



Arbitration CAS 2015/A/3872 Sheikh Khalid Al Qassimi & Abu Dhabi Racing Team v. Fédération Internationale de l'Automobile (FIA), Qatar Motor and Motorcycle Federation (QMMF) & Nassr Al-Attiyah, award on jurisdiction of 9 June 2015

Panel: Prof. Jan Paulsson (France), President; Prof. Luigi Fumagalli (Italy); Prof. Denis Oswald (Switzerland)

Automobile

Disputed competition result

Conditions for CAS jurisdiction in appeal procedures

“Favourable view of arbitration” by the SFT and limits of CAS jurisdiction

Associative rights and CAS jurisdiction

1. CAS decisions have consistently affirmed that in order for the CAS to have jurisdiction to hear an appeal, there must exist a specific arbitration agreement between the parties, or else the jurisdiction of CAS must be expressly recognized in the statutes or regulations of the sports-related body.
2. The contention that the Swiss Federal Tribunal takes a favourable view of arbitration, and moreover considers it particularly legitimate in the field of sports, does not suffice to justify the conclusion that Swiss law can create a right to arbitration out of a promise not to interfere with an already existing right.
3. Associative rights must be created, rather than assumed. Mere expectations of access to the CAS, or the belief - however well founded - that the CAS provides an especially appropriate forum, do not create rights.

I. PARTIES

1. Sheikh Khalid Al Qassimi (“Sheikh Khalid” or the “First Appellant”) is an Emirati professional car driver.
2. The Abu Dhabi Racing Team (the “Team” or “Second Appellant”) is an Abu Dhabi-based driving company and team which participates in various global motorsport competitions, including off-road and circuit races. Sheikh Khalid is a member of the Team.
3. The Fédération Internationale de l'Automobile (the “FIA” or First Respondent”) is the world governing body for four-wheeled motor sport. It issues rules and regulations establishing the conditions for participation in the sport, and sanctions championships and competitions

organized in accordance with those rules and regulations, including the FIA Middle East Rally Championship.

4. The Qatar Motor and Motorcycle Federation (“QMMF” or the “Second Respondent”) is the FIA’s member national federation for motor sport in Qatar.
5. Mr. Nasser Al-Attiyah (“Mr. Al-Attiyah” or “Third Respondent”) is a Qatari professional car driver and a license holder in the QMMF.

II. FACTUAL BACKGROUND

A. Background Facts

6. Below is a summary of the relevant facts and allegations based on the parties’ written submissions, pleadings and evidence adduced in connection with the preliminary issue of jurisdiction. Additional facts and allegations found in the parties’ written submissions, pleadings and evidence are set out, where relevant, in connection with the legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in this Award on Jurisdiction only to the submissions and evidence it considers necessary to explain its reasoning.
7. On 29 November 2014, Sheikh Khalid competed in the 2014 Dubai International Rally, one of the competitions in the 2014 FIA Middle East Rally Championship. Sheikh Khalid won the competition by 0.3 seconds and as a result won the championship by a single point.
8. After the race, Mr. Al-Attiyah filed a protest against Sheikh Khalid for violating certain driving regulations. In particular, Mr. Al-Attiyah alleged that Sheikh Khalid passed in front of a marked earth mound, rather than behind it as required by the applicable itinerary and road book directions, thereby gaining an unfair time advantage.
9. Such protests are heard by the race Stewards, who are responsible for enforcing the applicable rules and regulations for the competition. The Stewards rejected Mr. Al-Attiyah’s protest.
10. Mr. Al-Attiyah proceeded to appeal the decision of the Stewards to the International Court of Appeal (the “ICA”) established under the FIA Statutes. Since Mr. Al-Attiyah holds his FIA racing license through the QMMF, the QMMF filed Mr. Al-Attiyah’s appeal on his behalf in accordance with the FIA and QMMF rules.
11. On 4 December 2014, the ICA upheld Mr. Al-Attiyah’s appeal and assessed Sheikh Khalid a 30-second post-event penalty which took him off the podium for the competition and left Mr. Al-Attiyah as the winner of the competition and the championship (the “ICA Decision”).
12. It is from the ICA Decision that the Appellants now appeal to the Court of Arbitration for Sport (the “CAS”).

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

13. On 1 January 2015, the Appellants filed their statement of appeal in accordance with Article R47 *et seq.* of the Code of Arbitration for Sport (the “Code”) against the ICA Decision. In it, the Appellants nominated Prof. Luigi Fumagalli, attorney-at-law in Milan, Italy as arbitrator.
14. On 9 January 2015, the Respondents jointly nominated Prof. Denis Oswald, attorney-at-law in Colombier, Switzerland as arbitrator.
15. On 13 January 2015, the CAS Court Office, based upon the parties’ agreement, confirmed that decisions on CAS jurisdiction and the merits of the dispute would be bifurcated. In this regard, it was agreed that the parties would make preliminary submissions on CAS jurisdiction. If and when jurisdiction was confirmed by the Panel, the parties would then proceed to make submissions on the merits.
16. On 19 January 2015, the Second and Third Respondents filed their preliminary submission objecting to CAS jurisdiction.
17. On 21 January 2015, the First Respondent filed its preliminary submission objecting to CAS jurisdiction.
18. On 2 February 2015, the Appellants filed their response to the Respondents’ objections to CAS jurisdiction.
19. On 3 March 2015, the CAS Court Office informed the parties that the Panel appointed to decide this matter was as follows:

President: Prof. Jan Paulsson, law professor in Miami, Florida, USA
Arbitrators: Prof. Luigi Fumagalli, attorney-at-law in Milan, Italy
Prof. Denis Oswald, attorney-at-law, Colombier, Switzerland
20. On 15 April 2015, at the direction of the Panel, the First Respondent filed its reply submission on CAS jurisdiction. The Second and Third Respondent did not file a reply submission.
21. On 22 April 2015, at the direction of the Panel, the Appellants filed their reply submission on CAS jurisdiction.
22. On 29 April 2015, the CAS Court Office, on behalf of the Panel, informed the parties that the Panel deemed itself sufficiently well informed to render a decision on the preliminary issue of CAS jurisdiction without the need for a hearing in accordance with Article 57 of the Code.

IV. SUBMISSIONS OF THE PARTIES’ SUBMISSIONS ON CAS JURISDICTION

23. The Appellants’ submissions on jurisdiction, in essence, may be summarized as follows:

- The right to appeal the FIA Decision is inherent in Article 20 of the FIA Judicial and Disciplinary Rules (the “FIA Rules”), which provides as follows:

For the avoidance of doubt, nothing in these rules shall prevent any party from pursuing any right of action which it may have before any court or tribunal, subject at all times to such party having first exhausted all mechanisms of dispute resolution set out in the Statutes and Regulations of the FIA.

- Since ICA is the final court of appeal provided for in the FIA Statutes and Regulations and therefore, the Appellants have fulfilled their obligation to exhaust internal legal remedies as set forth in Article 20 of the FIA Rules. Consequently, the Appellants now maintain a right of appeal against the FIA Decision at the CAS because the CAS is, indeed, a “court or tribunal” as envisioned under the FIA Rules.
- The doctrine of *contra proferentem* impedes the FIA from preventing the Appellants from seeking redress from the CAS.
- Moreover, the Appellants’ ability to appeal to the CAS is derived from its membership in the Association des Fédérations Internationales de Sports reconnues par le CIO (“ARISF”) and Sport Accord, which by virtue of such membership, the Appellants have the possibility to file an appeal against any decision of the FIA before the CAS (*vis a vis* Article 20 of the FIA Rules).
- The ICA is not independent or impartial (as evident by its composition alone) and the first-instance hearing (or internal appeal) in Doha violated the Appellants’ rights to a fair hearing. They did not, as suggested by the Respondents, consent to the hearing venue and logistics. The CAS, in turn, is the only appropriate venue for this dispute.
- No element of competence would confer jurisdiction on the French courts as the FIA Decision was rendered in Doha in a dispute involving Qatari and Emirati parties concerning a Middle East Rally Championship organized by the Automobile & Touring Club of the United Arab Emirates.

24. The First Respondent’s submissions on jurisdiction, in essence, may be summarized as follows:

- The CAS has jurisdiction over a dispute only if the parties have agreed thereto. If a party has not agreed to give CAS jurisdiction to resolve a particular dispute, the CAS has no jurisdiction to resolve it.
- The FIA Statutes and Regulations give jurisdiction to the CAS only with respect to appeals from decisions of the FIA Anti-Doping Disciplinary Committee. The Statutes and Regulations are clear that any other decisions of the FIA, including the Stewards’ decisions on protests by competitors, may be appealed to the ICA, without prejudice to challenge the ICA’s decision before any “court or tribunal”.

- When a party is disappointed by a decision of the ICA, it may, for example, bring such appeal to the Tribunal de Grande Instance de Paris. In such a case, the FIA would not dispute the jurisdiction of such a court to hear the challenge.
 - The CAS, however, is not a “*court or tribunal*” for purposes of Article 20 of the FIA Rules as the paradigm meaning of a “*court or tribunal*” is a body established by law for the administration of justice by judges or other legal adjudicators. Furthermore, there is no clear intention within Article 20 of the FIA Rules to remove a dispute from the state courts in favour of an arbitral tribunal. Indeed, the FIA inserted Article 20 (at the behest of the European Commission) specifically and intentionally in order to make clear that decisions made under the FIA rules, including decisions of the ICA, could only be challenged within the FIA structure and before national courts.
 - Membership to ARISF and/or Sport Accord does not grant a right of appeal to the CAS for all disputes. To the contrary, membership in such organizations only recognizes a right to submit anti-doping disputes to the CAS, in accordance with the World Anti-Doping Code.
25. The Second and Third Respondents’ submission on jurisdiction, in essence, may be summarized as follows:
- The ICA venue and logistics were agreed upon by all parties and at no time did the Second or Third Respondent influence or compromise the appeal.
 - There are no provisions in the FIA Statutes or Regulations which permit an appeal to the CAS except decision arising out of the application of the FIA Anti-Doping Regulations.
 - The proper appeal venue for the Appellants was the French courts.

V. JURISDICTION

26. As the issues concerning CAS jurisdiction and the merits of the dispute have been bifurcated, the present award only addresses whether CAS has jurisdiction to hear the appeal lodged by the Appellants.

A. Competence of the Panel to Decide its Own Jurisdiction

27. Article 176 Para. 1 of Switzerland’s Federal Code on Private International Law (the “PIL”) provides that Articles 176 *et seq.* of the PIL apply if the seat of the arbitral tribunal is in Switzerland and if at least one of the parties at the time the arbitration agreement was concluded was neither domiciled nor habitually resident in Switzerland. The seat of the present arbitration is Lausanne, Switzerland (Article R28 of the Code). None of the parties are domiciled in Switzerland. Accordingly Articles 176 *et seq.* of the PIL apply to the present case.

28. Pursuant to Art. 186 Para. 1 PIL, the arbitral tribunal shall rule on its own jurisdiction. The objection of a lack of jurisdiction must be raised prior to any defense on the merits. The Respondents have contested CAS jurisdiction in their submissions in a timely manner.
29. The Panel thus has the authority and the duty to rule on its own jurisdiction in the present matter.

B. Jurisdiction of the CAS

30. Article R47 of the Code provides as follows:

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 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-related body.

31. CAS decisions have consistently affirmed that in order for the CAS to have jurisdiction to hear an appeal, there must exist a specific arbitration agreement between the parties, or else the jurisdiction of CAS must be expressly recognized in the statutes or regulations of the sports-related body (See, e.g., CAS 2013/A/3199; CAS 2008/A/1602; CAS 2009/A/1910; CAS 2008/A/1708 and CAS 2005/A/952). Neither condition is extant in this case.
32. The Appellants rely on the text of Article 20 of the FIA Rules to the effect that “*nothing in these Rules shall prevent any party from pursuing any right of action which it may have before any court or tribunal*”. They argue that this “*in effect prohibits the governing body, by virtue of its own rules, from refusing to submit to [...] CAS jurisdiction*”.
33. This is plainly wrong. To say that there can be no interference with a right is self-evidently not the same thing as establishing that the right exists in the first place. Article 20 of the Rules would allow the Appellants an option to go to either a court or to an arbitral tribunal, but only provided its right to do so exists (the words are “which it may have”, not “which it is hereby granted”).
34. The contention that the Swiss Federal Tribunal takes a favourable view of arbitration, and moreover considers it particularly legitimate in the field of sports, does not suffice to justify the conclusion that Swiss law can *create* a right to arbitration out of a promise not to interfere with an *already existing* right.
35. Nor does it assist the Appellants to argue that the issue of one of associative rather than contractual rights; associative rights too (even if the Appellants are right in their rather broad contention that “*federation rules are ...similar to statutory laws*”) must be created, rather than assumed. Mere *expectations* of access to the CAS, or the belief - however well founded - that the CAS provides an especially appropriate forum, do not *create* rights; the Appellants reliance on CAS 2012/A/3027 is therefore misplaced.

36. It is unnecessary to consider whether it is right to assert, as the Appellants do, that FIA has the burden of *disproving* arbitral jurisdiction, because in any event FIA has done so.
37. As a result, the Panel concludes that the CAS has no jurisdiction to proceed on the appeal filed by the Appellants.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. It does not have jurisdiction to decide on the appeal filed on 1 January 2015 Sheikh Khalid Al Qassimi & the Abu Dhabi Racing Team against the decision rendered on 4 December 2014 by the International Court of Appeal of the Fédération Internationale de l'Automobile (Doha).
2. The appeal filed by Shaikh Khalid Al Qassimi & Abu Dhabi Racing Team is dismissed.
3. The arbitration procedure CAS 2015/A/3872 Shaikh Khalid Al Qassimi & Abu Dhabi Racing Team v. Fédération Internationale de l'Automobile, Qatar Motor and Motorcycle Federation & Nassr Al-Attiyah is removed from the CAS roll.
4. (...).
5. (...).
6. All other motions or requests for relief are dismissed.