

The experimental arbitration system  
From the ISAF International Judges Manual

## Appendix 8. Protest Arbitration

Protest arbitration is a process of resolving protests without the formality of a full protest hearing. Arbitration is simply a short meeting between the sailors involved in a protest and an experienced judge serving as the arbitrator. The sailors tell the arbitrator what happened on the water and the arbitrator makes a decision about which boat, if any, broke a rule. The party that broke a rule is offered the chance to take a reduced penalty. If the arbitrator's decision is accepted, the protestor withdraws his protest and the dispute is resolved before the protest is formally heard by the protest committee. The primary purpose of arbitration is to simplify and speed up the protest process for incidents that do not require the full protest hearing process.

### 8.1 The Penalty

A penalty accepted at arbitration holds the same status as an alternative penalty taken on the water or a penalty imposed in the full protest committee hearing. The alternative penalty for arbitration should be more than an alternative penalty taken on the water, but significantly less than a DSQ. Most judges have found that a 40% penalty works best. A more severe penalty often results in a competitor refusing to take it and instead taking a chance on a DSQ in the protest room. A less severe penalty cheapens the penalty that a competitor promptly accepts on the water. The arbitration scoring penalty is the number of points equal to 40% of the boats entered (rounding 0.5 upward) added to her finishing place, except that she shall not be scored worse than the points for a DSQ. As in other scoring penalties, there is no change to the finishing order of other boats in the race. Therefore two boats may receive the same score.

### 8.2 Principles of Arbitration

In considering arbitration for an event, it is important for the organisers and the protest committee to understand the impact of arbitration on the racing rules. When used as described here, arbitration is consistent with the 2001- 2004 Racing Rules of Sailing. No rules in Part 5 (Protests, Redress, Hearings, Misconduct and Appeals) that protect the interests of the competitors are compromised by arbitration. All of the safeguards built into Part 5 Section A (Protests and Redress) and Part 5 Section B (Hearings and Decisions) remain in place. If the decision of the arbitrator is accepted by the protestor, the protest is withdrawn. If not, the protest remains and must be heard under the rules of Part 5 by the protest committee. See rule 63.1 (Requirement for a Hearing).

It is advisable that competitors be notified in the notice of race and sailing instructions that all protests involving a rule of Part 2 will be subject to arbitration. The sailing instructions should include:

"Rule 44.1 is changed to permit a boat to take a 40% scoring penalty as calculated in rule 44.3(c) during the arbitration hearing".

Arbitration takes place after a written protest has been filed, but prior to the protest hearing. The arbitration hearing is held in a quiet location, well away from other competitors and observers. Testimony given during arbitration should not be overheard by any potential witnesses of a subsequent protest hearing. Only the arbitration judge, the protestor and the protestee are permitted to attend. No witnesses will be allowed. If a competitor believes his case requires a witness, the protest will go to a protest hearing.

The hearing is informal but efficient. At the outset of the hearing, the arbitrator will explain the process so that the competitors are comfortable with the procedure. The following principles should be followed:

Arbitration should only be used for protests where:

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the incident involves two boats only. A protest involving three or more boats is usually too complex for a single judge to handle in less than 15 minutes.

the incident is limited to the rules of Part 2. If it becomes clear that other rules are applicable, or another boat may be involved, the arbitration hearing should be closed and the protest forwarded to the protest committee.

there was no contact that could have caused injury or serious damage.

An arbitration hearing is not a protest hearing. While the general procedures of hearing a protest are used in arbitration, the arbitrator is not bound by the rules of Part 5 that govern the conduct of a protest hearing. The arbitrator and the competitors should understand that any participant in an arbitration hearing may decide that the protest should be heard by the protest committee. Such a request from a competitor must not be denied.

The arbitrator conducts the hearing with the knowledge that the protest may still become a protest hearing. The arbitrator never enters into a discussion or interpretation of a rule or answers questions about his conclusions until his decision is accepted and the protest withdrawn.

The arbitration hearing begins with validity. The arbitrator may accept validity or may suggest that the protest be withdrawn when it is clearly invalid. If the validity of the protest is unclear, the arbitrator should refer the protest to the protest committee.

Using model boats, the arbitrator takes each party's evidence in turn, allowing questioning, but tightly controlling testimony. The decision made during arbitration is based on the high probability that more rigorous questioning of the parties or their witnesses will not substantially change the facts presented to the arbitrator.

The arbitrator will decide:

One or both boats broke a rule. Without saying so, the arbitrator applies the principles of exoneration to a boat that has been compelled by the other boat to break a rule. See rule 64.1(b).

Neither boat broke a rule.

The protest should go to the protest committee. The protest might be too complicated to decide without witnesses or may involve a rule not suited to arbitration.

The entire process should take no longer than 15 minutes. If that time is exceeded, the issue is too complex for arbitration, and the arbitration hearing should be terminated. The protest is then forwarded to the protest committee.

If the arbitrator's decision is accepted and the appropriate penalty(s) taken, the protestor may withdraw the protest. For arbitration hearings, the protest committee agrees to give the arbitrator the right to act on the committee's behalf and approve a request to withdraw a protest under rule 63.1 (Requirement for a Hearing).

If the protest is not withdrawn, it must be heard by the protest committee. Sometimes a protestor may refuse to withdraw the protest in order that the protestee will be scored DSQ in the protest hearing.

The arbitrator may need to explain that if a boat accepts a penalty in the arbitration hearing, rule 44.4(b) (Limits on Penalties) applies. In such a case, the protest committee may penalize the protestor in the subsequent protest hearing, but the boat that took the penalty may not be penalized further.

Once the protest is withdrawn, the arbitrator is free to discuss any aspect of the case with the parties to the hearing. Successful arbitration is often followed with a number of "what if" scenarios played out between the judge and the sailors.

The arbitration judge must not serve as a member of the protest committee impaneled to hear that same protest. There are two reasons for this. First, the arbitration judge will always be seen by the competitors to have already made up his mind. Second, the arbitrator will invariably have evidence obtained during arbitration that will not be available in the protest hearing.

Testimony given during the arbitration hearing shall remain confidential and the arbitrator shall not discuss any aspect of the arbitration with the protest committee before the hearing. The arbitration judge shall not be called as a witness. His testimony is not first hand.

It is desirable but not mandatory that the arbitrator not be an observer in a protest hearing of the same incident. Some judges believe that the arbitrator's presence in the hearing room keeps the parties from changing their stories. That view must be weighed against the importance of having the arbitration process be seen by the sailors as completely separate from the protest hearing.

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### **8.3 The Procedures**

When a protest is delivered to the protest desk, the judge or jury secretary accepting protests logs the time and asks the protestor to stand by. A judge then determines if the protest is suitable for arbitration and if so, the protestor is asked to find the representative of the other boat. The arbitration hearing is scheduled to be heard as soon as both boats are present.

If one of the parties does not come to the arbitration hearing, the arbitration hearing does not proceed. The voluntary nature of arbitration makes rule 63.3(b) inapplicable. The jury secretary will schedule the protest for a protest hearing.

The judge should have available the notice of race, the sailing instructions and any amendments to them, a current rule book, a watch to keep track of the time and boat models. If he desires, he may also have The Case Book on hand, but he should not refer to it while the competitors are in the room. However, if an ISAF Case must be consulted, the incident may already be too complex for arbitration.

Preprinted forms for penalty acceptance and withdrawing the protest are useful but not mandatory. The arbitrator assists the protestor in correcting protest contents under rule 61.2. The arbitrator does not write his decision on the protest form in case his decision is not accepted by the competitors.

Keep in mind that even if both parties agree with the arbitration decision, the arbitration is not complete until the withdrawal of the protest is approved by the arbitrator. It is advisable to have a signature from a competitor accepting a penalty during arbitration or from a boat withdrawing the protest. If no forms are available, the arbitrator can write on the protest form the words “I withdraw this protest” or “I acknowledge breaking a rule and accept a 40% penalty.” and the competitor is asked to sign the statement.

The arbitrator may accept a request, with good reason, to withdraw the protest before the arbitration hearing. However, if the hearing proceeds and the arbitrator decides the protestor broke a rule, the protestor is not permitted to withdraw the protest before he accepts the penalty.

If the arbitration is not accepted, the arbitrator must not discuss any part of the arbitration decision with the protest committee. When the protest is withdrawn, the arbitrator should freely discuss the protest with the competitors and may refer them to a specific rule, case or other pertinent information.

Arbitration decisions are not subject to appeal. Rule 70.1 dictates that only protest committee decisions can be appealed. If the arbitration decision is accepted the protest is withdrawn. So there is no protest remaining and nothing to appeal. If the protest is not withdrawn it remains to be decided by the protest committee whose decision may be subject to appeal.

### **8.4 The Arbitrator**

The judge who will arbitrate should be a highly qualified and experienced judge with a strong command of the rules. The arbitrator must think and make decisions quickly and must command the respect of the sailors. An excellent deliberative judge may not make the best arbitrator and will usually be more valuable in untangling the complex protests that were not quickly resolved through arbitration. If a judge would like to learn the arbitration process, it is acceptable to allow him to audit the arbitration hearing as an observer, as long as both parties agree. But be aware that neither the arbitrator nor the observer will be able to sit on a panel that might later hear that protest.

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## **8.5 Conclusion**

Sailboat racing is a self-policing sport and the method to resolve a dispute on the water begins with the hail of "protest." If the protested boat takes a penalty on the water, the dispute is resolved. If the protested boat does not take a penalty, the rest of the process is often seen by competitors to be too formal and too time consuming. Protest arbitration provides an intermediate method of protest resolution before the protest is heard formally by the protest committee. Arbitration gives sailors a chance to take a less severe penalty than disqualification when they realize that they have broken a rule. Arbitration does not solve all protests, but for most situations involving the rules of Part 2, arbitration is seen by competitors to be fast, informal and much less intimidating than attending a protest hearing.

The system of arbitration has been used very successfully at International events in the US and Caribbean for the last 5 years. As the system has evolved it has been found that it is necessary to be exacting about the Sailing Instructions when using the system.

It is necessary to alter two sections of the SI's. One section on PENALTY SYSTEMS [usually immediately preceding the section on PROTESTS] and the other section on ARBITRATION, which usually follows the section of the SI's on PROTESTS. Such modified sections of the SI's that have proved successful in practice are as follows:

### **14 PENALTY SYSTEMS**

**14.1** A boat that may have broken a rule of Part 2 while racing may take a penalty at the time of the incident by promptly making a 720 degree Turn after the incident in compliance with RRS 44.2 or by taking a Scoring Penalty in compliance with RRS 44.3 3 as amended by Sailing Instruction 14.1.

**14.1.1** The 20% penalty shall not be less than 2 places.

**14.2** RRS 44.1 is modified to allow a boat to take an Arbitration Penalty for a breach of a rule of Part 2 after the incident but prior to the protest hearing by acknowledging the breach before arbitration or by accepting the opinion of the arbitrator. This Arbitration Penalty shall be 40% of the number of boats entered (rounding 0.5 upward), but shall not be less than four places, added to her finish position. However she shall not be scored worse than "Did not finish".

### **16 ARBITRATION**

**16.1** For protests involving an alleged breach of a rule of Part 2, a short arbitration hearing of not more than 10 minutes will be held prior to a protest hearing. This changes Part 5, Section B of the RRS.

**16.2** After a written protest is delivered to the Protest Desk, one representative from each boat will meet with the arbitrator unless the protestor requests that the protest be withdrawn. No witnesses will be allowed. Protests not resolved by arbitration will be forwarded to the Jury.

**16.3** A boat that accepts the arbitrators opinion that she broke a rule of Part 2 shall receive a penalty score of 40% as detailed in Sailing Instruction 14.2.

**16.4** The acceptance of an Arbitration Penalty cannot be grounds for redress or be appealed.

**16.5** The arbitrator will not be a member of the Jury that hears the protest but will be permitted to observe the testimony given to the Jury and offer testimony. This changes rule 63.3(a).