



Arbitration CAS 2009/A/1860 Massimiliano Biaggi & Aprilia Racing Srl v. Fédération Internationale de Motocyclisme (FIM), award of 23 December 2009

Panel: Mr Martin Schimke (Germany), President; Mr Michele Bernasconi (Switzerland); Mr Luc Argand (Switzerland)

Motorcycling

Sanction imposed onto a rider

Determination of CAS jurisdiction in connection with field of play decision doctrine

Inadmissibility of an appeal filed late

1. It is to be noted that “*field of play*” decision doctrine – according to which CAS does not review “field of play” decisions made on the playing field – does not interfere with an arbitration clause, drafted in broad terms. The FIM Regulations sets a principle which cannot be derogated from: jurisdiction to CAS. A different solution would contradict the right to be heard of any athlete and R47 of the Code. As a result, a CAS panel has jurisdiction to hear a dispute regarding a “*ride through sanction*” against which no protest or appeal can be lodged (a final decision). In the exercise of such jurisdiction, however, the panel shall have to verify whether and to what extent the field of play decision doctrine applies, so as to preclude the examination of the merits of the dispute.
2. An appeal considered as late is inadmissible. According to the FIM Regulations, the time limit for lodging an appeal before the CAS is 5 days from the date and time of receipt of the decision by the appellant. The conditions relating to the receipt of the decision are met and the decision shall be considered as notified to the appellants once it was put on screen on the monitors used in all pit boxes and posted on the official board.

Mr Massimiliano Biaggi (“the Rider”) is a professional rider participating in the Superbike World Championship. He is a member of the Team of Aprilia Racing Srl (“the Team”).

Aprilia Racing Srl is a constructor providing the Rider with a motorcycle and participating in the Superbike World Championship.

The Fédération Internationale de Motocyclisme (FIM) is the international body governing motorcycling throughout the world. Its members are the national associations responsible for organising and supervising motorcycling in their countries.

On 22 September 2009, the Panel informed the parties that a hearing would be held and that the issue of admissibility of the appeal would be dealt with at the outset of the hearing. The Respondent was therefore invited to file its answer.

On 12 October 2009, the Respondent filed its answer.

The hearing was held in Lausanne on 3 November 2009.

On 10 May 2009, the Rider took part to the first race of the Superbike World Championship in Monza.

Before the race and during the pre-race briefing session for riders and team managers, the Race Direction issued a notice, dated 9 May 2009, to all riders and teams stating the following:

“Turn 1 & 5 (1st & 2nd chicane)

If you leave the race track at those 2 turns, you must rejoin the track using the access road indicated on the asphalt run off areas by 2 white lines:

If you rejoin the race track without using this access, article 1.22.3 of the Road Racing FIM Superbike & Supersport World Championships and FIM Superstock Cup Regulations will apply

- *During the warm up your lap time will be cancelled*
- *During the race if you took advantage you will be penalised by a ride through.*

In both cases further penalties may also be imposed”.

During the seventh lap, the Rider left the track and cut the chicane.

To return to the track, the Rider did not use the access road specifically established for that purpose.

Whilst the Marshal in charge of the supervision of the chicane noticed the occurrence, the Race Direction did not see it as it was following the race with the TV broadcast.

Nevertheless, the Marshal immediately informed the Race Direction of the occurrence.

In addition to the Marshal, Mr Francesco Batta, sport director of an opposing team, also provided the Race Direction with this information.

According to the Race Direction, in the heat of the moment, it had no capacity to look back at the TV footage, scrutinize the occurrence and decide whether the conditions of the infringements were met.

The Race Direction decided to proceed with this task at the end of the Race.

The Rider finished the race in third position.

Immediately after the end of the Race, the Race Direction reviewed the occurrence in question with the TV footage.

Once it observed the occurrence, it imposed a post race sanction of a 20 second time penalty.

This sanction relegated the Rider from third to eleventh place.

The sanction was mentioned on the “Superbike - Results Race 1” issued by the Race Direction just after the race.

The result list was affixed on the official board, distributed in the press room and put on screen on the monitors used in all pit boxes, official’s rooms and in the press room.

On 29 May 2009, the Appellants filed their Statement of Appeal against the decision to impose on the Rider a 20 second penalty.

By letter dated 3 June 2009 the CAS Court Office advised the Appellants – inter alia – to file an Appeal Brief with the CAS within 10 days following the expiry of the time limit for the appeal.

On 11 June 2009, the Appellants filed their Appeal Brief.

On 29 June 2009, the Respondent filed an application for preliminary decision based on the fact that the appeal was manifestly late.

On 16 July 2009, the Appellants filed their position in relation to the Respondent’s application.

On 24 July 2009, the CAS inter alia informed the parties that the question of the admissibility of the appeal would be dealt with by a Panel, that would also decide if it agreed to issue a preliminary decision on this point or not. Furthermore, the deadline to file the answer was considered as suspended from 29 June 2009 until the issuance of the Panel’s decision.

LAW

Applicable law

1. According to Article R58 of the Code:

“The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in 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”.

2. The Panel notes that the parties both refer to the FIM Regulations 2009. The Panel also notes that the FIM has its seat in Switzerland.

3. As a result, the Panel holds that the present dispute must be decided applying primarily the FIM Regulations and complementarily, Swiss law.
4. The relevant provisions are mainly the following rules of the Road Racing FIM Superbike & Supersport World Championships and the FIM Superstock Cup Regulations 2009:

“1.20 RIDE THROUGH PROCEDURE

During the race, the rider will be requested to ride through the pit lane, stopping is not permitted. He may then rejoin the race.

The rider must respect the speed limit (Art. 1.22.14) in the pit lane. In case of infraction of this speed limit, the ride through procedure will be repeated; in case of a second infraction of this speed limit, the black flag will be shown to the rider.

In the event of a restarted race, the above regulation will also apply.

In the case of a race interrupted prior to the penalty being complied with, and if there is a second part, the rider will be required to ride through after the start of the second part of the race.

In the case of a rider carrying forward a penalty for anticipation of the start, into the second part of an interrupted race and subsequently found to have anticipated the second start, the rider will be shown the black flag.

After notification has been made to the team, a yellow board (100 cm horizontal X 80 cm vertical) displaying the rider's number (black colour) will be shown at the finish line and the information will also be displayed on the time keeping monitors.

Failure by the relevant rider to ride through, having been shown the board 5 times, will result in that rider being shown the black flag.

In the case where the organisation has been unable to carry out the ride through penalty before the end of the race, the relevant rider will be inflicted with a time penalty of 20 seconds”.

“1.22 BEHAVIOUR DURING PRACTICE AND RACE

(...)

3) *Riders should use only the track and the pit-lane. However, if a rider accidentally leaves the track then he may rejoin it at the place indicated by the marshals or at a place which does not provide an advantage to him. Any infringement of this rule during the practices or warm up will be penalised by the cancellation of the lap time concerned and during the race, by a ride through. Further penalties (such as fine-disqualification-withdrawal of Championship points) may also be imposed”.*

(...)

“1.30.2 All classifications and results of practice and the race, as well as all decisions issued by the officials, will be posted on the official notice board”.

“3.4 PROTESTS AND APPEALS

3.4.1 Right of protest

Any legal entity or any individual, rider, team, manufacturer, official, etc. affected by a decision taken under the authority of the FIM, has the right to protest against that decision.

No protest may be lodged against a decision of the Race Direction entailing or not:

- *a change of position.*
- *a ride through.*
- *a disqualification from the practice sessions or races by means of a black flag or black flag with orange disc.*
- *a fine for speeding in the pit lane.*

No protest may be lodged against a decision of the Race Direction based on a photo finish”.

“3.4.2 Right of appeal

The rules concerning appeals against FIM disciplinary decisions are:

Against a decision of the Race Direction, to the FMI Stewards.

No appeal may be lodged against a decision of the Race Direction entailing or not:

- *a change of position.*
- *a ride through.*
- *a disqualification from the practice sessions or races by means of a black flag or black flag with orange disc.*
- *a fine for speeding in the pit lane.*

No appeal may be lodged against a decision of the Race Direction based on a photo finish.

No appeal may be lodged against a decision of the FMI Stewards if they confirm the previous decision of the Race Direction. Their decision is final”.

“3.4.6 Time limits for the lodging of an appeal

The time limit for lodging a statement of appeal is:

- *against a decision of the Race Direction* - 30 Minutes
- *against a decision of the FMI Stewards* - 5 days
- *statement of appeal before the Court of Arbitration for Sports (CAS)* - 5 days

The time limits shall be taken from the date and time of receipt of the decision by the appellant”.

“3.5.5 Notification of judgements

The decisions of the Race Direction or of the FMI Stewards must be notified directly at the event venue, or failing that, addressed by registered letter with acknowledgement of receipt.

All judgements of the International Disciplinary Court (CDI) must be notified, in writing, by registered letter with acknowledgement of receipt in order to inform all the parties concerned”.

“3.5.6 Publication of judgements

The disciplinary or arbitration body imposing a penalty or adjudicating a protest or an appeal must have its findings published and quote the names of all parties concerned. The persons or bodies quoted in these statements have no right of action against the FIM nor against any person having published the statement.

Furthermore, final decisions will be published in the Media Centre and in the FIM Magazine unless the Court itself decides otherwise”.

“3.9 Arbitration Clause

Final decisions handed down by the disciplinary bodies or the General Assembly of the FIM shall be referred to the Court of Arbitration for Sport 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”.

Jurisdiction of the CAS

5. The jurisdiction 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 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”.
6. According to this provision, the CAS has the power to adjudicate appeals against a sports organization only if three conditions are met:
 - If the statutes or regulations set forth an arbitration clause;
 - If any available stages of appeal within the sports organization have been exhausted;
 - If the sports organization issued an actual decision.
7. Art 3.9 of the FIM Regulations provides for an arbitration clause with a reference to art 3.4.6 that sets a time limit of five days for lodging an appeal before the CAS. The condition of an arbitration clause is therefore met.
8. Concerning the second condition, as to whether all remedies have been exhausted, the Panel shall first qualify the exact nature of the sanction that was imposed onto the Rider as the available protest or appeal may vary from one sanction to the other.
9. This clarification is even more necessary in light of the fact that, a pertinent issue in this case was whether the sanction imposed was in fact a time penalty imposed/decided on **after** the race (as opposed to a time penalty imposed in place of a ride through – i.e. in terms of Art.1.20(7)). In contrast to ride through sanctions (against which protests and appeals are precluded in terms of Arts. 3.4.1. and 3.4.2) appeals against time penalties imposed after the race are not precluded (see Arts. 3.4.1 and 3.4.2 of the FIM Regulations).

10. Regarding the scope of Article 1.20(7), the most detailed and unrefuted evidence is the testimony of the Race Direction (Mr Claude Danis), who explained very clearly at the hearing that, in his opinion, this provision can apply where the Race Direction has been prevented, for practical reasons (in this case, being tied up dealing with other race incidents and/or other duties), from imposing the sanction of a ride through until the race's conclusion. Furthermore, throughout the course of the hearing, the Appellants' representative did not argue that the sanction imposed was anything other than a time penalty in place of a ride through. Accordingly, in light of all of the above, and as a result of the explanations given by the Race Director during the hearing, the sequence of events appeared very clearly to the Panel. This sequence of events is the following:
11. The Race Direction did not notice the occurrence as the TV broadcast did not show it. Nonetheless, it was spotted by the Marshal responsible for the survey of the chicane and immediately mentioned to the Race Direction. As the Race Direction had no possibility to interrupt the follow up of the race, it decided to postpone the scrutiny of the case to the end of the Race. Once the race was over, the Race Direction was able to review the occurrence in question with the TV footage, and it decided to impose a sanction as the track followed by Mr Biaggi during the seventh lap had to be considered as an infringement to art. 1.22.3 of the FIM Regulations and to the notice issued before the race. As practically no ride through was possible, the Race being finished, the Race Direction imposed the 20 second penalty, that is the applicable sanction once the organization is not able to carry out the ride through (art 1.20 paragraph 7 of the FIM Regulations). From a mere sporting view, the Panel can understand that the late timing of the decision and its pure post-race effect may have caused some frustration to the Appellants. However, according to the Panel, the sanction imposed onto the Rider is nevertheless an ordinary ride through sanction provided for at art 1.22.3 and 1.20 of the FIM Regulations. According to art 3.4.1 and 3.4.2, no protest or appeal can be lodged against a ride through. The sanction imposed by the Race Direction shall therefore be considered as final.
12. The third condition, namely whether the FIM issued an actual decision relates to a broader issue, as, if the decision relates to a so called "field of play" decision it is outwith the jurisdiction of the CAS.
13. The "field of play" decision doctrine is well established in CAS jurisprudence:
14. In CAS OG 00/013, award of 30 September 2000, the Panel stated that:
"CAS arbitrators do not review the determinations made on the playing field by judges, referees, umpires, or other officials who are charged with applying what is sometimes called "rules of the games" (one exception among others would be if such rules have been applied in bad faith, e.g. as a consequence of corruption). If they happen to have been present at the relevant event, CAS arbitrators were mere spectators with no official role. Moreover, they are not, unlike on-field judges, selected for their expertise in officiating the particular sport".
15. In CAS OG 02/007, award of 23 February 2002, the Panel referred to "field of play" issues as those implying *"the application of the rules governing the playing of the particular game"* and held that:

“embark on a review of a purely technical “field of play” decision ... would be an illegitimate exercise, absent some evidence of bad faith in the making of the decision... (I)t is not open to a player to complain about a “field of play” decision simply because he or she disagrees with that decision”.

16. In CAS 2001/A/354 and CAS 2001/A/355 the Panel confirmed that:
“...it had been established that CAS does not review “field of play” decisions made on the playing field by judges, referees, umpires and other officials, who are responsible for applying the rules of a particular game. An exception is nevertheless possible if such rules have been applied in bad faith”.
17. In CAS 2008/A/1641, the CAS *“...fully endorsed such doctrine and agrees with the rationale underlying it: it is intended to protect the integrity of sporting events, which, barring specific exceptions, needs not be disrupted by litigation before courts of law or arbitration bodies. The Sole Arbitrator, therefore is not prepared to interfere with the application of the rules governing the play of the particular game, which is to be left to field officials, who are specifically trained to officiate the particular sport and are best placed, being on-site, to settle any question regarding it”.*
18. The question remains however, in such context, whether the jurisdiction of the CAS provided for at art 3.9 of the FIM Regulations is limited by the *“field of play”* decision doctrine. In CAS 2008/A/1641, the CAS found that it had jurisdiction to hear the dispute, *“in the exercise of such jurisdiction, however, the Sole Arbitrator shall have to verify whether and to what extent (...) the field of play decision doctrine applies, so as to preclude the examination of the merits of the dispute”.*
19. In the case at hand, art 3.9 of the FIM Regulations is drafted in broad terms, it refers to *“decisions handed down by the disciplinary bodies or the General Assembly of the FIM”* and sets as pre-conditions for the referral of such dispute to arbitration to the exhaustion of the legal remedies, the decision being *“final,”* and the timely filing *“be referred to the Court of Arbitration for Sport within the time limit of appeals as laid down in article 3.4.6”.*
20. The Panel notes that the *“field of play”* decision doctrine does not interfere with the arbitration clause, drafted in broad terms. Article 3.9 of the FIM Regulations sets a principle which cannot be derogated from: jurisdiction to CAS. A different solution would contradict the right to be heard of any athlete and R47 of the Code that provides for a right of appeal *“from the decision of a federation, association or sports body, insofar as the statutes or regulations of the said body so provide”.*
21. As a result, the Panel concludes, in accordance with CAS jurisprudence (CAS 2008/A/1641) that it has jurisdiction to hear the dispute, in the exercise of such jurisdiction, however, the Panel shall have to verify whether and to what extent the field of play decision doctrine applies, so as to preclude the examination of the merits of the dispute.

Time limit for Appeal

22. According to art R49 of the Code:

“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 (...).”

23. According to art 3.4.6 of the FIM Regulations, the time limit for lodging an appeal before the CAS is 5 days from the date and time of receipt of the decision by the appellant. The French version of art 3.4.6 of the FIM Regulations adds that : *“Les délais courent à partir de la date et de l’heure de réception de la décision par l’appelant, conformément à l’article 3.5.6”*. The English version does not mention this sentence.

24. There is an inconsistency between the English and the French versions. The Panel notes that under paragraph 3 of the *“General Undertakings and Conditions”* the FIM Regulations provide that *“Whilst these Regulations may be translated into other languages, in case of any dispute regarding interpretation the Official English text will prevail”*. It is doubtful whether this should also apply to the French version, a language in which the FIM Statutes and Regulations are also officially published as one could argue that this version may not be considered to be a *“translation into another language”* because, according to Art 8 of the FIM Statutes, English and French are the official languages of the FIM. However, even if the French version prevailed, the Panel considers that the conditions of art 3.5.6 are met as the Results list had been published and posted on the official board according to art 1.30.2 of the FIM Regulations. Such list shows the penalty imposed on the Rider and reference to the infringement is made. For the avoidance of doubt, Article 1.30.3 is not applicable in these circumstances as Arts. 3.5.6 and 1.30.2 are, in combination, the applicable *lex specialis*.

25. The Result list was as well put on screen on the monitors used in all pit boxes, officials’ room and in the press room. As a consequence, the decision shall be considered as notified to the Appellants once it was put on screen and posted on the official board, *i.e.* on the 10 May 2009. Moreover, the Appellants cannot pretend they were not aware or what were the grounds of the sanction as the Rider was barred from getting onto the podium and the available Result list mentioned the infraction.

26. Additionally, the infraction corresponded exactly to the warning made by the Race Direction in the pre-match briefing and to the notice issued before the race.

27. As the appeal was filed on 29 May 2009, it shall be considered as late and therefore inadmissible.

28. All of the parties’ other arguments and requests will therefore not be examined by the Panel.

The Court of Arbitration for Sport rules:

1. Declares the Appeal filed by Mr Massimiliano Biaggi and Aprilia Racing Srl on 29 May 2009 inadmissible.
 2. Dismisses all other motions or prayers for relief.
- (...).