

10. Arbitration

10. Introduction

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. All parties must agree to participate, and if any party refuses, arbitration cannot proceed. 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 may take a reduced penalty which is specified in the Sailing Instructions. If the arbitrator's decision is accepted, the protestor withdraws the 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.

10.1 The Penalty

Arbitration can only work if the boat that the arbitrator says broke a rule can take a penalty that is less than the disqualification she may receive in any subsequent protest hearing. The penalty is stated in the sailing instructions and, if accepted by a boat as a result of arbitration, holds the same status under rule 44.1(b) as the penalty she could have taken on the water.

The penalty for arbitration should be more severe than any penalty that is available to the boat on the water at the time of the incident, but significantly less severe than a DSQ. Most judges have found that a scoring penalty of 40% of the number of boats entered works reasonably well. A more severe penalty often results in a competitor refusing to take it and instead deciding to take a chance on avoiding a DSQ in the protest room. A less severe penalty cheapens the penalty that a competitor promptly accepts on the water. A boat 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.

For boats finishing toward the back of the fleet, any fixed percentage scoring penalty will often result in the penalty being the same as disqualification. As an alternative to the fixed 40% penalty, a sliding penalty may make arbitration acceptable for those boats, such as points equal to 40% of the number of entries or 50% of the difference between the boat's finishing position in the race and the number of entries, whichever is less. For all percentage penalties, use the rounding formula shown in rule A10.

The penalty must be clearly defined in the sailing instructions and as with penalties taken on the water, a penalty taken ashore should be available when appropriate to any boat, except in a protest hearing. That resolves potential inequities that result in having the penalty available only through arbitration. For example:

- (a) If the penalty was available only in arbitration, a boat that broke a rule in a situation that is not suitable for arbitration does not have access to the same penalty that a boat can take in a less complicated situation that is subject to arbitration.
- (b) The protestor cannot deny the protestee access to the lesser penalty by refusing to attend the arbitration. If the protestee can take the penalty in or out arbitration, the protestor does not gain by refusing arbitration.
- (c) A universal penalty available after racing allows a boat to take a penalty instead of retiring (RAF), when she realizes she broke a rule when coming ashore.

In all cases, the penalty taken must be appropriate for the infringement. A boat taking a penalty other than retirement cannot have caused injury or serious damage, or have gained a significant advantage from her breach.

10.2 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 2005-2008 Racing Rules of Sailing. None of

the 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).

The competitors should be notified in the notice of race and sailing instructions that all protests involving a rule of Part 2 will be subject to arbitration. Rule 44.1 needs to be changed in the sailing instructions with language similar to the following:

Rule 44.1 is changed to permit a boat that has broken a rule of Part 2 or rule 31.1 to take a penalty after racing but prior to any protest hearing. Her penalty shall be a scoring penalty as calculated in rule 44.3(c) equal to 40% of the number of entries or 50% of the difference between her finishing position and the number of entries, whichever is less.

Arbitration takes place after a written protest has been lodged, 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 are allowed. If a competitor believes the case requires a witness, the protest will go to a protest hearing.

Arbitration should only be used for protests where:

- the incident only involves two boats. 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 or rule 31. 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 be heard by the protest committee. The arbitrator never enters into a discussion on the interpretation of a rule or answers questions about his/her conclusions until the decision is accepted and the protest withdrawn.

The arbitrator's main task is to decide the likely outcome of the protest if it went to a protest hearing and includes validity which is the first hurdle. This includes the possibility that the protest will be dismissed as being invalid, e.g. if the protest form states the flag was displayed 3 minutes after the incident and there were no exceptional grounds, then why go any further and advise the protestor that the protest is invalid.

The arbitration hearing begins with validity but taking the nature of arbitration this cannot be an exhaustive probe for the facts of any issue. If this is needed then the protest is not suitable for arbitration. The arbitrator will ask *how did you inform [protestee] of your protest?* and *MAY did you fly a flag?* or *did you hail protest?*. A simple request for confirmation from the protestee helps but do not allow a long answer and does not deeply go into the timing of the flag or hail.

The arbitrators impression about validity will then be somewhere along the following lines:

	INVALID		QUESTIONABLE		VALID	
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To be reasonable to all parties the arbitrator should continue even though the limited available facts about validity put this in the *questionable* zone. But the arbitrator should not proceed if he/she is convinced that the protest is invalid.

If so, the arbitrator may say "I think the protest committee will find this protest invalid" and suggest that the protest be withdrawn.

Using model boats, the arbitrator takes each party's testimony in turn, allowing questioning, but keeping tight control. In making a decision, the arbitrator will consider the probability that testimony derived from witnesses or more rigorous questioning of the parties will not substantially change the facts presented to the arbitrator.

The arbitrator will decide:

- One or both boats broke a rule. The arbitrator applies the principles of exoneration to a boat that has been compelled by the other boat to break a rule, usually by saying "*I think Boat B broke a rule.*". Refer to 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 10 to 15 minutes. If that time is exceeded, the issue is too complex for arbitration, and the arbitration hearing should be closed. The protest is then forwarded to the protest committee.

If the arbitrator's decision is accepted and any appropriate penalty(s) taken, the arbitrator asks if the protestor wants to 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). Note that there are good reasons but no obligation on the protestor to withdraw the protest.

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 should explain that if a boat accepts an appropriate penalty, 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 shall 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, unless the judge has other duties. If time is limited, the judge can arrange to meet the competitors at a later time.

The arbitration judge must not serve as a member of the protest committee empanelled to hear that same protest. There are two reasons for this. First, the arbitration judge will be seen by the competitors to have already made up his/her mind. Second, the arbitrator could have testimony 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 as any testimony obtained by the arbitrator is not first hand.

The arbitrator should also not be an observer at the hearing. and should only be called as a witness if there is a subsequent hearing under rule 69 against one of the parties for lying in the protest hearing.

Some judges believe that the arbitrator's presence in the hearing room keeps the parties from changing their story. That view has to be weighed against the importance of having the arbitration process being seen by competitors as completely independent and transparent from any protest hearing.

10.3 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 or arbitrator reviews the protests as they are received to decide if the protest is suitable for arbitration. At large events it is preferable to have more than one arbitrator to enable the process to flow smoothly. If the protest is suitable for arbitration, the protestor is asked to find the representative of the other boat and the arbitration hearing is scheduled to be heard as soon as possible.

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 then schedule that 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. It may also be desirable to have The Case Book on hand, but it should not be referred to while the competitors are in the arbitration area. If an ISAF Case must be consulted, the incident may already be too complex for arbitration.

Pre-printed forms for penalty acceptance are useful but not mandatory. The last page of the Protest Form has a tick box for the protestor to withdraw the protest.

The arbitrator may assist the protestor in correcting protest contents under rule 61.2. The arbitrator does not write the decision on the protest form in case the 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 (rule 63.1) and agreed by the protestor. It is advisable to have the arbitrator write on the protest form the words "I withdraw this protest" or "I acknowledge breaking a rule and accept the penalty stated in the sailing instructions", and have the competitor 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 the penalty is accepted.

Arbitration decisions are not subject to appeal. Rule 70.1 dictates that only protest committee decisions can be appealed. If the protest is withdrawn, there is no protest remaining and nothing to appeal.

10.4 The Arbitrator

The judge who will arbitrate protests 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 are not quickly resolved through arbitration. If a judge would like to learn the arbitration process, it is acceptable to allow him/her to attend the arbitration hearing as an observer, as long as both parties agree. But, remember neither the arbitrator nor the observer will be able to sit on a panel that might later hear that protest.

10.5 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 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 and rule 31, arbitration is seen by competitors to be fast, informal and much less intimidating than attending a protest hearing.