided appropriate and proportional to the severity of the alleged anti-doping rule violation against the appellant.”

2. The Respondent

47. First and foremost, the Respondent submits that the substance GHRP-2 was already listed in the 2008 Prohibited List. GHRP stands for “*Growth Hormone Releasing Peptide*” which is a category of the growth hormone releasing factors which are listed in the 2008 Prohibited List under S2:

“The following substances and their releasing factors are prohibited:

....

2. Growth Hormone (hGH)

....”

48. GHRP, the Respondent states, was expressly included in the 2015 Prohibited List as one of the growth hormone releasing factors and, more specifically, GHRP-2 listed as an example of growth hormone releasing peptides:

“5. Growth Hormone (GH) and its releasing factors including ... GH-Releasing Peptides (GHRPs), e.g. ... hexarelin and pralmorelin (GHRP-2).”

49. Furthermore, the Respondent makes reference to the Explanatory Note issued in relation to the publication of the 2015 Prohibited List. According to that Note, the substances now listed in S2 were already prohibited substances under previous lists:

“Please note that all substances named as examples in this revised section [i.e. S2] of the 2015 Prohibited List were already considered prohibited under previous Prohibited Lists, as applicable.”

“GH releasing factors have been divided in a more precise categorization and several examples of each have been added to illustrate their different pharmacological properties.”

50. The Respondent concludes that, as GHRP-2 was already prohibited in 2008, there is no retroactive application in the Athlete’s case and the substances were prohibited irrespective of whether they could be detected at the time of the analysis.

51. Second, in reply to the Athlete's second contention, i.e. the alleged contradiction between the analyses conducted in 2008 and 2016, the Respondent refers to the fact that GHRP-2 could not have been detected in 2008 with the then available means of analysis. Both results were correct at the time when they were obtained. Since the methods to prove the presence of GHRP had not been published or even implemented in 2008 the Beijing laboratory was not in a position to conduct an analysis for GHRP.
52. Thereof, the Respondent concludes that the analyses performed in 2016, with methods and instruments which were capable to detect GHRP, were the only relevant analyses which shows that GHRP-2 was already present in 2008.
53. Third, concerning the statute of limitation, the Respondent submits that the 8-year limitation is not in contradiction with fundamental legal principles. For instance, the Swiss Code of Obligations provides for a regular statute of limitation of 10 years. In addition, the Respondent contends that time is an important factor in the re-analysis process because improvements in methods and laboratory equipment need time.
54. In reply to the Appellant's statement that, after almost 8 years, it was next to impossible to establish the reason for and the source of the substance, the Respondent refers to the applicable IOC ADR according to which the mere presence of a prohibited substance is sufficient to establish an ADRV with the automatic consequence of the disqualification of the results. Therefore, the Respondent submits, any explanations the Athlete may bring concerning the sources of the substances found were irrelevant for the outcome of these proceedings.
55. Fourth, the Respondent refers to Article 6.5 IOC ADR which expressly allows the IOC to have samples re-analysed.
56. According to Article 16.1 IOC ADR, these rules must be interpreted in consistency with the WADA Code which admittedly does not expressly provide for the re-analysis of samples. However, the Respondent submits, nothing in the WADA Code 2003 prevents the re-analysis of samples. The Respondent further refers to the ISL 2008 which were, according to the Respondent, issued during the application of the WADA Code 2003 and, in their Article 5.2.2.12 contain rules specific to re-analysis and, therefore, confirm the possibility of re-analysis.
57. The Respondent requests for relief are as follows:
 - I. *The Appeal is dismissed.*
 - II. *The IOC is granted an award for costs.*

V. JURISDICTION

58. 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.”

59. According to Rule 61.2 of the Olympic Charter and Articles 12.2, 12.2.1 and 12.2.2 IOC ADR, which are the rules applicable to the present dispute (see below), the Athlete has the right to appeal the decision of the IOC DC rendered on 10 January 2017 exclusively to the CAS.

60. Therefore, the Sole Arbitrator considers that CAS has jurisdiction to hear the present case. Such jurisdiction was not contested by the Parties and was confirmed by their signature of the Order of Procedure.

VI. ADMISSIBILITY

61. 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.”

62. By virtue of Article 12.5 IOC ADR, which are the rules applicable to the present dispute (see below), the Athlete is entitled to appeal from the decision of the IOC DC to the CAS

“within twenty-one (21) days from the date of the receipt of the decision by the appealing party.”

63. The Athlete’s Statement of Appeal was filed on 29 January 2017 and, therefore, the appeal against the decision of 10 January 2017 was lodged within the time-limit of 21 days. The admissibility of the appeal was not challenged by the Parties.

VII. APPLICABLE LAW

64. Article R58 of the Code provides as follows:

“The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.”

65. Pursuant to Rules 1, 23, 41 and 44 of the Olympic Charter 2008 (as of 7 July 2007) and confirmed by the Entry Form signed by the Athlete, the complete set of the Olympic rules and regulations including, in particular, the Olympic Charter, the IOC ADR and

the WADA Code, as applicable during the 2008 Olympic Games, constitute the applicable rules of law for the present dispute.

VIII. MERITS

66. The appealed decision of the IOC DC relied on the results of the B2 sample analysis which confirmed the results of the B1 sample analysis. These results as such were not challenged in substance or procedurally before the IOC DC or before the Sole Arbitrator. In the present proceedings the Athlete chiefly claims that, at the time when her sample was collected, GHRP-2 was not a prohibited substance listed in the 2008 Prohibited List and further contends that some other violations occurred. The facts of the case are not disputed by the Parties.

67. In the context of the present proceedings, according to Article R57 of the Code, the Sole Arbitrator has the power to review the facts and the law *de novo*.

1. Presence of a Prohibited Substance, Article 2.1 IOC ADR

68. According to Article 2.1 IOC ADR, “*the presence of a Prohibited Substance or its Metabolites or Markers*” in the Athlete’s body constitutes an ADRV. The analyses conducted by the WADA-accredited laboratory in Lausanne in July 2016 on the B samples no. 1844210 provided by the Athlete on 13 August 2008 undisputedly revealed the presence of GHRP-2 and its metabolite GHRP-2 M2.

69. “GHRP-2” as such was not explicitly listed in the 2008 Prohibited List expressly. However, the 2008 Prohibited List under “*S2 Hormones and related substances*” provides:

“The following substances and their releasing factors are prohibited:

....

2. Growth Hormone (hGH) ...”

70. Growth Hormone Releasing Peptide (GHRP-2) is a releasing factor for hGH and as such, pursuant to the clear wording of what is listed under S2, was already included in the 2008 Prohibited List.

71. This conclusion is not refuted, as the Athlete contends, but is rather corroborated by the explicit introduction of “*GH-Releasing Peptides (GHRPs)*” under “*S2 Peptide Hormones, Growth Factors, Related substances and mimetics*” in the 2015 Prohibited List:

“The following substances, and other substances with similar chemical structure or similar biological effect(s), are prohibited:

...

5. Growth Hormone (GH) and its releasing factors including Growth Hormone Releasing Hormone (GHRH) and its analogues, ... and GH-Releasing Peptides

(GHRP's), e.g. alexamorelin, GHRP-6, hexarelin and pralmorelin (GHRP-2)."
[emphasis added]

72. By listing "*Growth Hormone and its releasing factors*" explicitly, the 2015 Prohibited List literally repeats the text of S2 of the 2008 Prohibited List assembled, however, in a single and uninterrupted sequence of words. Furthermore, the 2015 Prohibited List merely adds ("*including*") the more precise specification "*GH-Releasing Peptides (GHRPs)*" and explicitly identifies "*hexarelin and pralmorelin (GHRP-2)*" as examples for GHRPs. With this wording the 2015 Prohibited List, under S2, explicitly conveys what the 2008 Prohibited List had already expressed, namely that GHRP-2 was already listed.
73. This textual interpretation is confirmed by the "*Summary of Major Modifications and Explanatory Notes*" issued by WADA on 20 September 2016 accompanying the publication of the 2015 Prohibited List. With regard to section S2 of the List the following explanations are given:

"Please note that all the substances named as examples in this revised section on the 2015 Prohibited List were already considered prohibited under previous Prohibited Lists, as applicable."

and more precisely relating to growth hormones:

"GH releasing factors have been divided in a more precise categorization and several examples of each have been added to illustrate their different pharmacological properties."

74. Although this text has no binding legal value on its own account it has supporting weight as a piece of authoritative interpretation issued by WADA as the relevant law-making organization. As such it must be taken into account for the interpretation of the Prohibited List.
75. Based on his expertise as the head of a WADA-accredited laboratory Dr. Saugy, in his statement of 23 March 2017, confirmed that GHRP-2 was already covered by the 2008 Prohibited List. The Sole Arbitrator takes into account that this expert witness was the Head of the Lausanne laboratory until May 2016, i.e. before the Athlete's samples were analysed. Nonetheless, the Sole Arbitrator acknowledges this evidence not as sole but as supporting element for the above interpretation.
76. From the above, the Sole Arbitrator concludes that GHRP-2 was a prohibited substance pursuant to the applicable 2008 Prohibited List. The IOC, as required by Article 3.1 IOC ADR, had established to the comfortable satisfaction of the Sole Arbitrator that an ADRV had occurred.

2. Departure from the applicable ISL, Article 3.2.1 IOC ADR

77. The Appellant requests to order the IOC to produce evidence that the transfer and storage of the Athlete's sample was in compliance with WADA requirements and insinuates that "*mishandling, tampering or inappropriate measures used during transit,*

transportation or storage could have caused” the AAF. The Appellant is of the opinion that it is the onus of the IOC to prove that no departure from the ISL occurred.

78. Contrary to Appellant’s view and according to Article 3.2.1 IOC ADR, it is not the IOC’s but the Athlete’s burden to establish “*that a departure from the International Standard occurred, which could reasonably have caused*” the AAF.
79. Therefore, the Appellant’s request for disclosure must be dismissed.
80. Furthermore, the Appellant (“*is concerned*”) does not even assert that departures from ISL actually occurred, not to speak of particular departures which might reasonably could have caused an AAF. At the verification stage of the anti-doping proceedings before it according to Article 7.2.2 IOC ADR, the IOC checked whether there was a departure from the ISL in vain. According to the information available in the file, there was no departure apparent to the Sole Arbitrator.
81. The mere allegation that departures of whatever kind might have occurred does not meet the standard of proof necessary under Article 3.2.1 IOC ADR to rebut the presumption that WADA-accredited laboratories have conducted the sample analysis and custodial procedures in accordance with the ISL.

3. Contradiction between the results obtained in 2008 and 2016

82. The Appellant contends that there is a contradiction between the results obtained by the Beijing laboratory for her sample in 2008 and the results found by the Lausanne laboratory in 2016 which must lead to the conclusion that the 2016 results cannot be used as the basis for the determination of an ADRV. The Appellant, however, did not specify in which way “*the principles of respect for human rights, proportionality, and other applicable legal principles*” would have been infringed.
83. The Sole Arbitrator does not find any inconsistency or even contradiction between the analytical findings obtained in 2008 and 2016. Both findings are the results of the analytical instruments and methodologies available at the time, respectively.
84. The method to detect the presence of GHRP was not published or even implemented in 2008 and, therefore, the analysis performed by the Beijing laboratory was neither intended nor capable to detect the presence of GHRP. In 2016, however, the improved analytical devices and methods allowed to detect GHRP-2.
85. The state of the analytical methods and instruments available at the time of the respective analyses explains the analytical results, i.e. the non-detection in 2008 and the detection in 2016. There is no contradiction which may have an impact on the reliability of the analytical results of the Lausanne laboratory.
86. According to the process of the re-analysis which was actually applied to the re-analysis of the Athlete’s samples in the Lausanne laboratory, the remains of her A sample were used for an initial analysis and, after a Presumptive AAF, the B sample was split into a B1 sample and a B2 sample which then constitute the relevant samples in a process similar to the regular analysis of A and B samples: the B1 sample corresponding to the

A and the B2 sample to the B sample. The A sample analysis conducted in 2008 has no meaning any more.

87. It is the main function of the re-analysis of samples to search for prohibited substances, which were prohibited at the time of the sample collection, with improved analytical means at a later stage. The mere fact that prohibited substances were not detectable at the time of the sample collection and, hence, the athletes were not sanctioned at that time does not entail any kind of legitimate expectation not to be sanctioned at a later stage. To the contrary, Article 6.5 IOC ADR in conjunction with Article 17 of the WADA Code 2003 provide that, during a period of 8 years, the IOC “*shall have the right to re-analyse samples (taken during the Period of the Olympic Games)*”. This opportunity of later re-analysis includes the possibility that prohibited substances are detected with improved means at a later stage. The athletes must be conscious to be found guilty of an ADRV during that period of time.

4. Length of the statute of limitations

88. The re-analysis of the Athlete’s sample which was conducted in July 2016 took place within the 8-year period from the sample collection on 13 August 2008, provided for in Article 6.5 IOC ADR. The period of 8 years coincides with the 8-year statute of limitation set forth in Article 17 of the WADA Code 2003.

89. The Appellant seems to contend that the statute of limitation of 8 years is too long and complains that, after almost 8 years, she is not in a position

“to establish the reason or source of the alleged prohibited substance” and “finds herself helpless and unable to build a proper defence as most otherwise obtainable evidences have been lost or impossible to retrieve.”

90. The Sole Arbitrator does not find any reason to conclude that the 8-years limitation would be in violation of legal principles or Swiss public policy. Article 127 of the Swiss Code of Obligations provides for a regular statute of limitation of 10 years for contractual obligations. According to Article 97 of the Swiss Criminal Code, the regular statute of limitation is 10 years, for minor criminal offences 7 years. The 8-years limitation stipulated in Article 6.5 IOC ADR follows the 4-year rhythm of the Olympic Games over which the IOC has jurisdiction. The aim of having the option for re-analysis, i.e. to make use of the improvements of the analytical devices and methods, requires sufficient time which is needed for making new methods operational.

91. Furthermore and in any event, the fact that the Athlete considers herself unable to establish the reason for and the source of the substances found, is irrelevant for the outcome of the present proceedings. The issue of the reason for taking a prohibited substance or the source of the substance found may, under Article 10.5.2 of the WADA Code, be relevant for establishing no significant fault or negligence which may have an impact on the length of the period of ineligibility. The dispute before the Sole Arbitrator, however, is exclusively about the determination of an ADRV and the disqualification of the results obtained by the Athlete in the Women’s 69 kg Weightlifting event. The disqualification automatically follows the finding of an ADRV, pursuant to Articles 8.1 and 9.1 IOC ADR, and, therefore, applies irrespective of any fault or negligence.

92. Independent of the alleged difficulties of providing evidence the Athlete does not even indicate what the reason for or the source of the substance might have been. In her statement dated 19 February 2017 she mentions an injury on her right elbow which occurred in February 2008 and was cured by two “*blockade injections*” in March and around 15 July 2008. No further indications with respect to the kind of injury and the medication used were made. The Athlete does not claim that the injections might have caused the finding of GHRP-2. The assertions submitted by the Athlete, however, are irrelevant for the outcome of the present proceedings because they do not put in question the presence of the prohibited substance, i.e. the occurrence of an ADRV.

5. Legal Basis for the Re-analysis, Article 6.5 IOC ADR

93. Article 6.5 IOC ADR provides a clear legal basis for the IOC to store and re-analyse samples collected during Olympic Games (see above). Article 17 of the WADA Code 2003, which is referred to by Article 6.5 IOC ADR speaks about “*action*” and does not expressly mention re-analysing. An express authorization of the re-analysis is provided for in Article 6.5 of the WADA Code 2009. Thereof, the Athlete seems to conclude that the re-analysis was not allowed under the applicable WADA Code 2003.
94. This conclusion does not find any legal justification. Of course, according to Article 16.1 IOC ADR, the IOC ADR “*are governed*” by the WADA Code. This means that the IOC ADR must not contravene the rules of the WADA Code. There is no provision in the WADA Code 2003 which deals with re-analysis at all or would prohibit the Anti-Doping Organizations to re-analyse samples. The fact that the following edition of the WADA Code, i.e. the 2009 version, in Article 6.5 expressly allows the re-analysis does not entail that re-analysis was prevented previously. The Comment to Article 6.5 states that:

“Although this Article is new, Anti-Doping Organizations have always had the authority to reanalyse samples.”

95. The authority to re-analyse samples before the entry into force of the WADA Code 2009 is confirmed by the fact that the ISL 2008, which were issued in January 2008 under the validity of the WADA Code 2003, contain provisions which expressly deal with the re-analysis of samples. Article 5.2.2.12 ISL 2008 regulates the “*Re-sealing of Samples for future re-testing*”. These rules clearly encompass that the re-analysis is allowed.
96. Based on the above, the Sole Arbitrator rules that the Athlete committed an ADRV in the form of a presence-violation under Article 2.1 IOC ADR.

IX. DISQUALIFICATION AND OTHER CONSEQUENCES, ARTICLES 8, 9 IOC ADR

97. Pursuant Article 9.1 IOC ADR which reads as follows:

“An Anti-Doping Rule Violation occurring during or in connection with the Olympic Games may lead to Disqualification of all of the Athlete’s results obtained in the Olympic Games with all consequences, including forfeiture of all medals, points and prizes, except as provided in Article 9.1.1.”

all results the Athlete may have obtained at the Beijing Olympic Games are disqualified with all consequences, including the forfeiture of any medal, points and prizes.

98. According to Article 5.1 sec. 2 IOC ADR, the *Period of the Olympic Games*, is defined as running from 27 July up until 24 August 2008. The doping test the Athlete underwent on 28 July 2008, therefore, constitutes an ADRV “*occurring during ... the Olympic Games*”. That leads to the consequence that all results the Athlete may have obtained at the Beijing Games and, in particular, in the Women’s 75 kg Weightlifting competition on 15 August 2008 are disqualified with all resulting consequences, including but not limited to the forfeiture of the Gold Medal, the medallist pin and the diploma.

X. CONCLUSION

99. Having thoroughly considered the facts and the law governing the present proceedings, as well as the submissions of the Parties and the written testimonies, the Sole Arbitrator finds that the Athlete committed an ADRV in the form of the presence of two prohibited substances under Article 2.1 IOC ADR. In the course of the re-analysis of the Athlete’s sample, the B2 sample analysis which revealed to presence of GHRP-2 has confirmed the results of the B1 sample analysis. GHRP-2 is a prohibited substance listed under S2 of the 2008 Prohibited List. Therefore, according to Articles 3.1 and 3.2.1 IOC ADR, the IOC has established the ADRV to the comfortable satisfaction of the Sole Arbitrator.
100. In view of the above, the Sole Arbitrator comes to the conclusion that the Athlete committed an ADRV on 15 August 2008 at the occasion of the Beijing Olympic Games and is to be disqualified with all resulting consequences. A less severe disciplinary sanction as subsidiarily requested by the Athlete is not provided for in the IOC ADR. Therefore, the decision of the IOC DC rendered on 10 January 2017 is upheld and the appeal filed by the Athlete must be entirely dismissed.

XI. COSTS

(...).

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Ms. Lei Cao on 29 March 2017 against the decision rendered by the Disciplinary Commission of the IOC on 10 January 2017 is dismissed.
2. The decision rendered by the Disciplinary Commission of the IOC on 10 January 2017 is confirmed.
3. (...).
4. (...).
5. All other motions or prayers for relief are dismissed.

Seat of arbitration: Lausanne, Switzerland
Date: 31 July 2017

THE COURT OF ARBITRATION FOR SPORT

Christoph Vedder
Sole Arbitrator