

CAS 2008/A/1458 UCI v. Vinokourov & KCF

ARBITRAL AWARD

rendered by the

Court of Arbitration for Sport

sitting in the following composition:

President: Christoph Vedder, Professor of law, Munich, Germany

Arbitrators: Beat Hodler, Attorney-at-law, Bern, Switzerland

Michele Bernasconi, Attorney-at-law, Zurich, Switzerland

in the arbitration between

Union Cycliste International (UCI), Aigle, Switzerland

represented by Mr. Philippe Verbiest, Attorney-at-law, Leuven, Belgium

Appellant

and

Alexander Vinokourov, Monaco

represented by Mr. Antonio Rigozzi, Attorney-at-law, Geneva, Switzerland

First Respondent

and

Kazakhstan Cycling Federation (KCF), Astana, Kazakhstan

represented by Ms. Griet Vanden Abeele and Mr. Peter Roosens, Attorneys-at-law, Leuven, Belgium

Second Respondent

A. SUMMARY OF THE FACTS

I. The Parties

- 1.1. The Union Cycliste International, the Appellant (hereinafter referred to as “UCI”), is the international federation governing the sport of cycling worldwide. It is an association which comprises the national federations which govern the sport of cycling in their respective countries as members and has its registered office in Aigle, Switzerland.
- 1.2. Mr. Alexander Vinokourov, the First Respondent (hereinafter referred to as “the Athlete” or “Mr. Vinokourov”) is an international professional cyclist of Kazakh nationality, under the jurisdiction of the Kazakhstan Cycling Federation. He holds a licence issued by the Kazakhstan Cycling Federation. He had participated in and ranked highly in numerous international top-level competitions, such as the Tour de France in 2003 where he was placed third.
- 1.3. The Kazakhstan Cycling Federation, the Second Respondent (hereinafter referred to as “KCF”) is the national federation responsible for the sport of cycling in Kazakhstan and, as such, member of UCI.

II. Factual Background

- 1.4. Mr. Vinokourov, as a member of the UCI Pro Team “Astana”, participated in the 2007 Tour de France, which was held from 7 July to 29 July 2007. Both on 21 and 23 July 2007, after the 13th and 15th stage of the Tour, UCI submitted Mr. Vinokourov to an in-competition blood doping test, according to UCI’s Anti-Doping Regulations (“ADR”).
- 1.5. Mr. Vinokourov's A samples were analyzed by the WADA accredited laboratory in Chateney-Malabry, France, on 23 and 24 July 2007 and resulted in an adverse analytical finding. Both A samples, sample A 1 collected on 21 July and sample A 2 collected on 23 July 2007 showed the presence of a *“mixed red blood cell population indicating homologous blood transfusion”*. On 24 July 2007, Mr. Vinokourov was notified that he was tested positive. The same day, he was suspended by his team and left the Tour de France. The analysis of the B 1 and B 2 samples, requested by Mr. Vinokourov and conducted in the laboratory of Châteney-Malabry on 27 July and 28 July 2007, respectively, confirmed the results of the A 1 and the A 2 samples analysis.
- 1.6. Upon receipt of the analysis results, UCI, by letter of 30 July 2007, asked KCF to initiate disciplinary proceedings against Mr. Vinokourov. After a hearing held on 5 December 2007 before the KCF’s Anti-Doping Commission in Almaty, Kazakhstan, this Commission, which had doubts about the reliability of the tests, decided to disqualify Mr. Vinokourov for a period of one year, only.

- 1.7. On 17 January 2008 UCI filed a Statement of Appeal contesting the decision of KCF's Anti-Doping Commission before the CAS and requested that Mr. Vinokourov be sanctioned in accordance with Article 261 of UCI's ADR with a two years period of ineligibility. On the same day, in the cover letter of UCI's Statement of Appeal, UCI asked for the suspension of the proceedings before CAS because Mr. Vinokourov had declared to end his career. On 24 January 2008 both Respondents, Mr. Vinokourov and the KCF, declared their agreement that the proceedings be suspended. By order of 25 February 2008 the President of the Appeals Division of CAS stayed the proceedings in the case *CAS 2008/A/1458/UCI v. Vinokourov & KCF*.
- 1.8. According to the decision of KCF's Anti-Doping Commission Mr. Vinokourov's period of ineligibility elapsed on 23 July 2008. The next day KCF issued the 2008 licence to Mr. Vinokourov. In September 2008 Mr. Vinokourov decided that he wanted to continue to compete and informed the KCF, accordingly.
- 1.9. As a result, on 3 October 2008 the Vice-President of KCF, Mr. A. Bekturov, had a meeting with the President of UCI, Mr. McQuaid, to discuss Mr. Vinokourov's return to competition. Mr. McQuaid, in an email of 6 October 2008, summarized the conditions for Mr. Vinokourov's return. In addition to the requirements arising from the regulations, Mr. Vinokourov should take into account further "elements": he should admit the doping offense, apologize and declare that he severely damaged his sport, and declare that he will make himself available for whatever anti-doping programme etc.
- 1.10. Attached to Mr. McQuaid's email was a letter, dated 6 October 2008, addressed to the President of KCF listing, amongst others, the following preconditions for Mr. Vinokourov's return to competitive cycling:
 1. *We need an official statement from Mr. Vinokourov indicating that according to article 252 of the UCI's anti-doping rules, he acknowledges the violation of the anti-doping rules of the UCI in the 2007 Tour de France and accepts a two years ineligibility, as well as the disqualification of his individual results obtained during the 2007 Tour de France.*
 2. *In accordance with the commitment that Mr. Vinokourov signed on 29 June 2007 (see attachment), the latter shall pay an amount equal to his annual salary for 2007 as a contribution to the fight against doping. Such amount shall be paid to the Cycling Antidoping Foundation into its account"*
- 1.11. On 7 October 2008, Mr. Vinokourov notified the UCI of his decision to resume international competition in 2009. Already on 6 October 2009 he had sent his whereabouts to UCI. By letter of 9 October 2008, Mr. McQuaid informed Mr. Vinokourov of the preconditions set out in his letter dated 6 October to the President of KCF and informed him "as a conclusion" that

“in accordance with article 277 of the Anti-Doping rules of the UCI, you will not be able to compete internationally before 7 April 2010.

For the rest, I refer to the content of my letter sent to the Kazakh Federation.”

- 1.12. As a result of Mr. Vinokourov's decision to return to competition, by letter of 18 December 2008 UCI requested the CAS to reactivate the proceedings and, attached to this letter, provided a “Statement of case”. UCI sought the following reliefs:

“- to reform the contested decision:

- to sanction Mr. Vinokourov in accordance with article 261 ADR, i. e. with a suspension of two years;*
- to disqualify Mr. Vinokourov from the race “Tour de France 2007” and to disqualify any subsequent results according to article 274 ADR;*
- to order Mr. Vinokourov to pay to the UCI an amount of CHF 2.000,- for costs under art. 245.2 ADR;*
- to order Mr. Vinokourov and the KCF to reimburse to the UCI the Court Office fee of CHF 500.- and to pay all other costs, including a contribution to UCI’s legal costs.”.*

- 1.13. In substance, UCI challenged the decision of KCF’s Anti-Doping Commission adopted on 5 December 2007 to impose on Mr. Vinokourov a sanction of one year only and chiefly submitted (1) that Mr. Vinokourov committed an anti-doping rule violation as proven by the laboratory analysis, (2) that no exceptional circumstances were present to justify a period of ineligibility of less than two years. Furthermore, UCI submitted (3) that, due to his temporary retirement, the date of Mr. Vinokourov's reinstatement must be calculated pursuant to Article 277 of UCI’s ADR. Accordingly, Mr. Vinokourov would not be eligible to compete before 7 April 2010.

B. PROCEEDINGS BEFORE THE CAS

- 2.1. By letter of 22 December 2008 the CAS Court Office notified the parties that, in accordance with the CAS Appeals Arbitration Division President’s order of 25 February 2008, the proceedings resume.

I. Composition of the Panel

- 2.2. By letter of 12 January 2009 the Respondents, Mr. Vinokourov and the KCF, jointly nominated Mr. Michele Bernasconi arbitrator, whereas Mr. Beat Hodler already was nominated by UCI in its Statement of Appeal of 18 December 2007. Pursuant to Article R54 of the Code of Sports-related Arbitration (“the Code”) the Deputy President of the CAS Appeals Arbitration Division appointed the panel to decide the dispute as follows: Mr. Beat Hodler and Mr. Michele Bernasconi (arbitrators) and Mr. Christoph Vedder (President of the Panel).

II. Admission of the Anti-Doping Rule Violation, acceptance of a two years sanction

- 2.3. In the statement of defence (“Answer”) of 27 January 2009 Mr. Vinokourov admitted the anti-doping rule violation and accepted a two years period of ineligibility. According to Mr. Vinokourov

“the main point raised by the UCI in the present arbitration is moot (and) the only issue in front of this Tribunal ... is the determination of the exact moment in which the two years suspension comes to an end.” (para. 48)

It is UCI's and Mr. Vinokourov's common position that the period of ineligibility started on 24 July 2007.

III. Date of reinstatement in dispute

- 2.4. Mr. Vinokourov mainly challenged the extension of the sanction sought by UCI on the basis of Article 277 ADR. In its “Additional Submission” dated 26 March 2009, however, UCI acknowledged that Mr. Vinokourov was in fact not removed from the testing pool in 2008. As the removal from the testing pool is one of the conditions under Article 277 ADR UCI did no longer rely on Article 277 ADR for an extension of Mr. Vinokourov's ineligibility beyond 23 July 2009.
- 2.5. Instead, UCI made Mr. Vinokourov's reinstatement conditional upon the payment of a “contribution” under the “Rider's commitment to a new cycling” signed by Mr. Vinokourov on 29 June 2007. This commitment provides for the payment of the annual salary for 2007 in case a cyclist commits an anti-doping rule violation and undergoes a sanction of two years or more. In UCI's opinion, the contribution is valid under Swiss law and justified by the paramount public interest in the fight against doping.
- 2.6. The Rider's commitment, in a translation delivered by the counsel to Mr. Vinokourov, reads as follows:

“I do solemnly declare, to my colleagues, the UCI, the cycling movement and the public that I am not involved in the Puerto affair nor in any other doping case and that I will not commit any infringement to the UCI anti-doping rules. As proof of my commitment, I accept, if it should happen that if I violate the rules and I am granted a standard sanction of a two-year suspension or more, in the Puerto affair or in any other anti-doping proceedings, to pay the UCI, in addition to the standard sanctions, an amount equal to my annual salary for 2007 as a contribution to the fight against doping.

At the same time, I declare to the Spanish Law [Courts?] [better: Spanish judiciary, the Panel], that my DNA is at its disposal, so that it can be compared with the blood samples seized in the Puerto affair. I appeal to the Spanish Law [Courts?] [better: Spanish judiciary, the Panel] to organize this test as soon as possible or allow the UCI to organize it.

Finally, I accept the UCI's wish to make my statement public."

- 2.7. Based on Mr. Vinokourov's "Contrat de travail" for 2007, signed by him on 10 January 2007, which shows a gross annual salary of 1.2 million Euro, UCI asked Mr. Vinokourov to indicate his net annual income corresponding to this salary. UCI submitted the following prayers for relief:

*"- To reform the contested decision;
- to sanction Mr. Vinokourov in accordance with article 261 ADR, i. e. with a suspension of two years;
- to disqualify Mr. Vinokourov from the race "Tour de France 2007" and to disqualify any subsequent results according to article 274 ADR;
- to order Mr. Vinokourov to pay to the UCI an amount of CHF 2.000,- for costs under art. 245.2 ADR;
- to order Mr. Vinokourov to pay to the UCI an amount equal to his net annual salary for 2007 and to order that Mr. Vinokourov shall not be reinstated before he shall have made such payment;
- to order Mr. Vinokourov and the KCF to reimburse to the UCI the Court Office fee of CHF 500,- and to pay all other costs, including a contribution to UCI's legal costs."*

- 2.8. In his "Response to the Appellant's "Additional Submission", dated 9 April 2009, Mr. Vinokourov chiefly submitted that UCI, in making his reinstatement conditional upon the payment of the contribution under the commitment, brings a new argument which was submitted out of time and, therefore, is not admissible. However, Mr. Vinokourov explicitly declared his consent

"to the UCI's change of case in this respect and does not object to the Panel's authority to decide on the UCI's corresponding request for payment under the Commitment."

and made submissions accordingly.

- 2.9. Mr. Vinokourov's prayers for relief were:

*"- Rejecting UCI's prayers for relief.
- Declaring that Mr. Vinokourov will regain eligibility to compete internationally as from 24 July 2009.
- Declaring that no payment is due by Vinokourov under the "Commitment to a new cycling" he signed by 29 June 2007.
- Condemning UCI to pay all Mr. Vinokourov's legal fees and other expenses incurred in connection with these proceedings."*

- 2.10. Whereas UCI introduced the commitment mainly but not exclusively as a condition for Mr. Vinokourov's reinstatement, Mr. Vinokourov went beyond and requested the Panel to decide on the existence of his alleged obligation to pay the contribution including the

validity of the commitment as an independent matter separate from the issue of the date of his reinstatement.

- 2.11. After some futile attempts to find a convenient date to hold a hearing the Panel fixed a date for a hearing on 30 April 2009. As the counsel to UCI declared himself unavailable for a hearing on 30 April 2009 and since it turned out to be impossible to schedule the hearing at a convenient date before June, the Panel, by letter of 5 May 2009, postponed the hearing and informed the parties that it will render a Partial Award concerning, but restricted, to the date of Mr. Vinokourov's re-eligibility.

IV. Partial Award

- 2.12. In its Partial Award the operative part of which was pronounced on 16 June 2009 whereas the full statement of reasons was delivered on 23 July 2009 the Panel found:

“V. Conclusions

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Based on the foregoing considerations the Panel comes to the conclusion that Mr. Vinokourov committed an anti-doping rule violation in the form of blood doping and, therefore, is to be declared ineligible to compete for two years commencing on 24 July 2007. Hence, the decision of KCF's Anti-Doping Commission of 5 December 2007 must be reversed. As Article 277 ADR 2004 does not apply and the payment of the “contribution” under the “Rider's commitment” is not conditional for Mr. Vinokourov's reinstatement the two years period of ineligibility will elapse on 23 July 2009 and Mr. Vinokourov will be eligible to compete internationally as from 24 July 2009.

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The dispute about the payment of the contribution as a matter independent of the dispute on the date of Mr. Vinokourov's reinstatement is not yet ready for a decision. Hence, the Panel issues its decision as a Partial Award, according to Art. 188 Swiss Statute on Private International Law.

VI. Costs

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The decision on the costs is reserved to the Final Award.

ON THESE GROUNDS

The Court of Arbitration for Sport, in a partial award, rules that:

- 1. The decision adopted on 5 December 2007 by the Anti-Doping Commission of the Kazakhstan Cycling Federation is set aside.*
- 2. Mr. Vinokourov committed an anti-doping rule violation under Article 15.2 of the*

Anti-Doping Regulations of the Union Cycliste Internationale and, according to Articles 261, 268, and 275 Anti-Doping Regulations, is declared ineligible for a period of two years commencing on 24 July 2007.

3. *Mr. Vinokourov will be eligible to compete in international competitions as of 24 July 2009.*
- 4 *The decision on all other prayers for relief including on costs is reserved to a Final Award.”*

V. Continued dispute

- 2.13. With a view to organizing the continuation of the arbitration, on 6 August 2009 the Panel issued the following order:

“In the course of the proceedings before the Panel both the Appellant and the First Respondent introduced the matter of the “Rider's commitment”. In the Partial Award this issue has been dealt with in so far as it has been submitted as a condition for Mr. Vinokourov's reinstatement.

The Panel observes that the First Respondent is requesting the Panel to decide on the alleged obligation arising out of the Commitment as an independent matter. The Appellant did not object and, in its letter of 23 July 2009, requests e hearing “on the issues still pending”. However, for the sake of clarity the Panel asks the parties to declare their wish and consent to continue the appeal proceedings with the view to having a decision on the issue of the payment allegedly due to the “Rider's commitment”.

In the event the Appellant and the First Respondent decide to continue the proceedings as mentioned above, the Panel will decide to submit the present matter, concerning the decision on the costs, to article R65.4 of the Code of Sports-related Arbitration (Code), considering that the dispute will go beyond a strict disciplinary matter as it becomes of a patrimonial nature. In such case, the Second Respondent will be considered a party to the continued procedure only formally.

Upon receipt of the Appellant's and First Respondent's consent the Panel will schedule a date for a hearing.

However, as an alternative, the Appellant and First Respondent may sign a specific arbitration agreement to continue the dispute relating to the payment obligation under the same Panel by way of an Ordinary Arbitration Procedure according to Articles R38 et seq. of the Code. This would put an end to the appeal procedure and a final award on the costs of the appeal procedure would be delivered in due course.

The Panel invites the Parties to respond until 18 August 2009.”

- 2.14. By letter of 14 August 2009 UCI declared that it has “no objection that this case is continued under the appeals procedure ... “

2.15. Mr. Vinokourov, by letter dated 18 August 2009, expressed his preference to terminate the appeals procedure and to continue the arbitration under the Ordinary Arbitration Procedure. However, he declared his consent to continue the arbitration under the Appeals Procedure as indicated in the order of 6 August 2009, should the Panel so decide. In this event Mr. Vinokourov requested to Panel to issue a partial award on the costs of the “*first part of the appeals procedure*”. Both parties requested the opportunity to make submissions.

2.16. On 21 August 2009 the Panel issued the following order:

“The Panel, having considered the exchange of views following its letter of 6 August 2009 and the positions of the Appellant and the First Respondent in the course of the proceedings so far, decides that the dispute shall continue under the Appeals Arbitration Procedure.

However, as already indicated, the decision on the costs will take into consideration that the continuation of the dispute, in its substance, goes beyond the Appeals Arbitration and, in this respect, will be based on Article R64.5 of the Code of Sports-related Arbitration (the “Code”). A request to that effect has been addressed to the Division President. In its final award, the Panel will delimit the costs for the proceedings up to the Partial Award of 16 June/23 July 2009 and the subsequent arbitration.

Further to that, in application of Article R56 of the Code, the parties will be invited to file additional submissions.

The Appellant is granted the opportunity to file a written statement concerning the “Rider’s Commitment”, in particular in response to paras. 32 et seq. of the First Respondent’s statement of 9 April 2009, until 4 September 2009. First Respondent may reply no later than 18 September 2009. The Panel invites the Appellant and the First Respondent to express their views about the applicable law and, if wished, to authorize the Panel to decide ex aequo et bono.”

and proposed various dates for a hearing.

2.17. After an exchange of letters the Panel, by order of 1 September 2009, scheduled the hearing for 2 November 2009.

2.18. By letter of 4 September 2009 the parties were informed

“that the President of the Appeals Arbitration Division has considered the Panel’s conclusion that the continuation of the dispute goes beyond the appeals arbitration and that Articles R64.4 and R64.5 of the Code of Spots-related Arbitration (the “Code”) should be applied to this procedure.

The President of the Appeals Arbitration Division, in view of the circumstances and the nature of this case, agrees with the Panel.

In the light of the above, please be advised that as the cost of the second phase of this arbitration procedure, from the issuance of the Partial Award to the issuance of the Final Award, must be paid by the parties, the CAS Secretary General will shortly write to the parties inviting them to pay an advance on such arbitration costs, in accordance with Article R64.2 of the Code.”

The advance has been paid by Appellant before 26 October 2009.

- 2.19. On 4 September 2009 UCI filed a “Written Statement” focussing on the legal validity of the “Rider's commitment” signed by Mr. Vinokourov under Swiss law. UCI submitted as “conclusion”:

“The breach of the personality of Mr. Vinokourov who has to pay, in accordance with his commitment, an amount equal to his annual salary is justified on the one hand by the consent of the rider himself and by the public interest in relation with the fight against doping.

It results from what has been said that Mr. Vinokourov has to pay an amount equal to his annual salary from 2007 as a contribution to the fight against doping.”

- 2.20. On the same day, UCI requested the disclosure of all bank statements of Mr. Vinokourov from 1 January 2007 until 4 September 2009 and an extract from the Monegasque real estate records concerning Mr. Vinokourov. The motion for disclosure was dismissed by the Panel on 22 October 2009. The Panel, however, reserved its right to request additional documents from either party, should the proper handling of the dispute so require.
- 2.21. On 18 September 2009, Mr. Vinokourov filed A “Reply to the Appellant`s Written Submission” submitting that the Rider's commitment is not binding under Swiss law and is not enforceable. He requests the Panel to issue an award:

- “- Rejecting UCI's prayers for relief.*
- Declaring that Mr. Vinokourov will regain eligibility to compete internationally as from 24 July 2009*

- Declaring that no payment is due by Mr. Vinokourov under the “Rider`s commitment to a new cycling” he signed on 29 June 2007*
- Condemning UCI to pay all Mr. Vinokourov's legal fees and other expenses incurred in connection with these proceedings.”*

- 2.22. KCF, Second Respondent in the original appeal proceeding, in a letter of 10 March 2009, indicated to support Mr. Vinokourov's position [*i.e.* concerning the date of his reinstatement, the Panel]. No further submissions were made in the course of the proceedings on behalf of KCF.

VI. Submissions of the Parties

- 2.23. In its order of 21 August 2009 the Panel had invited the parties to file additional submissions pertaining to the continued dispute on the payment allegedly due under the “Rider's commitment”. The Appellant and the First Respondent chiefly advocated the following facts and arguments with regard to the legal validity of the “Rider's commitment” signed by Mr. Vinokourov on 29 July 2007.

1. Appellant

- 2.24. In his “Written Statement”, dated 4 September 2009, UCI identified the obligation to pay the contribution as provided for by the Rider's commitment as a penalty clause. According to UCI, the non-fulfilment of the main obligation, *i. e.* not to be involved in the Puerto affair or any other doping affair and not to violate UCI's anti-doping regulations, entails the payment of the contribution. The condition to trigger the penalty is the imposition of an anti-doping sanction of a minimum of two years.

- 2.25. UCI further argues that the injury inflicted to Mr. Vinokourov by the payment be justified according to Article 28 para. 2 Swiss Civil Code (“CC”). Article 28 para. 2 CC stipulates:

“A violation is illegal unless justified by the consent of the victim, by a predominant private or public interest or by law.”

In UCI's opinion the obligation to pay is justified by both the consent of Mr. Vinokourov and an overriding public interest.

- 2.26. UCI considers the obligation to pay primarily justified by the consent expressed by Mr. Vinokourov when he signed the commitment. As, according to UCI, the obligation is not excessive and the violation committed by Mr. Vinokourov a serious one, the consent is not excluded by virtue of Article 27 para. 2 CC. UCI submits that Mr. Vinokourov's consent was given freely. With reference to the *Cañas* decision of the Swiss Federal Tribunal (22 March 2007, 4P.172/2006 - BGE 133 III 235) it is argued that Mr. Vinokourov who was one of the best professional rider was not in a weak position vis-à-vis the UCI. UCI further contends that Mr. Vinokourov did not show which kind of pressure had been exercised on him. By making his application for the rider's licence Mr. Vinokourov had accepted the rules of UCI including the Anti-Doping Regulations. In

particular, UCI distinguishes the situation at hand from the situation in *Cañas*. Whereas in *Cañas* the athlete signed a waiver to appeal which deprived him of any legal remedy Mr. Vinokourov simply accepted to pay a certain amount of money.

- 2.27. UCI further claimed a predominant interest of sports bodies to sanction and to exclude doped athletes. According to UCI, the fight against doping is of predominant public interest, too. As the sanction of ineligibility is not enough to overcome doping UCI additionally introduced the payment of the contribution.
- 2.28. Finally, UCI denied any discrimination, as contended by Mr. Vinokourov, between riders who's main annual event is the Tour de France and riders who focus on other major cycling events like the Giro d'Italia.
- 2.29. As a "conclusion" UCI stated

"that Mr. Vinokourov has to pay an amount equal to his annual salary from 2007 as a contribution to the fight against doping."

2. First Respondent

- 2.30. As early as in his "Response to the Appellant's "Additional Submission"", dated 9 April 2009, Mr. Vinokourov replied to UCI's request to pay the contribution allegedly due under the "Rider's commitment" and dealt with the commitment as a matter separate from and independent of his reinstatement. In his Response, and as stated in his Answer of 27 January 2009, Mr. Vinokourov submitted that the commitment is null and void. The commitment is unenforceable because he was not free to sign or not to sign. According to him, by reference to the *Cañas* decision of the Swiss Federal Tribunal an undertaking signed by an athlete as a precondition to participate in an event is unenforceable under Swiss law.
- 2.31. In his "Reply to the Appellant's Written Statement", dated 18 September 2009, Mr. Vinokourov submitted facts and various arguments contending primarily that the Rider's commitment is not legally valid and secondarily, in case the Panel should consider the commitment validly entered into, that it violates his personality rights without being justified by consent or overriding public interests.
- 2.32. First, according to Mr. Vinokourov, UCI when introducing the Rider's commitment violated the WADA Code 2003 which was the edition of that Code in force in July 2007. UCI as any other IF is in a position to impose additional fines for anti-doping rule violations only after the entry into force of the new WADA Code 2009 with its new Article 10.12. No such rule existed when Mr. Vinokourov signed the commitment.

According to its Article 23.2.1 the WADA Code 2003 shall be implemented by the IFs and, in particular, according to the second paragraph of the Introduction to the WADA Code 2003, some rules including Article 10 on sanctions

“must be incorporated into the rules of each Anti-Doping Organization without any substantial changes”.

However, Mr. Vinokourov does not claim that the non-compliance with the WADA Code 2003, by virtue of Swiss law, has an impact on the validity of the Rider`s commitment.

- 2.33. After having reconfirmed an *“implied choice of law agreement”* to apply Swiss law Mr. Vinokourov concurs with UCI in that the commitment has to be understood as a penalty clause. However, it is contended that the commitment is not valid under Swiss law.
- 2.34. The main contention is that the Rider's commitment was not validly concluded because Mr. Vinokourov was not free to sign. Although UCI dealt with the issue of Mr. Vinokourov's consent only as a possible element justifying the violation of personality rights, Mr. Vinokourov submits that his consent is a precondition for the coming into effect of the Rider's commitment.
- 2.35. Mr. Vinokourov puts forward that he signed the commitment on 29 June 2007 exclusively because the signing of that undertaking was made a condition for him to participate in the Tour de France 2007 which was to begin only 7 days later. Mr. Vinokourov argued that, according to declarations made by UCI's officials and by representatives of the Tour organizer, the signature of the commitment was a *conditio sine qua non* to participate in the Tour de France which is the most important event in the cycling calendar. This is evidenced by a press article of 19 July 2007. The President of UCI, Mr. McQuaid, UCI's Head of the Anti-Doping Program and the Director of the Tour had made public statements to the effect that the acceptance of the Rider's commitment is a condition for the participation in the Tour 2007. Under these conditions he had no other choice than to sign. This was all the more compelling to him as he was one of the favourites to win the upcoming edition of the Tour de France.
- 2.36. According to Mr. Vinokourov, the ruling of the Swiss Federal Tribunal in the *Cañas* case applies to any contract (*“as any other contract”*) and not only to a waiver to appeal, as advocated by UCI. That in *Cañas* the fundamental right to due process was affected is, according to Mr. Vinokourov, only an additional reason for the Swiss Federal Tribunal to declare that waiver unenforceable.

- 2.37. Mr. Vinokourov characterizes UCI's submission that he was not on weak position vis-à-vis the federation as misleading. The CAS award in the *Matuzalem* case which was referred to by UCI dealt with labour contracts of riders. Mr. Vinokourov emphasises that riders conclude labour contracts with their teams rather than with UCI.
- 2.38. Furthermore, Mr. Vinokourov rejects UCI's argument that he implicitly had accepted the commitment by his application for a riders licence which included the acceptance of UCI's rules including the Anti-Doping Regulations. Mr. Vinokourov does not contest the validity of UCI's regulations but submits that the "*last minute request*" to sign the commitment was contrary to the WADA Code 2003 and therefore not covered by UCI's own rules.
- 2.39. Lastly in respect of the conclusion of the commitment, Mr. Vinokourov refers to public statements made by Mr. McQuaid, President of UCI, and Ms. Anne Gripper, Head of the Anti-Doping Department of UCI that they were in doubt about the legal validity of the commitment as evidenced by the press article of 19 June 2007.
- 2.40. For the sake of completeness, would the Panel find that the commitment is validly concluded, Mr. Vinokourov goes further to address UCI's arguments advocating that he is bound by the commitment. Firstly, he submits that he, as he was not free to sign the commitment, did not freely express his consent as required under Article 28 para. 2 CC. In particular, he refers to a legal writing which, contrary to UCI's presentation, expressly states that the Rider's commitment was signed under pressure and, hence, not legally valid.
- 2.41. Mr. Vinokourov further submits that the Commitment constitutes an excessive and therefore not binding obligation within the meaning of Article 27 CC.
- 2.42. Mr. Vinokourov acknowledges that UCI has a private interest to have the contribution paid but he contests that this interest prevails over his interest. Moreover, the payment of the contribution is not necessary to reach the goal of doping-free cycling. To attain that aim the exclusion from competition is sufficient.
- 2.43. Mr. Vinokourov further accepts that the fight against doping lies in the public interest. However, under Article 28 para. 2 CC this public interest must prevail over the pecuniary interest of Mr. Vinokourov. According to legal literature, this depends on a balance of interests and the authors are reluctant to see an overriding public interest. The Swiss Federal Tribunal had ruled that the public interest in a disqualification prevails but there is no precedent for a financial sanction.

- 2.44. By reference to the *Krabbe* decision of the Landgericht München according to which any sanction beyond a period of two years is disproportionate Mr. Vinokourov concludes that any financial sanction in addition to a sanction of two years ineligibility is not proportionate and therefore not justified under Article 28 para. 2 CC.
- 2.45. Finally, Mr. Vinokourov submits that a violation of personality rights is justified under Article 28 para. 2 CC only under the condition that it complies with fundamental principles of law such as equal treatment. In the view of Mr. Vinokourov UCI, when requiring the riders, who wanted to compete in the Tour de France, to sign the Rider's commitment, treated riders like Mr. Vinokourov for whom the Tour de France is the main if not only important event of the year differently from other riders who did not intend to participate in the Tour or who do not put primary attention to the Tour. Only a limited number of riders can participate in the Tour and, in particular, Mr. Vinokourov had the prospective to win the Tour.
- 2.46. With regard to the costs Mr. Vinokourov draws the attention of the Panel to the fact that, as far as Mr. Vinokourov's reinstatement was at stake, UCI withdrew part of its claims and did not prevail on the remaining claims. Taking also into account UCI's procedural behaviour it is claimed that UCI pay the costs of the arbitration and the totality of Mr. Vinokourov's legal fees or at least to pay an amount of CHF 35'000.-.
- 2.47. Mr. Vinokourov's prayers for relief are: the Panel may issue an award
- *rejecting UCI's prayers for relief*
 - *Declaring that Mr. Vinokourov will regain eligibility to compete internationally as from 24 July 2009*
 - *Declaring that no payment is due by Mr. Vinokourov under the "Rider's Commitment for a new cycling" he signed on 29 June 2007*
 - *Condemning UCI to pay all Mr. Vinokourov's legal fees and other expenses incurred in connection with these proceedings."*

VII. The Hearing

- 2.48. The hearing took place on 2 November 2009 at the premises of the CAS in Lausanne. In addition to the Panel members and Ms. Andrea Zimmermann of the CAS court office those participating in the hearing were:
- for the Appellant
 - Mr. Philippe Verbiest, attorney-at-law of Leuven, Belgium, counsel for UCI
 - Mr. Jean-Marc Reymond, attorney-at-law of Lausanne, Switzerland, co-counsel for UCI
 - Ms. Delphine Rochat, attorney-at-law, Lausanne, Switzerland, co-counsel for UCI

- for the First Respondent
- Mr. Alexander Vinokourov
- Mr. Antonio Rigozzi, attorney-at-law, Geneva, Switzerland, counsel to Mr. Vinokourov
- Ms. Noelle Rentsch, attorney-at-law, Geneva, Switzerland, co-counsel for Mr. Vinokourov

Ms. Svetlana Vinokourov, Mr. Vinokourov's wife, who was authorized by the Panel's decision of 27 October 2009 to attend the hearing as an observer, did not appear.

- 2.49. At the outset, the President of the Panel recapitulated the state of the dispute both procedurally and in substance and issued the Panel's directions for the conduct of the hearing. In particular, the President of the Panel stated that both parties agree that Swiss law applies. No objections were raised as to the jurisdiction of the CAS, the applicable law, the composition of the Panel and the procedure thus far.
- 2.50. The Panel heard oral opening statements by Appellant and First Respondent and discussed the issues in dispute with the counsels for the parties and heard Mr. Vinokourov himself. Particularly discussed was the salary Mr. Vinokourov received in 2007 and, hence, the amount of payment requested by UCI. As a matter of fact UCI accepted that Mr. Vinokourov actually was paid 575.000 Euro until his team Astana cancelled the contract following his departure from the Tour. Although, in the course of the hearing, both parties came to the agreement that the net annual salary for 2007 was meant in the Rider's commitment and authorized the Panel to fix the amount *ex aequo et bono* including a reduction of the payment requested by UCI, the latter in its oral conclusions maintained its prayers for relief presented in its pleadings and claimed an amount of 1.2 mio Euro to be paid by Mr. Vinokourov.
- 2.51. The second major point of dispute discussed in the course of the hearing were the factual circumstances of the signing of the "Rider's commitment for a new cycling" by Mr. Vinokourov and UCI's intentions linked to the introduction of the "Rider's commitment". A letter of UCI, dated 22 June 2009, summarizing a meeting with the teams, and a circular letter of Mr. McQuaid to the managers of the UCI ProTeams, dated 3 August 2009, were introduced by UCI and, as accepted by First Respondent, authorized by the Panel.
- 2.52. In particular, UCI argued that the Rider's commitment was validly concluded because Mr. Vinokourov was free to sign. According to UCI no pressure was exercised. The press articles which quoted Mr. McQuaid and Ms. Gripper to that effect could not be invoked in order to show that the riders were forced to sign.

- 2.53. UCI argues that the undertaking in the Rider's commitment is clear in the sense of Article 18 of the Swiss Code of Obligations (CO). The parties, however, agree that the Rider's commitment was introduced in order to restore the integrity of cycling in the eyes of the public in that particular situation at the eve of the start of *the* Tour de France 2007.
- 2.54. As a matter of fact the debates at the hearing revealed that eventually not all professional riders registered with UCI had signed the Rider's commitment.
- 2.55. With regard to the costs UCI submitted that the proceedings before the CAS were suspended because of Mr. Vinokourov's temporary retirement and reactivated when he revoked his retirement. By Mr. Vinokourov admitting the anti-doping rule violation and accepting a two years sanction, all of UCI original prayers for relief were fulfilled.
- 2.56. At the end of the hearing UCI's prayers for relief were:
- to order Mr. Vinokourov to pay an amount of 1.2 mio Euro subject to a reduction *ex aequo et bono* by the Panel;
 - to order Mr. Vinokourov to pay all costs of the arbitration and a contribution to the legal costs incurred to UCI.
- 2.57. Mr. Vinokourov's prayers for relief were:
- to declare that no payment is due by Mr. Vinokourov under the Rider's commitment;
 - to order UCI to pay all costs of the arbitration and the entire legal costs incurred to Mr. Vinokourov.
- 2.58. The Panel heard the pleadings of the parties including the replies and extensively dealt with the facts and the law. Further, Mr. Vinokourov made a final personal statement.
- 2.59. At the end of the hearing, the President of the Panel declared the proceedings closed.

C. THE LEGAL ANALYSIS

I. Jurisdiction of the CAS

- 3.1. Originally, the Panel had jurisdiction to hear the case according to R47 para. 1 of the Code. UCI appealed a "*decision of a federation*", *i. e.* the decision of KCF's Anti-Doping Commission. According to Articles 280, 281 lit. a, and 282 of UCI's ADR 2004 this decision is appealable before the CAS by UCI against the KCF and Mr. Vinokourov. As no other remedies are available under UCI's rules and regulations the internal remedies

within UCI's framework have been exhausted.

- 3.2. However, in the course of the proceedings the contentious matters of the dispute have changed considerably. Originally, by 17 January 2008, UCI lodged an appeal against the decision of KCF's Anti-Doping Commission to impose on Mr. Vinokourov a sanction of one year only. In its Statement of Appeal and Statement of case, in particular in the prayers for relief, UCI requested the Panel to state that an anti-doping rule violation took place and declare Mr. Vinokourov ineligible for two years. The extension of the period of ineligibility required by UCI pursuant to Article 277 ADR 2004 was only mentioned in the reasoning of the Statement of case of 18 December 2008.
- 3.3. As Mr. Vinokourov, in his answer of 27 January 2009, admitted to have committed an anti-doping rule violation and accepted a two year sanction the continuing dispute focussed on the matter of the date of the reinstatement. Mr. Vinokourov submitted arguments against the application of Article 277 ADR 2004 in his case. The issue of Article 277 ADR 2004 gave rise to the exchange of further written submissions. The date of the commencement of the period of ineligibility, however, was not disputed: 24 July 2007.
- 3.4. In its Additional Submission of 26 March 2009, UCI abandoned the claim for application of Article 277 ADR 2004 because Mr. Vinokourov actually was not removed from UCI's registered testing pool. Therefore the issue of an extension of the period of ineligibility based on Article 277 ADR was no longer a matter of dispute. At that stage, all matters raised by UCI in its original appeal and dealt with in the parties' submissions thus far were solved.
- 3.5. However, UCI, in the same Additional Submission, dated 26 March 2009, introduced the issue of the payment of the contribution allegedly due under the "Rider's commitment" as a condition for Mr. Vinokourov's reinstatement. Against this argument Mr. Vinokourov submitted various counter-arguments including that UCI's submission had to be considered inadmissible because, according to R51 and 56 of the Code, it was submitted out of time. But, on the other hand, he explicitly declared his consent to the Panel's power to decide on the matter of the validity of the commitment and submitted prayers for relief, accordingly).
- 3.6. Whereas UCI introduced the commitment mainly as a condition for Mr. Vinokourov's reinstatement, Mr. Vinokourov went beyond and requested the Panel to decide on the validity of his alleged obligation to pay the contribution as a matter independent of and separate from the issue of the date of his reinstatement.

- 3.7. In its Partial Award of 16 June/23 July 2009 the Panel ruled that
- Mr. Vinokourov committed an anti-doping rule violation,
 - a sanction of two years beginning with 24 July 2007 and elapsing on 23 July 2009 be imposed,
 - as Art. 277 ADR 2004 does not apply and the payment allegedly due to the Rider's commitment is not conditional for his reinstatement, Mr. Vinokourov is eligible to compete as from 24 July 2009,
 - the dispute about the payment as an independent matter is not ripe for decision,
 - the decision on the costs is reserved to the Final Award.
- 3.8. Because, at that moment, the appeal as originally lodged was fully settled and the dispute about the payment of the contribution alone is no longer a disciplinary matter for the Appeals Arbitration according to Article R47 of the Code but rather a purely pecuniary claim for the Ordinary Arbitration under Article R38 of the Code, the Panel, in its order of 6 August 2009, set out the procedural conditions for the continuation of the dispute. In letters of 14 and 18 August 2009 Appellant and First Respondent agreed to continue under the Appeals Arbitration formula and, by order of 21 August 2009, the Panel ordered accordingly. Following a decision of the Appeal Arbitration Division's President the Parties, on 4 September 2009, were informed that Articles R64.4 and R64.5 of the Code apply with regard to the costs.
- 3.9. Under these circumstances the Panel concludes that it has jurisdiction to rule on the matter of the payment allegedly due under the Rider's commitment signed by Mr. Vinokourov on 29 June 2007.

II. Applicable Law

- 3.10. In accordance with Article R58 of the Code the parties had agreed that the original appeal be decided according to the applicable rules of UCI, *i.e.* UCI's Anti-Doping Regulations in force at the time of the Tour de France 2007. With regard to the validity of the Rider's commitment Appellant and First Respondent, by referring to Swiss law, choose Swiss law as the applicable law.

III. The Merits of the Dispute

- 3.11. UCI and Mr. Vinokourov are in dispute about the validity and enforceability of the Rider's commitment. Whereas UCI chiefly is of the opinion that the commitment is legally valid and the infringement of Mr. Vinokourov's personality rights is justified by his free consent and overriding public interest, the latter challenges the validity of the commitment mainly because he was not free to sign or reject the commitment which was the precondition for his participation in the Tour de France 2007.

1. Conclusion of the Rider`s commitment: the true intent of the parties

- 3.12. The first and foremost condition for UCI's claim that Mr. Vinokourov must pay the contribution is that the Rider's commitment was validly concluded. Undisputedly, Mr. Vinokourov signed the Rider's commitment on 29 June 2007, *i. e.* 7 days before the Tour de France started on 7 July 2007. Appellant and First Respondent concur in that the Rider's commitment contains a penalty clause in the sense of Article 160 CO. The various elements of the obligation to pay the penalty set forth in the Rider's commitment are met: Mr. Vinokourov committed and admitted an anti-doping rule violation and accepted a sanction of two years.
- 3.13. Appellant and First Respondent, however, differ as to the valid conclusion of the Rider's commitment.
- 3.14. A contract must be interpreted and applied according to the true intention of the contracting parties. Article 18 CO reads as follows:
- “(1) As regards both the form and content of a contract, the real intent which is mutually agreed upon shall be considered, and not an incorrect statement or manner of expression used by the parties, whether due to an error, or with the intention of concealing the true nature of the contract.
(2) ...”*
- 3.15. The intentions linked to the Rider's commitment were an issue at the hearing and discussed with Appellant and First Respondent.
- 3.16. According to Article 18 para.1 CO the Rider's commitment has to be interpreted taking into account the true intent of the parties to that commitment. Having intensively considered all the facts and circumstances related to the introduction of the Rider`s commitment by UCI and its signing by Mr. Vinokourov, including, in particular, the statements by high representatives of UCI, the Panel finds that Appellant and First Respondent did not have the true intention to conclude a penalty clause, *i.e.* to create a binding obligation to pay indeed the contribution in the event of doping. The prohibition of doping, however, was fully and sufficiently provided for in the ADR of UCI. Instead, the parties to the commitment, in particular UCI, which introduced the commitment, intended to take an action to restore the credibility and esteem of professional cycling, in general, and the Tour de France, in particular, in the eyes of the public.
- 3.17. The press conference of 18 June 2007, in which UCI presented its new policy including the Rider's commitment to the public, was reported by *l'Equipe* in an article published on 19 June 2007 as follows:

“L’ Union cycliste internationale (UCI) a présenté hier mardi à Genève une nouvelle charte anti-dopage destinée à laver l’honneur d’un sport de plus en plus sali par les affaires de dopage. Pat McQuaid, le président de l’UCI, a ensuite invité tous les cyclistes professionnels à signer “cet engagement des coureurs pour un nouveau cyclisme” avant le 7 juillet, même si le document n’aura aucune valeur légale. “De ce point de vue, nous n’avons pas la possibilité de prendre des sanctions” reconnaît toutefois l’Irlandais. “Mais nous demanderons à toutes les équipes de prendre en compte la non-signature quand elles décideront quel cycliste participera à une course.”

...

Par ailleurs, Anne Gripper, responsable du programme antidopage de la fédération internationale, a estimé qu’un cycliste n’ayant pas signé l’engagement ne prendra vraisemblablement pas le départ du tour de France, “non pour des raisons légales mais à cause de pression”. Même son de cloche du côté du Tour de France. Les coureurs, qui ne seront pas soumis à l’engagement, ne seront pas acceptés par l’organisation de la Grande Boucle. “Nous nous opposerons à leur présence au départ du Tour”, a déclaré Christian Prudhomme. “Cela va dans le sens de la lettre que nous avons envoyée vendredi dernier aux équipes pour leur demander de faire tout ce qu’il fallait avant le départ du Tour”, a ajouté Christian Prudhomme en précisant que trois groupes (T-Mobile, Rabobank, Agritubel) avaient déjà répondu.”

The newspaper *l’Equipe* is close to cycling and the Tour de France and is owned by the same company as the company which organizes the Tour de France. UCI did not put into question the correctness of the content of the article.

- 3.18. Following a meeting UCI held with the teams on 19 June 2007, Mr. McQuaid, on 22 June 2007, sent a letter to the teams:

“I would like to thank you for participating in our meeting held in Geneva on June 19th. The credibility of cycling today is regularly being questioned by numerous players (media, sponsors, spectators, sporting and anti-doping organizations) because of the number of doping issues touching our sport. We are all suffering from this.

Faced with this ill, we must send out a message that is as clear and as unanimous as possible so that the public at large ceases to automatically associate the words “doping” and “cycling”. We must prove to the world that the great majority of cyclists are not involved in doping and have no qualms in affirming it. That is the reason for the “Rider`s commitment to a new cycling” that I presented to you on June 19th and asked you to pass on to your cyclists for signature. There is no reason for an athlete who is not cheating to refuse to sign and I seriously recommend that you ask yourself what motives would push an individual to wriggle out of signing.

It goes without saying that I expect you to actively support this initiative that aims to restore confidence in cycling. It is fundamental.

....”

3.19. In a circular letter, dated 3 August 2007, the President of UCI, stated:

“To date around 620 riders have signed the “Rider`s commitment to a new cycling”, thereby declaring on their honour that they were not involved in the Puerto Affair or in any other doping cases, and that they would in no way contravene any of the UCI anti-doping regulations.

Many riders however still have not signed this document.

If this is the case for your team, I would like to ask you without delay to remind it to the riders concerned and to draw the inevitable conclusions in respect of those who refuse to do so. This is important in view of the situation in which cycling finds itself: we must show publicly our joint commitment to effectively combat doping.

...”

3.20. The public statements made at the press conference on 18 June 2007 and the letter, dated 19 June 2007, which summarized UCI's new anti-doping policy, an important part of which was represented by the Rider's commitment, convince the Panel that this initiative, launched 19 days before the beginning of the Tour de France 2007, constitutes a public relations operation with the aim of restoring the credibility and honesty of professional cycling, in general, and the Tour de France, in particular, rather than to create a legally binding penalty clause in relation to each particular rider. It is common knowledge that shortly before the Tour de France 2007, for the second time after 1998, the Tour was severely distressed by a doping affair. The fate of the Tour was at stake. The Rider's commitment was intended by UCI to somehow calm the public debate and regain a positive image in the public opinion. This was the state of information available to Mr. Vinokourov when he signed the Rider's commitment on 29 June 2007.

3.21. Mainly, it was the Tour organizer, represented by Mr. Prudhomme during the press conference, who adopted a strict policy of non-participation in the Tour of those riders not having signed the commitment. UCI was under the pressure of the Tour organizer. This is clearly shown for instance by the report on UCI's press conference on 18 June 2007 published in *l'Equipe* the next day.

3.22. The understanding of the Rider's commitment as a kind of public relations measure is also confirmed by the wording of the commitment itself which speaks of a solemn declaration *“to my colleagues, the UCI, the cycling movement and the public”* and of Mr. McQuaid's letter of 22 June 2007 which resumed the meeting with the team officials and emphasized that *“we must send out a message that it is as clear and as unanimous as possible so that the public at large ceases automatically to associate the words “doping” and “cycling”. We must prove to the world that ...”*

3.23. The character of the commitment as a public declaration is further confirmed by the fact that it was unilaterally conceived by UCI and first presented to the public in a press conference rather than being negotiated with the riders - and Mr. Vinokourov, in

particular. Moreover, UCI did not approach the riders directly but requested the professional cycling teams to urge the riders belonging to their team to sign the commitment and not to nominate riders who had refused to sign. Exactly that happened when Mr. Vinokourov's team Astana caused him to sign.

3.24. Furthermore, and significantly, in the press conference on 18 June 2007, when the Rider's commitment was presented to the public, both the President and the Director of the Anti-Doping Program of UCI publicly disclosed their doubts with regard to the legal validity of the commitment and referred to the pressure and the exclusion from the Tour in order to make the riders sign. In that situation Mr. Vinokourov legitimately could have had the belief that the Rider's commitment was not intended to have binding force and he, thus, did not adopt a separate legal obligation specifically emanating from the Rider's commitment. The fact that UCI launched the Rider's commitment despite their doubts with regard to the legal validity of the commitment demonstrates that the aim of the undertaking was to calm the negative public opinion rather than to create a binding obligation.

3.25. Again, the introductory words of the Rider's commitment emphasize its character of a declaration towards the public:

“I do solemnly declare, to my colleagues, the UCI, the cycling movement and the public ...”

3.26. Such a belief by Mr. Vinokourov is also understandable against the background that he held a valid annual licence for 2007. According to § 1.1.001 of UCI's Cycling Regulations the licence “*authorize(d) him to participate in cycling events*”. By applying for the licence Mr. Vinokourov declared and committed himself to respect the UCI rules including UCI's ADR which, in the event of an anti-doping rule violation, did foresee certain sanctions. However, by introducing the Rider's commitment as a condition for the participation in the Tour de France 2007, and assuming a legal binding nature of the commitment, UCI would have introduced during the course of the cycling season an additional condition to participate to a sporting event. This would have, without a legal basis in UCI's rules, somehow invalidated the licence and limited Mr. Vinokourov's right to compete.

3.27. The non-contractual character of the Rider's commitment is further supported by the fact that it was not the result of negotiations between the parties, *i.e.* UCI and Mr. Vinokourov but unilaterally conceived by UCI and announced publicly in the press conference of 18 June 2007. Only three weeks before the start of the Tour de France UCI imposed the commitment to the riders unilaterally and surprisingly. Then the commitment was sent out to the teams in a standard form and the riders were requested by their teams to sign unilaterally without any signature by or on behalf of UCI. The Panel concludes that the

Rider's commitment does not constitute an individually agreed and mutually concluded penalty clause aiming at reinforcing an already existing obligation of Mr. Vinokourov. As its introductory words show it rather is an unilateral declaration of good conduct towards the public and the cycling movement.

- 3.28. The obligation to pay an additional pecuniary fine would have constituted a new instrument providing for an additional doping sanction which went beyond the sanctions set forth in UCI's own rules and the WADA Code as in force at the material time. UCI was aware that an additional sanction as provided for in the commitment was not in line with the applicable rules of sport law which would be amended in that respect only by the upcoming new WADA Code 2009 and, therefore, tried to circumvent the limitations of the anti-doping rules by using a contractual clause under private law. UCI was aware of the legal weakness of the commitment as the public statements of Mr. McQuaid and Mrs. Gripper clearly show. Despite that risk UCI requested the riders to sign. This behaviour is against any precaution which sports federations usually observe when they introduce new sanctions in order to avoid to loose legal proceedings. The Panel comes to the view that UCI created the Rider's commitment in order to meet the pressure by the public opinion, in general, and exercised by the Tour organizer, in particular, notwithstanding the legal ramifications. Under this perspective, UCI's behaviour is understandable from a practical point of view, but it does not change the legal interpretation of the Rider's commitment.
- 3.29. The Panel finds another indication of the lack of intent to establish a valid, binding penalty clause in the fact that the essential element of the clause, *i.e.* the amount to be paid, was not sufficiently clearly defined. It was disputed in the written submissions and during the hearing whether "*annual salary*" refers to the gross or net salary and includes only the salary paid by the rider's team or all income generated by a rider in connection with his activities in professional cycling.
- 3.30. Mr. Vinokourov knew about UCI's true intentions and its doubts as to the legal validity and enforceability of the commitment; his own and only intention was to participate in the Tour de France which was supposed to begin 7 days later.
- 3.31. Therefore, duly considering all evidence submitted, the Panel is satisfied that on 29 June 2007, the day Mr. Vinokourov signed the Rider's commitment, which is the relevant time for the interpretation of the parties' intentions, both UCI and Mr. Vinokourov mutually did not intend to establish a penalty clause. Rather, their real intention was to issue a declaration of good will to the public.
- 3.32. Furthermore, UCI did not seriously pursue that the commitment was signed by all other professional riders than the allegedly 620 ones which had signed the commitment before 3 August 2007. In its letter of 3 August 2007 UCI limited itself to ask the teams to make

their riders sign the commitment. It is common knowledge that Mr. Paolo Bettini, who won the road race at the World Championship in September 2007 in Stuttgart, signed the commitment subject to a reservation. Significantly, in the proceedings before the Panel UCI relied on the payment of the contribution allegedly due to the commitment only at a late stage, in its Additional Submission of 26 March 2009, as an argument of last resort in order to prolong the period of ineligibility of Mr. Vinokourov.

- 3.33. Hence, after due consideration of all arguments submitted by the parties, the Panel finds for all the reasons set out above, that the Rider's commitment does not provide a valid, binding legal basis for UCI's claim that Mr. Vinokourov pays the contribution.

2. Further arguments submitted by the parties

- 3.34. Having determined that the Rider's commitment does not provide a valid legal basis for UCI's claim for the reasons set out above, the Panel must not rule on the other submissions and arguments made by UCI and Mr. Vinokourov, such as for instance non-conformity with the WADA Code 2003, signing of the commitment under pressure, violation of personality rights, excessive obligation, violation of the principle of proportionality, discrimination and a reduction of the penalty.

D. CONCLUSIONS

- 4.1. From the foregoing, taking into account all of the circumstances relating to the Rider's commitment and the wording of the commitment itself and various letters and declarations related thereto, the Panel concludes that the "*Rider's commitment for a new cycling*", according to the true intent of the parties to the commitment and, in particular, of UCI which had conceived and introduced the commitment unilaterally, constitutes an action directed to the public, the media, sponsors and the Tour de France organizer in order to regain public credibility and esteem for the sport of cycling, in general, and the Tour de France 2007, in particular. Therefore, according to Article 18 CO, UCI and Mr. Vinokourov did not agree on a valid and binding penalty clause under Swiss civil law.
- 4.2. The Panel comes to the final conclusion that there is no legal basis for UCI to claim the payment of a contribution under the Rider's commitment. Accordingly, Mr. Vinokourov is not obliged to make the payment requested by UCI. Against this background, further prayers for relief and further considerations of the parties are dismissed.

E. COSTS

1. In general

- 5.1. Both Appellant and First Respondent request the Panel to order the other party to pay all the costs for the arbitration proceedings incurred in the second phase of the dispute. UCI further requests that Mr. Vinokourov pays a contribution to its legal expenses. Mr. Vinokourov claims that his legal costs are fully reimbursed by UCI, at least a minimum payment of CHF 35'000.- (thirty five thousand Swiss francs).
- 5.2. After the Panel had ruled on all matters pertaining to Mr. Vinokourov's reinstatement in its Partial Award, dated 16 June/ 23 July 2009, the remaining dispute is of purely pecuniary rather than disciplinary nature. However, Appellant and First Respondent agreed to continue the proceedings under the Appeals Arbitration Division. Taking into consideration the pecuniary nature of the remaining dispute the President of the Appeals Arbitration Division, before 4 September 2009, decided that Articles R64.4 and 64.5 of the Code apply to the costs which originate as of the issuance of the Partial Award. The Panel ordered accordingly on 4 September 2009.
- 5.3. Therefore, the Panel decides on the costs which incurred until the delivery of the Partial Award and in the proceedings thereafter, separately.
- 5.4. The Second Respondent, KCF, did not actively take part in the first part of the arbitration and did not at all participate in the dispute after the Partial Award was pronounced. The Panel considers KCF as a party in the second part of the proceedings only formally. According to Article R65.1 of the Code no costs for appeal arbitration in disciplinary matters of international nature occur. KCF did not claim for legal expenses and is not requested to pay a contribution to the legal expenses of any other party. Therefore, KCF is not affected by the decision on the costs.

2. Costs relating to the disciplinary dispute

- 5.5. As long as the dispute was about the date of Mr. Vinokourov's reinstatement, including the issue of the payment of the contribution under the Rider's commitment as a condition for his reinstatement, it was strictly a disciplinary matter of international nature under the Appeals Arbitration. According to Article R65.1 of the Code this part of the proceedings is free. Thus, no arbitration costs must be borne by the parties for the proceedings until the Partial Award was pronounced.

5.6. According to Article R65.3 of the Code

“In the award, the Panel shall decide which party shall bear them [the costs of the parties, witnesses, experts and interpreters, the Panel] or on what proportion the parties shall bear them, taking into account the outcome of the proceedings, as well as the conduct and financial resources of the parties.”

5.7. UCI's appeal against the erroneous decision of KCF's Disciplinary Commission as well as the reactivation of the stayed proceedings shall be deemed as justified. When Mr. Vinokourov, in his Statement of Defence, had admitted the anti-doping rule violation and accepted a two years sanction, the decision of KFC's Anti-Doping Commission, adopted on 5 December 2007, was set aside by the Partial Award and the appeal as originally lodged was settled. Then UCI introduced two new conditions for Mr. Vinokourov's reinstatement which gave rise to a second round of submissions. Finally, UCI abandoned its claim based on Art. 277 ADR as unsubstantiated and, as the Panel ruled in the Partial Award, Mr. Vinokourov was successful with regard to the payment of the contribution as conditional for his reinstatement. Taking into account this outcome of the proceedings so far and the procedural behaviour of the Parties, the Panel orders that each Party bears its own legal expenses incurred for the proceedings thus far.

3. Costs relating to the pecuniary dispute

5.8. According to the Appeal Arbitration Division President's decision Articles R65.4 and R64.5 apply to the proceedings subsequent to the Partial Award.

5.9. According to Article R64.5 of the Code the Panel, in its award,

“shall determine which party shall bear the arbitration costs or in which proportion the parties shall bear them.”

Secondly,

“As a general rule the award shall grant the prevailing party a contribution towards its legal fees and other expenses occurred in connection with the proceedings ... When granting such contribution, the panel shall take into account the outcome of the proceedings, as well as the conduct and the financial resources of the parties.”

5.10. Taking into account the ruling of this Final Award which, in its entirety, is positive for Mr. Vinokourov the Panel determines that UCI bears the total of the arbitration costs incurred in the second phase of the dispute, i.e. after the Partial Award was issued, and pays Mr. Vinokourov a contribution of CHF 10'000.- (ten thousand Swiss francs) towards his legal expenses.

F. PUBLICATION OF THE AWARD

The award may be published by the CAS, unless the parties agree in writing that no publication shall take place.

* * * * *

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. Paragraphs 1 to 3 of the Partial Award issued on 16 June/23 July 2009 in the present procedure are ratified.
2. No payment is due by Mr. Vinokourov under the “Rider's commitment for a new cycling” signed on 29 June 2007; consequently, the relief requested by the UCI in its written statement dated 4 September 2009 is dismissed.
3. The arbitration costs incurred in the proceedings after the issuance of the Partial Award, which shall be determined and separately communicated to the parties by the CAS Court Office, shall be entirely born by UCI.
4. Each Party shall bear its own legal expenses incurred in the proceedings until the delivery of the Partial Award.
5. UCI is ordered to pay to Mr. Vinokourov as contribution to his legal expenses incurred in the proceedings after the issuance of the Partial Award an amount of CHF 10'000.- (ten thousand Swiss francs).
6. All other and further prayers for relief are dismissed.

Lausanne, 30 August 2010

THE COURT OF ARBITRATION FOR SPORT

Christoph Vedder
President of the Panel

Beat Hodler
Arbitrator

Michele Bernasconi
Arbitrator