



Arbitration CAS ad hoc Division (OG Athens) 04/009 Hellenic Olympic Committee (HOC) & Nikolaos Kaklamanakis v. International Sailing Federation (ISAF), award of 24 August 2004

Panel: Prof. Richard McLaren (Canada), President; The Hon. Justice Deon van Zyl (South Africa); Mr Sharad Rao (Kenya)

Windsurfing

Absence of a right of appeal from a decision of an international jury acting as a protest committee

CAS jurisdiction

Lack of due process

- 1. CAS will always have jurisdiction to overrule the rules of any sport federation if its decision making bodies conduct themselves with a lack of good faith or not in accordance with due process.**
- 2. According to the applicable ISAF regulations, a competitor who protests may be accompanied by an observer. Nevertheless, that right is qualified by the Information for Observers at Jury Hearings. The Chair of the protest committee may restrict attendance at their discretion. The exclusion of a National Olympic Committee is therefore within the jurisdiction of the Chair of the protest committee and does not constitute sufficient reason for establishing lack of due process.**

This is an appeal by the Applicants, the Hellenic Olympic Committee (“HOC”) and Mr. Nikolaos Kaklamanakis (“Kaklamanakis”) against four decisions arising out of protests to the International Jury (“Protest Committee”) of the Respondent, the International Sailing Federation (“ISAF”).

The following persons attended the hearing:

For the Applicant (Kaklamanakis and HOC)

- Anthony Bruce Kendall (coach)
- Elli Roussou (attorney)
- Antonios Dimitrakopoulos (President Hellenic Sailing Federation)
- Ioannis Vasileiadis (Secretary General Hellenic Sailing Federation)
- Ioannis Papadogiannakis (Greek Chef de Mission)

For the Respondent (ISAF)

- John Doerr, Witness (member international Jury)
- Charles Cook (attorney)

- John Tinker (attorney)
- David Tillett, witness (chairman international Jury)
- Jerome Pels, witness (technical delegate)
- Emily Moorman (Executive assistant)

For the Interested Party Brazilian Olympic Committee (BOC)

- Ana Luiza Pinheiro (attorney)
- Carlos Nuzman (President Brazilian NOC)
- Waldes Osorio (President, Brazilian Sailing Federation)
- Reinaldo Camara (member, Brazilian Sailing Federation)

For the Interested Party Argentine Olympic Committee (AOC)

- Hernan Jorge Ferrari (Secretary General, Argentinean NOC)

More specifically, the Applicants appeal against the three 15 August 2004 decisions of the Protest Committee to abandon Race 1 of the Men's Windsurfer Mistral held on 15 August 2004. The Applicants also appeal against the Protest Committee's decision of 16 August 2004, to deny the request of Kaklamanakis for redress in respect of the hearing of the protests 7, 9 and 10 (see 1.10).

Race 1 of the Men's Windsurfer Mistral was held on 15 August 2004 in Agios Kosmas Olympic Marina. The target time for a windsurf race is thirty to forty minutes.

At the beginning of the race, instructions for the number of times to sail the course were posted on the bow of the committee boat. An electronic display also showed the wind direction.

The Applicants aver that at the team leaders' meeting, on the morning of 15 August 2004, the organizing committee made an announcement that the finishing flags would only be raised when the race leader was rounding the last mark and was then heading for the finish.

Thirty-five minutes into the race, Kaklamanakis was leading the race and rounded mark 3, the last mark. He saw the flags raised and headed for what he assumed to be the finish line.

When Kaklamanakis crossed this finish line, the Race Committee boat made the finishing sound signal and the spectators and press cheered. His finishing time was forty-one minutes.

Kaklamanakis was then immediately intercepted by a press boat, forcing him to tack and stop and the press started to ask him questions.

After finishing the race, three sailors protested (protests No. 7, 9 and 10) and requested the race be abandoned. After a three hour protest hearing, the Protest Committee ruled that the race be abandoned. The Race Committee ruled the race was to be re-sailed on a later date.

On the following day, 16 August 2004, Kaklamanakis presented a protest (No. 19) for redress according to ISAF Rule 62.1(a) and 64.2.

The Protest Committee concluded that the "*requests [of Kaklamanakis] are in fact requests to reopen the hearing of cases 7, 9 and 10*" and that the "*present hearing is a pre-hearing as to whether or not to reopen*". The

Protest Committee further concluded that *“all relevant evidence was considered at the original hearing”* and denied Kaklamanakis’ request to reopen the hearing of cases No. 7, 9 and 10.

Three other sailors, from Portugal, Brazil and Holland, also protested the decision of the Protest Committee to abandon Race 1. Their protests were also denied.

The re-race of the Men’s Windsurf Mistral was held on 17 August 2004.

LAW

1. These proceedings are governed by the CAS Arbitration Rules for the Olympic Games (the “CAS ad hoc Rules”) enacted by the International Council of Arbitration for Sport (“ICAS”) on 14 October 2003. They are further governed by Chapter 12 of the Swiss Private International Law Act of 18 December 1987 (“PIL Act”). The PIL Act applies to this arbitration as a result of the express choice of law contained in Article 17 of the CAS ad hoc Rules and as the result of the choice of Lausanne, Switzerland as the seat of the ad hoc Division and of its panels of Arbitrators, pursuant to Article 7 of the CAS ad hoc Rules.
2. The ad hoc Division of the Court of Arbitration for Sport (Athens, Greece) has jurisdiction over NOCs by reason of Rules 4.1, 31 and 74 of the Olympic Charter and over IFs by reason of Rules 4.3, 29, 30 and 74 of the same instrument. In short, by reason of the benefits which accrue to each type of organisation by reason of their recognition by the IOC, each can be deemed to have subscribed to the arbitration clause in Rule 74. This conclusion is fortified by the undertaking of each to promote the Olympic Charter in the particular manner set out in it (see OG 00/0002; OG 04/001). It has jurisdiction over the IOC by reason of Rule 74 of the Olympic Charter.
3. As appears from the chronology, the AOC has duly exhausted internal remedies so as to engage the jurisdiction of the ad hoc Division, again as required by Article 1 of the CAS ad hoc Rules.
4. The appeal arose within the period of the CAS Ad Hoc Division jurisdiction as required by Article 1 of the CAS ad hoc Rules. Under Article 17 of the CAS ad hoc Rules, the Panel must decide the dispute *“pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate”*.
5. According to Article 16 of the CAS ad hoc Rules, the Panel has *“full power to establish the facts on which the application is based”*.

6. Applicable ISAF Rules

Racing Rules of Sailing

Part 4 – Other Requirements When Racing

...

41 *Outside help*

A boat may receive outside help as provided for in rule 1. Otherwise, she shall not receive help except for an ill or injured crew member or, after a collision, from the crew of the other boat.

Part 5 – Protests, Redress, Hearings, Misconducts and Appeals

Section A – Protests and Redress

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62 *Redress*

62.1. A request for redress or a protest committee's decision to consider redress shall be based on a claim or possibility that a boat's finishing place in a race or series has, through no fault of her own, been made significantly worse by

(a) an improper action or omission of the race committee or protest committee,

...

64 *Decisions*

...

64.2 *Decisions on Redress*

When the protest committee decides that a boat is entitled to redress under rule 62, it shall make as fair an arrangement as possible for all boats affected, whether or not they asked for redress. This may be to adjust the scoring (see Rule A10 for some examples) or finishing times of boats, to abandon the race, to let the results stand or to make some other arrangement. When in doubt about the facts or probable results of any arrangement for the race or series, especially before abandoning the race, the protest committee shall take evidence from appropriate sources.

Section D – Appeals

70 *Right of appeal and requests for interpretation*

70.1 Provided that the right of appeal has not been denied under rule 70.4, a protest committee's interpretation of a rule or its procedures, but not the facts in its decision, may be appealed to the national authority of the venue by

(a) ...

70.4 There shall be no appeal from the decisions of an international jury constituted in compliance with Appendix M. Furthermore if the notice of race and the sailing instructions so state, the right of appeal may be denied provided that

(a) ...

Appendix M – International Juries

M1 Composition, appointment and organization

M1.1 An international jury shall be composed of experienced sailors with excellent knowledge of the racing rules and extensive protest committee experience. It shall be independent of and have no members from the race committee, and be appointed by the organizing authority, subject to approval by the national authority if required (see rule 89(c)), or by the ISAF under rule 87.2.

M2 Responsibilities

M2.1 An international jury is responsible for hearing and deciding all protests, requests for redress and other matters arising under the rules of Part 5. When asked by the organizing authority or the race committee, it shall advise and assist them on any matter directly affecting the fairness of the competition.

Definitions

A term used as stated below is shown in italic type or, in preambles, in bold italic type.

Abandon: A race that a race committee or protest committee abandons is void but may be resailed.

Sailing Instructions

17 Protests and requests for redress

17.10 Decisions of the Jury will be final as provided in rule 70.4.

7. The Applicants (Kaklamanakis) argues that there was some confusion at the beginning and during the race and that he complied with all the instructions of the organizing committee.
8. The Applicants argue that Kaklamanakis' protest was in accordance with ISAF Rules 62.1[a] and 64.2. The Protest Committee incorrectly applied ISAF Rule 66, which is irrelevant and refers to the reopening of the hearing. The protest may rely on the same incidents but what is important in Kaklamanakis' protest is that the request for redress is based on the Protest Committee's actions not the new elements found in the case.
9. The Applicants challenge the finding of the Protest Committee that "no boat claimed that she did not know that she was required to sail another loop to complete the course". Kaklamanakis did not think that he had to sail an extra loop.
10. The Applicants argue that their right to due process was violated since Kaklamanakis did not have an opportunity to be heard. The HOC also claims that its rights to due process was violated because it was not allowed to be present at the protest hearing for protest No. 19.
11. The Applicants requests that:
 - The original Race 1 be reinstated,
 - The re-sailed Race 1 be counted as a valid following race, and

- At the hearing a 12th Race be added to the competition and that the three protesting parties be given a result in Race 1 equal to their mark rounding position.
- 12. The Respondent argues that this CAS ad hoc Division Panel does not have jurisdiction to hear this application.
- 13. It was submitted that Rule 70.4 in the Racing Rules of Sailing bars the appeal from a decision of an international jury constituted in compliance with Appendix M.
- 14. The Respondent submits that in the present case the international jury was constituted in compliance with its rules.
- 15. The Respondent submits that a party's inability to appeal was also signalled out in Rule 17.10 of the Sailing Instructions and in the Notice of Race.
- 16. The Panel is requested to rule that it does not have jurisdiction to hear this matter. In the event that the Panel rules that it has jurisdiction, the Respondent seeks the confirmation of the Protest Committee's decisions.
- 17. An international jury (protest committee) is comprised of the highest level of experienced sailors with independence from the race committee. See Appendix M 1.1 of the Racing Rules of Sailing (the "Racing Rules"). At the Olympic Games an international jury is used to form the protest committee.
- 18. A protest committee's responsibility is set out in Rule M2.1. It is "*responsible for hearing and deciding all protests, requests for redress and other matters arising under the rules of Part 5 [Racing Rules]*".
- 19. The Applicant Kaklamanakis was a competitor in the Men's Windsurfer Mistral Competition. He was dissatisfied with the way the racing competition was completed during Race 1 on 15 August 2004 and lodged a protest under the Racing Rules. A number of other athletes did likewise but none of them applied to the CAS ad hoc Division at the Athens Games.
- 20. At the proceedings before the Panel, the HOC also became an Applicant. They did not have such status before the Protest Committee.
- 21. The Panel deliberated and provided oral reasons, now confirmed by this decision, to the following effect. Rule 70.4 of the Racing Rules provides that a "*decision of an international jury*" properly constituted as the protest committee shall be unappealable. The CAS ad hoc Division has jurisdiction to hear and determine if Rule 70.4 should be applied. This decision represents the exercise of that jurisdiction.
- 22. The Panel notes that Rule 70.4 must be read in conjunction with Rule 70.1. That rule provides that if the right of appeal has not been denied under Rule 70.4, which this Panel finds is the case, then appeals of interpretation are permitted but not of fact. This provision is similar to one found in the rules for the sport of Equestrian (see the CAS decision at the Olympic Games of 2004, CAS OG 04/007). If we were to apply rule 70.1, which we do not have to apply because of Rule 70.4, then we would find the situation herein similar to the one of facts concerning what occurred on the water about which there could also be no appeal by Rule 70.1.

23. The absence of a right of appeal from an international jury acting as a protest committee is also contained in Rule 17.10 of the Sailing Instructions. Therefore, the protest committee decision was not appealable as provided for under the Racing Rules. The CAS has full jurisdiction to interpret and apply those rules.
24. Despite the foregoing conclusions, CAS will always have jurisdiction to overrule the Rules of any sport federation if its decision making bodies conduct themselves with a lack of good faith or not in accordance with due process. In this regard both applicants have made submissions that there was a lack of due process. If such were found to be the case the Rules of Sailing might well not be applied to this dispute (See CAS OG 00/013 para. 7 and 23; CAS OG 02/007 para. 5; TAS 2003/A/490 para. 29; and CAS 2000/A/305 para. 5).
25. The Applicant attended the protest committee meeting as he was entitled to do. A number of other competitors also attended the protest committee meeting on 15 and 16 August 2004.
26. A competitor who protests may be accompanied by an observer. Nevertheless, that right is qualified by the Information for Observers at Jury Hearings. The Chair of the protest committee may restrict attendance at their discretion. In this case there were a number of competitors present. Therefore, observers were not allowed to be present.
27. The protest committee met on a second occasion on 16 August 2004 before ruling on the protest. At that time Mr Papadogiannakis, Chef de Mission of the Hellenic Olympic Committee, requested to be present. He and his colleague were refused access to the protest committee meeting which at that time was in progress continuing its meeting from the previous day.
28. The exclusion of the Hellenic Olympic Committee was within the jurisdiction of the Chair of the protest committee and was consistent with the ruling of the previous day in respect of observers.
29. The facts herein do not in the determination of this Panel, constitute sufficient reason for establishing lack of due process, thereby permitting the Panel to override Rule 70.4 of the Racing Rules.

For all of the foregoing reasons the application is hereby dismissed.