

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

PARTIAL AWARD

rendered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

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

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

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

in the arbitration between:

Union Cycliste Internationale (UCI), Aigle, Switzerland
Represented by Mr Philippe Verbiest, Beelen Advocaten, Leuven, Belgium

- Appellant -

and

Mr Alexander Vinokourov, Monaco, Monaco
Represented by Mr Antonio Rigozzi, Lévy Kaufmann-Kohler, Geneva, Switzerland

- Respondent 1 -

and

Kazakhstan Cycling Federation (KCF), Astana, Kazakhstan
Represented by Ms Griet vanden Abeele and Mr Peter Roosens, Curian Ondernemende
Advocate, Leuven, Belgium

- Respondent 2 -

A. Summary of the Facts

I. The Parties

1. The Union Cycliste International (UCI), 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.
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 has participated in and ranked highly in numerous international top-level competitions, such as the Tour de France in 2003 where he was placed third.
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

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 stages of the Tour, UCI submitted Mr. Vinokourov to an in-competition blood doping test, according to its Anti-Doping Regulations (ADR).
5. Mr. Vinokourov's A blood 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 2007 and sample A 2 collected on 23 July 2007 showed the presence of a "mixed red blood cell population indicating homologous blood transfusion". Mr. Vinokourov was notified that he was tested positive on 24 July 2007. The same day, he was suspended by his team and left the Tour de France. Mr. Vinokourov has not competed since then.
6. The analysis of the B 1 and B 2 samples, requested by Mr. Vinokourov and conducted in the laboratory of Chateney-Malabry on 27 July and 28 July respectively, confirmed the results of the A 1 and the A 2 samples. Mr. Vinokourov was notified of the results of the B samples analysis by the UCI in a letter dated 30 July 2007.

7. Upon receipt of the analysis results, the UCI, by letter of 30 July 2007, asked the 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 on the same day:
 - *To disqualify Mr. Vinokourov for a period of one year*
 - *according to item 274 of Rules UCI to cancel all personal results of Mr. Vinokourov since July 21, 2007 including victories on 13 and 15 stages of cycle race of Tour de France*
 - *to establish the beginning of the term of disqualification from the date of discharge from competitions - since July 24, 2007*
 - *to establish termination date of disqualification - July 23, 2008".*
8. After the communication of the Anti-Doping Commission's decision, in a press conference held on 7 December 2007, Mr. Vinokourov declared publicly that he would end his career.
9. 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 Anti-Doping Regulations with a two year period of ineligibility. By email of 6 December 2007 UCI had asked KCF for a copy of the decision. UCI had received the decision together with the related documentation on 18 December 2007.
10. 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.
11. 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* and decided that they would resume at the request of either party or upon a decision of the CAS.
12. 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.
13. In September 2008 Mr. Vinokourov decided that he wanted to continue to compete and informed the KCF, accordingly.
14. 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, he should apologize and declare that he severely damaged his sport, declare that he will make himself available for whatever anti-doping programme etc.

15. Attached to Mr. McQuaid's email was a letter dated 6 October 2008 addressed to the President of KCF listing 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 as a contribution to the fight against doping. Such amount shall be paid to the Cycling Antidoping Foundation into its account*
 3. *Mr. Vinokourov shall also pay an amount of CHF 1000 for results management costs under article 245 of UCI's anti-doping rules.*
 4. *According to article 277 of the UCI's Anti-Doping rules and with a view to being eligible for reinstatement, Mr. Vinokourov shall notify the UCI and his national federation and be available for Out-Of-Competition Testing for a period of time equal to the longer of the period set forth in article 77 (i.e. 6 months) or the period of ineligibility remaining as of the date the rider had retired. It would be fair to retain as a date of retirement the date on which Mr. Vinokourov agreed to suspend the proceedings before CAS, i. e. on 24 January 2008.*
 5. *As a result, as from the moment that Mr. Vinokourov notifies the UCI and his national federation of his returning to the competition, he has to be available for out-of-competition testing for 18 months (period of ineligibility remaining as of 24 January 2008) before regaining eligibility to compete internationally.*
-”

16. On 7 October 2008 Mr. Vinokourov notified the UCI of his decision to resume international competition in 2009. Already on 6 October 2008 he had sent his whereabouts to UCI.

17. 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 Mr. Vinokourov "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."*

III. The Appeal

18. 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". According to that Statement:

"the present appeal aims at:

- *having the challenged decision reformed*
- *having declared that Mr. Vinokourov committed an anti-doping violation (use of a prohibited method - presence of a mixed red blood cell population indicating homologous blood transfusion) and imposed upon Mr. Vinokourov a two years ineligibility in accordance with UCI's Anti-doping rules*
- *having Mr. Vinokourov disqualified from the race Tour de France 2007" and to disqualify any subsequent results according to article 274 ADR."*

19. In its "Statement of case", dated 18 December 2008, 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 "ATour 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."*

20. In substance, UCI challenged the decision of KCF's Anti-Doping Commission taken 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 proved 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. According to that, Mr. Vinokourov would not be eligible to compete before 7 April 2010.

IV. Proceedings before the CAS

21. 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.

22. 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 CAS 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.

23. 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. He

"does not challenge the existence of an anti-doping rule violation and is prepared to accept the maximum sanction of two years ...". "Mr. Vinokourov is not in a position to challenge the results of the analysis. For the purpose of the present proceedings. Mr. Vinokourov is thus prepared to accept the two years suspension sought by the UCI."

24. 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."*

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

26. Hence, in his statement of defence Mr. Vinokourov mainly challenges the extension of the sanction sought by UCI on the basis of Article 277 ADR. He submitted that (1) UCI is estopped from invoking an additional suspension pursuant to Article 277 ADR, (2) instead Article 325 of the new ADR in force as of 1st January 2009 should apply, (3) Mr. Vinokourov did not retire in the sense of the "retirement rule" and (4) an additional suspension would illicitly infringe Mr. Vinokourov's personality rights under Article 28 of the Swiss Civil Code.

27. Mr. Vinokourov's first submission was that, both in its Statement of Appeal and Statement of Case, UCI did not mention the alleged retirement and that in the request to stay the proceedings UCI only referred to the fact that Mr. Vinokourov declared publicly that he would stop his career. Therefore, UCI would be estopped from relying on Article 277 ADR.

28. Mr. Vinokourov further submitted that, instead of Article 277 ADR 2004, according to the transitional rule of Article 373 (a) ADR 2009, Article 325 ADR 2009 should apply as *lex mitior*. Article 325 ADR 2009 is more favourable to Mr. Vinokourov because this rule, in its par. 2, defines the retirement as the formal act of returning the licence to the relevant national federation which the UCI shall be informed of. This never happened.

29. In case the Panel should apply Article 277 ADR 2004 it was submitted that, by reference to previous CAS decisions with regard to UCI's ADR, the new regulations can be used to fill the gaps that existed in previous rules. Article 325 par. 2 ADR 2009 was introduced to clarify the bearing of Article 277 ADR 2004. Furthermore, Mr. Vinokourov did not receive the departure prize nor did he draw out the money from his solidarity fund. Hence, also in the sense of Article 277 ADR 2004 no retirement took place.

30. Finally, it was submitted that the additional period of suspension under Articles 277 ADR 2004 or 325 ADR 2009 respectively would infringe Mr. Vinokourov's personality rights under Article 28 Swiss Civil Code because the extension would not be justified by an overriding public or private interest.

31. Mr. Vinokourov, in his statement of defence of 27 January 2009, sought the following prayers for relief:

- "- *Rejecting UCI's prayers for relief*
- *Declaring that Mr. Vinokourov will regain eligibility as from 24 July 2009*
- *Condemning UCI to pay Mr. Vinokourov's legal fees and other expenses incurred in connection with the proceedings."*

32. After having been granted an extension of time for filing a response the Second Respondent, KCF, by letter of 10 March 2009 stated:

*"Taken into account the fact that Mr. Vinokourov is willing to accept the maximum suspension of two years, our client does not oppose the appeal of the UCI against the decision of our client dd. 5 December 2007.
As to the issue of reinstatement of Mr. Vinokourov, our client refers to the arguments developed by Mr. Antonio Rigozzi on behalf of Mr. Vinokourov."*

No further submission was made on behalf of the KCF.

33. As a reaction to Mr. Vinokourov's "Answer" of 27 January 2009, by letter of 10 February 2009 UCI, according to R56 CAS Code, requested an opportunity to file additional written submissions in order to respond to the situation after Mr. Vinokourov had accepted a

sanction of two years. In particular, the applicability and the construction of Article 277 ADR had not been dealt with in UCI's previous submissions.

34. Although Mr. Vinokourov, by letter of 11 February 2009, opposed to this request the Panel, by order of 12 March 2009, granted the UCI the opportunity to file a further statement within two weeks, however "*strictly limited to the new arguments and facts raised*" in Mr. Vinokourov's answer of 27 January 2009. The Respondents were granted to file a response within two weeks, equally.
35. After some futile attempts to find a convenient date to hold a hearing the Panel, by the same order of 12 March 2009, fixed a date for a hearing on 30 April 2009. By letters of 20 February and 4 March 2009 Mr. Vinokourov had requested a hearing to be held. This request was supported by UCI.
36. 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.
37. The Panel so decided after having duly deliberated the arguments submitted by the UCI and Mr. Vinokourov, in particular in the additional round of submissions, in a conference call on 5 May 2009.
38. In its "Additional Submission" dated 26 March 2009 UCI intended to respond to the new arguments and facts raised by Mr. Vinokourov in his defence. Once Mr. Vinokourov had admitted that he committed an anti-doping rule violation and had accepted the two years sanction, according to UCI, the dispute is restricted to the matter of the date of Mr. Vinokourov's re-eligibility.
39. In relation to the extension of the sanction pursuant to Article 277 ADR 2004 UCI now stated that Mr. Vinokourov, who was listed in the UCI's registered testing pool per 1 January 2007, was in fact not removed from the testing pool in 2008. According to UCI's position the removal from the testing pool is one of the conditions under Article 277 ADR and, therefore, Article 277 ADR 2004 does not apply to Mr. Vinokourov. UCI does no longer rely on Article 277 ADR for an extension of Mr. Vinokourov's ineligibility beyond 23 July 2009 - although it contests the submissions made by Mr. Vinokourov in this respect.
40. Instead, UCI makes 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.

41. 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 an a contribution to the fight against doping.

At the same time, I declare to the Spanish Law [Courts?], 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?] 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. "

42. 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 asks Mr. Vinokourov to indicate his net annual income corresponding to this salary.

43. UCI submits 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. "*

44. Attached to UCI's "Additional Submission" are the "Contrat de Travail" between Mr. Vinokourov and his Team Astana as well as a press information about the "Rider's commitment" released by UCI on 3 July 2007.

45. In his "Response to the Appellant's "Additional Submission", dated 9 April 2009, Mr. Vinokourov made the following submissions:
46. First, Mr. Vinokourov acknowledged UCI's change of case concerning Article 277 ADR 2004. However, it is submitted that this fact should be taken into account when the decision on the costs will be made.
47. Second, Mr. Vinokourov submits that UCI, in making the reinstatement conditional upon the payment of the contribution under the "Commitment", brings a new argument which is neither admissible nor founded.
48. The obligation to pay a contribution under the Commitment had been mentioned as a condition for the reinstatement only in Mr. McQuaid's letter of 6 October 2008 to the KCF, but not mentioned in the original appeal brief "Statement of Case" of 18 December 2008. Therefore, Mr. Vinokourov in his Answer of 27 January 2009 stated that UCI apparently had renounced the payment of the contribution as a condition for reinstatement. However, he reserved the right to present arguments in this respect. Contrary to that, in its Additional Submission, UCI stated that it had not renounced the payment of the contribution and submitted a prayer for relief, accordingly.
49. Mr. Vinokourov claims that UCI is estopped from relying on the Commitment. The Commitment and the alleged obligation arising from it was not mentioned in UCI's original Statement of Appeal dated 17 January 2008 and the first Statement of case dated 18 December 2008. According to R56 CAS Code, after the submission of the Appeal Brief and the Answer of Respondent, the parties are not allowed to supplement their arguments unless they agree or the President of the Panel orders otherwise. By order of the Panel of 12 March 2009 the second round of submissions was "*strictly limited to the new arguments and facts raised in (Mr. Vinokourov's) Answer*", i.e. related to Art. 277 ADR. This order did not allow new arguments in the sense of R56 CAS Code.
50. Third, even if UCI would not be estopped from relying on the Commitment Mr. Vinokourov submitted that the payment of the contribution would not constitute a condition for his reinstatement. The Commitment itself does not speak about such a condition and does not establish a contractual obligation linking the payment to the eligibility.
51. Furthermore, no regulatory provision exists in the ADR or elsewhere or has even been alleged to exist by UCI that would make the reinstatement conditional upon the payment of the contribution.
52. As, undisputedly, Mr. Vinokourov's ineligibility started on 24 July 2007 and he did not participate in any race since then and because Article 277 ADR 2004 does not apply and the

Commitment is no condition for the reinstatement Mr. Vinokourov concludes that he shall be eligible to compete internationally as of 24 July 2009.

53. Finally, in his Response, Mr. Vinokourov dealt with the Commitment as a matter separate from and independent of his reinstatement. Mr. Vinokourov

"hereby explicitly agrees 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."

"As a final matter, given the UCI's past track record in changing its position, Mr. Vinokourov wishes that the question of the payment requested by the UCI shall be dealt with once and for all in this arbitration."

54. As already stated in his Answer of 27 January 2009, Mr. Vinokourov submitted that the Commitment is null and void. The Commitment is unenforceable because Mr. Vinokourov was not free to sign or not to sign the Commitment. By reference to the *Canas* 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.

55. 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 June 2007.

56. Mr. Vinokourov further submits that the Commitment constitutes an excessive obligation within the meaning of Art. 27 Swiss Civil Code and is not justified by a paramount public interest of the fight against doping under Art. 28 Swiss Civil Code. A two years suspension plus the payment of an annual salary would be disproportionate.

57. The above mentioned press article, quoted by Mr. Vinokourov, reveals that Mr. McQuaid and Mrs. Anne Gripper, responsible for the anti-doping program of UCI, were aware of the fact that the Commitment may have no legal value.

58. As it is of paramount importance for Mr. Vinokourov to know with certainty the date of his eligibility to compete as soon as possible, he proposes a Partial Award on all the parties' prayers for relief except UCI's prayers relating to the payment of the contribution as a condition for the reinstatement and waived his right for a hearing accordingly.

59. Mr. Vinokourov made further submissions regarding the costs.

60. Mr. Vinokourov's prayers for relief are:

- "- *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 "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."*

V. The Remaining Dispute

61. 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.

62. As Mr. Vinokourov, in his Answer of 27 January 2009, admitted to have committed an anti-doping rule violation and accepted a two years sanction the original issues of the dispute were settled and 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.

63. In its Additional Submission of 26 March 2009, UCI abandoned the application of Article 277 ADR 2004 because Mr. Vinokourov 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.

64. At this stage, all matters raised by UCI in its appeal and dealt with in the parties' submissions are resolved.

65. However, UCI, in its Additional Submission, introduced 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 the submission is inadmissible because, according to R51 and R56 CAS 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.

66. Whereas UCI introduced the "Commitment" mainly as a condition for Mr. Vinokourov's reinstatement, Mr. Vinokourov goes beyond and requests 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.

67. Both the UCI and Mr. Vinokourov claim the reimbursement of their legal fees and other costs incurred.

VI. The Legal Analysis

1. Jurisdiction of the CAS

68. The Panel has the jurisdiction to hear the case according to R47 par. 1 CAS 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 ADR 2004 the said 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.

69. On 17 January 2008 the appeal was filed in time. According to the provision in R49 CAS Code, Article 285 ADR 2004 applies which, for an appeal by UCI, sets a time limit of 1 month *of the receipt of the full case file from the hearing body of the National Federation, i.e.* the Anti-Doping Commission of KCF. UCI received the contested decision plus the complete file on 18 December 2007.

70. Furthermore, no objection was raised by the parties with regard to the jurisdiction of CAS or the composition of the Panel.

2. Applicable Law

71. In accordance with R58 CAS Code the parties agree that the dispute shall 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.

3. The Merits of the Dispute

72. According to R57 par. 1 CAS Code the Panel has *full power to review the facts and the law.*

It may issue a new decision which replaces the decision challenged. The proceedings are de novo.

a. Anti-Doping Rule Violation

73. Mr. Vinokourov committed an anti-doping rule violation according to Article 15 par. 2 ADR 2004. The analysis of both the A and the B samples conducted by the WADA accredited laboratory in Chatenay-Malabry, France, revealed the presence of a mixed red blood cell population indicating homologous blood transfusion which constitutes the use of a prohibited method in the sense of Article 15 par. 2 ADR 2004 in connection with M 1 of the WADA 2007 Prohibited List (blood doping).

74. Mr. Vinokourov was not able to challenge the validity of the laboratory findings and explicitly admitted to have committed an anti-doping rule violation.

b. Two year sanction

75. UCI's ADR, in its Article 261, for an anti-doping rule violation according to Article 15 par. 2 ADR provides for a sanction of two years. By explicitly accepting the two years period of ineligibility Mr. Vinokourov waived the opportunity to claim the existence of exceptional circumstances which, according to Articles 264 *et seq.* ADR 2004, could reduce the period of ineligibility.

c. Commencement of the period of ineligibility

76. According to Article 275 as read together with Articles 217 *et seq.* and Article 268 ADR 2004 the period of Mr. Vinokourov's ineligibility commenced on 24 July 2007, the day on which he was suspended by his team and left the Tour de France. This date is not disputed by either party nor is disputed the fact that Mr. Vinokourov did not participate in any race since then.

e. Disqualification of results

77. The results obtained by Mr. Vinokourov during the Tour de France 2007 are automatically annulled according to Articles 256 and 257 ADR 2004. Results obtained later, if any, are disqualified, according to Article 274 ADR 2004.

f. The Date of the Reinstatement According to UCI's ADR 2004

78. Based on the foregoing considerations and, in particular, according to Articles 261 par. 1 and 275 ADR 2004 the sanction of two years' ineligibility extends to 23 July 2009.

79. As UCI is no longer of the opinion that Art. 277 ADR applies to Mr. Vinokourov's case and the Panel does not see the elements of that provision met in this particular case, an extension of the period of ineligibility, as initially submitted by UCI, cannot be justified on the basis of Article 277 ADR 2004.

g. The Payment of the Contribution according to the Rider's commitment as a condition for reinstatement

80. According to R51 and R56 CAS Code, the Panel would have to reject UCI's submission in relation to the Commitment as delayed. Neither did the UCI and Mr. Vinokourov agree in advance nor did the Panel order that further submissions may be made concerning the Commitment. No exceptional circumstances could have justified such kind of a late submission. The Panel allowed further submissions exclusively in relation to Article 277 ADR 2004. However, as Mr. Vinokourov in his response expressly agrees to the extension of the claim made by UCI, the Panel will deal with the issue of the Rider's commitment as a potential condition for reinstatement.

81. The "Rider's commitment", signed by Mr. Vinokourov on 29 June 2007, *i.e.* 8 days before the Tour de France 2007 started, does not establish the payment of the contribution as a condition for the reinstatement. Pursuant to the Commitment the payment of the contribution is an obligation "*in addition to the standard sanctions*". The standard sanction according to the anti-doping regulations, *i. e.* ineligibility for two years, remains unaffected. The Commitment, in its original French version, speaks of "*sanction réglementaire*" which clearly shows that the Commitment is an additional and distinct measure. The payment of the contribution is "*in addition*" to the sanction and, hence, separate and independent of the regular sanction. Furthermore, the Commitment aims at the payment of a "*contribution to the fight against doping*" which is supposed to be payable to the Council for the Fight Against Doping. This wording differs considerably from terms such as "fine", as used in the later Article 326 ADR 2009 (see below par. 86) which would have clearly indicated the meaning of a sanction or even a contractual penalty. Mr. Vinokourov, when he accepted and signed the Commitment, reasonably could have been of the understanding that the Commitment had nothing to do with a possible doping sanction, in particular the duration of a suspension.

82. The Panel notes that UCI, in its letter to the President of the KCF, dated 6 October 2008, did not link the payment of the contribution to the date of Mr. Vinokourov's reinstatement. In the letter to Mr. Vinokourov of 9 October 2008 UCI only mentioned the alleged extension according to Article 277 ADR 2004 and, hence, fixed the date of re-eligibility for 7 April 2010. The payment of the contribution was only indirectly mentioned by reference to the letter to the KCF.

83. This understanding of the wording of the Commitment is supported by the context of the Commitment. It is an ad hoc-measure taken by the UCI in order to counteract the rumours nourished by the so-called Puerto affair shortly before the Tour de France. The Commitment itself, as the beginning of its first paragraph shows, was a mere symbolic action which mainly addresses to the public, the legal validity of which was doubted even by the UCI President and high officials. For that purpose UCI created the payment of an annual salary as a severe additional sanction. In this situation, if UCI had wished to make the fulfilment of the Commitment a condition for the reinstatement, this would have had to be phrased unequivocally in the Commitment itself. A clear wording of the Commitment would have been necessary also because the relevant anti-doping regulations, at that time, did not contain such a condition for reinstatement.
84. In the absence of a contractual condition for Mr. Vinokourov's reinstatement an extension of the sanction could be based exclusively on the set of rules which specifically govern anti-doping rule violations and their consequences. However, UCI's ADR 2004, which apply to the case (see above par. 71) do not mention a payment whatsoever as a sanction or a precondition for the reinstatement of an athlete who had served a period of ineligibility. As the Panel already stated, Mr. Vinokourov will be eligible to compete as from 24 July 2009 according to the applicable ADR 2004 (see above par. 78).
85. In compliance with Article 10.12 of the WADA Code 2009 UCI introduced into its ADR 2009 a new Article 326 which provides for the imposition of fines "*in addition to the sanctions*" provided for generally. According to Article 326 par. 1 lit. a ADR 2009 in a situation where a sanction of two years or more is imposed, a "*fine*" equal to the net annual income shall be inflicted. However, neither Article 326 nor any other rule of the ADR 2009 nor the WADA Code 2009 make the reinstatement dependent on the prior payment of the fine.
86. Only by virtue of a footnote attached to Articles 324 and 325 ADR 2009 which deal with the conditions for the reinstatement such as testing and the consequences of retirement - the previous Art. 277 ADR 2004 - the payment of the fine is made conditional for the reinstatement, indirectly. The footnote refers to an Article 12.1.034 which is found under "Amendments to other regulations" which reads:
- "The person suspended shall not, upon expiry of the period of suspension, be returned his licence or given a new licence and shall not be eligible to participate in cycling events in whatever capacity if he has not fulfilled all his obligations under the present regulations or under any decision taken in accordance therewith."*
87. However, according to the transitional rule of Article 373 ADR 2009 the provisions of the

new ADR do not apply to an anti-doping rule violation which occurred prior to 1 January 2009, unless one of the new rules is a *lex mitior*. Article 326 ADR 2009, as read with Article 12.1.034, does not constitute a rule more favourable to Mr. Vinokourov than the rules of the ADR 2004. Therefore, Article 326 ADR 2009 does not apply to Mr. Vinokourov's reinstatement.

88. In accordance with and on the basis of Article 10.12 WADA Code 2009 UCI, in its ADR 2009, has introduced the imposition of a fine as an additional sanction which is new in the anti-doping law. Article 326 ADR 2009 provides a new category of an anti-doping sanction and is not a mere clarification or codification of the legal situation that already existed under the previous rules. Therefore, Article 326 ADR 2009, as amended by Article 12.1.034, cannot be taken into consideration for the interpretation of the ADR 2004 in the sense that the payment of a fine is a condition for reinstatement already under the ADR 2004.
89. In the situation where the payment of the contribution is not conditional for Mr. Vinokourov's re-eligibility the Panel leaves open the issue whether or not the Commitment is legally valid and the alleged obligation arising from it is enforceable.

4. Merits of the Dispute in relation to the obligation to pay the contribution under the "Rider's commitment"

90. UCI and Mr. Vinokourov are in dispute about the validity and enforceability of the Commitment. Whereas UCI is of the opinion that the commitment is legally valid and, in particular, that Mr. Vinokourov was free to sign, the latter challenges the commitment mainly because he was not free to sign or reject the commitment which was a precondition for his participation in the Tour de France.
91. The Panel was requested by UCI, in its 5th prayer for relief in the "Additional Submission" of 26 March 2009, to decide, first, on the payment of the contribution as an independent matter and, second, on the payment to be conditional for the reinstatement. Mr. Vinokourov, in his "Response" of 9 April 2009 agreed to this new subject-matter of the dispute and requested the Panel to decide. However, the Panel is of the opinion that this issue, given the amount of money at stake and the general importance of such an extra-regulatory contractual sanction, needs more consideration with respect to the facts and the law.
92. Therefore, because the issue of the date of Mr. Vinokourov's eligibility to compete does not tolerate further delay, the Panel decided, according to Article 188 Swiss Statute on Private International Law, to issue a Partial Award regarding the date of Mr. Vinokourov's reinstatement only.

5. Conclusions

93. 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.
94. 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.
95. (...)

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.

Operative part done in Lausanne, 16 June 2009

Complete partial award done in Lausanne, 23 July 2009

THE COURT OF ARBITRATION FOR SPORT

Christoph Vedder
President of the Panel

Beat Hodler
Arbitrator

Michele Bernasconi
Arbitrator