



Arbitration CAS ad hoc Division (OG Athens) 04/005 David Calder & Christopher Jarvis v. Fédération Internationale des Sociétés d’Aviron (FISA), award of 20 August 2004

Panel: Mr Dirk-Reiner Martens (Germany), President; Mr Hans Nater (Switzerland); Mr Ivaylo Dermendjiev (Bulgaria)

Rowing

Exclusion of rowers from a race for interference with a competitor in the adjacent lane

Extent of the CAS power of review when the rules grant discretion to the decision-maker

Competent entity to apply sanctions

- 1. It is a general rule that in cases of decisions based on discretionary powers the reviewing body is not entitled to substitute its own assessment of the “just result” for that of the decision-maker unless the latter acted arbitrarily or outside its powers.**
- 2. It is not for the competitors but it is the prerogative of the governing body of the sport alone to take a decision on whether and to what extent a penalty must be applied.**

This is an appeal by two Canadian rowers who were excluded from the semi-final race in the M-2 Men Class on 18 August 2004. The appeal was heard on 19 August 2004 at the CAS ad hoc Division offices in Athens from 18:30 to 20:45.

On 18 August 2004, the Applicants competed in the semi-finals of the M-2 race. Approximately 200m before the finish line, the Applicants’ boat started to move into the lane of the South African boat in the adjacent lane. Despite the Umpire’s warnings, the Applicants were unable to avoid an overlap of their oar blades with those of the South African boat in the next lane which eventually caused the South African pair to stop racing. According to the findings of FISA Board of Jury, the blades of the Applicants were “*more than 1,5 meters into the lane of RSA ... which clearly caused a disadvantage to RSA*”. The final placings of the race (1. Germany, 2. Canada, 3. Serbia & Montenegro, 4. South Africa) were corrected by the FISA Board of Jury to the effect that the Applicants were put in the last place and that the South African boat moved to the A-Final which is scheduled to take place on 21 August.

Immediately after the race, the South African pair protested the interference by the Applicants to the Umpire who decided to exclude the Applicants from the race.

Upon appeal, the FISA Board of the Jury, on the same 18 August 2004, confirmed the Umpire’s decision.

A further appeal was lodged by the Applicants to the FISA Executive Committee on the same 18 August 2004 which “*decided that according to Rule 79(6), the appropriate measure is to allow the CAN M-2 to participate in Final B on Thursday*”, thus effectively setting aside the Umpire’s/Board of the Jury’s decision to exclude the Applicants from the race but disallowing their participation in the A Final for which they would have been qualified according to the placings in the race.

It is this decision of the FISA Executive Committee (the “Decision”) which is the subject matter of this appeal.

LAW

1. The jurisdiction of the CAS ad hoc Division arises out of the entry form signed by each and every participant in the Olympic Games as well as out of Rule 74 of the Olympic Charter.
2. FISA is an association governed by articles 60 et seq. of the Swiss Civil Code (see art. 1 para 2 of the FISA Statutes). Consequently, the FISA Rules are subject to Swiss law.
3. The following rules of the FISA Rules of Racing (the “FISA Rules”) are relevant to this case:

“Part I – SCOPE

[...]

Rule 2 – Application

[...]

These Rules and the relevant Bye-Laws shall apply to

[...]

2. Olympic Regattas within the limits of the authority of FISA

Part VI – ORGANISATION OF REGATTAS

[...]

Section 6 – The Jury

Rule 56 - Composition of the Jury

[...]

b) FISA Championship Regattas - The FISA Umpiring Commission shall appoint the jury for FISA World Rowing Championships and shall supervise its activities.”

[according to Rule 4c

“Olympic Regattas shall have the same status as FISA World Rowing Championships. Within the limits of the authority of FISA the same Rules, Regulations and Bye-Laws shall apply”].

Rule 61 – Exceptional Cases

[...]

- b) *FISA Championship Regattas - Should it be necessary to take decisions in exceptional cases (e.g. postponement of a race or suspension of the regatta), the Executive Committee or another committee specifically appointed by the Executive Committee for that purpose shall take such decisions.*

[...]

Section 8 – During the Race

Rule 71 – Responsibility of the Rowers

Rowers are responsible for their own steering. Each crew shall have a lane reserved for its own use. A crew may, at its own risk, leave its lane provided that it does not impede any of its opponents or gain any advantage thereby.

[...]

Rule 72 – The Umpire

The umpire shall ensure the proper conduct of the race and the safety of the rowers. In particular, he shall endeavour to ensure that no crew gains any advantage or suffers any disadvantage from its opponents or from outside interference.

Where the umpire is satisfied that a crew has been significantly impeded, the umpire shall endeavour to ensure that its chance of winning is fully restored to it.

He shall impose appropriate penalties on crews at fault but, in principle, only after a previous warning.

[...]

The umpire may also exclude crews after the race has finished or may confine the re-row to such crews as he shall designate.

Bye – Laws to Rule 72 – Duties of the Umpire

[...]

7. Penalties

Crews interfering with their opponents may be excluded by the umpire but, in principle, only after a warning has been given. Any action taken is entirely at the umpire’s discretion. If a crew is placed at a disadvantage, the first priority is to restore its chances of winning. The imposition of any appropriate penalties takes second place. [...]

Section 11 - Objections, Protests, Outcome of Protests, Appeals

Rule 77 – Objections

A crew claiming that its race has been improperly run or judged may make an objection to the umpire immediately after the finish of the race and before getting out of the boat, except when prevented by unavoidable circumstances. [...]

The umpire of the race decides immediately on the objection and communicates his decision orally to the crews in the race and to the other race officials.

Bye-Law to Rule 77 – Objections

If a crew wishes to make an objection a member of the crew must immediately raise his arm clearly into the air and keep it raised until the Umpire acknowledges that the crew is making an objection.

Rule 78 – Protests

A crew whose objection has been rejected or crews affected by the acceptance of the objection may lodge a protest in writing to the Board of the Jury not later than one hour after the umpire has communicated his decision regarding the objection. [...]

[...]

Rule 79 – The Outcome of the Protest

The Board of the Jury shall decide on the protest and on the measures resulting from its decision including:

- 1. reprimand;*
- 2. warning (applying to the next round in which the crew is concerned);*
- 3. exclusion (from all the rounds of the event in question);*
- 4. disqualification (from all events in the regatta);*
- 5. re-row (for a specified number of crews);*
- 6. any other appropriate measure in order to assure the fairness of the competition.*

Rule 80 – Appeals

[...]

b) FISA Championship Regattas – An appeal against a decision of the Board of the Jury by a person affected can only be made to the Executive Committee on the same day. A final decision will be taken before the next round of the event concerned.

Decisions taken by the Executive Committee on matter of appeal are final within FISA.

Appeals outside of FISA can only be made to the Court of Arbitration for Sport in Lausanne, according to Art. 53 of the FISA Statutes”.

4. The facts summarised in section 2 above are not disputed by the Applicants. In fact, in their 19 August 2004 appeal memorandum the Applicants *“accept and agree that it was an appropriate course of action to allow the South African team to advance to the A Final in light of the incident. It is clear from the video footage of the race that had it not been for the action of the Canadian men, the South African Team would have placed in top three of their semi-final race and ultimately, advance to the A final”*.
5. During the hearing before this Panel, the Applicants confirmed that the infraction took place as outlined above.
6. However, the Applicant’s stress that *“the incident ... was unintentional”* and further argue that:
 1. *The FISA Executive Committee failed to correctly apply the appropriate measure pursuant to s. 79(6) of the FISA Rulebook,*
 2. *The FISA Executive Committee failed to apply other appropriate remedies pursuant to s. 79.*
 3. *The FISA Executive Committee failed to consider the goals and objectives of the semi-final race,*
 4. *The FISA Executive Committee failed to consider the option of including a 7th boat in the A final,*
 5. *The other countries in the A Final would not be prejudiced by Canada’s participation.*
7. The Applicants request the following relief:
 1. *An order allowing the Canadian Men’s pair to compete in the A Final*
 2. *An order permitting a seventh boat compete in the A Final*
 3. *An order granting the Canadian Men’s pair to be exempted from competing in the B Final and order delaying the B Final Race pending the outcome of the appeal.*
8. The Respondent requests that the Decision be upheld.
9. The appeal was filed at 08:30am on 19 August 2004. It applied for an interim order with respect to the prayers for relief listed in 7 above. The request was dismissed by the President of the CAS ad hoc Division on 19 August 2004 at 10:55am.
10. The Applicants admitted to have moved into another lane and to have caused a disadvantage to the South African boat. Effectively, they do not contest that they committed an infraction of the Rules, in other words, the “field of play” decision of the Umpire is not put into question. However, the Applicants take issue with the consequences drawn from that infraction in the Decision, i.e. the decision not to let the Applicants participate in the A-Final. As the incident happened unintentionally, in the Applicants’ opinion a proper exercise of the FISA Executive Committee’s discretion should have resulted in the Applicants being admitted as a 7th boat in the A-Final.
11. The FISA Rules grant to the Board of the Jury and, indirectly, to the Executive Committee a variety of options in their decisions arising out of an infraction of the FISA Rules. In fact, according to Rule 79 the Board of the Jury

“shall decide on the protest and on the measures resulting from its decisions including

1. *reprimand;*
 2. *warning (applying to the next round in which the crew is concerned);*
 3. *exclusion (from all the rounds of the event in question);*
 4. *disqualification (from all events in the regatta);*
 5. *re-row (for a specified number of crews);*
 6. *any other appropriate measure in order to assure the fairness of the competition”.*
12. In the case in hand, the Executive Committee chose to overrule the Board of the Jury’s decision excluding the Applicants from all events of the M-2 race (option 3) and instead declared them eligible to participate in the B-Final in the exercise of the discretion given to the Board of the Jury under option 6 above.
 13. In other words, the Respondent made use of the ample discretion granted to it in its decision-making and this bears on the extent of the review by CAS. In fact, the CAS review of decisions based on rules granting discretion to the decision-maker is limited to examining whether the decision-maker (here: the Executive Committee) has erred in the exercise of this discretionary power.
 14. The Panel has no problem finding that the exercise by the FISA Executive Committee of the discretionary power granted to it is not objectionable.
 15. It is a general rule that in cases of decisions based on discretionary powers the reviewing body is not entitled to substitute its own assessment of the “just result” for that of the decision-maker unless the latter acted arbitrarily or outside its powers.
 16. The Applicants have breached the rules. The Decision not only corrected the sporting disadvantages caused by this infraction to the South African pair but also imposed a penalty on the Applicants which is not amongst the most severe measures provided for in the FISA Rules (exclusion or disqualification) but takes a more lenient approach by applying “*any other appropriate measure*” (Rule 79, 1) and relegating the Applicants to the B-Final. No doubt this decision falls within the powers granted to FISA under the Rules.
 17. The Applicants argue that the Executive Committee should have applied the “exceptional case” principle according to Rule 61 b) and should have added them as a 7th boat to the A-Final. They contend that whereas in the past the Executive Committee had always imposed an exclusion on boats which had interfered with a competitor in the adjacent lane, in the case in hand the Executive Committee adopted a more lenient approach and allowed the Applicants to participate in the B-Final. From this the Applicants infer that the Executive Committee was of the opinion that this may be an “exceptional case”.
 18. The Panel disagrees. First of all, Rule 61 does not seem to be designed to provide for yet another means of correcting results in the sporting competition for which detailed regulations can be

found in Section 11 (Objections, Protests, Outcome of Protests, Appeals) of the FISA Rules. But even if the circumstances of this case could give rise to the application of the “exceptional case” principle, the discretion granted to the Executive Committee is even greater than that in Rule 79. The Panel is unable to second-guess the decision not to apply the “exceptional case” principle.

19. The Panel wishes to add that the attitude taken by the Applicants (and by the Respondent) during these proceedings has been exemplary. It is always sad to see athletes suffer the bitter consequences of an error which they commit in the heat of a competition for which they have prepared very hard over a very long time. But this is what sport is all about!
20. It is also worth noting that the South African pair which was the victim in the incident displayed great sportsmanship by expressly stating that they do not object to the addition of the Applicants as a 7th boat in the A-Final. However, it is not for the competitors but for the governing body alone to take a decision on whether and to what extent a penalty must be applied.
21. Based on the foregoing, the Panel rejects the Applicants’ arguments listed in 6 above:
 - The FISA Executive Committee correctly applied the FISA Rules.
 - The FISA Executive Committee did not exceed the limits of the discretionary powers granted to it in the FISA Rules and correctly applied a measure provided for in Rule 79.
 - The goals and objectives of the semi-final race are to determine the teams which reach the finish line in first, second and third place, to the extent that these teams have respected the applicable rules. In the case in hand, the Applicants have breached these rules and have been stripped of their place in accordance with the FISA Rules.
 - The FISA Executive Committee acted without error in not adding the Applicants as a 7th team to the A-Final.
 - Even though the South African Team stated that they do not object to the Applicants’ addition as a 7th team to the A-Final, it is the prerogative of the governing body of the sport and not for the competitors to apply or refraining from applying penalties.
22. In view of the CAS decision denying the Applicants’ request for interim relief, the Applicants have withdrawn their request for an order that the Applicants be exempted from competing in the B-Final and that the B-Final be postponed.

The ad hoc Division of the Court of Arbitration for Sport dismisses the application and confirms the decision of the FISA Executive Committee.