



Arbitration CAS 2006/A/1142 Emilios Papathanasiou v. International Sailing Federation (ISAF), International Finn Association (IFA), Croatian Sailing Federation, Croatian Finn Association & Yachting Club Labud, award of 4 May 2007

Panel: Mr Quentin Byrne-Sutton (Switzerland), President; Mr Chris Georghiades (Cyprus); Mr Peter Leaver QC (United Kingdom)

Sailing

Breach of a racing rule of sailing

Adequacy of racing rules of sailing with rules of the game

CAS jurisdiction

1. Rule 3 (c) of the Racing Rules of Sailing (RRS) was not intended to derogate from the long-established principle of the finality of the decisions of international juries, and the exclusion of such decisions from review by the CAS or by any other tribunal. Decisions of international juries of breaches of the RRS are to be equated with what are commonly referred to as “*field of play*” decisions in other sports. The wording of Rule 3 (c) RRS is clear and means that CAS jurisdiction does not extend to matters to be determined under the racing rules, in contrast with matters to be determined under other parts of the ISAF Regulations such as the eligibility code, the advertising code, or the anti-doping code.
2. Rule 3 (c) of the RRS cannot be construed so as to confer a general jurisdiction on the CAS. This is particularly the case when it is remembered that Article 4 of the ISAF Regulations contains a “catch all” choice-of-forum clause, which gives jurisdiction not to the CAS but to the English courts. Faced with such a widely drafted choice-of-forum clause in favour of the English courts, the CAS cannot assume for itself jurisdiction over disputes arising out of the ISAF Regulations unless those Regulations clearly and specifically attribute jurisdiction to the CAS for the resolution of certain categories of dispute.

Mr Emilios Papathanasiou (the Appellant, hereinafter “Mr Papathanasiou”) is a world-class sailor in the Finn class.

The International Sailing Federation (the first-named Respondent, hereinafter the “ISAF”) is the controlling authority of the sport of sailing in all its forms throughout the world.

The International Finn Association (the second-named Respondent, hereinafter “IFA”) is the organisation governing the Finn class worldwide and is an International and Recognised Class Association (ICA) member of ISAF.

The Croatian Sailing Federation, (the third-named Respondent) is the supreme organisation governing sailing in Croatia, and is a full member of ISAF.

The Croatian Finn Association, (the fourth-named Respondent) is the organisation governing the Finn class in Croatia, and is a member of IFA.

The Yachting Club Labud (the fifth-named Respondent) was the host and organising authority of the 2006 Finn Gold Cup regatta.

The Hellenic Yachting Federation is the supreme organisation governing sailing in Greece, and is a full member of ISAF (the first intervener).

The Hellenic Olympic Committee is the Greek member of the International Olympic Committee (the second intervener).

In July 2006, the Finn Gold Cup regatta, which is, in effect, the World Championship in the Finn sailing class, was held in Split, Croatia, with the Yachting Club Labud acting as host and organising authority.

Mr Papathanasiou competed in the 2006 Finn Gold Cup.

A competitor’s final ranking in the Finn Gold Cup depends on the results obtained in a series of races during the regatta.

The technical rules that govern the Finn Gold Cup, and which apply to competitors participating in the regatta, are the *Racing Rules of Sailing* (“RRS”) of the ISAF.

The RRS are to be found in a self-contained book of rules. Pursuant to ISAF Regulation 15.21, the responsibility for the formulation, revision and publication of the RRS is that of the Racing Rules Committee. The RRS are published every 4 years after approval by the ISAF Council. There are 51 sections in the ISAF Regulations, including an eligibility code, an advertising code and an anti-doping code. The *Memorandum and Articles of Association* of the ISAF also contain a number of provisions that can be invoked by members and competitors in relation to ISAF decisions affecting them.

The RRS stipulate that a protest committee has the function, among others, of supervising the races during an event to ensure boats conform with the racing rules. In certain circumstances, the protest committee may protest a boat, if it deems the racing rules to have been broken.

In an international event such as the Finn Gold Cup, the protest committee is appointed in the form of an international jury.

Rule 70.4 of the RRS provides, inter alia, that *“There shall be no appeal from the decisions of an international jury constituted in compliance with Appendix N”*.

At the 2006 Finn World Cup Regatta, the International Jury was composed of Mr Bill Bell, Mr Ralph Roberts, Mr Bill O’Hara, Mr Josip Vehovec and Mr Tonci Antiunovic. Mr Bell, Mr Roberts, Mr O’Hara and Mr Vehovec were all ISAF certified International Judges with substantial years of experience as International Judges. Mr Antiunovic was a Croatian National Judge.

On 14 July 2006 after Race 6 of the 2006 Finn Gold Cup, two members of the protest committee, Mr Bill O’Hara and Mr Josip Vehovec, who had been supervising the start of the race from the water, protested boat GRE 7, sailed by Mr Papathanasiou, on the grounds that at the start of the race the latter had made manoeuvres in breach of the RRS, which led to contact with another boat.

The boat with which Mr Papathanasiou’s boat had allegedly collided was boat HUN 17, sailed by Hungarian sailor, Mr Gabor Keresztes.

The protest form, which was posted at 5.20pm on 14 July 2006, indicated the breach of Rule 2 (Fair Sailing), Rule 11 (On The Same Tack, Overlapped), Rule 14 (Avoiding Contact) and Rule 44.1 (Taking a Penalty). The protest committee named Mr Gabor Keresztes and Mr Josip Vehovec as witnesses.

The international jury appointed for the 2006 Finn Gold Cup, acting as a protest committee in accordance with Rule 90(b) of the RRS, heard the protest against boat GRE 7.

The hearing took place on 14 July 2006.

At the start of the hearing, Mr Papathanasiou objected to Mr Bill Bell taking part in deciding the protest. The basis for his objection was that he was concerned that Mr Bell was biased against him as a result of incidents that had occurred (i) before the postponement of Race 1, when Mr Bell and a colleague had told Mr Papathanasiou and another competitor that he had seen them *“sculling”* in breach of RRS Rule 42.2(d) and (ii) during Race 5, when Mr Bell had shown Mr Papathanasiou a yellow flag for a breach of RRS 42. However, the Chairman of the international jury, Mr Ralph Roberts, decided that Mr Bill Bell could participate.

During the hearing of 14 July 2006, Mr Josip Vehovec gave evidence about the sequence of events he had witnessed when supervising the start of Race 6 from the water. Mr Gabor Keresztes was heard as a witness of what he had seen as a competitor in Race 6.

During his testimony in front of the international jury Mr Gabor Keresztes indicated that he had not seen any manoeuvres of Mr Papathanasiou that might be considered to be in breach of the RRS, and affirmed, in the face of persistent questioning by the members of the international jury, that he was not aware of any contact between Mr Papathanasiou’s boat and his boat. He was adamant that he was not aware of any collision.

After the hearing, at 19:44 pm on 14 July 2006, the international jury rendered the following decision, whereby it disqualified Mr. Papathanasiou from race 6:

“Finn Gold Cup 2006

Race: 6

Facts found:

1. GRE 7 to windward had an inside overlap on HUN 17 at the starting vessel as they approached to start.
2. There was insufficient room for GRE 7 to pass between HUN 17 and the back of the starting vessel.
3. GRE 7 shouted, and sailed between the back of the starting vessel and HUN 17.
4. There was contact with no damage.

Conclusion:

GRE 7 failed to keep clear of HUN 17 and was not entitled to room.

Rule(s) applicable:

R 11, R 14, R 18.1(a)

Decision:

GRE 7 DSQ from race 6”.

Upon receiving the international jury’s decision and after gathering further evidence, Mr Papathanasiou decided to apply for a reopening of the hearing, as provided for by the RRS.

At 11:58 am on 15 July 2006, Mr Papathanasiou filed his application for reopening, invoking as new evidence the proposed testimony of another competitor, Mr Marko Colic, who participated in race 6 as boat ITA 40.

RRS Rule 66, which is a rule to which Mr Papathanasiou referred on the application for reopening, permits the protest committee to reopen a hearing when it decides that it may have made a significant error or when “*significant new evidence becomes available within a reasonable time*”. The international jury decided to hear what Mr Marko Colic had to say in order to determine whether his evidence could be deemed to be significant, and whether his evidence would lead it to conclude that it may have made a significant error. Having done so, the international jury decided that Mr Marko Colic’s testimony could not be admitted as “*significant new evidence*” under the RRS. In concluding that Mr Colic’s evidence was neither significant nor new, the international jury was of the view that Mr Papathanasiou could have called the witness at the original hearing. Consequently, the international jury refused to reopen the hearing. Mr Colic told the international jury that his attention had been attracted by some shouting that he heard just before the start of Race 6. He had been ahead of boats GRE 7 and HUN 17, but turned in the direction of the shouting and had seen boats GRE 7 and HUN 17. Despite being relatively close to them (he estimated that he was a few metres ahead of HUN 17 and GRE 7 was a few metres on the right side of HUN 17) he had not seen any contact between the two boats.

When the international jury denied Mr Papathanasiou's application for a reopening of the hearing, it was composed of the same members who had made the disqualification decision the previous day. The jury's decision not to reopen the hearing was rendered at 15:40 pm on 15 July 2006 and formulated as follows:

"Finn Gold Cup 2006

Race: 6

Facts found:

1. *Request to reopen was based on three points:*
 - (a) *Significant error by the Jury in their interpretation of 60. 3(a).*
 - (b) *A written submission by HUN 17 confirming his verbal evidence of the previous day.*
 - (c) *New evidence from ITA 40.*
2. *The jury decided to listen to ITA 40's evidence to see if his evidence was significant.*

Conclusion:

No significant error by the jury and there was no significant new evidence.

Rule(s) applicable:

R 66

Decision:

Re-opening denied".

Faced with these ISAF international jury's decisions that he deemed mistaken and made in violation of due process, Mr Papathanasiou decided to appeal to the Court of Arbitration for Sport ("CAS").

The statement of appeal contained the following prayer for relief:

"The Appellant is requesting relief against the above challenged decisions thus seeking to annul them for reasons that the Jury conducted themselves with lack of good faith which eventually led to repeated gross violations of the due process principle and the principle of fairness. The Appellant is also requesting to be acquitted from the sanction of disqualification imposed on him and regain the points gained by him in the relevant race".

Mr Papathanasiou made the following principal submissions on jurisdiction:

- Rule 3 (c) gives jurisdiction to CAS because fundamental breaches of the ISAF Regulations and of competitor's rights as those which occurred in this case are not matters to be determined under the racing rules.
- According to CAS precedents, it will always have jurisdiction to overrule a sport federation's decisions if the bodies having made them acted in bad faith or with lack of due process.

Mr Papathanasiou made the following principal submissions on the merits:

- The international jury misapplied racing rules 11, 14 and 18.1 by mistakenly judging that Appellant had collided with boat HUN 17 and engaged in prohibited manoeuvres during the start of race 6.
- In making that judgment, the international jury failed to respect due process in a number of respects: (a) because members of the international jury were wrongly allowed to combine the roles of protestor, witness and judge; (b) the evidence was not weighed fairly or assessed according to the defined procedures; (c) the international jury's decisions contained no reasons; (d) the international jury should not have sat in the same composition to hear the request for re-opening; and (e) it incorrectly determined that the testimony offered by competitor ITA 40 could not be treated as new evidence, and, therefore, wrongly refused to re-open the hearing.

Insofar as the other Respondents espoused the position of ISAF with regard to the issue of jurisdiction and did not express themselves on the merits of the appeals, the following is a summary of ISAF's submissions.

ISAF's principal submissions were:

- There is no arbitration agreement of any nature between ISAF and the Appellant covering disputes relating to the RRS.
- It is clear from the wording of Rule 3 as a whole and in particular Rule 3 (c) that it does not give CAS jurisdiction over any disputes relating to matters governed by the RRS.
- The history of the adoption of Rule 3 (c) confirms that decisions by international juries under the RRS have always been excluded from any form of appeal and that the intention of ISAF in adopting Rule 3 (c) as currently drafted was only to give jurisdiction to CAS for disputes unrelated to the rules of sailing, notably for eligibility disputes.

ISAF contends that the international jury's decision to disqualify the Appellant from Race 6 was well-founded under the RRS; that the procedures following in reaching the decision were fair and in conformity with ISAF Regulations and due process; and that Mr Papathanasiou has no right of appeal by virtue of RRS Rule 70.4.

The Hellenic Yachting Federation submitted that it should be admitted as a party to the arbitration as it had a direct interest in the success of the appeal, both financially and for reasons of image, particularly because Mr Papathanasiou is such a good ambassador for his sport and so famous in Greece.

The Hellenic Yachting Federation further submitted that the international jury failed to act impartially and that its decision should be overturned for that reason.

LAW

Nature of the Jurisdictional issue

1. To invoke the jurisdiction of CAS to adjudicate his appeal, Mr Papathanasiou relies upon Rule 3 (c) of the RRS.
2. Rule 3 provides as follows:
“By participating in a race conducted under these racing rules, each competitor and boat owner agrees
 - (a) to be governed by the **rules**;*
 - (b) to accept the penalties imposed and other action taken under the **rules**, subject to the appeal and review procedures provided in them, as the final determination of any matter arising under the **rules**;*
 - (c) and where the matter is not one to be determined under the **rules**, not to resort to any court of law or any tribunal until all internal remedies provided by the ISAF or by the Court of Arbitration for Sport have been exhausted”.*
3. In contending that Rule 3 (c) gives jurisdiction to the CAS to adjudicate his claims, Mr Papathanasiou is contending, in effect, that the violations of due process he is invoking are not matters to be determined under the RRS alone because they call into play higher principles of justice, such as the right to a fair trial prescribed by article 6 of the *European Convention on Human Rights*.
4. ISAF does not dispute that Rule 3 (c) gives jurisdiction to CAS to adjudicate certain types of disputes arising out of the ISAF Regulations.
5. During the hearing the current Director of Sailing of ISAF, Mr Jerome Pels, one of whose principal duties is to monitor the content of and changes made to the ISAF Regulations, told the Panel that in approving Rule 3 (c) the ISAF Council had been seeking to broaden the jurisdiction of its members to take their disputes to the CAS in order to protect the ISAF from the risk of having to face a multitude of lawsuits filed against it in national courts. He told the Panel that when deciding to broaden the jurisdiction of CAS in such manner, the ISAF Council had in mind not only to include disputes in various known areas of contention, such as eligibility issues, but also disputes over hitherto unknown issues that might arise under the ISAF Regulations.
6. However, Mr Pels re-affirmed what is, in essence, set out in the ISAF’s written submissions and in an affidavit of Mr David Tillet (Chairman of the ISAF Racing Rules Committee), namely, that the inclusion of Rule 3(c) was not intended to derogate from the long-established principle of the finality of the decisions of international juries, and the exclusion of such decisions from review by the CAS or by any other tribunal. He also stressed that the decisions of international juries of breaches of the RRS are to be equated with what are commonly referred to as “*field of play*” decisions in other sports.

7. Mr Pels further stressed that, in adopting Rule 3 (c), ISAF had not intended to give jurisdiction to the CAS over disputes arising out of the RRS, because the racing rules constitute a self-contained system, including not only technical rules but also various procedures to ensure fairness in assessing breaches thereto, such system being rooted in the principle provided in Rule 70.4, and confirmed in Rule 3 (b), that the decisions of an international jury are final and not subject to any form of appeal.
8. In the light of the parties' submissions, the jurisdictional question the Panel must resolve is whether or not the claims made by Mr Papathanasiou are matters that fall to be determined, or are amenable to resolution, under the RRS.

Application of Rule 3 (c) to Mr Papathanasiou's appeal

9. It will be recalled that Rule 3 (c) only reserves to CAS arbitration cases "*where the matter is not one to be determined under the [RRS]*".
10. The Panel considers that, in itself, the wording of Rule 3 (c) is clear.
11. The Panel finds that the wording means that CAS jurisdiction does not extend to matters to be determined under the racing rules, in contrast with matters to be determined under other parts of the ISAF Regulations such as, for example, the eligibility code, the advertising code, and the anti-doping code.
12. In this case, the grounds of Mr Papathanasiou's appeal to CAS can be summarised as follows:
 - The international jury misapplied RRS Rules 11, 14 and 18.1(a) by mistakenly judging that Appellant had collided with boat HUN 17 and engaged in prohibited manoeuvres during the start of Race 6.
 - In making that judgment, the international jury failed to pay proper attention to due process in a number of respects: (a) because members of the international jury were wrongly allowed to combine the roles of protestor, witness and judge; (b) the evidence was not weighed fairly or assessed according to the defined procedures; (c) the international jury's decisions contained no reasons; (d) the international jury should not have sat in the same composition upon the request for re-opening; and (e) the international jury incorrectly determined that the testimony offered by the competitor of boat ITA 40 could not be characterised as new evidence and, therefore, wrongly refused to re-open the hearing.
13. The Panel finds that all of those grounds of appeal ultimately relate to a matter to be determined under the RRS, which is whether or not Mr Papathanasiou broke racing rules 11, 14 and 18.1(a) at the start of Race 6. In other words, whether the international jury was right or wrong in its factual assessment of what happened at the start of Race 6 and whether or not it acted fairly and in accordance with due process in making its judgment, there is no doubt

that its decision was made in accordance with the RRS and concerned only matters to be determined under the RRS.

14. Consequently, Mr Papathanasiou's appeal cannot be treated as a "*matter that is not to be determined under the [RRS]*", and so the Panel has no jurisdiction under Rule 3 (c).
15. Furthermore, the Panel finds that the situation in this case is fundamentally different from that of the CAS precedents being relied on by Mr Papathanasiou. In those cases there was a general clause providing the CAS with jurisdiction over all disputes arising between the parties. The question was one of arbitrability i.e. whether or not, on the basis of such jurisdiction, the CAS was competent to review a "*field of play*" decision when it was being contended that the decision-making body had acted in bad faith, arbitrarily, in breach of due process or illegally. In several of those cases, the jurisdiction of the CAS derived from the Olympic Charter and in one case from a general clause in the sports regulations in question.
16. Here, Rule 3 (c) of the RRS cannot be construed so as to confer a general jurisdiction on the CAS. This is particularly the case when it is remembered that Article 4 of the ISAF Regulations contains a "catch all" choice-of-forum clause, which gives jurisdiction not to the CAS but to the English courts. Article 4 is in the following terms: "*Any disputes relating to the validity or construction of the ISAF Constitution or Regulations or any other rules or regulations made there under (together, the "ISAF Regulations"), and any disputes relating to the application of the ISAF Regulations or the exercise of powers there under, shall be subject to the exclusive jurisdiction of the courts of England and Wales and their principles, and shall be governed by English law, excluding English choice of law principles*".
17. Faced with such a widely drafted choice-of-forum clause in favour of the English courts, the CAS cannot assume for itself jurisdiction over disputes arising out of the ISAF Regulations unless those Regulations clearly and specifically attribute jurisdiction to the CAS for the resolution of certain categories of dispute, as is the case for example under Article 21.8.1 of the anti-doping code in the ISAF Regulations. If it is to be resolved at all outside the ISAF Council, the dispute would appear to be one which is to be resolved in accordance with the procedure stipulated in Article 4 of the ISAF Regulations.
18. For the above reasons, the Panel finds that RRS Rule 3 (c) does not confer jurisdiction on the CAS over Mr Papathanasiou's claims and that, absent any other basis upon which jurisdiction can be founded, the Panel must dismiss the appeal. Since the request for intervention of the Hellenic Yachting Federation is dependent upon Mr Papathanasiou's claims, it follows that the Panel also lacks jurisdiction to entertain the applications made by the Hellenic Yachting Federation.
19. The Panel's findings should not be understood to be suggesting that international juries acting under the RRS can be operated in such manner that competitors are left with no recourse in cases of grossly unfair, arbitrary or illegal decisions under those rules. It simply means that, absent a clause giving the CAS jurisdiction, decisions made under the RRS can only be

challenged in the competent courts and under the laws governing ISAF's duties as a legal entity.

20. That being said, the Panel finds that the mixture of different arbitration clauses to be found in the ISAF Regulations, when combined with the general choice-of-forum clause under Article 4, is potentially confusing for the non-lawyer. ISAF must bear in mind that its Regulations are meant to be comprehensible to sailors, the majority of whom are unlikely to be lawyers. In the result, the Panel takes the view that the lack of clarity in the drafting of the Regulations and RRS means that the ISAF must bear some responsibility for Mr Papathanasiou believing that he could appeal to the CAS from the protest committee's decisions. The Panel proposes to take this into account in the allocation of the costs of the appeal.

The Court of Arbitration for Sport rules:

1. The Court of Arbitration for Sport lacks jurisdiction to entertain the appeal filed by Mr Emilios Papathanasiou against the decisions of 14 and 15 July 2006 of ISAF's international jury.
2. The Court of Arbitration for Sport lacks jurisdiction to entertain the request for intervention of the Hellenic Yachting Federation.

(...).