



Arbitration CAS 2003/A/461 & 471 & 473 WCM-GP Limited v/ Fédération Internationale Motocycliste (FIM), Award of 19 August 2003

Panel: Martin Schimke (Germany), President; Peter Leaver (United Kingdom); Jean-Philippe Rochat (Switzerland)

Motorcycling

Technical requirements to be eligible to compete in Grand Prix races

Game Rule vs. Rule of Law

Contra proferentem rule

1. The "*Game Rules*" are the rules intended to ensure the correct course of the game and competition respectively. The application of such rules cannot, save in very exceptional circumstances, lead to any judicial review. On the contrary, the "*Rules of Law*" are proper statutory sanctions that can affect the judicial interests of the person upon whom a sanction has been imposed other than in the course of the game or competition. For this reason, they have to be subject to judicial review.
2. According to Article 1 of the Swiss Civil Code, the judge has to interpret the law according to its letter, to its spirit and to its purpose. The first step, therefore, is for the Panel to construe the words used in the Regulations. Interpreting the law according to its letter requires a tribunal to construe the meaning of the words used by the legislator. Swiss law relies on the principles of legal certainty, proportionality and the rule *contra proferentem* only if there is ambiguity and no clear meaning can be drawn from an interpretation based on the letter and the spirit of the law.
3. The purpose of Article 2.2.1 of the FIM Road Racing World Championship Grand Prix Regulations is beyond doubt: it is intended to make a clear distinction between the Grand Prix category and the Superbikes and Supersports series. As prototype motorcycles are admitted in the Grand Prix category, the Superbikes and Supersports series allow only production motorcycles. The distinction between prototype and production motorcycles relies on the core of a motorbike, i.e. the crankcase, cylinder or cylinder head. Once those are derived from the industrial production, they cannot be considered as prototypes any longer.

The Appellant is a motorcycling team participating in Grand Prix Road Racing.

The Fédération Internationale Motocycliste ("the FIM") is the International Federation governing sports related to motorcycling world wide.

The FIM has its seat in Mies, Switzerland and its purpose is, *inter alia*, "to develop, promote, supervise and govern motorcycling activities throughout the world" (see FIM's statutes article 3.6).

The FIM has published specific rules which contain, *inter alia*, sporting, technical and disciplinary provisions: the Road Racing World Championship Grand Prix Regulations. The rules applicable to this case include the following :

1. Sporting Regulations

"1.4.1 (...)

Technical Director Responsible for ensuring that technical Regulations are correctly enforced (...).

(...)

1.14 *Technical Control – Medical Control – Doping Control*

1.14.1 (...)

Unless a waiver is granted by the Race Direction, teams who do not comply with the schedule for technical or medical controls will not be allowed to take part in the event.

1.14.2 *The procedure for Technical Control is described in the Technical Regulations, articles 2.12 and 2.13. The procedure for Medical Control is described in the Medical Code."*

"2. Technical Regulations

2.2 *Classes*

2.2.1 *The following classes will be accommodated, which will be designated by engine capacity:*

125 *Over 80cc up to 125cc - Maximum one cylinder*

250 *Over 175cc up to 250cc - Maximum two cylinders*

500 *Over 350cc up to 500cc - Maximum four cylinders*

4-stroke prototype motorcycles : Over 350cc up to 990cc

A four-stroke prototype motorcycle must have an engine of original design and must not use castings of the crankcase, cylinder or cylinder head derived from the industrial production. The moving parts (crankshaft, pistons, connecting rods, gearbox etc.) are not taken into consideration."

"2.12. *Procedures for Technical Control*

2.12.2 *The technical control procedure will be carried out in accordance with the schedule set out in the FIM Road Racing World Championship Grand Prix regulations. The technical scrutineers must be available throughout the event to check the motorcycles and equipment as required by the Technical Director.*

(...)

2.12.6 *The technical scrutineers should inspect the motorcycle for obvious safety omissions and may also at their discretion choose to check the motorcycles for technical compliance with other aspects of the FIM Road Racing World Championship Grand Prix regulations."*

"3. *Disciplinary and Arbitration Code*

3.1 *Principles*

The obligations incumbent upon the participants, officials and organisers are set out in the FIM Road Racing World Championship Grand Prix regulations published by the FIM.

Proven violation or non-observance of these obligations will be subject to the penalties laid down in this chapter.

3.2 *Penalties*

The penalties are:

- *warnings*
- *fines*
- *stop and go*
- *time penalties*
- *disqualification*
- *withdrawal of Championship points*
- *suspension*
- *exclusion"*

The world of motorcycle road racing is divided into two championships, the FIM Road Racing World Championship Grand Prix ("Grand Prix"), and the Superbikes and Supersports series.

Only prototype motorcycles are permitted to race in the Grand Prix category, whilst only production motorcycles are allowed to race in Superbikes and Supersports competitions.

Up to and including the season 2001, only two-stroke engines were admitted to the Grand Prix events whereas four-stroke engines were admitted in the Superbikes and Supersports series.

At the request of the Motorcycle Sports Manufacturers Association, during the 2003 season, four-stroke engines were admitted in the 500cc Grand Prix. But, in order to conform to the Road Racing World Championship Grand Prix Regulations, those engines had to be prototypes.

The permitted cubic capacity of the engines in the four-stroke class was stipulated as between 350cc and 990cc. This change made the four-stroke engines more attractive for racing.

On 23 April 2003 shortly before the Arnette Africa's Grand Prix in Welkom, scheduled for 27 April 2003, Mr Oriol Puig Bulto, Mr Fabio Fazi, respectively President and Vice-President of the Technical Panel of FIM and Mr Mike Webb, Technical Director of FIM, checked the engine of the Appellant's motorcycle that was intended to race in the South African Grand Prix.

They concluded that the engine was not in conformity with rules 2.2.1 of the Road Racing World Championship Grand Prix Regulations: although it was a four-stroke engine, it was not a prototype.

Despite those findings, the Race Direction decided not to penalise the Appellant.

The FIM lodged an appeal against the Race Direction's decision, and after hearing the appeal the Panel of FIM Stewards "*decided to disqualify the WCM bikes from the event of Arnette Africa's Grand Prix*". This decision was issued on 24 April 2003.

The Appellant lodged an appeal against the decision of the Panel of FIM Stewards to the International Disciplinary Court ("CDI") .

In its decision of 4 June 2003, the CDI confirmed "*in every respect the decision handed down by the Panel of FIM Stewards on 24 April 2003 at Welkom in South Africa which disqualified the Harris-WCM motorcycle of the WCM-GP Ltd team.*"

Shortly before the Gran Premio Marlboro de Espana, that is, the Spanish Grand Prix, the Race Direction upheld the Technical Director's decision that the WCM-GP motorcycles were "*not eligible for entry in the MotoGP class*".

The Appellant lodged an appeal from that decision to the Panel of FIM Stewards. On 8 May 2003 the FIM Stewards confirmed the decision of the Race Direction.

Shortly before the Grand Prix de France, that is, the French Grand Prix, the Race Direction upheld the Technical Director's decision that the WCM-GP motorcycles were "*not eligible for entry in the French Grand Prix*".

The Appellant lodged an appeal from that decision to the Panel of FIM Stewards. On 22 May 2003 the FIM Stewards confirmed the decision of the Race Direction.

On 13 May 2003 the Appellant filed an appeal before the Court of Arbitration for Sports ("CAS") against the FIM Stewards' decision of 8 May 2003 in respect of the Spanish Grand Prix.

On 27 May 2003 the Appellant filed a second appeal before the CAS. This appeal was in respect of the FIM Stewards' decision of 22 May 2003 that the Appellant's motorcycle was not eligible for the French Grand Prix.

On 8 June 2003 the Appellant filed a third appeal before the CAS. This appeal was against the decision of the CDI issued on 4 June 2003 confirming the *disqualification* of the Appellant from the South African Grand Prix.

The three appeal procedures were conducted jointly after the parties had finally accepted that the three procedures be heard together.

On 18 June 2003 the Respondent filed its answer before the CAS. The hearing was held in Lausanne on 23 June 2003.

The Appellant brought before the Panel two "full" engines (Yamaha R1 engine and WCM-GP engine), two motorbikes (Yamaha R1 and WCM-GP motorbikes) and three crankcase/cylinders and cylinders head (Yamaha R1 crankcase/cylinders and cylinders head, WCM-GP crankcase/cylinders and cylinders head intended for the South African, Spanish and French Grand Prix, and the Baijen Racing Technology crankcase/cylinders and cylinders head).

The Panel had the opportunity to have a close look at the different parts of the Yamaha R1 and WCM-GP motorbikes and equipment, and to hear the explanations of the witnesses.

In its statements dated 9 June 2003 and 5 May 2003, the Appellant challenges the decision of the CDI, claiming that its interpretation of article 2.2.1 of the Road Racing World Championship Grand Prix Regulations ("the Regulations") based on Mr Bulto statement was not correct. The Appellant considers that the interpretation of this article should be made in accordance with three general principles of law "*which clearly form part of the sporting lex mercatoria and which are particularly relevant. These are:*

- *the principle of legal certainty;*
- *the contra proferentem rule and*
- *the principle of proportionality."*

According to these principles, the Appellant claims that the article 2.2.1 of the Regulations was not breached, i.e. the four-stroke engine has an "*original design*" and the castings "*used*" were not derived from "*the industrial production*".

On the above grounds, the Appellant petitions the Panel to reject as incorrect the decision of the CDI, to find that the WCM-GP machine is a four-stroke prototype motorcycle for the purpose of article 2.2.1 of the Regulations and that WCM-GP should have been permitted to race that machine in the South African, Spanish and French Grand Prix.

Alternatively, even if the WCM-GP machine did offend against article 2.2.1 of the Regulations, the Appellant claims that the penalty of disqualification was unjustified, disproportionate and excessive.

The Respondent points out in its Answer dated 18 June 2003 that there are two main categories in motorcycling road racing, namely prototype motorcycles and machines from the industrial production. Prototype motorcycles are racing in the Grand Prix category, whereas motorcycles from the industrial production are racing in the Superbikes and Supersports series. In order to avoid dilution between the two categories, Grand Prix machines are not allowed in Superbikes and Supersports races and *vice versa*.

Accordingly, the Respondent submits that article 2.2.1 of the Regulations is intended to draw a line between the two categories of road racing competitions, and claims that the Respondent did offend against this rule in presenting a "*tuned Yamaha R1 engine*" for the South African, Spanish and French Grand Prix.

On the above grounds, the Respondent requests the Panel to reject the appeals and to confirm the decisions of the Panel of FIM Stewards of 8 May 2003 (Spanish Grand Prix) and 22 May 2003 (French Grand Prix) and the decision of the CDI of 4 June 2003 (Arnette's African Grand Prix).

LAW

1. The competence of the CAS to act as an appeal body is based on art R47 of the Code which provides that :

"A party may appeal from the decision of a disciplinary tribunal or similar body of a federation, association or sports body, insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports body."

and on article 3.9. of the Road Racing World Championship Grand Prix Regulations ("the Regulations") applicable at the time when the Appeal was filed which reads as follows:

"Final decisions handed down by the jurisdictional organs or the General Assembly of the FIM shall not be subject to appeal in the ordinary courts. Such decisions must be referred to the Court of Arbitration for Sports within the time limit of appeals as laid down in article 3.4.6, which shall have exclusive authority to impose a definitive settlement in accordance with the Code of Arbitration applicable to sport."

2. The Appellant's appeals are appeals against the decision of the CDI and the decisions of the Panel of FIM Stewards, that is the decisions "*of a disciplinary tribunal or similar body of a federation*".
3. It must be noted that, according to article 3.4.2 of the Regulations, appeals against decisions of the Panel of FIM Stewards ordinarily go to the CDI, and that no appeal may be lodged against

a decision of the FIM Stewards if they confirm the previous decision of the Race Direction (article 3.4.2 § 6 of the Regulations).

4. The FIM Stewards' decision is final. This is the case for the decisions related to the French and Spanish Grand Prix.
5. The Road Racing World Championship Grand Prix Regulations provide for arbitration before the CAS and the Appellant has exhausted the legal remedies available prior to the appeal to the CAS. As the decisions of the CDI and the Panel of FIM Stewards are final, the conditions set by art. R47 of the Code are therefore met.
6. Moreover, the competence of the CAS is explicitly recognised by the parties in their briefs and in the Order of Procedure signed by both of them.
7. The appeals are admissible for the following reasons :
8. The Appellant's appeals were filed on :
 - 13 May 2003 against the FIM Stewards' decision of 8 May in respect of the *non-eligibility* of the Appellant's motorcycle for the Spanish Grand Prix.
 - 27 May 2003 against the FIM Stewards' decision of 22 May 2003 in respect of the *non-eligibility* of the Appellant's motorcycle for the French Grand Prix.
 - 8 June 2003 against the decision of the CDI issued on 4 June 2003 in respect of the *disqualification* of the Appellant's motorcycle from the South African Grand Prix.
9. All three appeals were filed within the deadline of five days from the time of receipt of the sanction, as laid down by the Road Racing World Championship Grand Prix Regulations and the Code (article 3.4.6 of the Road Racing World Championship Grand Prix Regulations Guide and by art. R49 of the Code).
10. They are thus admissible.
11. Art. R58 of Code provides :

"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 body which has issued the challenged decision is domiciled."
12. Such provision was expressly mentioned in the Order of Procedure.
13. The "*applicable regulations*" in this case are those contained in the FIM material, i.e. the Road Racing World Championship Grand Prix Regulations ("the Regulations").

14. The parties have not expressly or impliedly agreed a choice of law applicable to these proceedings before the CAS.
15. Since the domicile of FIM is in Mies, Switzerland, the Panel shall apply Swiss law.
16. Pursuant to article 3.3 of the Regulations, the disciplinary and arbitration bodies of the FIM, qualified to deal with disciplinary and arbitration matters, are:
 - The Race Direction,
 - The Panel of FIM Stewards and
 - The International Disciplinary Court (CDI).
17. According to article 3.3.1.2 of the Regulations, the Race Direction has the authority to penalise automatically riders, participants, officials and promoters/organisers for infringements of the FIM Road Racing World Championship Grand Prix regulations occurring during an event. The Race Direction is also competent to adjudicate upon a protest lodged during an event.
18. In both the Spanish and the French Grand Prix, the Appellant lodged a protest to the Race Direction after the Technical Director had decided that the WCM-GP motorcycle was not eligible for the Grand Prix.
19. According to Paragraph 1.4.1 § 6 of the Regulations, the Technical Director is responsible for ensuring that Technical Regulations are correctly enforced.
20. As such, Mr Mike Webb, the Technical Director, was authorised to proceed with a technical control of the WCM-GP motorcycles and to decide whether the engines of the motorcycles complied with the Regulations.
21. Once the Appellant lodged its appeal from the Technical Director's decision, the Race Direction was authorised to decide the appeal, and if it so decided, to impose on the Appellant one of the sanctions, *inter alia* disqualification, provided by article 3.3.1.3 of the Regulations.
22. At the South African Grand Prix, the Technical Director, Mr Mike Webb, assisted by Mr Bulto and Mr Fazi, inspected the WCM-GP motorcycles and reported the non-compliance of the engines to the Race Direction.
23. The Race Direction considered the Appellant's appeal and decided not to penalise the WCM-GP team.
24. In accordance with article 3.3.2.2 of the Regulations, the Representative of the FIM then lodged an appeal against the decision of the Race Direction: that appeal was heard by the Panel of FIM Stewards. In accordance with article 3.3.2.3 of the Regulations, this Panel also has the power to impose penalties .

25. Pursuant to article 3.3.4.3. of the Regulations, the CDI is competent to hear any appeal against decisions taken by the Panel of FIM Stewards.
26. It is the opinion of the Panel that, in accordance with the Regulations, the FIM was competent to initiate disciplinary proceedings against the Appellant.
27. In the Panel's opinion, the first issue that falls to be decided is to define the nature of article 2.2.1 of the Regulation which is the end of a section of the Regulations dealing with "technical matters" (see articles 1.14.1 § 3, 1.14.2, 2.12.6 and finally 2.2.1 of the Regulation).
28. According to Swiss case law about Sports law, there are two types of rules :

- the "*Rules of the Game*" and
- the "*Rules of Law*".

(ATF 118 II 271; ATF 120 II 369)

29. The "*Rules of the Game*" (sometimes also called "Technical Rules") are the rules which are intended to ensure the correct course of the game and competition respectively. The application of such rules cannot, save in very exceptional circumstances, lead to any judicial review (see CAS OG 2000/013 Segura v/IAAF, in Digest of CAS Awards II 1998-2000, p. 680).
30. The "*Rules of Law*" are of a different nature. They are proper statutory sanctions that can affect the judicial interests of the person upon whom a sanction has been imposed other than in the course of the game or competition. For this reason, they have to be subject to judicial review.
31. In the present case, the sanction imposed on the Appellant had a direct effect on its economic interests, but also on its personality (ATF 118 II 12/19). Running a team that races in 500cc Grand Prix involves an important investment. As the application of article 2.2.1 can lead to the disqualification of a team, and, therefore, may put at risk these investments and the existence of the team itself, one must consider such rule not only as a "*Rules of the Game*" but as a "*Rules of Law*".
32. In these circumstances, the Panel is of the opinion that it has full power to review the application of article 2.2.1 of the Regulations.
33. Article 1 of the Swiss Civil Code provides :

"The law must be applied in all cases which come within the letter or the spirit of any of its provisions"

34. This provision means that the judge has to interpret the law according to its letter, to its spirit and to its purpose. (ATF 112 II 1; JT 1986 633)

35. The wording of the article 2.2.1 of the Regulations is the following :

"A four-stroke prototype motorcycle must have an engine of original design and must not use castings of the crankcase, cylinder or cylinder head derived from the industrial production. The moving parts (crankshaft, pistons, connecting rods, gearbox etc.) are not taken into consideration."

36. The first step, therefore, is for the Panel to construe the words used in the Regulations. Interpreting the law according to its letter requires a tribunal to construe the meaning of the words used by the legislator. (H. Deschenaux, "Titre Préliminaire du Code Civil", p. 158). Contrary to the submission made by the Appellant to convince the Panel that one should apply the principles of legal certainty, proportionality and the rule *contra proferentem* automatically, Swiss law relies on such principles only if there is ambiguity and no clear meaning can be drawn from an interpretation based on the letter and the spirit of the law.
37. Therefore, the first issue for the Panel is to construe a meaning to the words "*original design*", "*use*", "*castings of the crankcase, cylinder or cylinders head*", "*derived from*" and "*industrial production*".
38. Although the phrase "*castings of the crankcase, cylinder or cylinders head*" does not involve any difficulty in construction, the construction of the other relevant words, namely, "*original design*", "*use*" and "*derived from industrial production*" may not be so straightforward".
39. According to Cambridge International Dictionary of English (Cambridge University Press, 1995) "*original*" is used to describe something which existed from the beginning of a process or which is the first or earliest form of something.
40. "*Design*" is either a plan or the way in which something is arranged.
41. The witness statement and oral evidence of Mr Hagen, designer and principal engineer involved in the design and manufacture of the engine for the WCM-GP team, emphasised the fact that his first task was to design an engine based on the silhouette of the Yamaha R1 engine and to provide the manufacturing partner, i.e. Baijen Racing Technology, with that information.
42. Secondly, and because of time constraints, he had to build a version of the engine using the R1 crankcase and cylinder head castings as a "*starting base*". For such purpose, he undertook full programme of research and development, and came up with a design. He then adapted the R1 engine to his results.
43. The time pressure was due to the fact that there was insufficient time to permit Mr Hagen to research, develop and design a new engine, and then to have that engine built by the manufacturer chosen by the Appellant before the beginning of the 2003 season. In order to be able to race during that season, the Appellant chose to use the Yamaha R1 engine as the

"*starting base*", as an engine designed from this "starting base" could be ready before the first Grand Prix of the season.

44. It is in the light of this evidence that the Panel proposes to construe article 2.2.1 of the Regulations.
45. If the word "*design*" means **the plan**, it can be accepted that the plan was "*original*", as it existed from the beginning of the process. The Appellant would, thus, not be in breach of the Regulations. On the other hand, if the word "*design*" means **the method of arrangement**, the conclusion must be different, as the modifications performed by Mr Hagen on the Yamaha R1 engine were not sufficient to change the "*design*", in the sense of the method of arrangement of the Yamaha R1 engine. In the Panel's opinion, it is the latter sense which is the true construction of the word "design". If "design" meant merely "plan" it would be open to a party to contend that an inchoate plan was sufficient to satisfy the regulations. Thus, it could have been contended by the Appellant that Mr Hagen's intention to create something new would have been sufficient notwithstanding the fact that the intention was not even off the drawing board.
46. In this regard in addition to its opinion on the true construction of the Regulations, the Panel relies on its visual scrutiny of the crankcase, cylinders and cylinder heads of the Yamaha R1 engine which was intended to participate to the South Africa, French and Spanish Grand Prix as compared with the engine prepared by Baijen Racing Technology on the basis of Mr Hagen's design. The latter engine was not one which had been declared to be not in conformity with the Regulations.
47. If the Baijen Racing Technology crankcase, cylinders and cylinders head appeared as very different from the one of the Yamaha R1, that was not the case for the crankcases, cylinders and cylinder heads in the engine intended to participate to the South African, French and Spanish Grand Prix. Those appeared as almost identical to the Yamaha R1 "*design*".
48. The Panel is of the opinion that the construction of the phrase "*derived from industrial production*" presents no difficulty. There was no dispute that the Yamaha R1 engine was in industrial production. Once the Appellant used a Yamaha R1 casting as a "*starting base*", it cannot, in the Panel's opinion, be sensibly argued that such casting did not "*derive from the industrial production*".
49. The meaning of the word "*use*", according to the Cambridge International Dictionary of English is to put something such as a tool, skill or building to a particular purpose.
50. Mr Hagen clearly put a Yamaha R1 casting, even heavily modified, in the WCM-GP engine. As such, he "*used*" a casting "*derived from industrial production*".
51. The second step of interpretation required by article 1 of the Swiss Civil Code is the interpretation of the law according to its spirit and to its purpose.

52. The purpose of article 2.2.1 Regulations is beyond doubt: it is intended to make a clear distinction between the Grand Prix category and the Superbikes and Supersports series.
53. As prototype motorcycles are admitted in the Grand Prix category, the Superbikes and Supersports series allow only production motorcycles.
54. The distinction between prototype and production motorcycles relies on the core of a motorbike, i.e. the crankcase, cylinder or cylinder head. Once those are derived from the industrial production, they cannot be considered as prototypes any longer.
55. In the present case, the Panel is of the opinion that the Appellant clearly violated the spirit of article 2.2.1 of the Regulations in putting a Yamaha R1 casting in its engine. As such its motorcycles cannot be considered as a prototype and participate to the Grand Prix Road Racing Competitions.
56. The purpose of this rule is logical and is consistent with the construction made according to the letter of the rule. The Appellant violated article 2.2.1 of the Regulations.
57. Therefore, there is, in the Panel's opinion, no ambiguity in the Regulations and no need for an interpretation made according to the principles of legal certainty, proportionality and to the rule *contra proferentem*. In the Panel's opinion, it is the Appellant's submission that is wrong in law, that provides no legal certainty and is contrary to the spirit of the Regulations.
58. The Panel is not blind to the reality of the situation in which the Appellant found itself, and that the time pressure to which reference has been made caused the Appellant great difficulty, and put at risk its considerable investment and that of its sponsors. However, any sympathy that the Panel may have for that predicament cannot affect its construction of the Regulations, and has not done so.

The Court of Arbitration for Sport rules:

1. The appeals filed by WCM-GP Limited on 13 May 2003 in the case CAS 2003/A/461, on 27 May 2003 in the case CAS 2003/A/471 and on 8 June 2003 in the case CAS 2003/A/473 are dismissed.
2. (...)