

Section L  
**Arbitration**

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## **L.1 Introduction**

Protest arbitration is a simplified procedure for resolving a protest coming from an on-the-water incident between two boats involving one or more rules of Part 2 or rule 31. There are two components to the process. In the first component, before the protest hearing, the protestor and the protestee meet with the arbitrator, who is an experienced judge. The sailors each describe what happened on the water, and the arbitrator will then render an opinion about the validity of the protest, and which boat, if any, broke a rule. The second component involves Post-Race Penalties that a competitor may choose to take before a protest hearing on the incident. The process then permits the protestor to withdraw the protest. Otherwise, the protest goes to the protest committee for a hearing, in accordance with RRS 63.1.

Some race officials believe that we should be using the term, mediation, because arbitration is almost always binding on the parties. Whether dispute resolution is binding does not determine whether the process is mediation or arbitration. While there are similarities between mediation and arbitration, since both involve a knowledgeable, impartial third person, the difference between the processes is more fundamental.

In mediation, the facilitator helps the disputing parties arrive at a mutually acceptable resolution through a process of give and take. In mediation, the resolution is negotiable and determined by the parties.

In arbitration, the facilitator hears the testimony of both parties and offers an opinion on the rules and the penalties that apply. In arbitration, the resolution is fixed by the rules and either accepted or declined by the parties, which is the way it works in our sport.

Different mediation and arbitration systems have been in use in sailing. RRS Appendix T provides for both the opinion of a knowledgeable, impartial third person on the incident, and a Post-Race Penalty system.

## **L.2 The Arbitrator**

The judge who will arbitrate protests should be highly experienced with a good knowledge of the rules. The arbitrator must think and make decisions quickly and must command the respect of the sailors. An excellent judge who would contemplate extensively may not make the best arbitrator and will usually be more valuable in

deciding the complex protests that are not quickly resolved through arbitration.

Appendix T advises that arbitration may not be appropriate for all events, as it requires an additional knowledgeable person to act as the arbitrator. The judge who does arbitration should have a thorough understanding of Appendix T, the rules of Part 2, RRS 31, and their applications.

If the arbitrator is member of the jury, he may participate on the protest committee that will decide the protest if it goes to a hearing, except if a party objects based on a conflict of interest. It is important to keep a strong protest committee available for hearings, for example with international juries of five judges or protest committee of at least three judges. The arbitrator's presence at the hearing as a member of the panel would help to keep the information presented in the hearing consistent with the information presented in the arbitration meeting.

### L.3 The Penalty

RRS Appendix T must be invoked by the notice of race or the sailing instructions.

Arbitration and the Post-Race Penalty system can only work if the Post-Race Penalty is less than the disqualification that a boat would receive in a subsequent protest hearing. The penalty, if taken by a boat, holds the same status under rule 64.1(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 Did Not Finish.

The penalty in Appendix T is 30% of the score for DNF, rounded to the nearest whole number (0.5 round upwards). However, the OA may want to change the penalty, modifying Appendix T1(b) in the sailing instructions by changing the percentage level or providing for a Post-Race Penalty that is a points penalty. 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. Note that, mathematically, the worse the boat's finishing position in the race, the less advantage she will have in accepting a post-race penalty. 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 DNF. 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.

Under Appendix T, the Post-Race Penalty is available to any boat, when appropriate. A boat may not take a penalty other than retirement if she caused injury or serious damage, or if she has gained a significant advantage from her breach. See RRS T1(a) and 44.1(b).

For example:

- (a) A boat may take a Post-Race penalty even if it was not protested and it would not go to an arbitration meeting.
  
- (b) Having a Post-Race Penalty available after racing allows a boat to take a penalty instead of retiring (RET), when she realizes she broke one or more rules of Part 2 or rule 31, after coming ashore.

- (c) The protestor may not deny the protestee access to the lesser penalty by refusing to attend the arbitration. The protestee may take the penalty in or out of arbitration.

## L.4 Principles of Arbitration

The arbitrator's role is to give an opinion as to what the protest committee is likely to decide. Even though the process is informal and the boats are not bound by the opinion of the arbitrator, all of the safeguards built into RRS Part 5 Section A Protests and Redress and Part 5 Section B hearings and decisions remain in place. Whether or not the opinion of the arbitrator is accepted, the protest remains and must be heard by the protest committee. See rule 63.1, the requirements for a hearing. Only if the protestor requests to withdraw the protest may the arbitrator act on behalf of the protest committee to allow the withdrawal.

Arbitration takes place after a written protest has been delivered, but prior to the protest hearing. Hold the arbitration meeting in a quiet location, well away from other competitors and observers. Provided that both parties agree, a judge trainee may be allowed to observe the process. Otherwise, no observers are permitted. Testimony given during arbitration should not be overheard by any potential witnesses. Only the arbitrator, the protestor and the protestee are permitted to attend. No witnesses will be permitted. If a party believes the case requires a witness, the protest goes to a protest hearing.

Arbitration is appropriate when:

- the incident involves only two boats. A protest involving three or more boats is usually too complex for the arbitrator 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 meeting should be closed and the protest forwarded to the protest committee.
- rule 44.1(b) does not apply.

The arbitrator conducts the arbitration meeting with the knowledge that the protestor might not ask to withdraw the protest, and so it may still be heard by the protest committee. The arbitrator never enters into a discussion on the interpretation of a rule or answers questions regarding any conclusions until after the protest is withdrawn.

The arbitrator's task is to offer an opinion as to the likely outcome of the protest if it went to a protest hearing.

The first step is to give an opinion on the validity of the protest. This includes the possibility that the protest committee will find the protest is invalid. For example, if the protest form and the protestor's testimony clearly indicate that the protestor did not comply with RRS 61.1(a), the arbitrator will advise the parties that the protest committee will likely find the protest invalid. The protestor then may request to withdraw the protest, or proceed to the protest committee for a hearing. In either case, the arbitration ends.

If the protest is clearly valid or clearly invalid after the protestor's initial statement, then the arbitrator's task of giving an opinion on validity is easy. However, it is much more

common that the protest is neither clearly valid nor clearly invalid. In such cases, consider:

- The task of determining validity during arbitration cannot be an exhaustive investigation. No witnesses can be called and it is unlikely that extensive questioning will resolve validity.
- Due process is not at risk because neither party is bound by the decision of the arbitrator.
- A statement by the protestor that a hail was made and a flag was flown, coupled with a statement that the protestee did not hear the hail and did not see the flag, does not mean that either party is not telling the truth.

The arbitrator will consider the evidence on the balance of probabilities and give an opinion as to what the protest committee is likely to decide. When the arbitrator is in doubt, the protest is not suitable for arbitration and it proceeds to a hearing with the protest committee.

The second step occurs if the arbitrator's opinion is that the protest is valid. The arbitrator should then ask if there was any damage or injury as a result of the incident. If it is possible that RRS 44.1(b) applies, then RRS T1(a) and RRS T2 do not permit the boat to take a Post-Race Penalty. In that case, the arbitration meeting would not be held, and if it was in progress, it would be closed.

If the arbitrator's opinion is that the protest is valid, and if RRS 44.1(b) does not apply, then the arbitrator continues with the arbitration. In this step, the arbitrator takes each party's testimony in turn, using model boats. The arbitrator asks any necessary questions, but keeps tight control of the conversation.

The arbitrator will offer one of these opinions as to what the protest committee is likely to decide:

- A. The protest is invalid.
- B. One or both boats broke one or more rules. The arbitrator applies the principles of exoneration to a boat that has been compelled by the other boat to break a rule.
- C. No boat would be penalized for breaking a rule.
- D. The protest is not suitable for arbitration. The protest might be too complicated to decide without witnesses, it may involve a rule not suited to arbitration, or the Post-Race Penalty is not appropriate. The protest then proceeds to a hearing unless the protestor requests to withdraw her protest, and the arbitrator allows the withdrawal.

A good way for the arbitrator to give his opinion is by saying "if this goes to a protest hearing, the protest committee will likely decide that . . ."

The entire process should take no longer than 10 to 15 minutes. If the arbitrator does not have an opinion within that time, the issue is too complex for arbitration, and the arbitration meeting should be closed. The protest then proceeds to the protest committee for a hearing.

If any appropriate penalties are taken, the arbitrator then asks if the protestor wants to

withdraw the protest. Under RRS T4(b), the arbitrator may act on behalf of the protest committee in accordance with rule 63.1 to allow the withdrawal. However, the protestor is under no obligation to request that the protest be withdrawn.

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 64.1(b) applies. The boat that took the penalty then could not be penalized further unless it is proven that the Post-Race penalty was not appropriate, normally because rule 44.1(b) applied.

Once the protest is withdrawn, the arbitrator may discuss any aspect of the case with the parties to the hearing. Successful arbitration is often followed with a discussion of a number of possible scenarios, if time allows. If time is limited, the arbitrator can arrange to meet the competitors at a later time.

Testimony given during arbitration remains confidential and the arbitrator must not discuss any aspect of the arbitration with the protest committee before the hearing. The judge who held the arbitration meeting shall not be called as a witness during any subsequent protest hearing as the earlier testimony obtained by the arbitrator is not first hand. The arbitrator may 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.

## L.5 The Procedures

When a protest is delivered to the protest desk, the judge or protest committee 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. They also review the Post-Race penalty forms. 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 meeting is scheduled to be held as soon as possible. When the protestee arrives, the protestee is given a copy of the protest before the arbitration meeting begins.

The voluntary nature of arbitration makes rule 63.3(b), to proceed in the absence of a party, inapplicable. If one of the parties does not come to the arbitration meeting, arbitration does not proceed, and the protest is scheduled for a hearing. The arbitrator 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. When a boat accepts a Post-Race Penalty, it may be recorded on a pre-printed form or on the back side of the original protest form and signed by the representative. The back side of the protest form also has a tick box for the protestor to withdraw the protest.

The arbitrator may, with good reason, accept a request to withdraw a protest before arbitration begins.

The arbitrator's opinion and the decisions of the parties to the protest made at arbitration are not subject to appeal. If the protest is withdrawn, there is no protest remaining and nothing to appeal.

## **L.6 Conclusion**

With Appendix T, protest arbitration can be easily understood by sailors and consistently applied by judges around the world.