Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2010/A/2083 UCI v/ Jan Ullrich & Swiss Olympic

PARTIAL AWARD ON JURISDICTION

rendered by

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr. Romano **Subiotto** QC, Solicitor-Advocate, London, England and Brussels, Belgium

Arbitrators: Mr. Ulrich **Haas**, Professor, Zurich, Switzerland

Mr. Hans **Nater**, Attorney-at-law, Zurich, Switzerland

in the arbitration between

INTERNATIONAL CYCLING UNION, Aigle, Switzerland

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

-Appellant-

– and –

Mr. JAN ULLRICH, Scherzingen, Switzerland

Represented by Mr. Eugene Ibig and Ms. Marjolaine Viret, Attorneys-at-law, Geneva, Switzerland

-First Respondent-

– and –

SWISS OLYMPIC, Bern, Switzerland

Represented by Mr. Hans Babst, Bern, Switzerland

-Second Respondent-

PARTIAL AWARD ON JURISDICTION

I. PARTIES

1. The Appellant, the International Cycling Union ("UCI"), is an international sporting federation and the world governing body for cycling, headquartered in Aigle, Switzerland. The UCI oversees competitive cycling events internationally and maintains a calendar of races in which its license-holders compete. Part 14 of the UCI Cycling Regulations that entered into force on August 13, 2004 were the Anti-Doping Rules of the UCI (the "UCI Rules") in force throughout 2006.[1] The UCI Rules adopt and implement the World Anti-Doping Code (the "WADC"), as it stood at the time.

2. The First Respondent, Jan Ullrich ("Ullrich"), is a German former professional road cyclist resident in Switzerland. Among other achievements, Ullrich was the winner of the 1997 Tour de France and the gold medalist in the men's individual road race at the Sydney 2000 Summer Olympic Games. Prior to the events in question in 2006, Ullrich was a member of the T-Mobile professional cycling team, a member of Swiss Cycling, and a UCI license-holder.

3. The Second Respondent, Swiss Olympic, is the National Olympic Committee of Switzerland. An independent body within Swiss Olympic, the Disciplinary Chamber, issued the first instance award against which the UCI appeals (the "Decision"). In a letter from its Deputy Director, Hans Babst, dated December 15, 2010, Swiss Olympic advised that it "*does not wish to be actively involved in the present procedure*" and "*confirms that it will abide by any decision the Panel will reach in the present procedure.*"

II. BACKGROUND

4. Ullrich has been resident in Switzerland since 2003. From that time until the events in question, he was a member of Swiss Cycling, and through the auspices of Swiss Cycling was a UCI license-holder. By a form signed and dated November 24, 2005, Ullrich applied for and obtained a UCI license for the 2006 calendar year.[2]

5. In 2004 the Spanish Guardia Civil and the Investigating magistrate no. 31 of Madrid opened an investigation that has come to be known as "*Operation Puerto*". Pursuant to this investigation, on May 23, 2006 searches were carried out of two Madrid

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1 The UCI enacted new anti-doping rules that came into force January 1, 2009. According to Article 373 of those rules, they do not apply retrospectively, subject to the principle of *lex mitior*, which is not applicable in this case.

2 See Decision, para. 7.1 and the attachments to the letter from Beelen Advocaten, November 25, 2010.

apartments belonging to Spanish physician Dr. Eufemiano Fuentes. Documents and other materials were seized from the apartments, including evidence of possible doping offences by athletes. The Guardia Civil drafted a report ("*Report no 116*") on June 27, 2006, which made reference to certain of the materials seized from the apartments.[3]

6. On June 30, 2006, Ullrich was suspended by T-Mobile and withdrawn from the 2006 Tour de France.[4] On July 21, 2006, T-Mobile dismissed Ullrich.[5]

7. A copy of Report no 116 was provided to the umbrella Spanish sport organization, the Consejo Superior de Deportes ("CSD"), which in turn forwarded Report No 116 to the Real Federacion Espanola de Cyclismo ("RFEC"), the UCI and the World Anti-Doping Agency ("WADA").[6]

8. Having examined report no 116, by letter dated August 11, 2006, the UCI requested that Swiss Cycling open disciplinary proceedings against Jan Ullrich pursuant to Articles "*182 à 185 et 224 et suivant*" UCI Rules.[7]

9. On October 19, 2006, Ullrich resigned his membership in Swiss Cycling.[8]

10. On February 26, 2007, Ullrich publicly announced his retirement from professional cycling.[9]

11. Sometime after August 11, 2006, Swiss Cycling forwarded the UCI's letter and its attachments to the Commission for the Fight against Doping ("FDB"). The FDB was the body charged, under the version of Swiss Olympic's doping statutes effective at the time, with the organization of the non-governmental fight against doping in sports. The FDB also represented Swiss Olympic in proceedings before the Disciplinary Chamber.[10]

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3 See Decision para. 7.2.

4 See Jeff Jones, "*Ullrich, Sevilla and Pevenage suspended*", Cycling News, June 30, 2006, available online: http://autobus.cyclingnews.com/news.php?id=news/2006/jun06/jun30news2.

5 See "*T-Mobile Fires Jan Ullrich and Oscar Sevilla*", T-Mobile press release, July 21, 2006, available online: http://www.canadiancyclist.com/dailynews.php?id=10912.

6 See Decision para 7.4.

7 See Decision para. 7.4 and letter from Lenz & Staehelin, October 7, 2010, page 9.

8 See Decision para. 7.5 and letter from Lenz & Staehelin, October 7, 2010, page 2.

9 See letter from Lenz & Staeholin, April 12, 2010, page 1. See also "*Jan Ullrich retires*", *Cycling News*, February 26, 2007, available online: http://www.cyclingnews.com/news/jan-ullrich-retires (last accessed January 1, 2011).

10 See Decision para. 7.6.

12. As of July 1, 2008, the FDB's anti-doping responsibilities, including the responsibility to appear on behalf of Swiss Olympic before the Disciplinary Chamber, were transferred to Antidoping Schweiz. The statutes and regulations of Swiss Olympic were adapted accordingly.[11]

13. *On May 20, 2009, based on the files received from the FDB, Antidoping Schweiz* initiated proceedings before the Disciplinary Chamber that led to the issuance of the Decision.[12] By Decision dated January 30, 2010, the Disciplinary Chamber held that Swiss Olympic's statute in force in 2006 did not permit Swiss Olympic (or its nominated anti-doping prosecutor) to initiate new proceedings against an athlete who had previously terminated his membership.[13] The Disciplinary Chamber made no ruling as to whether or not the UCI, which was not an active party to the proceedings, might itself have standing.[14]

14. On March 22, 2010, the UCI lodged a Statement of Appeal with the Court of Arbitration for Sport ("CAS"), requesting that the Decision be set aside and, among other requests, that Ullrich be declared to have committed an antidoping offence under the UCI Rules. Thereafter followed a series of correspondence between the parties and counsel for the CAS. On November 24, 2010, procedural directions were issued in this case, which included the stipulations that: (1) English would be the language of this arbitration, and (2) a partial award on jurisdiction would be issued prior to a consideration of the substance.

III. APPLICABLE LAW

15. Concerning arbitrations in Switzerland, Swiss law distinguished – up until December 31, 2010 - between two different sources of law, *i.e.*, chapter 12 of the Private International Law Act (the "PIL") applicable to international arbitrations, and the Swiss Intercantonal Concordat on Arbitration (the "ICA") applicable to domestic arbitrations. Arbitration procedures are domestic in nature if the seat of the arbitration and all the parties at the time of the conclusion of the arbitration agreement were domiciled or habitually resident in Switzerland.[15] The seat of the present arbitration is in Switzerland.[16] Moreover, all three parties to these proceedings have and had their domicile in Switzerland. Accordingly, the domestic arbitration rules of the ICA are applicable.

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11 See Decision para. 7.7.

12 See Decision para. 1 and 7.8.

13 See Decision para. 10.5.

14 See Decision para. 10.7.

15 See Article 176(1), PIL.

16 See Rule 28 of the CAS Rules.

16. On January 1, 2011 the new Swiss Code of Civil Procedure ("CCP") came into force. The CCP includes provisions on domestic arbitration in Articles 353 *et seq* that replace the ICA and sets up a framework for Swiss domestic arbitration that is consistent with Switzerland's Federal Code on Private International Law ("PIL"). Like the PIL, Article 358 CCP provides that an arbitration clause is valid if it is concluded in writing or if its existence can be proven by means of any other text. The validity of arbitration agreements is thus more easily established under the CCP than under the ICA.

17. The transitional rules for the CCP provisions applicable to domestic arbitrations are contained in Article 407. Article 407(1) CCP states that "*La validité des conventions d'arbitrage conclues avant l'entrée en vigueur de la présente loi est determinée selon le droit le plus favorable*". It thus concerns the validity of arbitration agreements concluded prior to the coming into force of the CCP. It provides that in respect of the validity of such agreements, the "*more favorable rules*" apply. The purpose of this provision is to "*save*" arbitration agreements concluded under the ICA by applying the less restrictive requirements for the formation of arbitration agreements contained in the CCP.[17] Article 407(1) CCP contains no restrictions, and makes no reference to Article 407(2) CCP. Article 407(2) CCP states that "*Les procédures d'arbitrage pendantes à l'entrée en vigueur de la présente loi sont régies par l'ancien droit. Les parties peuvent toutefois convenir de l'application du nouveau droit*". It thus concerns the rules that apply to arbitrations initiated prior to, and which continue after, the coming into force of the CCP on January 1, 2011. It provides that in such instances, the arbitration is governed by the rules under the ICA, unless the parties agree otherwise (which they do not in this case).

IV. ARGUMENTS OF THE PARTIES AND PRELIMINARY MATTERS

18. Ullrich submits there is no arbitration agreement under Swiss law that binds the parties to these proceedings, and that as a result the CAS has no jurisdiction.

19. The UCI submits that the jurisdiction of the CAS is established under Articles 6(1) and 6(2) of the ICA.

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17 *Netzle*, in Sutter-Somm/Hasenbühler/Leuenberger (Ed.), *Kommentar zur Schweizerischen Zivilprozessordnung*, 2010, Article 407 no. 1; BSK-ZPO/*Girsberger*, 2010, Art. 407 no. 2 seq.; see Berger/Kellerhals, *International and Domestic Arbitration in Switzerland*, 2nd Edition, para 412, page 113.

20. First, UCI points to Ullrich's two-part application for a UCI licence, dated November 24, 2005, which it has submitted to the Panel.[18] The application form was issued and processed by Swiss Cycling.[19] The first part of the application, the "*Lizenzbegehren 2006 für Athleten*", makes no reference to any arbitral agreement. It is signed by Ullrich and countersigned by a club official whose signature is illegible and who has not been identified. Although the first part of the form calls for the club official's signature to bear the club's stamp, it does not appear that any formal stamp has been affixed. The first part of the form makes reference to the second part, the "*Formular für alle Lizenzbeantrager für das Jahr 2006*". The second part is in the format of an acknowledgment of obligations and appears intended to be executed unilaterally only. Indeed, it has been signed by Jan Ullrich but not counter-signed by a representative of Swiss Cycling or any other organization. The second part, which replicates Article 1.1.023 of Part I of the UCI Cycling Regulations, includes the following acknowledgements:

> *"I shall submit to disciplinary measures taken against me and shall take any appeals and litigation before the authorities provided for in the regulations. I accept the Court of Arbitration for Sport (CAS) as the sole competent body for appeals in such cases and under the conditions set out in the regulations. I accept that the CAS shall be the court of the last instance and that its decisions shall be definitive and without right of appeal...*
>
> *I agree to submit to and be bound by the UCI antidoping regulations, the clauses of the World Antidoping Code and its international Standards to which the UCI antidoping regulations refer and to the antidoping regulations of other competent bodies as per the regulations of the UCI and the World Antidoping Code provided that they comply with that Code.*"

21. The UCI notes that Ullrich has applied annually for a UCI licence since the outset of his professional cycling career. According to the UCI, these annual applications familiarized Ullrich with the obligations undertaken through the application for a UCI licence, and Ullrich by his application gave his approval to those obligations.[20]

22. Second, the UCI submits that as a consequence of Ullrich's application, he obtained a licence in the form of a card, issued by Swiss Cycling and signed by the President of Swiss Cycling,[21] displaying the following text: "*The holder agrees to abide by the regulations of the UCI and of the national federations. He accepts antidoping and blood tests provided by the rules and the sole competence of the CAS.*"[22] The license

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18 See Beelen Advocaten letter of November 25, 2010.

19 The Panel notes that the form requests that it be returned to Swiss Cycling.

20 See Beelen Advocaten letter of December 16, 2010.

21 See Beelen Advocaten letter of December 16, 2010, page 3.

22 See Article 1.1.024 of Part I of the UCI Cycling Regulations.

is counter-signed by the athlete. The UCI asserts that, "*to the extent that a signature on behalf of the UCI would be necessary, quod non, the signature of the national federation president on the licence document shall count as such as the licence document represents the acceptance of the rider's application.*"[23]

23. The UCI has not produced a copy of the card issued to Ullrich in evidence, although it has furnished a copy of a card issued to another Swiss athlete for the 2006 cycling season, and which it asserts is identical (save for personal information) to the card issued to Ullrich.[24] The UCI also submitted a statement from Swiss Cycling confirming that Swiss Cycling issued a licence to Ullrich for 2006.[25] Ullrich submits that "*there is no evidence whatsoever that the same type of licence card with the same contents was ever issued to Mr. Jan Ullrich and then signed by him (the allegations that might have been made to by the Union Cycliste Internationale to that effect are hereby contested).*"[26] The Panel rejects Ullrich's submission. Ullrich has acknowledged applying for a licence through the November 24, 2005 application form, and subsequently acquiring a licence that he terminated in October 2006. All licensed athletes in Switzerland are issued the same card. Absent such a card he would not have been entitled to participate in UCI races in 2006,[27] Ullrich did indeed race in 2006 prior to the events in question, including at the Giro d'Italia, where, among other results, he won Stage 11, a 50 kilometer time trial in and around Pontedera, Italy, in 58 minutes and 48 seconds.

24. Separate and apart from the question of the arbitration agreement's validity under the ICA, as noted in paragraph 18, the CCP, which replaces the ICA, is now in force. The UCI relies upon Article 407(1) CCP for its submission that Article 358 CCP should apply, pointing to a statement of the Swiss federal Council of June 28, 2006, at page 7013, that "*la validité d'une clause d'arbitrage se determine selon le droit qui lui est le plus favorable*" (emphasis added), meaning, according to the UCI, that the rules that must be applied are those that are most favourable to the validity of the arbitration clause. It contends that Article 407(2) CCP "*refers to the arbitration proceedings itself but does not concern the validity of the arbitration agreement. If it had wished to limit the validity of the arbitration agreement according to article 358 CCP to the cases in which no arbitration proceedings had been initiated before 1st January 2011... the legislator would have stated this expressly in the text. Instead the validity of the arbitration agreement has been disconnected from the date at which*

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23 *Ibid.*

24 See Beelen Advocaten letter of December 16, 2010, page 2.

25 See Beelen Advocaten letter of February 9, 2011, page 1.

26 See Lenz & Staeholin letter of December 22, 2010, page 1.

27 See Article 1.1.002 of the UCI Cycling Regulations ("*No one who does not hold the requisite licence may participate in a cycling event organized or supervised by the UCI, the UCI continental confederations, the UCI member federations or their affiliates*").

arbitration proceedings have started, which makes sense."[28] Ullrich disagrees, and submits that *"proceedings already pending at the time the new law enters into force continue to be governed by the earlier law,"* and in particular, that *"all aspects of arbitrations already pending, including the requirements to be met that enable a claimant to bring arbitration... must therefore have been fulfilled at the time the arbitration was initiated... Any other interpretation... would lead to a rather peculiar result: arbitration agreements would become "moving targets" that could transmogrify from invalid into valid agreements in the course of the proceedings."*[29]

V. DISCUSSION

25. Under the ICA, the enforceability of an arbitration agreement is conditioned on meeting one of the two sets of formal requirements in Article 6 , namely:

> *(1) An arbitration agreement shall be in writing.*
>
> *(2) It may take the form of a written declaration whereby a party joins a moral person [or submits to the statutes of a moral person] provided that this declaration expressly refers to the arbitration clause contained in the statutes or rules of that moral person.*

26. In addition, the Swiss Code of Obligations ("CO") contains, *inter alia*, rules relating to the formation of contracts that inform the application of Article 6 of the ICA.

27. The requirements of a valid arbitration agreement under the CCP are less formal than under the ICA. For instance, Article 358 of the CCP provides:

> *The arbitration agreement must be concluded in writing or by any other formal means which permits it to be evidenced by text.*

28. Under Article 6 of the ICA, agreements had to be in writing, a requirement that is construed according to Article 13 *et seq* of the CO. Article 13 of the CO provides that only arbitration agreements signed by the parties are enforceable.[30] By contrast, Article 358 of the CCP is modeled on Article 178(1) of the PIL. Like the PIL, Article 358 of the CCP does not require a written form in the sense and meaning of Articles 13 *et seq.* of the CO; it need only be done in such a manner as to be enforceable by text.[31] Thus, the signature of the parties to the arbitration agreement is no longer a condition of validity. As a result, a number of agreements that would not be

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28 See Beelen Advocaten letter of February 9, 2011, page 2.

29 See Lenz & Staehelin letter of February 9, 2011, pages 2-3.

30 Lalive/Poudret/Reymond, Le Droit de L'Arbitrage, 1989, Art. 6 CIA no. 1.

31 Dasser, in Oberhammer (Ed.), Schweizerische Zivilprozessordnung, 2010, Art. 358 no. 1.

enforceable under Article 6 of the ICA would be enforceable under Article 358 of the CCP.

29. For the purposes of convenience, the Panel considers, first, the UCI's contention that an agreement to arbitrate exists under Article 6(2) of the ICA.

A. ARTICLE 6(2) OF THE ICA

1. Preliminary Considerations

30. An arbitration agreement can be established under Article 6(2) of the ICA upon the written declaration of one party. The requirements in relation to this declaration are, however, somewhat ambiguous.

31. An initial ambiguity concerns the nature of the declaration to be made, and arises from differences between the French and German versions of the ICA. The French version of Article 6(2) of the ICA requires that the "declaration" be executed for the purposes of accepting the statutes of the association (or corporate body) ("*déclaration écrite d'adhésion aux statuts d'une personne morale*"). However, the German version of Article 6(2) of the ICA appears to be narrower, suggesting that the "declaration" must be directed to becoming a member of a legal person, either an association or corporate body ("*Beitritt zu einer juristischen Person*"). It is generally the case that obtaining membership in an association usually includes an obligation to be bound by the rules of that association, but it is not necessarily always the case that the submission to the rules of an association results in membership in the association. The French version of Article 6(2) of the ICA is therefore broader than the German language version.

32. A second source of ambiguity arises from the declaration's formal requirements. Article 6(2) of the ICA requires that the "declaration" be in writing and that the "declaration" make express reference to the arbitration clause included in the statutes and regulations. While a "declaration" is a unilateral act, a binding submission to the rules and regulations of an association ("*Regelanerkennungsvertrag*") or the accession to an association ("*Aufnahmevertrag*") can only be accomplished by an agreement between the respective parties.[32] The question arises, therefore, whether the formalities contained in Article 6(2) of the ICA (*i.e.*, "*in writing*" and "*express reference*") apply only to the unilateral declaration of the party acceding to the association or submitting to its rules, or whether they apply to the contract or agreement as a whole.

33. The Panel considers that the better arguments speak in favor of the first alternative, and that the formalities necessary to create a valid arbitration agreement need only be observed by the unilateral declaration of the party acceding to the association or

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32 That is, offer by the association and acceptance by the counterparty.

submitting to its rules. In this connection, the Panel notes that the nature of the relationship between an association and a member is not that of an agreement pursuant to the CO, since most of the rights and obligations of a member flow from the association's rules, which can be established without the consent of the member(s). In this context, the purpose of Article 6(2) of the ICA is to ensure that members have a full opportunity to understand, at the time of their agreement to be bound by the rules of an association, that future disputes will be decided by arbitration. The association, however, requires no such formal warning or protection. The association is the body that sets the terms of the agreement in the first instance, and can safely be assumed to be aware of the terms and obligations imposed by its own statutes, which it itself ratified and is required to observe. As the "*in writing*" and "*express reference*" requirements set forth in Article 6(2) of the ICA benefit only the party making the unilateral declaration, the formalities imposed by those obligations need only attach to the unilateral declaration. Therefore, it follows from a correct interpretation of Art. 6(2) of the ICA that this provision - as regards the formal requirements of an arbitration clause - is an exception to Articles 13 of the CO, in that it permits a party to unilaterally agree in writing to arbitration with an association without the signature of the counter-party association.

2. Application to the Facts

34. Ullrich signed the licence application dated November 24, 2005. The second part of that application contained the acknowledgment quoted above in paragraph 21.

35. The UCI submits that Ullrich "*submitted expressly to the UCI's Constitution and Regulations by signing the aforementioned form. The UCI is a legal body. And the same document with which he submitted to those regulations contained a textual explanation about jurisdiction of CAS. Consequently, the conditions of Art. 6 C-Arb, if applicable, have been fulfilled.*"[33]

36. Ullrich disputes that he agreed to any arbitration provision through the completion of the application form submitted to Swiss Cycling. In essence, his argument focuses on the nature of his relationship to the UCI. Ullrich points out that his application was for membership in Swiss Cycling, not the UCI, and that Ullrich has never been a member of UCI. Ullrich contends that absent membership (or even an application for membership in an organization), he could not have agreed to the rules of an association to which he did not belong.[34]

37. Article 6(2) of the ICA imposes certain conditions for arbitration agreements to be enforceable under its terms (see paragraph 25, above). By his unilateral act, *i.e.*, by the written and signed application for a licence in 2006, Ullrich agreed to be bound by

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33 See Beelen Advocaten letter of December 16, 2010, at page 2.

34 See Lenz & Staehelin letter of October 7, 2010 at page 2; letter of November 26, 2010 at page 3; letter of December 21, 2010 at page 3.

the UCI Rules. In his application for a licence, Ullrich also agreed to accept the jurisdiction of the CAS as the sole competent body for appeals in cases brought under the UCI Rules, and as the court of the last instance. It is true that the application form does not mention explicitly the Article of the UCI Rules in which the arbitration clause is contained. However, the Panel is of the view that the purpose of Article 6(2) of the ICA is fulfilled, if express reference is made to the *essentialia negotii* of the arbitration clause in the declaration. This Panel therefore finds that Ullrich's application for a licence fulfils the formal requirements contained in Article 6(2) of the ICA, *i.e.*, a declaration in writing making express reference to the arbitration clause in the statutes of UCI.

38. Whether membership in an organization is a condition for the applicability of Article 6(2) of the ICA, as Ullrich and the German, but not the French, version of Article 6(2) of the ICA suggest, is, according to the Panel, an irrelevant consideration in this case. The UCI's issuance of a licence following Ullrich's application made Ullrich a *de facto* member, or, in other words, an indirect member of the UCI.

39. The conclusion that Ullrich held *de facto* or indirect membership in the UCI is supported, in the first instance, by the characteristics of the legal relationship Ullrich entered into with the UCI. In this connection, the Panel observes that Ullrich's legal rights (which flow from his UCI licence) do not differ from the rights of a member in a typical association. Like a member of a typical association, the licence entitled Ullrich to make use of all UCI facilities and benefits, including the ability to cycle in UCI calendar events. Moreover, the licence entitled Ullrich to the protections of the UCI Rules and to demand equal treatment with all of the association's other licensees. The UCI Rules gave Ullrich the right (through legal recourse) to challenge measures taken by the association against him, thereby protecting him from infringements by the UCI of its own rules. That right of recourse extends to non-discrimination and equal treatment, which ensures he benefits from the same treatment as every other license holder. This type of protection afforded to a UCI license holder is modeled on Article 75 of the Swiss Civil Code (thereinafter referred to as "CC"), and is similar to the legal recourse available to members of typical associations.

40. The Panel also observes that Ullrich's obligations as a *licence* holder are the same as the obligations of a member in a typical association. In particular, Ullrich's main obligation under his licence, and a condition of his licence, was to comply with the UCI Rules. Membership in an organization is subject to the same basic requirements. Furthermore, the rules and regulations of an association are construed and interpreted independently of whether someone has submitted to them by joining the association or by recognizing them contractually ("*Regelanerkennumgsvertrag*"). In either case, identical principles of interpretation apply, which, according the consistent CAS

decisional practice, differ considerably from those that apply to the interpretation of simple contracts.[35]

41. The legal literature and case law also support the Panel's view. The legal literature views the special relationship between an association and athlete, who has submitted to the association's rules (without being a member of it) as an "indirect membership".[36] The Federal Tribunal has acknowledged this special relationship between an athlete and an association that requires the athlete to be treated as a *de facto* member of the association in its judgment in the case "Gundel", where it stated as follows:[37]

> *"Le membre indirect peut lui aussi attaquer les décisions de l'association conformément à l'art. 75CC, ou faire examiner par le juge les sanctions (peines statutaires) qui lui ont été infligées...Dans le cas des sanctions, cette protection juridique doit être accordée même à la personne qui n'est pas membre de l'association, si elle s'est soumise à la réglementation établie par cette dernière, par exemple lorsque pareille démarche est une condition à remplir pour pouvoir participer à une manifestation organisée par l'association".*

42. In summary, the Panel is of the view that, despite the absence of formal membership in the UCI, Ullrich's rights and obligations under his licence clearly created a special relationship between himself and the UCI that is akin to membership. Such relationship has been already emphasized by the Swiss Federal Tribunal in a case involving the same kind of situation (FT 4C.44/1996). That special relationship can be contrasted from a recent judgment of the Swiss Federal Tribunal, in which it rejected an arbitration Panel's jurisdiction where the relationship between individual and association was restricted only to the request to arbitrate.[38] In that case the Federal Tribunal made clear, however, that membership in the association itself was not itself a condition of validity under Article 6(2) of the ICA, and explained that relationships that were not characterized as one of "membership" were still capable of giving rise to valid arbitration agreements under Article 6(2) if other important elements are present.

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35 CAS [20.12.1999 - 99/A/230] *B v/ International Judo Federation*, in Reeb (Hrsg) Digest of CAS Awards II 1998-2000, 2002, S. 369, 375; [12.2.1998 – 1998/002] *R v/ International Olympic Committee (IOC)*, in Reeb (Ed.) Digest of CAS Awards I 1986 – 1998, S. 419, 424 seq.; see also CAS [22.7.1996 – 1996/001] *US Swimming v/ FINA*, in Reeb (Ed.) Digest CAS Awards I 1986 – 1998, 1998, p. 377, 380 seq.

36 Cf. comparative analysis of *Rigozzi*, L'arbitrage international en matière de sport, 2005, no. 85 *et seq;* see also Berner KommentarZGB/Riemer, 1990, Systematischer Teil no. 510 and Art. 75 no. 46.

37 ATF 119 II 271 E. 3.b (276).

38 See FT 4A_533/2010.

43. There is only *one* aspect of Ullrich's relationship with the UCI through his licence that the Panel was capable of distinguishing from a typical member-association relationship in its deliberations: Ullrich's licence does not permit him to participate in the formation of the association's will, for instance through a vote for the association's management, or through a direct vote periodically ratifying the association's foundational documents, such as its statute. Despite this difference, the Panel does not consider the point so decisive or important as to undermine the characterization of Ullrich's relationship with the UCI as one of *de facto* membership. It is a fact that many associations have statutes that restrict (sometimes to a great extent) individual members' rights or opportunities to participate in the formation of the association's will. In view of these considerations, the Panel concludes that Ullrich's relationship with the UCI was of sufficient quality to characterize his licence as one of "*membership*". An agreement to arbitrate between the UCI and Ullrich is therefore established under either the French or German version of Article 6(2) of the ICA.

44. In the event the Panel were wrong, and if Ullrich's relationship with the UCI could not be qualified as one of membership, the Panel would still be prepared to find that the UCI and Ullrich are bound by a valid arbitration agreement. The French version of Article 6(2) of the ICA does not condition the validity of an arbitration agreement upon one party's membership in the association. There is no reason or evidence to suggest that the terms of Article 6(2) of the ICA were not intended to be enforceable in full (including the more liberal language in the French version), or to otherwise prefer the German version of the text. Moreover, a restrictive reading of Article 6(2) of the ICA would render portions of the French version unenforceable despite their clear wording. Even on the assumption, *quod non*, that Ullrich was not a *de facto* member of the UCI, this Panel considers that his unilateral written declaration to be bound by its rules is sufficient to create a valid and enforceable arbitration agreement.

45. Apart from the strictly legal conclusions about the enforceability of the agreement under Article 6(2) of the ICA, the Panel is of the view that upholding the arbitration agreement between the UCI and Ullrich is a matter of good sports policy. This is so for a number of reasons:

a. ***Licensing Scheme of the UCI Cycling Regulations.*** The UCI Cycling Regulations operate by expressly delegating authority and responsibility for the issuance of UCI licences to the UCI member federations where applicants are ordinarily resident.[39] This is a sensible organizational scheme for an international body without local offices to attract athletes to its programming, and such a scheme is

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39 See Article 1.1.011 of Part I of the UCI Cycling Regulations. There are two limited exceptions to this delegation. Applicants can apply to the UCI directly for a license where there is no UCI member federation in the country of the applicant's residence (Article 1.1.013) and where a national federation does nto respond to a license application within 30 days of it being filed (Article 1.1.014).

widely employed among international sporting organizations. The UCI Cycling Regulations, which contain the UCI Rules, also envisage a role for the UCI in antidoping proceedings before the CAS involving its license holders. The scheme of the UCI Cycling Regulations clearly is for the member federations to form legal relationships with their license holders on behalf of the UCI that will permit the UCI to maintain and assert its interests in antidoping proceedings should they arise. A contrary finding would jeopardize the UCI's (and other international sporting organizations') ability to hold to account Swiss athletes, although all foreign athletes would still be subject to the association's rules. Such an asymmetrical result would jeopardize Switzerland's attractiveness as a seat for a large number of international sporting organizations (including the International Olympic Committee) and have potential negative consequences for the willingness of sporting organizers to accept Swiss athletes into their events (something that is clearly not in the interest of Swiss Olympic, among others).

b. ***Relationship of the Licence Card to the UCI Cycling Regulations.*** The UCI Cycling Regulations mandate that the licensing process (and in particular the application form and the form of licence) adhere to certain standards by using specified language intended to forge the legal relationships the UCI intends with its license holders.[40] Swiss Cycling has complied with its obligations under the UCI Cycling Regulations and has reflected the specified language in its application form and licence. Swiss Cycling's use of this language is clearly intended to implement the scheme of the UCI Cycling Regulations, as set out above. A finding otherwise would leave international sporting organizations without guidance as to how they validly might affect their organizational schemes as it concerns Swiss athletes.

c. ***Ullrich's Career.*** Ullrich became a professional cyclist in 1994 and each year between then and his retirement, he applied for and obtained a UCI licence.[41] Ullrich's reason for obtaining a UCI licence was to race in UCI calendar events. The Panel accepts that, over this period, Ullrich would have familiarized himself at least at some basic level with the antidoping framework, including the general pith and scope of the UCI Rules and the competence of national sporting authorities and

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40 See Articles 1.1.021 to 1.1.026 of Part I of the UCI Cycling Regulations.

41 See Beelen Advocaten letter of December 16, 2010, at page 2. In 1994, as a first year professional, Ullrich finished third at the UCI world championships.

the CAS on appeal in antidoping proceedings.[42] A finding otherwise would be at odds with these basic and obvious facts.

3. Conclusion on Article 6(2) of the ICA

46. Ullrich submits that there is no agreement to arbitrate between the UCI and himself. In determining whether a valid agreement to arbitrate exists, the Panel has regard to Rule 47 of the CAS Rules, which provides that:

> *An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement....*

47. Without regard to the question of whether or not the UCI enjoys a right of appeal under the Swiss Olympic Statute, according to which the contested Decision was issued, the UCI has demonstrated that it has concluded a specific arbitration agreement with Ullrich that is enforceable. In particular, as a matter of Swiss law under Article 6(2) of the ICA, Ullrich has through his unilateral declaration agreed to be bound by the UCI Rules, and to submit appeals under those rules to the Court of Arbitration for Sport.

B. ARTICLE 6(1) OF THE ICA

48. The Panel has already concluded that there is a valid arbitration agreement under Article 6(2) of the ICA. It is therefore not necessary to consider whether a specific agreement between Ullrich and the UCI is also enforceable under Article 6(1) of the ICA. Accordingly, the Panel takes no view on this issue.

C. ARTICLES 358 AND 407 OF THE CCP

49. As noted, Article 6 of the ICA is more restrictive than Article 358 CCP. The Panel has already accepted the validity of the arbitration agreement between Ullrich and the UCI under Article 6(2) ICA. The Panel also accepts that an enforceable arbitration agreement between Ullrich and the UCI exists under Article 358 CCP, including for all the reasons that motivated its decision under Article 6(2) ICA. The instructions contained in Article 407(1) CCP (that the Panel apply the set of rules (ICA versus CCP) most favorable to a finding of validity of the arbitration clause) are therefore irrelevant, since the outcome of this award would be the same under either the ICA or the CCP.

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[42] The Panel takes comfort in this conclusion that, among other exposure to antidoping regulations, Ullrich participated in the 1998 Tour de France, which was marred by the Festina Affair.

50. On the basis of Article 407(2) CCP, Ullrich objects to the Panel's ability to apply the CCP. Though the Order appended to this award does not turn on the issue, in this section the Panel sets out certain of the reasons why Article 358 CCP is in fact applicable to the present proceedings.

a. Article 407(1) CCP does not itself contain any restrictions or limitations upon its applicability. It also contains no internal reference to Article 407(2) CCP, and does not expressly suggest that it is otherwise subject to that provision. Indeed, Article 407(1) can be viewed as a *lex specialis* relative to Article 407(2).

b. Article 407(1) CCP precedes Article 407(2) CCP. As a result, Article 407(2) CCP can hardly be perceived as the general and overriding principle in relation to the transitional rules. Thus, according to a literal and systematic interpretation of Article 407(1) CCP, Article 358 CCP would be applicable in the case at hand.

c. Article 407(2) CCP concerns the rules applicable to arbitration proceedings. As a matter of policy, it is a sensible provision as it concerns the procedural rules: it ensures that the procedure which has governed an arbitration from the outset continues to apply throughout the arbitral proceedings. It would not be sensible, as a matter of policy, if Article 407(2), as Ullrich urges, were to require the application of the old ICA rules to the issue of the validity of the arbitral agreement. The requirements of validity under the ICA are stricter than under the CCP – imposing stricter validity requirements would conflict with the purposes of Article 407(1) CCP, which operates to "*save*" arbitral agreements that would not be enforceable under the ICA but would be enforceable under Article 358 CCP. Interpreting Article 407(2) CCP in the manner suggested by Ullrich would serve no public purpose and would result in additional matters being litigated before the Swiss courts. This result is the antithesis of the intention of arbitration laws, which is (in part) to encourage out-of-court dispute resolution and lighten the case load of national courts. There is no reason to read Article 407(2) CCP as extending to any matter other than the applicable procedural rules.

d. The Panel's reading of the policy purpose of Article 407(2) CCP is supported by the legal history of the provision. The CCP, including the transitional rules contained in Article 407 CCP, is based on the PIL, and the CCP is to be interpreted in accordance with the PIL.[43] The PIL was applicable to the question of validity of arbitration

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43 See the *Rapport accompagnant l'avant-projet de la commission d'experts du Lot fédérale de procedure civile*, June 2003, section 184.

agreements concluded prior to the entering into force of the PIL if the rules of the PIL were more favorable. Well-known legal scholars agreed that the PIL's retroactive application was not restricted in any way, including by the timing of the initiation of proceedings.[44] Ullrich disputes the point and cites Berger/Kellerhals in support of the proposition that Article 407(1) CCP only operates where arbitration proceedings are initiated after January 1, 2011.[45] The citation does not support Ullrich's argument. It merely indicates that the PIL is applicable to the determination of a pre-PIL arbitration agreement's validity if arbitration were initiated after PIL's coming into force. However, the authors do not address the issue to be decided here, where both the arbitration agreement and the proceedings pre-date the coming into force of the new law, but the question of the arbitration agreement's validity has yet to be pronounced upon. Indeed, focusing on Article 407(1), the very same authors as those cited by Ullrich share the Panel's opinion on the interpretation of Article 407(1).[46]

e. Ullrich's criticism that the Panel's interpretation of the provisions of Article 407 CCP would result in "*moving targets*" is not persuasive. The interpretation of Article 407(2) CCP that Ullrich urges upon the Commission would also create a "*moving target*", albeit a different one, in that parties might decide to delay initiating arbitration proceedings in order to obtain the benefits of Article 358 CCP. Different legal outcomes that depend upon timing are not in this case a reason for preferring one interpretation of the provisions of Article 407 CCP over another; they are simply a feature of law reform.

51. The only restriction upon the application of Article 407(1) CCP arises from the requirement that the CCP be interpreted consistently with the PIL. Article 196(1) of the PIL provides that, "*Facts or legal transactions that occurred and produced all their effects before the effective date of this Code shall be governed by the former law.*"

52. The question, therefore, arises at what point in time an arbitration agreement has produced all its effects. In the Panel's view "*all effects*" will have been produced in the past if, for instance, on the basis of an alleged arbitration agreement an arbitral

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44 "*Toutefois, pour les arbitrages pendants à la date de l'entrée en vigeur, l'art 197 al. 1er LDIP prévoit l'application du droit ancien ... à la compétence, donc la validité de la convention d'arbitrage qui en est la condition, si ce droit est plus favorable. ... Ainsi ... rien ne s'oppose à l'application du droit nouveau aux décisions sur la compétence d'un tribunal arbitral international dès le 1er janvier 1989.* " See *Poudret*, Bull.AA 1988, 304.

45 Berger/Kellerhals, *Internationale und interne Schiedsgerichtsbarkeit in der Schweiz*, 2006, page 44.

46 see Berger/Kellerhals, *International and Domestic Arbitration in Switzerland*, 2nd Edition, para 412, page 113.

tribunal has rendered a decision for which all appeals have been exhausted. For a number of reasons it is quite unlikely that "*all effects*" arising from an arbitration agreement will have occurred if, as in the present case, the arbitration proceedings have been initiated but not even concluded or terminated on the key date (January 1, 2011 in this case). First, arbitration agreements produce a set of rights and obligations[47] among the contracting parties that do not terminate once the arbitration proceeding becomes pending. On the contrary, a number of duties survive past the point of *lis pendens* and bind the parties throughout the arbitral process (*e.g.*, the duty of the parties not to resort to state courts, to act in good faith, or to support the arbitral proceedings). Second, the arbitration agreement is the basis for all the procedural actions of the arbitral tribunal throughout the proceedings. Third, the validity of the arbitration agreement is a condition of admissibility of the proceedings. For procedural requirements before state courts it is generally recognized that the key moment in time in which a procedural requirement must be ascertained in order for the claim to be admissible is the time of deliberation of the judgment (and not the time when the proceeding becomes pending).[48] Based on these facts, the Panel concludes that in the case at hand all the effects of the arbitration agreement had not occurred prior to 1 January 2011.

53. As a result of the foregoing, the Panel takes the view that Article 407(1) CCP mandates the application of the more favourable rules set forth in Article 358 CCP concerning the determination of the validity of arbitration clauses connected to arbitral proceedings ongoing as at January 1, 2011, and confirms the validity of the agreement to arbitrate between Ullrich and the UCI also on the basis of Article 358 CCP.

VI. COSTS

54. The UCI Rules make provision for cost awards before the CAS, but only where the "*hearing body which made the decision against which the appeal has been made has applied the regulations incorrectly.*"[49] The Rules of the CAS provide the Panel with discretion to issue a cost award by "*taking into account the outcome of the proceedings, as well as the conduct and financial resources of the parties.*"

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47 Cf. BSK-ZPO/*Girsberger*, 2010, Art. 357 no. 6.

48 Cf. ATF 127 III 41 E. 4 c (43); Oberhammer/*Domej*, Schweizerische Zivilprozessordnung, 2010, Art. 59 no. 3. For some procedural requirements the law provides that the discontinuation of a procedural requirement that was fulfilled at the time of the initiation of the proceeding does not lead to the inadmissibility of the claim, cf. Article 64 (1) lit. b CCP.

49 See UCI Rules, Article 282.

55. The subject matter of this award (a specific agreement between the UCI and Ullrich separate from the rights UCI enjoys under the Swiss Olympic Statute) were not considered by the Disciplinary Chamber in its Decision. Moreover, this award is merely a preliminary decision on jurisdiction. The Panel has not had the benefit of pleadings on the substantive issues at play in this case, and the final outcome of these proceedings is therefore entirely unknown. Given the lack of opportunity for the issues in this award to be considered at first instance and the uncertainty about the ultimate result of these proceedings, an award on costs at this juncture would be inappropriate, and is certainly not necessary. Costs have nevertheless been incurred and cannot simply be dismissed. The Panel therefore orders that the costs connected with these jurisdictional objectives be determined in the final award.

ORDER

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The CAS acknowledges its jurisdiction over the appeal submitted by the UCI against the Decision.
2. The objection submitted by Mr. Jan Ullrich that the CAS has no jurisdiction to hear this matter is dismissed.
3. The costs connected with Mr. Jan Ullrich's objections related to jurisdiction and with the present partial award shall be determined in the final award.

Done in Lausanne, Switzerland, on 2 March 2011.

THE COURT OF ARBITRATION FOR SPORT

Romano Subiotto QC
President