Arbitration CAS 2013/A/3057 Kolesarski Klub Perutnina Ptuj v. The 2011 Tour of Hainan Organising Committee, award of 22 January 2014

Panel: Mr David Williams QC (New Zealand), President; Prof. Peter Grilc (Slovenia); Prof. Jin Huang (China)

Cycling
Contract between a Tour Organizing Committee and a team
Intervention as an accessory party under the Swiss Code of Civil Procedure
Validity of a petition that was not signed under the UCI Cycling Regulations
Interpretation of the contractual terms regarding obligation to pay for and arrange luggage for the team to attend the Tour

1. **Article 74 of the Swiss Code of Civil Procedure provides that any person who shows a credible legal interest in having a pending dispute decided in favour of one of the parties may intervene at any time as an accessory party and for this purpose submit to the court an intervention application.**

2. **Article 12.3.016(vii) of the UCI Cycling Regulations governs how disputes between persons or authorities subject to the UCI Cycling Regulations may be submitted to the UCI Arbitral Board. It provides that any matter shall be lodged in a petition that includes the appellant's signature. The phrase *"shall be mandatory failing which the appeal shall not be entertained"* indicates that the UCI Arbitral Board will not accept a petition unless it is signed. However, it does not obviously follow that where the Board entertains a petition despite the lack of signature, the Board's decision will be invalid. This is especially so if the lack of signature was not raised as an issue by either party before the Board, but was raised for the first time before the appeal proceedings.**

3. **If the terms of the contract concluded between a team and the Organizing Committee of a Tour state that the latter will provide *"[t]he booking of round-trip airline tickets",* it must be understood that the obligations of the Organizing Committee of the Tour under the contract include the obligation to organise adequate luggage allowances for the team to transport their bicycles. This is particularly so where the Organizing Committee of the Tour offer included a commitment to pay for all of the team's costs in attending the Tour: not only airline tickets, but also full accommodation, local transport, and cars and vans for the team.**

1. INTRODUCTION, PROCEDURAL HISTORY, JURISDICTION/ ADMISSIBILITY AND THE PRINCIPLES APPLICABLE TO THE APPEAL

The Nature of the Dispute

1.1 In September 2011, the Union Cycliste Internationale (UCI) team Perutnina Ptuj ("Team") agreed to participate in The 2011 Tour of Hainan, a cycling race in the Hainan province in China which took place from 20 – 28 October 2011 ("Tour"). The Tour was organised by the Respondent, the 2011 Tour of Hainan Organising Committee.

1.2 On 5 October 2011, the Team emailed the Committee to say that it was pulling out of the Tour. It is said that this was because the Respondent had not organised and prepaid for excess luggage for the Team's bicycles. As it had signified, the Team did not attend the Tour. The Respondent lodged a petition before the UCI Arbitral Board against the Team on 23 March 2011, invoking Article 1.2.053 of the UCI Regulations, which states as follows:

> In the event that a UCI registered team or rider belonging to such a team is entered but fails to appear, the signatory of the entry and the team that he represents shall be jointly and severally liable to pay the organizer an indemnity equal to twice the travel and subsistence expenses agreed to in writing.

1.3 On Monday, 6 December 2012, the UCI Arbitral Board comprised of Mr Sergio Fusaro ruled that there had been a failure to appear and ordered the Team to pay CNY 338,316 to the Respondent.

The Procedure to Date

1.4 The Appellant, Kolesarski Klub Perutnina Ptuj, the paying agent of the Team which has now been dissolved, appealed this decision to the Court of Arbitration for Sport (CAS) by filing a Statement of Appeal with CAS on 4 January 2013. In its Statement of Appeal, the Appellant nominated Professor Peter Grilc as arbitrator. Furthermore, the Appellant indicated that its Statement of Appeal shall serve as Appeal Brief.

1.5 By letter dated 15 January 2013, CAS directed the Respondent to submit its Answer within 20 days of receipt of its letter by DHL.

1.6 On 15 February 2013, CAS wrote to the parties stating that this deadline had expired on 11 February 2013.

1.7 By letter dated 25 February 2013, the Respondent applied for an extension until 8 March 2013 to file its Answer. The Respondent's reason was that it had not received the CAS letter until 16 February 2013, as it had been delivered to the wrong office, and then hand-delivered to a member of staff at an organisation related to the Respondent, and only delivered to a staff member of the Respondent on 16 February. In its letter, the Respondent nominated Mr Liu Chi as arbitrator.

1.8 By letter dated 26 February 2013, the Appellant opposed the extension of the deadline for the Answer and opposed the nomination of Mr Liu Chi as being out of time.

1.9 The Respondent's Answer was filed on 27 February 2013.

1.10 On 13 June 2013, the Panel was constituted as follows: Professor David A.R. Williams Q.C., President of the Panel; Professor Peter Grilc and Mr Liu Chi, arbitrators.

1.11 By letter dated 10 July 2013, CAS informed the parties that the Panel had decided that the Respondent's Answer was deemed admissible, and would give reasons in its Final Award.

1.12 The Panel directs that the Respondent's Answer is admissible. The Respondent's explanation as to why its Answer was filed late is plausible. More importantly, balancing any prejudice caused to the Appellant by the late filing of the Answer against any prejudice that would have been caused to the Respondent by refusing to allow the Answer, the Panel considers that the latter prejudice is greater, especially considering that the delay in filing was not greatly significant.

1.13 Procedural Order No 1 was issued on 14 August 2013 and signed on 22 August 2013. CAS had circulated the Panel's draft List of Issues on that same day. The Appellant provided its comments on the List on 20 August 2013 and the Respondent provided its comments on 26 August 2013.

1.14 The Appellant submitted the following signed witness statements (in Slovenian, with certified translations to English) on 22 August 2013:

(b) Witness Statement of Mr Marjan Kelner, the Team's Manager in 2011; and

(c) Witness Statement of Mr Matej Marin, a competitor in and Head of Competitors for the Team in 2011.

1.15 The Respondent did not submit any witness statements. However, as directed by Procedural Order No 1, the Respondent submitted certified translations of the documents contained at pages 26–27 of its Answer.

1.16 The Appellant's preference was for a hearing while the Respondent submitted that the matter should be decided on the papers. By letter dated 10 July 2013, CAS conveyed the Panel's decision that a hearing would take place by way of teleconference.

1.17 The hearing was initially set down for 4 September 2013 at 9am (Swiss time). However, on 22 August 2013, at Mr Liu's request, CAS informed the parties that Mr Liu was about to join Dacheng Law Offices, which was the law firm representing the Respondent. Following a challenge by the Appellant, Mr Liu resigned on 27 August 2013 and the 4 September 2013 hearing date was vacated. By letter dated 27 August 2013, the Respondent nominated Professor Huang Jin as a replacement arbitrator. Professor Huang accepted this nomination.

1.18 On 3 September 2013, the Panel was newly constituted as follows: Professor David A.R. Williams Q.C., President of the Panel; Professor Peter Grilc and Professor Huang Jin, arbitrators.

1.19 A new hearing was scheduled for 9 November 2013 by way of teleconference.

Issues for Determination

1.20 After receiving comments from both parties on the draft List of Issues, on 5 November 2013 the Panel issued the following List of Issues for determination at the hearing:

1. Does the Appellant, Kolesarski Klub Perutnina Ptuj, have standing to bring an appeal against a decision that the UCI Continental Team Perutnina Ptuj is liable to pay 338,316 CNY to the Respondent, given that the Appellant is not the UCI Continental Team Perutnina Ptuj?

2. On the basis that the Appellant is not the UCI Continental Team Perutnina Ptuj, can the Respondent enforce the decision of the UCI Arbitral Board (if it is upheld) or any decision of this Tribunal against the Appellant?

3. Were there any procedural defects in the decision of the UCI Arbitral Board, and, if so, what are the consequences of those procedural defects? The defects which the Appellant alleges include:
    a. The Petition to the Arbitral Board of UCI dated 23 March 2012 is not signed by the Respondent or its representative, and there is no reference to the responsible person or counsel for the Respondent;
    b. There is no evidence that the Respondent was the organiser of the Tour of Hainan 2011; and
    c. Mr René Glavnik was not mentioned in the petition and was not a party in the proceeding.

4. Was a contract concluded between the Appellant or the UCI Continental Team Perutnina Ptuj and the Respondent?

5. If a contract was concluded:
    a. On what date was the contract concluded?
    b. What were the terms of that contract?
    c. Did the Respondent breach the contract?
    d. Was the Appellant or the UCI Continental Team Perutnina Ptuj entitled to cancel the contract, and, if so, did it cancel the contract?
    e. If the Appellant or the UCI Continental Team Perutnina Ptuj did cancel the contract, did the Respondent accept the cancellation?
    f. Did the Appellant or the UCI Continental Team Perutnina Ptuj breach the contract?

g. If the Appellant or the UCI Continental Team Perutnina Ptuj breached the contract, what amount if any should the Appellant pay to the Respondent?
h. If the Appellant or the UCI Continental Team Perutnina Ptuj breached the contract, what is the quantum of loss, if any, which the Respondent suffered as a consequence?

1.21 The Panel will traverse each of these issues in turn but, for reasons of convenience, will address Issues One and Two together.

The Hearing

1.22 The hearing was scheduled for Saturday, 9 November 2013 at 10am (Swiss time) and ran for several hours. The following persons were in attendance:

(a) The Panel: Professor Peter Grilc, Professor Huang Jin and Professor David A R Williams QC;

(b) For the Appellant: Mr Pavle Pensa and Mr Jaka Simončič of Jadek & Pensa and Mr Rene Glavnik the Manager for the Appellant;

(c) For the Respondent: Mr Liang Xiaozhun of Dacheng Law Offices; Mr Hu Lan of The 2011 Tour of Hainan Organising Committee; and

(d) Witnesses for the Appellant: Mr Marjan Kelner and Mr Matej Marin, along with an interpreter.

1.23 Both witnesses were sworn, were warned of the consequences of perjury, and agreed to tell the truth. They confirmed that the contents of their statements were true and correct. Neither the Respondent nor the Panel had any questions for either witness.

1.24 At the end of the hearing, the Panel instructed both parties to supply the Panel with one page submissions on costs by 25 November 2013. The Appellant duly provided its submission on 25 November 2013. By letter dated 26 November 2013, CAS noted that the Respondent had failed to file its submissions on costs in time. By letter dated 28 November 2013, the Respondent claimed that it had submitted a closing statement to CAS on 21 November 2013, and provided details of its costs. CAS confirmed that it had never received the 21 November 2013 submission.

1.25 By letter dated 11 December 2013, CAS communicated the Panel's decision that the costs details provided in the Respondent's 28 November 2013 submission would be admissible.

Jurisdiction and Admissibility

1.26 Article R47 of the Code of Sports-related Arbitration (the "Code") governs the appeal

procedure:

> An appeal against a decision of a federation, association or sports-related body may be filed with CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with statutes or regulations of the said sports-related body.

1.27 Article R49 of the Code concerns the time limit for filing an appeal:

> In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against.

1.28 Article 12.3.036 of the UCI Cycling Regulations provides:

> The decisions of the Arbitral Board are subject to an appeal to the Court of Arbitration for Sport in Lausanne (CAS). The appeal must be lodged within thirty days of the receipt of the decision and the reasons for it.

1.29 The Appellant submitted its appeal on 4 January 2012. It follows that the appeal is admissible. The jurisdiction of the CAS was not contested by the Respondent and was confirmed by the parties' signing of Procedural Order No 1, which was issued on 14 August 2013 and signed on 22 August 2013.

The Principles Governing the Panel's Decision

1.30 Article R57 of the Code governs the Panel's powers on appeal:

> The Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance.

1.31 Article R58 of the Code concerns the law applicable to the merits of the dispute:

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

1.32 The applicable regulations are the UCI Cycling Regulations. As for the applicable rules of law

which apply subsidiarily, these were not chosen by the parties, so Swiss law applies, being the law of the country in which the association (UCI) which issued the challenged decision is domiciled. Swiss law was referred to by the parties during the hearing.

2. ISSUE ONE: WHETHER THE APPELLANT HAD STANDING TO BRING THE APPEAL

2.1 As noted above, it was not alleged that the Appellant had failed to attend the Tour, but rather that the relevant failure had been that of the Team. The Appellant submitted that as the Team was no longer in existence, the Appellant as the paying agent was the only party left to bring an appeal. The Appellant claimed that both the UCI Cycling Regulations and Articles 80 and 82 Swiss Code of Procedure conferred it with standing. The Appellant refrained from commenting on whether the decision of the UCI Arbitral Board or any decision of this Panel would be enforceable against it.

2.2 At paragraph 4 of its Answer, the Respondent stated:

> […] 'paying agent' may have different meanings in different legal cultures. If this expression means that the Appellant shall bear all obligations of the Team-SLO, on condition that the Appellant states expressly to undertake all the obligations and legal positions from Team-SLO, the Appellant might be the right person to argue the UCI Decision.

2.3 The Respondent therefore conceded that the Appellant had standing to bring the appeal, provided that the Appellant would commit to paying any award issued against the team. The Respondent reiterated this contention at the hearing. As for enforcement, the Respondent's position was that the award of the UCI Arbitral Board against the Team, and any award of the Panel against the Appellant, would be enforceable against the Appellant.

2.4 Article 2.16.001 of the UCI Cycling Regulations provides:

> The professional continental team comprises all the riders registered with the UCI as members of the team, *the paying agent*, the sponsors and all other persons contacted by the paying agent and/or the sponsors to provide for the continuing operation of the team […] [emphasis added].

2.5 Article 2.16.008 provides:

> The paying agent shall represent the professional continental team for all purposes as regards the UCI regulations […] The paying agent and the principal partners shall be jointly and severally liable for all the financial obligations of the professional continental team to the UCI and national federations, including fines.

2.6 Thus the Team comprised of the paying agent, with the result that an award against the Team is an award against the paying agent. The paying agent was liable for all of the Team's financial obligations. It is logical that the paying agent would have standing to appeal against an award made against the Team. Furthermore, the paying agent's role was to represent the Team for all purposes as regards the UCI regulations. On an objective interpretation, this encompasses an appeal brought under the regulations. In any event, both parties proceeded on the assumption that the Appellant had standing to bring the appeal.

2.7 Articles 80 and 82 of the Swiss Code of Civil Procedure refer to third party notices; it is more likely that the Appellant was referring to Article 74, which provides:

> Any person who shows a credible legal interest in having a pending dispute decided in favour of one of the parties may intervene at any time as an accessory party and for this purpose submit to the court an intervention application.

2.8 However, the Panel considers the UCI Cycling Regulations referred to in paragraphs 2.3–2.4 above sufficient to determine that the Appellant had standing to bring this appeal.

2.9 As for whether any decision of the UCI Arbitral Board or this Panel would be enforceable against the Appellant, the Panel considers that this is a matter for the body before which enforcement is sought. Therefore, the Panel does not reach a finding on this second issue.

3. ISSUE TWO: THE EXISTENCE AND IMPACT OF ALLEGED PROCEDURAL DEFECTS IN THE PROCEEDINGS BEFORE THE UCI ARBITRAL BOARD

The Appellant's Signature

3.1 Article 12.3.016(vii) of the UCI Cycling Regulations governs how disputes between persons or authorities subject to the UCI Cycling Regulations may be submitted to the UCI Arbitral Board. It provides that *"[a]ny matter shall be lodged in a petition including […] the appellant's signature […] Items i, ii, iv, v, vi and vii shall be mandatory failing which the appeal shall not be entertained"*. It is clear that in Article 12.3.016(vii), "appellant" refers to the entity bringing the petition, i.e. the Respondent in the present proceedings. For the sake of clarity, in the following paragraphs "Appellant" and "Respondent" refer to the Appellant and Respondent in the present proceedings, rather than in the proceedings before the UCI Arbitral Board.

3.2 Exhibit 9 to the Appellant's Appeal Brief revealed that the petition was not signed by the Respondent. The Appellant alleged that by reason of the phrase *"shall be mandatory failing which the appeal shall not be entertained",* the lack of signature was a serious procedural defect which meant that the UCI Arbitral Board's Decision was "incorrect" and should be annulled.

3.3 The Respondent contended that the purpose of requiring a signature was to confirm that the correct body was committing itself to lodging a petition. Since the Respondent had affirmed its willingness to lodge the petition by its actions in going forward with the petition, the lack

of signature was not an issue and could not warrant the reversal of the UCI Arbitral Board's decision.

3.4 Given the Panel's findings on Issues Three and Four, the Panel does not find it necessary to finally determine this issue, but provides its provisional view given that submissions on this matter were made by both parties. The phrase *"shall be mandatory failing which the appeal shall not be entertained"* indicates that the UCI Arbitral Board will not accept a petition unless it is signed. However, it does not obviously follow that where the Board entertains a petition despite the lack of signature, the Board's decision will be invalid. This is especially so where, as here, the lack of signature was not raised as an issue by either party before the Board, but was raised for the first time by the Appellant before this Panel. The Panel appreciates that the Appellant was without legal representation before the Board, but nevertheless considers that its failure to raise the issue of the lack of signature before the Board amounted to a waiver of this procedural irregularity.

Whether the Respondent Organised the Tour

3.5 The Appellant submitted that there was no evidence that the Respondent was in fact the organiser of the Tour, and therefore that the Respondent was unable to request an indemnity under Article 1.2.053 of the UCI Regulations. The Appellant argued that the official enrolment form, appended as Exhibit 10 to its Statement of Appeal, did not name the Respondent but merely stated that the address of the organising body was No 59 Haifu Road, Haikou Hainan, China.

3.6 In its Answer, the Respondent replied that it was plainly the organiser of the Tour, and that not being named on the form could not be sufficient to displace this.

3.7 The Panel does not consider that this point of appeal has any merit. The Invitation appended to the entry form is signed off "Organizing Committee of the 2011 Tour of Hainan" and the entry form itself refers to the email address TourOfHainan@gmail.com. It is clear that an entity named "The Organizing Committee of the 2011 Tour of Hainan" organised the Tour. The Respondent has asserted itself to be that entity and there is no evidence to the contrary. The Panel finds that the Respondent organised the Tour.

The Involvement of Mr René Glavnik

3.8 The Appellant explained that paragraphs 1 and 2 of the findings in the UCI Arbitral Board's decision declared the Team and Mr René Glavnik to be jointly and severally liable for the breach of the UCI Cycling Regulations, and joint debtors for 338,316 CNY. The Appellant argued that since Mr Glavnik was not party to the proceedings and was not afforded the right to be heard, *"the part of the Decision relating to him should be annulled"*. The Respondent replied that the UCI Arbitral Board was empowered to render a decision without affording Mr Glavnik a hearing.

3.9 Given the Panel's findings on Issues Three and Four, the Panel does not find it necessary to determine this issue.

4. ISSUE THREE: WHETHER A CONTRACT WAS CONCLUDED BETWEEN THE TEAM AND THE RESPONDENT, AND ITS TERMS

4.1 Article I(1) of the Swiss Code of Obligations provides that *"[t]he conclusion of a contract requires a mutual expression of intent by the parties"*. It was common ground between the parties that the Team and the Respondent had concluded a contract for the Team to attend the race. The contract was formed when:

(a) By sending an invitation and entry form to the Team, the Respondent offered to pay for the Team to attend the race in exchange for the Team's attendance; and

(b) The Appellant accepted this offer by signing and returning the entry form, which the Respondent received by email on 13 September 2011.

4.2 In issue is whether it was a term of the Agreement that the Respondent would organise adequate luggage allowances for the Team to transport their bicycles.

The Appellant's Position

4.3 The Appellant referred to the invitation from the Respondent (i.e. the offer), which stated that the organisers would provide *"[t]he booking of round-trip airline tickets for 12 persons per team (7 riders + 5 officials)"*. The Appellant contended that the ordinary meaning of round-trip airline tickets included baggage. The Appellant argued that this interpretation was clear from three factors. First, without bicycles the Appellant could not participate in the Tour. Second, the Team did not have sufficient funds to pay for the excess luggage itself. Third, excess baggage needed to be arranged in advance; it was not the case that every flight in Europe would be able to take nine bicycles without notice.

4.4 At the hearing, the Appellant argued that the Respondent recognised at paragraph 28 of its Answer that the contract obliged the Respondent, as opposed to the Appellant, to pay for the excess baggage: *"[t]he sole obligation of the Team-SLO after signing the Agreement was to appear to the race [sic]"*.

The Respondent's Position

4.5 The Respondent argued that the plain meaning of *"round-trip airline tickets"* did not include baggage. This was first because it would be impossible for the Respondent to pay for the luggage in advance. The Team had never informed it of the number of pieces of luggage, although it had mentioned the size and weight of the luggage. Moreover, the fees for the extra luggage would only be determined once the bags were weighed at the airport. Therefore, *"[t]he only way to solve this problem was that an invited team should pay in advance the allowance for extra luggage*

and be refunded by the Respondent", as had occurred with other teams on the tour.

4.6 The second reason the Respondent said it was not obliged to pay for the excess luggage in advance was that the practice of a team paying luggage fees in advance and the Respondent refunding them was a *"well-known custom and usage"*. This custom was said to inform the interpretation of the terms of the contract.

The Panel's Decision

4.7 The majority of the Panel finds that it was a term of the contract that the Respondent's obligation under the contract to supply round-trip air tickets included the obligation to pay for excess baggage sufficient to accommodate the Team's bicycles. The Panel takes judicial notice of the fact that people do not commonly book their baggage separately to their airline tickets. When one has an airline ticket, one usually has the right to transport one's person and a certain amount of baggage on the aeroplane. In this case, the amount of baggage was informed by the context: the Respondent was offering to pay for airline tickets in order for the Team to participate in the Tour, for which they needed their bicycles. Reasonable people in the position of the Team and the Respondent would have assumed that the offer to pay for airline tickets included an offer to pay for any excess baggage needed to transport the bicycles. This is particularly so where the Respondent's offer included a commitment to pay for all of the Team's costs in attending the Tour: not only airline tickets, but also full accommodation, local transport, and cars and vans for the team.

4.8 The majority of the Panel also considers that this obligation to pay for excess baggage included the obligation to arrange and pay for this baggage in advance, as was the case with the accommodation, transport and tickets themselves. It would be odd if the parties intended that different rules apply to excess baggage. As the Appellant pointed out, the parties were unlikely to intend for the Team to pay for excess baggage at the airport and for the Respondent to reimburse the Team upon arrival in Hainan. Not every flight in Europe is able to take excess baggage, especially when it is requested at the airport mere hours before the flight is scheduled to leave. This is why it is imperative to organise the excess baggage in advance. The interpretation of the contract contended for by the Respondent would risk the Team being unable to transport their bicycles to the Tour.

4.9 Turning to the Respondent's arguments, the majority of the Panel does not consider that it would have been impossible for the Respondent to pay the costs of the baggage in advance of weighing it at the airport. The Respondent did not advance any evidence in support of this contention. It would have known that it could ask the Team for more information if it did not have sufficient information to book the excess luggage. The only evidence the Respondent provided of a custom of teams paying for excess baggage then being reimbursed was the practice of two teams which participated in the 2011 Tour of Hainan. This was not sufficient to convince the Panel of a widespread practice such that the Respondent and the Team would have understood that the contract did not oblige the Respondent to arrange luggage in advance.

5. ISSUE FOUR: WHETHER THE APPELLANT VALIDLY CANCELLED THE CONTRACT

5.1 On 4 October 2011, Mr Kelner for the Team emailed the Respondent and stated:

> Perutnina Ptuj cycling team will not be attending the Tour of Hainan, due to unfortunate complications regarding transportation of our equipment and luggage, because you are not able to provide as intended in the beginning.

The Team confirmed this in its email of 5 October 2011. In issue is whether the Team's email of 4 October 2011 constituted a valid cancellation of the contract.

The Appellant's Position

5.2 The Appellant claimed that the Respondent's obligation to pay for and arrange excess baggage in advance was an essential term of the contract, breach of which justified the Appellant's cancellation. After the Appellant validly cancelled by its email of 4 October 2011, the Appellant was no longer entered in the Tour. Therefore, Article 1.2.053 of the UCI Cycling Regulations, which referred to a team which is *"entered but fails to appear",* could not apply to the Team, and neither could the penalty that Article 1.2.053 imposed.

5.3 As for the Respondent's offer to reimburse the cost of excess baggage, the Appellant observed that the offer was first made on 13 January 2012, which was three months after the Tour took place. Secondly, the Appellant argued, the contract obliged the Respondent to pay for the luggage directly, and this contract was never varied by the Appellant accepting the Respondent's offer to reimburse the Appellant upon arrival.

5.4 The Appellant also contended that the Respondent's email of 14 October 2011 constituted an acceptance of the Appellant's cancellation of the contract.

The Respondent's Position

5.5 The Respondent's position was that the Appellant had no right to terminate the contract. The Respondent in its Answer contended that it had *"spared no efforts to help the race teams with luggage problem"* and had *"tried its best to negotiate with the airline companies"*. The Respondent explained that it had offered for the Appellant to purchase excess luggage at the airport and for the Respondent to refund the Appellant on arrival, but the Team *"showed no interest in negotiating to solve the problem and stated abruptly that they would not come"*.

5.6 Turning to the Appellant's allegation that the Respondent had accepted the Appellant's cancellation, the Respondent argued at the hearing that the emails merely evinced first, intent to reduce their loss by attempting to cancel the tickets, and second, courtesy towards the Team.

The Panel's Decision

5.7 The position of the UCI Arbitral Board was that any failure by the Respondent to pay for the luggage in advance did not justify cancellation:

> The single arbitrator considers that this is not a valid response. Indeed, on 5 October 2011 the Organiser expressly informs the Team that the problem related to the additional costs of the extra luggage is solved. The Organiser commits to reimburse the additional costs as soon as the Team will arrive in China.

5.8 The majority of the Panel disagrees with this finding and considers that the obligation to pay for and arrange luggage in advance was an essential term of the contract. Failure to arrange excess luggage in advance created a very real possibility that the Team would be unable to transport their bicycles and attend the Tour. The parties cannot have assumed that the Team would have sufficient funds to pay for the baggage themselves before being reimbursed. More importantly, the flight may not have accepted the bicycles without prior notice. Ms Kelner testified:

> It is possible that some flights, disregarding payment of excessive baggage charges, would not accept excessive baggage without prior agreement with the carrier. Leaving with the possibility of not being able to board the plane, was out of question. Such risk was unacceptable for the competitors and the Club that would have to pay for the land transport from Ptuj to Vienna and back.

5.9 The question becomes whether the Respondent breached its obligation to provide luggage in advance. The Team received the tickets provided by the Respondent on 28 September 2011. Those tickets show that the flight from Vienna to Amsterdam and from Paris to Vienna only included one piece of baggage per person. On the same day, Mr Marin emailed the Respondent querying this. On 29 September 2011, Ms Liang for the Respondent acknowledged this breach, stating *"Concerning the luggage, we are very sorry that we failed to apply excess luggage limit at the part of flight within Europe, and all other teams from Europe are the same situation […] I will try my best to help you with the problem, though I'm not sure I finally can"*.

5.10 On 29 September 2011, Mr Marin replied, *"If you do not find a solution that we take our bicicles with us from the beginning of our trip, we will not go come* [sic]". On the same date, Ms Liang stated that the Respondent would purchase further baggage allowance and asked for the total weight. Mr Marin replied with this information the following day. For the following five days, no information was forthcoming from the Respondent. Ms Kelner's evidence was that:

> there was no reply within the reasonable amount of time that was usually expected from the organiser. Just 14 days before we were supposed to leave, I estimated that there was no point to any further discussion and that we should terminate our preparations and inform the organizer of our cancellation.

5.11 Even if an offer to reimburse the Team for excess luggage would have meant that the

Respondent had not breached its contract, the Panel does not consider that this offer was clearly put to the Team. On 5 October 2011, the Respondent merely stated that *"we have successfully solved the luggage problem for you",* but did not suggest the solution, namely reimbursing the Team on arrival. Ms Kelner explained:

> We received an email on 5 October 2011 that the baggage problem was solved and that the organizer would buy an extra baggage allowance, but the same email also said that we have already received the tickets. I understood that they would not change the tickets and that we would receive an additional document for our baggage, but no such document came.

5.12 The first time this offer was referred to was in the Respondent's email of 13 January 2012, sent after the Tour had taken place:

> [W]e never said you should pay all the luggage expenses by yourself, we have told you that we will buy all the luggage costs for you […] we have promised you that you can buy it in the airport, then when you arrived in Hainan, we will give you a full refund of all the costs.

5.13 The Respondent claimed that the Appellant provided it with the size and weight of its luggage requirements, but not the number of pieces required. To the extent that this amounted to a contention that the Team frustrated the Respondent's attempts to comply with its obligations, the Panel considers that this is unfounded. It would have been clear to any reasonable person that each traveller would have two items of baggage: their bike, and a bag of personal items. If the Respondent had any doubts about this, it could have asked the Appellant for further information. From the beginning, the Appellant had provided the Respondent with prompt and detailed information concerning its luggage requirements.

5.14 In his email of 13 September 2011, Mr Marin told the Respondent: *"About luggage: every riders has a bike (7 bikes) and we need to have two spare bakes. Our mechanic need special tools and spare parts for bikes. Total luggage for 12 people is max 450 kg (bikes and our luggage)* [sic]*"*. Ms Liang acknowledged that this amounted to 46kg per person in her email of 13 September 2011. In his email of 16 September 2011, Mr Marin again explained:

> When you will book tickets, please tell to people who sells flight tickets, that we will have 9 oversize baggages (where will be our bikes) and dimensions of this baggages are 140cm X 140cm (height and lengt) and will be between 12 – 14kg. They need to be informed in front, because this is a connection flight and not every plane can take our bikes. We had this problem in the past so I am careful about that. 46kg of luggage pro person is ok, we will calculate ourselves how much weight is our personal luggage and bike [sic].

5.15 The majority of the Panel finds that the Respondent's failure to provide excess baggage constituted a breach of an essential term of the contract, and that the Appellant was entitled to cancel the contract, as it did in Mr Kelner's email of 4 October 2011:

> Perutnina Ptuj cycling team will not be attending the Tour of Hainan, due to unfortunate complications regarding transportation of our equipment and luggage, because you are not able to provide as intended in the beginning.

5.16 Given this finding, the Panel does not find it necessary to determine two other arguments raised by the Appellant. The first of these was that the Respondent, in two emails dated 14 October 2011, had accepted the Team's cancellation as valid. The Respondent had said that it regretted that the Team could not participate, asked for scanned copies of the Team's passports to help with ticket cancellation, and told the Team it hoped they could co-operate again in the future. While not finally determining the issue, the Panel accepts the Respondent's contention that these emails were merely intended to show courtesy and to minimise the Respondent's loss by cancelling the tickets. This could not have constituted acceptance of the Team's cancellation, especially given the Respondent's email of 5 October 2011, where it was said *"But if you finally decide not to come without a clearly reason, we will report the whole thing to the CCA"*.

5.17 The second argument made by the Appellant which it is not necessary to consider was that the amount of travel and subsistence expenses to be provided by the Respondent had not been agreed in writing, and that there was insufficient proof of both the costs of the airline tickets and whether they had been cancelled. The Appellant said that for these reasons, notwithstanding questions of liability, the quantum awarded by the UCI Arbitral Board could not stand.

5.18 For all of the foregoing reasons and rejecting all submissions to the contrary, the Panel upholds the Appellant's appeal and quashes the Decision of the UCI Arbitral Board.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed by Kolesarski Klub Perutnina Ptuj on 4 January 2013 against the Decision of the UCI Arbitral Board of 6 December 2012 is upheld.

2. The Decision of the UCI Arbitral Board of 6 December 2012 is quashed.

3. (…).

4. (…).

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