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Idiosyncrasies of Sports Law in Sailing Regattas

Abstract

The aim of this paper is to outline a segment of *lex sportiva* that is grounded in the idiosyncrasies of the internal rules of the hearing procedure in sports sailing whereby the fundamental principles and concepts of sports law as well as the bodies involved in the process of forming sports law are being analysed. For this purpose, the general notion of sailing, its theoretical systematization and the basic features of its sports variant will be presented, in the context of which the organization, rules and regulations will be considered i.e. basic documents including the fundamental legal principles of sports law represented in the relevant sport, all of which for the purpose of re-establishing the sports law, its concept and nature i.e. its potentially interdisciplinary character. To this extent, the re-establishment of sports law and its specific features will be highlighted particularly through appropriate examples of court and arbitration practices as well as the specific rules of sports sailing, part of which are also the rules on the hearing procedure which will be roughly presented and thereby their compliance with the fundamental principles of sports law will be accordingly analysed.

Key words: sports law, sailing regatta, ISAF, WS, hearing procedure, *lex sportiva*, *lex ludica*, fairness principle, Arbitral court for sports, CAS

1. Introduction

We have been witnessing the trend of the increasing emergence of new branches of law or sub-branches, such as tourism law¹, medical law, pharmaceutical law, urban law², space private law, video game law³, luxury law, entertainment law, energy law,

¹ See more: Gorenc, Vilim, Šmid, Vjekoslav, (1999) Poslovno pravo u turizmu i ugostiteljstvu, Zagreb, Školska knjiga; also, Vujisić, Dragana, Mićović, Andreja, (2016) Poslovanje i usluge turističko-ugostiteljskih subjekata, the University of Kragujevac Faculty of Law and the Institute for legal and social studies, Kragujevac

² See more: Anđelković, Žarko, (2011) Građa za Urbano pravo, Čigoja stampa, Beograd

³ See more: Festinger, Jon, Q.C., Metcalfe, Chris, Ripley, Roch, (2012) Video Game Law, 2nd Edition, LexisNexis Canada

information and high-tech law⁴, digital law, internet law, blockchain law, but also sports law.⁵ As Kačer *et al.* outline, it's been a long time when legal branches could be counted on the fingers of one or at best two hands.⁶ However, in today's dynamic and intertwined society the mentioned branches of law and also other are manifestation of not only the development of the society and its relations, but also of increasing complexities of such relations, and consequently of the intersection of different branches and areas of law, legal issues and ever greater demands for interdisciplinary approaches to science, business, and available knowledge.

While it could be said for certain formulations of legal branches that they present purely an aesthetic categorization, other represent something more than that. Taking into account the title of this paper, one can ask, for example, the question as to which material fields of practice fall under the sports law framework? Undoubtedly, this new and all-attractive branch of law in both the scientific circles and the field of practice is a kind of amalgam that could be described as a mosaic arbitrarily constructed from the diversity of generally accepted and distinct areas of law.⁷ Here examples could be singled out such as labour law, intellectual property law, administrative law, criminal law, law of obligations. Yet, aren't the last two grounded in the foundations of every branch of law as the epitomes of the simplest and primary interactions between people?

However, when it comes to sports law, its central notion is not negligible, and this is –sport that is by no means uniform, since the notion of sport *eo ipso* is not only diversified by various kinds of sports, each of which makes its own distinct and individual domain with its own rules and needs, but it also includes both professional

⁴ See more: Dragičević, Dražen, (2015) *Pravna informatika i pravo informacijskih tehnologija*, Narodne novine

⁵ Even in the 1990s there was a legal-academic debate regarding internet law, when in 1996 Frank H. Easterbrook introduced the argument named the “Law of the Horse” with the central question whether internet law should be understood as a real subject/course that should be taught at law schools. In his exposition the author assumed that the fact of the existence of a horse did not mean that a so-called “Horse Law” or Law of the Horse should be taught, since all legal relations related to a horse can be derived from contract law or law of obligations, i.e. civil law, criminal law and other generally renowned branches of law. For that reason, emphasis has been placed on traditional branches of law being the basic and sole branches of law that contain rules and solutions related to internet law, thus concluding that internet law does not need to be considered a new branch of law since it is the same as “Law of the Horse”. Of course, the opposite arguments contested this stance, but the expression and the argument of the Law of the Horse remains whenever the topic of a new branch of law is popularized. See more: Easterbrook, H. Frank, *Cyberspace and the Law of the Horse*, University of Chicago Law School, Chicago Unbound, 1996; also, see: Lessig, Lawrence, *Commentaries - The Law of the Horse: What Cyber Law Might Teach*, 1999, <https://cyber.harvard.edu/works/lessig/finalhls.pdf> (15.06.2018.)

⁶ Kačer, Hrvoje, Perkušić, Ante, Ivančić-Kačer, Blanka, *Insufficiency of the Normative as a Characteristic of Sports Law*, Collection of Papers, Faculty of Law of Split, yr. 49, 4/2012., p. 727

⁷ Siekmann, C.R. Robert, *What is Sports Law? Lex Sportiva and Lex Ludica: A Reassessment of Content and Terminology*, Siekmann, C.R. Robert, Soek Janwillem (ed.), (2012) *Introduction to International and European Sports Law: Capita Selecta*, T.M.C. Asser Press, p. 3

and recreational part. Given this versatility of the notion of sport, the same can be concluded also in regard to sports law by which the social phenomenon of sport is regulated and thus it can be said that sports law can also come as an intersection between different branches of law; as an interdisciplinary branch which requires not only understanding of the appropriate legal areas and branches, but also the understanding of the needs of a certain type of sport and the actors involved in it, therefore, a particular sport as such, which there are undoubtedly many.

The aim of the paper

In addition to the above mentioned, in this paper the imperative will certainly be placed on the idiosyncrasies of sports law seen through the prism of sailing i.e. sports sailing; however, in order to make the purpose of the presentation more understandable, this paper will include an analysis of some of the basic terms such as the very notion of sports law, but also some other, whose analysis itself is a subordinate purpose of this paper. In this way, the interdisciplinarity i.e. versatility of sports law will become apparent as a feature which has already been referred to in the introduction.

Accordingly, in the following elaboration sailing will be presented both in its recreational and professional context first, followed by the notion of sports law, and then by the peculiarities of sports sailing, which as such would form an integral part of sports law.

2. Sailing

Sailing is a skill of navigating, that is, handling a sailing boat or vessel on water using only the propulsion power of the wind. With the appearance of a steam engine later followed by other types of engines, this once basic skill that in its application had been universal to all ships, be it war or merchant ones, today has been limited to recreation and leisure and has earned a name for its popularity and ubiquity.

As is the case today, the art of sailing has historically found its use for tourism purposes as well, i.e. leisure and recreation, as evidenced by the first records of nautical tourism that mention regattas ever since the 16th century on the Dutch channels.⁸ Nautical tourism developed further in the 17th and 18th c. when such an activity first occurred in the UK⁹ and at the end of the 18th c. when the first trans-ocean cruises followed, which can also be considered the beginning of modern nautical tourism. The first Yacht Club was founded in 1720 in Cork (Ireland), while in the 19th c. the first travel

⁸ Dundović, Čedomir, (2003) Pomorski sustavi i pomorska politika, Faculty of Maritime Studies in Rijeka, Rijeka, p. 200; also: Šamanović, Josip, (2002) Nautički turizam i management marina, Maritime College of Split, Split, p. 156

⁹ loc. cit.

agencies and a special type of ship with a new purpose – navigation for entertainment arose.¹⁰ Nautical tourism from the elite phenomenon has gradually become a mass phenomenon and in 1907 the Alger - Monte Carlo regatta was organized.¹¹

In regard to the diverse criterion-related definitions of nautical tourism taking as a starting point its purpose, motives or goals, followed by activities, types of means of transport, which include a set of relations arising from travel and stay, the environment, services or nautical-tourism supply provided within the same¹², *sailing* equally takes up an appropriate place and plays a certain role. For example, in addition to “*large*” or *cruise-ship tourism* and *nautical tourism in rented vessels*, in terms of the vessel size criterion, it is possible to differentiate the so-called “*small*” *nautical tourism*¹³ within the framework of nautical tourism.

Nowadays, as a very important and prevalent form, “*small*” *nautical tourism* is characterized by smaller vessels such as yachts, speedboats, boats, but also sailboats and other vessels for sport, recreation and entertainment that is realized not only in the so-called “entertainment navigation”¹⁴, but also in terms of sports-competitive tourism.¹⁵ It is exactly here, that sports law *via* sports sailing finds its place within nautical tourism as an intersection between the tourism and maritime law or even “nautical tourism law”.

In this sense sailing can be divided into recreational and sport-professional, of which the imperative will be placed on the latter.

Sports sailing

Sailing as a sport includes a number of competitive sailing formats that are sanctioned through various sailing federations and yacht clubs. There are two types of matches:

- (a) Small class regatta
- (b) Cruiser regatta

¹⁰ Nautical tourism appeared in the area of today’s Republic of Croatia in the 19th century, almost a century later as compared to the West. For example, in Istria sailing took off after the World War II, more precisely in 1947. The first Istrian regatta was organized in 1949 by sailing club Galeb Rijeka. It has become traditional and every other year Pula’s sailing clubs Mornar and Uljanik alternate in its organization. The first regatta was held on the Pula-Brijuni-Pula route. After the first regatta a maritime-shipping company Vega was established with its headquarters in Vrgarola.

¹¹ Dundović, Čedomir, op. cit., p. 200

¹² See more: Šamanović, Josip, op. cit., p. 105 et seq

¹³ Vidučić, Vinko (ed.), Pašalić, Želimir, Munitić, Ante, Zelenika, Ratko, Šimunić, Slavko, (2007) Pomorski turizam: prometne, razvojne i ekološke dileme, Faculty of Maritime Studies University of Split, Split, p. 160

¹⁴ Šamanović, Josip, op. cit., p. 131

¹⁵ Sports-competitive tourism may be: regatta competition, kayak competition on wild and calm waters and sport fishing competition; see more: Vidučić, Vinko (ed.) et al., op. cit., p. 163-165; cf. Šamanović, Josip, op. cit., p. 137

The *small class regatta* is characterized by holding competitions on a so-called regatta field that can be shaped like a triangle or a trapeze. Alternatively, it is possible to sail in a straight line.

The *cruiser regatta*, on the other hand, implies sailing boats with a multi-day sailing cabin. Disciplines in both forms include matches:

- within the fleet of sailing crafts,
- between pairs within the same fleet (*alias* match race),
- between teams.

In addition, there are specialized competitions that include setting speed records. The racing format includes the closed course and so-called point-to-point competitions and competitions can be held in protected waters, coastal or on open sea, i.e. an ocean, such as the well-known *Volvo Ocean Race*. This is a case of a navigational regatta.

Most competitions are held within the defined grades or ratings (classes) and depending on a sailboat class the competition may alternatively include: (a) one type of sailboat (monotypes) to primarily ensure a skill-based competition¹⁶ or (b) sailing boats with restrictions (heterogeneous) whereby an assessment of sailing boats is done for creating classifications or handicaps^{17, 18}.

The umbrella organization for sailing in the Republic of Croatia (hereinafter: Croatia) is the Croatian Sailing Federation (CSF; cro. *Hrvatski jedriličarski savez* - HJS). At the European level there is the European Sailing Federation (EUSAF), while at the global scale there is the international organization - world sailing association now known as the World Sailing (WS) and formerly as the International Sailing Federation (ISAF).

The International organization WS is the main body governing the sport of sailing that is recognized by both the International Olympic Committee (IOC) and the International Paralympics Committee (IPC). Key documents that the organization

¹⁶ In this case, the subject is sailboats of a unique design, whereby the dimensions and shape of the hull, the sails and equipment are precisely defined.

¹⁷ In this case, on the other hand, since it is a matter of heterogeneous sailboats each of which has its advantages and disadvantages, it is an open-type competition where different sailboats may participate, more precisely, with mutual deviation in regards to hull size, type of sail, depth gauge, etc. The best example is the ORC (Offshore Racing Congress) regatta. In such a competition for heterogeneous sailboats, ratings and classification are calculated (racing value), i.e. a *measuring* of participating sailboats is carried out in order to establish the advantages and disadvantages, i.e. to identify „handicaps“ and create the appropriate classifications based on which a distribution of points will be conducted later according to these parameters. In other words, a sailboat which is shorter, due to her handicap will receive a difference in the points (offset of time) over a sailboat which is faster due to her length or size, all of which in order to achieve as much as equal and fair match. In addition to this, there is also the so-called IMS (International Measure System), within which the so-called *theoretical speed* is individually calculated for each sailboat which is based on comparing the skill of the crew and the helmsman with the capabilities of the sailboat in relation to the conditions on the racing field. In this case, the winning sailboat would be the one who reaches closest to her theoretical speed.

¹⁸ See more on regatta competition: Šamanović, Josip, op. cit., p. 144-147

has under its control are: (a) Racing Rules of Sailing (RRS)¹⁹, (b) Equipment Rules of Sailing (EDF), (c) Offshore Special Regulations (OSR), (d) World Sailing Regulations and Constitution. All this is the backbone of sailing regattas, but also of sports law when it comes to this type of sport. At the level of the CSF, the key documents would be the charter of the organization and by-laws that would constitute the autonomous law of regatta (sports) sailing and therefore sports law.

3. Sports law

In the objective sense sports law is defined as a set of legal norms or legal rules regulating sport-legal relations²⁰, however, sports law seems to be much more and more complex than that. The reasons of complexity have already been pointed out in the introductory part of the paper, however, the fact that sports law is something far more than a mere mosaic of legal rules pertaining to sport, which are actually found anchored in other appropriate branches of law, is implied not only by subordinate legal acts and special laws such as the Sports Inspection Act²¹, the Act on Prevention of Violence at Sporting Events²², Act on Golf Courses²³, in part followed by the Act on Games of Chance²⁴, the Hunting Act²⁵, the Sea Fishing Act²⁶ and of course the indispensable Sports Act²⁷, but also by the fact of the existence of fundamental postulates and concepts we find in the foundations of sports law (more *infra*).

In addition to this, there is certainly the case law as well as the practice of various bodies within sports associations and the activities of relevant institutions, then the jurisprudence and also scientific and professional (technical) literature of sports law.²⁸ Apart from regulations at the national level, the legal (*acquis communautaire - acquis*) of the European Union (hereinafter: EU) could also be added here as an integral part of the domestic law, and of course, this could even be the case of European or EU sports law.

However, what makes the core of sports law, are its fundamental concepts and postulates as well as the practice of bodies and organs that define, create, reaffirm and generally apply those same postulates when dealing with issues related to sport (more

¹⁹ The RRS Rulebook is updated every olympic year; more on the rules *infra*. IV

²⁰ Kačer, Hrvoje (ed.) et al., (2009) (Uvod u) Športsko pravo, Inženjerski biro, Zagreb, p. 3

²¹ NN (OG), no. 86/12

²² NN (OG), no. 117/03, 71/06, 43/09, 34/11

²³ NN (OG), no. 152/08, 80/10, 130/11

²⁴ NN (OG), no. 87/09, 35/13, 158/13, 41/14, 143/14

²⁵ NN (OG), no. 140/05, 75/09, 153/09, 14/1 4, 21/1 6, 41/16, 67/16, 62/17

²⁶ NN (OG), no. 62/17, 130/17

²⁷ NN (OG), no. 71/06, 150/08, 124/10, 1 24/11 , 86/12, 94/13, 85/15, 19/16

²⁸ Kačer, Hrvoje (ed.) et al., *op. cit.*, p. 10

infra.).

These principles that make up the core content of sports law, according to Foster, can be classified as follows: (a) good governance, (b) procedural fairness, (c) harmonization of standards, and (d) fairness and equitable treatment.²⁹

Apart from this, the unavoidable concepts of sports law are also both *lex sportiva* and *lex ludica*. The first is a multifaceted and somewhat not quite defined and established term today. It does not represent a Latin variant of sports law, but perhaps it should be precisely that - i.e. regarding for now the questionable definition of *lex sportiva* and simultaneously contradictory assertions (as to what it actually represents), in the author's opinion it should denote sports law in the widest sense as the whole *corpus* of postulates, practices, customs of sport law and its rules, which include not only the autonomous law, but also the international law as well as the domestic and comparative laws. *Lex ludica*, on the other hand, although it has been used as an alternative reference term for sports law³⁰, in the author's opinion, and also in some others', represents the so-called rules of the game, the term which can be characterized as a *sui generis* set of rules within the autonomous law of sports organizations that also constitute a part of the aforementioned *corpus* of sports law.

Finally, the fundamental principle of sports law is *fairness*, which has been taking clear contours thanks to the work of the relevant sports bodies and in particular the Arbitration Court for Sport.

Activities of sports bodies and the principle of fairness

The principle of fairness (fairness principle; fairness) just as the notion of *lex sportiva* has no generally applicable definition.³¹ Nevertheless, it represents a fundamental principle of sports law recognized by the one-of-a-kind international arbitration court for sport (Court of Arbitration for Sport – CAS; frh. Tribunal Arbitral du Sport – TAS) since its inception in 1984 in Lausanne, Switzerland where its headquarters are, and which is under the administrative and financial cap of the International Council of Arbitration for Sport (ICAS).³²

²⁹ Foster, Ken, *Lex Sportiva and Lex Ludica: the Court Of Arbitration for Sport's Jurisprudence*, Siekmann, C.R. Robert, Soek Janwillem (ed.), (2012) *Introduction to International and European Sports Law: Capita Selecta*, T.M.C. Asser Press, p. 125

³⁰ Siekmann, C.R. Robert, *What is Sports Law? Lex Sportiva and Lex Ludica: A Reassessment...*, p. 3

³¹ Vieweg, Klaus, *Lex Sportiva and the Fairness Principle*, *International Sports Law Review Pandektis (ISLR/Pandektis)*, Vol. 10: 3-4, 2014, p. 394

³² An alternative option of legal protection, most commonly for cases without an international element, would be autonomous and independent bodies within the Croatian Olympic Committee (COC; cro. Hrvatski olimpijski odbor - HOO); the Sports Arbitration Court (PAS; cro. Športsko arbitražno sudište – ŠAS) and the Council of Sports Arbitration (CSA; cro. Vijeće športske arbitraže – VŠA).

Fairness is the quality we expect from officials in the sports arena where the *fair-play* of the athletes is also derived from, who in the very same arena play the main role and which implies not only respecting the established rules of the game, but also a certain attitude (respect for the adversary, the preservation of psychological and physical dignity, the renunciation of non-sporting advantages). As Mićović states, fair play presents an integral factor of all sports activities, sports politics and management, meaning that it applies not only to athletes but also to other individuals who are in contact with sports activities (referees, coaches, members of sports clubs board, fans).³³ According to Mićović, within sports law fair-play presents sports moral the same way as good business practices represent a synonym for business moral in commercial law.

As an ethical framework for sporting and other activities related to sport, the *fair-play* or the concept of *fairness* has developed as one of the most important sports principles.³⁴ Although ever since the establishment of CAS the principle of fairness has been given no defined elements of its content whatsoever, the knowledge of its existence within sports law has never been questionable. Namely, even if negative by their character, there are examples in which the judicial bodies, despite rejecting or ignoring the principles of fairness in sports activities, nevertheless argued about it and by doing so confirmed its existence. An example of this is the Mercury Bay³⁵ case as the most famous dispute in the history of sports sailing.

The cause of the dispute was the sailing equipment that was intended for use in the competition between a New Zealand challenger - the Mercury Bay Club - and the American San Diego Yacht Club, which was based on a „fiduciary“ *Deed of Gift*³⁶ whose interpretation thus became the object of court dispute.³⁷ After the American club statement, made in response to the challenger's statement, that they would use a sailboat that was almost three times longer than the usual length defined by the then usual practice and reciprocally accepted conditions, that they would compete by a

³³ Mićović, Miodrag, *Lex sportiva i fair-play*, Collection of Papers, Faculty of Law of Split, yr. 48, 4/2011, p. 754

³⁴ *ibid.*, p. 754

³⁵ *Mercury Bay Boating Club v. San Diego Yacht Club* 557 N.E.2d 87 (1990)

³⁶ In essence, the case was about Deed of Trust, a legal instrument typical of the common law system. For more discussion on the topic of the trust agreement see: Kadenić, Softić, Darja, *The Notion and Role of the Treuhand in the law and practice of Germany, Austria and Switzerland and its Potential Impact on the Development of Law in Bosnia and Herzegovina and the Region*, *Nova pravna revija*, no. 1-2/201 5, p. 69-86

³⁷ The outlined agreement brought into being the world match race *America's Cup* in 1851. It is one of the most famous and most respected sailing regattas. According to that contract, the sailing club that would win the competition would become the trustee of that contract and thus assume the duty to plan and carry out the following competition (Nafziger, A.R., 2011:17). Since the beginning of the competition until 1983, the New York Yacht Club scored every victory, thus providing itself the position of a permanent trustee. Today America's Cup is the benchmark for the biggest sports achievements in sailing. To win this race it is necessary to gather top notch sailors, but also massive financial resources required for building expensive and technically state-of-the-art sailing boats.

multi-hulled catamaran, the New Zealand club initiated civil proceedings against their competitor before a court in New York. However, the court both in the first and second instance of the proceedings held that the foundation of the competition - the fiduciary deed of gift - had not in any way precluded the American club from the possibility of participating in the competition with a multi-hull catamaran and that the club as the competition commissioner (trustee) at that time had fulfilled all of its fiduciary duties it had under that contract.³⁸

Interestingly enough, despite contractual stipulations containing stylizations such as “*friendly competition among countries*” and *inter alia* the designation of the original originator (settler of the fiduciary contract – i.e. trust) that the “(...) *governing principle of America’s Cup competition is fairness*”, the court was not prompted to take into account fairness when interpreting the contract. Moreover, the American Appellate Court pointed out that the question of whether a certain treatment is sporting and fair in the context of a particular sporting event is completely different from the question whether something is legally permitted i.e. legal. Further, pointing out that the issue of sportsmanship and fairness related to the sporting context largely depends on the rules of a particular sport and the experiences of those educated in that sport, makes these questions as such not suitable for judicial resolution.³⁹

In contrast to this position of the court, strongly dissenting opinions also came up including the one of Judge Kassal J. who, in terms of the manner and scope of interpretation of the disputed contract, pointed out that the true sportsmanship and integrity of this sport demands far more.⁴⁰ Thus, when interpreting the legal basis, the *ratio* of contractual relation and *bona fide* that supported it, were fully neglected in that sense.

Optimistically speaking, although the US court refused to take into account fairness in the interpretation of the contract on which the competition was based, by paying attention to this aspect of the dispute it admitted its existence in the context of sport and potential disputes related to it. Today, thanks to the CAS, fairness is a general principle to be used when deciding on sports disputes.⁴¹

³⁸ Nafziger, A. R. James, Ross, F. Stephen, (2011) Handbook on International Sports Law, Edward Elgar Pub, Reprint edition, p. 17-18

³⁹ Mercury Bay Boating Club v. San Diego Yacht Club 557 N.E.2d 87 (1990)

⁴⁰ Nafziger, A. R. James, op. cit., p. 17-18

⁴¹ Having in mind the judge’s stance exposed in Mercury Bay case, it may be indicated that the sports law principle of fairness represents a *diferentia specifica* in relation to the general legal principle of fairness or even equity (*aequitas*). Namely, the court wouldn’t have needed to specially single out the relevant principle or even refrain from its application if it hadn’t been the case of a special kind of principle rather than the classical principle of fairness. In terms of Croatian law and the spirit of Croatian language the problem area is even more evident. Namely, from the aforementioned follows that the appropriate Croatian term for the English „fairness“ would be „*poštenost*“. Even the Croatian terms „*pravičnost*“ and „*pravednost*“ would not be adequate for the English term „fairness“ as a sports law concept since they already represent translations of some other legal wordings and principles. Consequently, fairness principle in terms of Croatian

According to Vieweg, the legal notion of fairness consists of two meaning layers - the procedural and substantive law element. In the first, fairness sets the procedural requirements that must be met and in the second fairness acts as a rule of conduct and demands that all participants mutually respect each other, more precisely, that they have regard for their reciprocal interests and work to develop equal opportunities.⁴²

In this respect, CAS in regard to the fairness principle unreservedly recognized its procedural dimension⁴³ and affirmed the principle in question and in the legal-sport sense gave importance to the principle of fair procedure as the minimum procedural standard that must be taken into account during the hearings conducted by sports federations (Vieweg, 2014: 388-389). Following this line of reasoning, the CAS also recognized the *right to a fair hearing*⁴⁴ as a branch of the legal-sport *principle of fair procedure* and as one of the fundamental and general legal principles recognized as a human right deriving from natural law and the rule of law. Apart from this, further derivations recognized by the CAS as general legal principles are the principle of *estoppel*⁴⁵ and *venire contra factum proprium*⁴⁶, as well as the principle of fairness and diligence i.e. good faith (*bona fides*)⁴⁷ which, in the case of Mercury Bay, was completely ignored even from the viewpoint of interpretation in accordance with rules of contract law (i.e. law of obligations).

language and law is recommended to be understood as „poštenost“ i.e. „načelo poštenosti“ - as a principle that is similar to the Croatian principle of „pravičnost“, but separate and special and as such inherent to sports law, i.e. lex sportiva. Cf. Nafziger, A. R. James, op. cit., p. 19-20

⁴² Vieweg, Klaus, Lex Sportiva and the Fairness Principle, International Sports Law Review Pandektis (ISLR/Pandektis), Vol. 10: 3-4, 2014, p. 394

⁴³ Fusimalohi v. FIFA, CAS 2011/A/2425, margin no. 71; ARcyling AG v. UCI, CAS 2004/A/777, margin no. 56; GFA v. UEFA, CAS 2002/O/410, Digest III, 68 (75); AEK Athens & SK Slavia Prague v. UEFA, CAS 1998/200, Digest II, 38 (61, 103), reference 36, Vieweg, Klaus, op. cit., p. 388

⁴⁴ Vieweg, Klaus, op. cit., p. 389

⁴⁵ There are different types of *estoppel*, such as equitable estoppel, collateral estoppel, promissory estoppel, each with its own special meaning, however, it can be said that the principle of *estoppel* generally prohibits the parties from challenging a particular fact that has arisen from parties' behaviour, assertion or challenge. In other words, with such a legal instrument the court can prevent i.e. estoppel a person who renounces or opposes a prior agreement or request e.g. a contractual waiver of a lawsuit and subsequently submitting the same for compensation for damage that results from the contractual relationship. The legal doctrine of *estoppel* is conceived by and is particularly characteristic of the common law legal systems, however this legal principle is also the general principle of international commercial law recognized in UNIDROIT principles. Apart from this, the *estoppel* principle is also recognized in the EU law within which it was established *via* Criminal proceedings against Tullio Ratti 148/78 case, according to which nobody, not even the state, can invoke its own omission for the implementation of a directive into national legislation, thus causing damage to individuals. Therefore, a state cannot invoke its own failure to fulfil the obligations under the directive.

⁴⁶ The principle of *venire contra factum proprium*, means that no one may set himself in contradiction to his own previous conduct.

⁴⁷ Vieweg, Klaus, op. cit., p. 389

The *principle of equal treatment* and the *principle of proportionality* also occur as a derivative of the substantive legal element of the principle of fairness and are of utmost importance when applying and interpreting rules and regulations of sports associations and filling in legal gaps (*lacunae*). Of course, relevance is still lacking in this domain regarding the importance of the principle of fairness in restricting the powers of sports federations to adopt rules and regulations.⁴⁸

As regards the development of *lex sportiva* within the CAS, it is certainly necessary to mention Dirk de Ridder v. ISAF⁴⁹ case. In this case, Dutchman Dirk de Ridder, a professional sports sailor and former member of Oracle Team USA (OTUSA), was charged by the ISAF's Disciplinary Commission and the Review Board for allegedly having been involved in manipulation of the weight distribution of the AC45 yachts used in the America's Cup World Series and the America's Cup 2013. The ISAF Disciplinary Commission found that de Ridder had committed a gross breach of the rules that required vessels to comply with class rules, as well as of good sportsmanship, all of which resulted in disrepute of the sport. Thus, such an act became open to sanctioning and the ISAF Review Board agreed to impose a period of ineligibility as a three-year suspension. By appealing to the CAS a repeated procedure was carried out resulting in a *de novo* arbitrage decision by which de Ridder was found guilty and was sentenced to an 18-month suspension.⁵⁰

The significance of this case is evident as the so-called "Essential Requirements of Fairness" had been established in it. There is a total of six requirements and these are:

There should be a clear line of delimitation between the role of investigators, prosecutors and decision makers (arbitrators) – in short, a legal separation of powers;

Full transparency is required in respect of all materials in the possession of the prosecution and which may be of assistance to the person who is charged with the offense i.e. disciplinary offense;

The material on which the arbitrator is invited to base his decision should be clearly exposed and defined to the person charged and, to the extent possible, the arbitrator should be shielded from material that is potentially prejudicial to the person charged but on which the prosecution does not intend to rely for the purpose of the proceedings;

⁴⁸ Vidi više: Vieweg, Klaus, op. cit., in extenso

⁴⁹ Dirk de Ridder v. International Sailing Federation CAS 2014/A/3630

⁵⁰ The decision was made on the basis of a unique standard, the so-called "*comfortable satisfaction test*", which is generally widely applicable by CAS panels in a number of other disciplinary procedures. This sports-legal standard is located on the scale between criminal law and civil law evidence standards, namely the "*comfortable satisfaction test*" is located below the higher criminal law standard - "*beyond reasonable doubt*", but above the civil law standard - "*balance of probabilities*". This is the case of standards according to the understanding of Anglo-American legal literature. See more: Uzelac, Alan, (1997) *Istina u sudskom postupku*, Faculty of Law in Zagreb, Zagreb

There should be clear delimitations between persons sitting in the first instance and those sitting in any body to which first instance decisions may be appealed within the same disciplinary structure;

The person charged should be informed and access granted to the procedures to be applied in his or her case; and

No change to a disciplinary procedure should be introduced with retrospective effect unless it is favourable to the person charged.⁵¹

4. Idiosyncrasies of sports law in the context of sailing regattas

Following the prior presentation of procedural principles in sports disputes, it is evident that sports law has been actively created as a relatively young and unestablished branch of law with a number of actual issues still existing. For example, just as in general there is the actual issue of definition and labour-legal status of athletes, in the context of sports sailing and in appropriate circumstances it is possible to raise a parallel question of comparison between sports sailor - sailor and skipper, i.e. seafarer; furthermore, the question of the status and registration of sailboats, i.e. sports vessels, damage liability and insurance issues in regatta competitions, then issues relating to average, participation of children in competitions, issues relating to the legal framework of sport ports and berths⁵² for sailboats etc. However, in this paper we will stick to the issues of procedural character i.e. of the WS's special rules on the hearing procedure.

The competition in sports sailing has been and will be regulated by the so-called Rules of Sailing Competitions (Regatta Rules) for the period 2017-2020 (2017 - 2020 World Sailing Racing Rules of Sailing – RRS) that have been in force since 1st of January 2017. The contents of the Regatta Rules include signalling for the needs of the race (Race Signals), a list of electronic documents (Online Rules Documents), then the introductory part (Introduction), followed by the part defining the appropriate terms (Definitions), and apart from this it contains a section in which elementary principles are outlined (Basic Principles) and they are “sportsmanship and the rules” and, interestingly enough, “environmental responsibility”. The first states in the spirit of sport that competitors are governed by a body of rules that they are expected to follow and enforce. The fundamental principle of sportsmanship is the competitor's prompt acceptance of the penalty after the violation of the rules, which may be withdrawal from the competition i.e. to retire. The last mentioned principle, which is eco-oriented, with regard to the marine environment, encourages competitors to minimize any adverse

⁵¹ Dirk de Ridder v. International Sailing Federation CAS 2014/A/3630, para. 109

⁵² *Apropos*, see *inter alia* Panžić, Tončić, Sport Ports in Croatian Legislation, Collection of Papers, Faculty of Law of Split, vol. 47, no. 3, 2010, as well as Vuković, Ante, Sports Act in the function of development of nautical ports in Croatia and the Mediterranean (Part I.), *Our Sea*, vol. 64, no. 3, 2017 and *id.*, Sports Act as a Function of Nautical Tourism Development in Croatia and in the Mediterranean, part II, vol. 65, no. 2, 2018

impact of the sailing sport on the environment.⁵³

Finally, the core part of the Regatta Rules consists of two main units. The first one, Parts 1-7, contains the rules that apply to all contestants. The second, Appendices, specify the particularities of the rules, rules relating to only a small number of contestants or officials and rules applicable to specific types of competitions, i.e. Radio Sailing Racing Rules (Appendix E), Team Racing Rules (Appendix D), Match Racing Rules (Appendix C) and even windsurfing competition rules (Appendix B) and kiteboard (Appendix F)⁵⁴ as separate disciplines of water sports that are outlined as special types of competitions, to all of which the general Regatta Rules apply *mutatis mutandis*.

Parts making the first unit are: Part 1: Fundamental Rules, Part 2: When Boats Meet, Part 3: Conduct of a Race, Part 4: Other Requirements When Racing, Part 5: Protests, Redress, Hearings, Misconduct and Appeals, Part 6: Entry and Qualification, Part 7: Race Organization. For the purposes of this paper, we will limit ourselves to „Part 5: Protests, Redress, Hearings, Misconduct and Appeals“.

4.1. Sports procedural rules in sailing regattas-„small version of maritime procedural law“

„Part 5: Protests, Redress, Hearings, Misconduct and Appeals“ is a set of Regatta Rules that regulates the procedural part of filing a remonstrance, i.e. *protest* over the violation of the rules at the expense of other participants in the competition or alternatively filing request for redress due to appropriate aggravating circumstances in the course of the contest pursuant to which before an appropriate committee it is possible to present arguments of one's protest or request for redress and seek compensation either of moral-sports or material-property character. Part 5 is divided into four chapters: (a) *Right to protest; right to request redress or Rule 69 action*, (b) *Hearings and decisions*, (c) *Gross misconduct*, (d) *Appeals*.

In considering the rules in question, the analysis will be structured in such a way that the subjects of the procedure will be considered first, then the formal requirements for a protest and the right of its filing as well as invoking redress, followed by the course of the procedure, and finally, decisions and remedies.

⁵³ It is clear from this that the fundamental postulates of the Law of the Sea and the Conventions governing the protection of the marine environment have not been taken lightly whilst creating this sports discipline. In view of the foregoing, the provision of Rule 55 may be outlined, which reads as follows: “a competitor shall not intentionally put trash in the water. This rule applies at all times while afloat. The penalty for a breach of this rule may be less than disqualification.”

⁵⁴ Rules for other forms of kiteboarding competitions (e.g. Short Track, Kitecross, Slalom, Boarder X) or other kiteboarding competitions (e.g. Freestyle, Wave, Big Air, Speed) are not included in Appendix F.

4. 1. 1. *The subjects in the procedure*

The subjects in the proceedings are the competitor that has filed a protest (protestator) on one side and the competitor who has committed a violation (the “offender”; the protestee) on the other. Both subjects in the Regatta Rules are referred to as „Boats“, which means both the vessel and crew on it.⁵⁵ Then, in the hearing upon a request for redress, the subject in the procedure is the Boat requesting redress or for which redress is requested by the appropriate committee as well as the committee itself in certain circumstances i.e. acting in accordance with appropriate rules⁵⁶ (see *infra*).

Other subjects in the procedure are the appropriate committees, and these are: the Race Committee, the Technical Committee and the Protest Committee. Interestingly enough, even though the Protest Committee under appropriate conditions has the possibility to lodge a protest, it is never a party to the proceedings⁵⁷ like the other mentioned subjects; moreover, it is the body to which the requests for protest and redress are filed and which makes the decision on such claims. In accordance with the special provisions of Rule 63.8 apart from the protest between the competitors from the same regatta, protests are also possible between Boats sailing in different races conducted by different organizing authorities, in which case the Protest Committee will obligatorily hold the hearing pursuant to the relevant rule, which is acceptable to the organizing authorities and whose boats are in dispute.

4. 1. 2. *Formal pre-procedural actions*

According to the Regatta Rules the protest is defined as an allegation made by a Boat, the Race Committee, the Technical Committee or the Protest Committee under rule 61.2, saying that a Boat has broken a rule.⁵⁸ Rule 61.2 of the Regatta Rules sets the requirements under which a protest may be lodged by each of the outlined subjects in the procedure upon protest.

The protest can be categorized as the so-called formal pre-procedural action i.e. formal action by which the appropriate procedure is initiated. In addition to the protest there is an alternative option of filing a Request for Redress, however, the circle of actively legitimate entities (subjects) for this type of mechanism is somewhat more limited because it does not include the Protest Committee.⁵⁹ Therefore, a request for redress can be filed only by: a Boat⁶⁰, the Race Committee (for a Boat)⁶¹ and the

⁵⁵ See Regatta Rules: Introduction

⁵⁶ Item (c) under the term “Party” as defined in the section *Definitions* of the Regatta Rules

⁵⁷ See Regatta Rules: Definitions

⁵⁸ See Regatta Rules: Definitions

⁵⁹ Rule 60

⁶⁰ Rule 60.1 (b)

⁶¹ Rule 60.2 (b)

Technical Committee (for a Boat)⁶².

a) Request for Redress

Request for Redress is made when the boat's score in a race or series has been or may be made significantly worse by an *improper action or omission* of certain regatta organs (Race Committee, Protest Committee, regatta's Technical Committee or even the regatta's organizing authority).⁶³ In this matter *improper action or omission* does not mean the effect of the decision made by the Protest Committee upon a protest/redress when that same Boat was a party to a proceeding. In other words, request for redress cannot be filed against decisions of the Protest Committee by Boats that were parties to the proceedings.⁶⁴

Furthermore, redress can be requested when a participant in the contest i.e. a Boat or its crew member had been issued a penalty or warning.⁶⁵ For example, penalty for breach of the rules relating to the so-called *Fair Sailing*⁶⁶ as one of the basic rules (Part 1) or, for example, in the event of participation in the competition of a Boat or a crew member that was disqualified or suspended.⁶⁷

Finally, redress request can be filed even in the event of force majeure and material damage.⁶⁸ This includes providing assistance to third parties and vessels at sea thus complying with rule 1.1.⁶⁹ as well as injuries and physical damages caused by the following actions:

- (a) a boat that has violated a rule applicable to sailing (Part 2) or
- (b) vessels not competing (not racing) and required to keep clear⁷⁰ (such as fisheries, boats, yachts, etc.)

b) Protest

Conditions or circumstances giving the right to lodge a protest to each of the procedural subjects can be divided with respect to actively legitimated subjects, namely: the Boat, the Race Committee, the Technical Committee, the Protest Committee.

⁶² Rule 60.4 (b)

⁶³ Rule 62

⁶⁴ Rule 62.1 (a)

⁶⁵ Rule 62.1 (d)

⁶⁶ A boat and her owner shall compete in compliance with recognized principles of sportsmanship and fair play. A boat may be penalized under this rule only if it is clearly established that these principles have been violated. The penalty shall be either disqualification or disqualification that is not excludable (Rule 2).

⁶⁷ Rule 2

⁶⁸ Rule 62.1 (b)

⁶⁹ Rule 62.1 (c)

⁷⁰ Rule 62.1 (b)

A *Boat* may lodge a protest against another *Boat* in all cases except:

- (a) in case of violation of the rules on “*When Boats Meet*”(Part 2) and
- (b) in the event the *Boat* touches the starting mark before starting, i.e. the mark that begins, bounds or ends the leg of the course on which she is sailing, or a finishing mark after finishing (Rule 31).

Exceptionally, of course, it is possible to have the protest lodged by the *Boat* - protester in the case of Rule 31 if she was involved in the incident or saw the *Boat* by which the same violation had been done.⁷¹

The *Race Committee* may lodge a protest against the *Boat* in all cases except on the basis of the circumstances of which the information (notice) arise from:

- (a) a request for redress
- (b) an invalid protest, or
- (c) a report from a person with a conflict of interest^{72 73}

An exception to the last mentioned case would be a report from the representative of the *Boat* herself, in which case the *Race Committee* could lodge a protest based on the circumstances learned about in such a report.⁷⁴

The *Technical Committee* may lodge a protest under the same conditions as the *Race Committee*, however, according to the Regatta Rules it is obliged to lodge a protest in cases when it decides i.e. determines that the *Boat* - protestee:

- (a) had violated the rules relating to the so-called „*Other Requirements When Racing*“ (Part 4), whose content refers to e.g. propulsion, followed by competitor’s clothing and equipment, the circumstances of anchoring and mooring, fog signals and lights and traffic separation schemes⁷⁵, setting and sheeting sails, trash disposal or skin friction in view of ejecting or releasing a substance, such as a polymer, or have specially textured surfaces that could

⁷¹ Rule 62.1

⁷² Rule 60.2 (a)

⁷³ Pursuant to the Regatta Rules a person with a conflict of interest is the said party if he: „*may gain or lose as a result of a decision to which he contributes, may reasonably appear to have a personal or financial interest which could affect his ability to be impartial, or has a close personal interest in a decision.*“ Following the conclusion in The Case Book for 2017-2020: Interpretations of the Racing Rules - Case 137: „*When deciding if a conflict of interest is significant, the protest committee should take into account the degree of conflict, the level of the event and the overall perception of fairness.*“ See also: Royal Yachting Association (RYA) Case Book 2017-2020: RYA Case RYA1984-02; The Appeals Book for 2017-2020 - United States Sailing Association (US Sailing): USA Appeal US22 (*Wayfarer 1115 vs. Wayfarer 1030 and others*); USA Appeal US42 (*Super Sunfish 238 and others vs. Super Sunfish 648*).

⁷⁴ Rule 60.2 (a)

⁷⁵ Under the Rule 48.1:“*When safety requires, a boat shall sound fog signals and show lights as required by the International Regulations for Preventing Collisions at Sea (IRPCAS) or applicable government rules.*”; Rule 48.2:“*A boat shall comply with rule 10, Traffic Separation Schemes, of the IRPCAS.*”

improve the character of the flow of water inside the boundary layer⁷⁶, or when (b) a Boat or personal equipment does not comply with the *Class Rules*;⁷⁷

The *Protest Committee* has the right to lodge protests in all the general cases where the same right have both the Race and the Technical Committee; however, in contrast to them it also has the option of lodging protests in special circumstances, namely:

- (a) if it learns that a Boat was involved in an incident that may have resulted in injury or serious damage, or
- (b) if during the hearing of a valid protest it learns that the Boat, although not a party to the hearing, was involved in the incident and may have broken a rule⁷⁸

c) Special powers and exceptions

Pursuant to Rule 60.5. neither the boat nor the committee may protest for an alleged breach of:

- Rule 5 concerning anti-doping,
- Rule 6 relating to betting and corruption,
- Rule 7 relating to disciplinary proceedings.

These are special cases for which special procedures are foreseen outside the framework of the rules that we are considering. In addition to these, pursuant to Rule 60.5. it is not possible to lodge the protest against Rule 69, which relates to misconduct since such a circumstance is solely under the competence of the Protest Committee.

In respect of Rule 69 both the Race Committee and the Technical Committee have the power to report to the Protest Committee and request the hearing procedure⁷⁹, however, the Protest Committee is not required to meet the relevant requests, but independently assesses whether or not it will convene a hearing for *misconduct*^{80,81}

Finally, the Protest Committee also has the exclusive authority in deciding whether to convene a hearing to consider a redress⁸² as well as in considering, either on the basis of their own observation or information received from any source including evidence taken during a hearing, whether a *support person* (coach, trainer, parent, guardian, manager, medic, paramedic, team staff, etc.) has broken any rule even those outside

⁷⁶ The protest cannot be lodged in case of a violation of Rule 41 (Outside help), Rule 24 (Interfering with another boat), Rule 44 (Penalties at the time of an incident) and Rule 46 (Person in charge).

⁷⁷ Rule 60.4 (a) (1) and (2)

⁷⁸ Rule 60.3 (a) (1) and (2)

⁷⁹ Rule 60.2 (c) and Rule 60.4 (c)

⁸⁰ According to Rule 69.1 (b) Misconduct is: (1) conduct that is a breach of good manners, a breach of good sportsmanship, or unethical behaviour, or (2) conduct that may bring the sport into disrepute.

⁸¹ Rule 60.3 (c)

⁸² Rule 60.3 (b)

the Regatta Rules that apply to the race in question^{83, 84}

d) Formal conditions and preclusive period

Both the protest and the redress request must be made in writing. While the redress request must state only the reason for its submission⁸⁵, pursuant to Rule 61.2 the protest has a precisely defined content with outlined components that include (a) the protestor and protestee; (b) the incident; (c) where and when the incident occurred;⁸⁶ (d) any rule the protestor believes was broken; and (e) the name of the protestor's representative. Of course, paragraph 2 of the Rule mentions exceptions pursuant to which it may be concluded that the Regatta Rules do not require the strict formality of the protest composition as certain conditions can be met in the course of the hearing proceedings.⁸⁷ It is important that the condition under item (b) is met, i.e. that an incident had occurred due to which the Boat intending to protest must notify the other Boat on the first possible occasion. While conditions (d) and (e) can be met prior to or during the hearing, the condition under item (a) may be met at any time before the hearing as long as the condition under item (b) has been met.

In general, the protest of a Boat, the Race Committee, the Technical Committee or the Protest Committee about an incident noticed in the competition area must be submitted to the regatta office (*race office*) within the time limit for the protest referred to in the *sailing instructions* under threat of right preclusion.⁸⁸ The time limit is two hours after the last boat in the race finishes, unless otherwise specified.⁸⁹

Other protests by the Race Committee, the Technical Committee, or the Protest Committee must be submitted to the race office no later than two hours after the committee receives the necessary notice.⁹⁰ Of course, the Protest Committee shall prolong the time if there is a good reason to do so.⁹¹ The redress request is submitted under the same conditions whereas other requests shall be delivered as soon as reasonably possible after learning of the reasons for making the request.⁹²

⁸³ Rule 60.3 (d)

⁸⁴ Rule 62.3 (d)

⁸⁵ Rule 62.2

⁸⁶ Requirement (c) may also be met before or during the hearing, provided the protestee is allowed reasonable time to prepare for the hearing.

⁸⁷ According to para. 2 of Rule 61.2: "(...) if requirement (b) is met, requirement (a) may be met at any time before the hearing, and requirements (d) and (e) may be met before or during the hearing. Requirement (c) may also be met before or during the hearing, provided the protestee is allowed reasonable time to prepare for the hearing."

⁸⁸ Rule 61.3

⁸⁹ Rule 61.3

⁹⁰ Rule 61.3

⁹¹ Rule 61.3

⁹² Rule 62.2

The only difference between these two formal pre-procedural actions is that in the case of the *redress request* no displaying of red flag is required during the occurrence of an incident, while in the case of the *protest* a requirement is set out on the part of a Boat - potential protestator is to hail “*Protest*” at the first reasonable opportunity and conspicuously display a red flag at the first reasonable opportunity.⁹³ The flag must be displayed until she is no longer racing.⁹⁴ In this respect, the Regatta Rules prescribe explicitly indicated cases of exceptions to this rule.⁹⁵

4. 1. 3. Procedure course

After the submission of a protest or redress request and accordingly commencement of the hearing procedure, at the beginning of the hearing the Protest Committee shall collect the evidence it holds indispensable and starts the formal examination and assessment of the request. If the request is assessed positively in terms of its validity, the hearing shall be continued. If not, the Committee shall declare the protest or redress request invalid and close the hearing (Rule 63.5). In other cases, the Committee must also determine whether or not injury or serious damage resulted from the incident in question. If not, the hearing shall be closed.⁹⁶

In any event, the Protest Committee shall hear all protests and redress requests submitted to the race office, unless it approves the withdrawal of the protest or redress request.⁹⁷ A decision granting a redress or imposing a penalty may not be made *in absentia*, i.e. without a hearing, unless otherwise provided for in the Regatta Rules.⁹⁸ All parties to the hearing must be notified of the time and place of the hearing, the protest or redress information must be made available to them and they must be given reasonable time to prepare for the hearing (Rule 63.2).

Within the provisions governing the hearing, the Regatta Rules further elaborate questions and exceptions regarding the Requirement for a Hearing⁹⁹, Conflict of Interest¹⁰⁰, Taking Evidence and Finding Facts¹⁰¹, Conflict between Rules¹⁰².

⁹³ Rule 61.1 (a)

⁹⁴ Rule 61.1 (a) *in fine*

⁹⁵ See more: Rule 61.1 (a), item (1), (2), (3), (4)

⁹⁶ Rule 63.5 *in fine*

⁹⁷ Rule 63.6

⁹⁸ Rule 63.1

⁹⁹ See more: Rule 63.1 and Rules 30.2, 30.3, 30.4, 64.3 (d), 69, 78.2, A5 and P2 to which it refers.

¹⁰⁰ Rule 63.4

¹⁰¹ Rule 63.6

¹⁰² Rule 63.7

4. 1. 4. Decision

The Protest Committee will make decisions on the submitted protest or redress request after the hearing has been conducted.

Interestingly enough, a decision in case of a redress request: if it is found that the Boat has the grounds for redress under Rule 62, the decision will be made as fair an arrangement as possible for all boats affected regardless of whether they asked for redress.¹⁰³ Redress may be expressed in:

- adjustment of scoring or finishing times of boats,
- abandoning¹⁰⁴ the race,
- letting the results stand, or
- making some other arrangement (Rule 64.2).

As regards penalties and indemnity i.e. *exoneration*, as referred to in Rule 64.1, the Protest Committee shall disqualify the Boat (unless some other penalty applies to the Boat that is a party to the hearing procedure) that is found to have violated the relevant rule and not redeemed herself.¹⁰⁵ Such a penalty will be imposed regardless of whether the applicable rule was mentioned in the protest or not.¹⁰⁶ Rule 64.1 contains further exceptions and reserves.¹⁰⁷

In addition to this, Rules 64.3 and 64.4 deal with *Decisions on Protests Concerning Class Rules* and *Decisions Concerning Support Persons* separately and in particular.

According to Regatta Rule 67 the question of damages arising from a breach of any rule must be governed by the prescriptions, if any, of the national authority (association).

4. 1. 5. Remedium of extraordinary and ordinary character

Regatta Rules also provide for appropriate legal means for correction of errors (essential procedure infringements) or attempts to achieve a satisfactory result by appealing to the first-instance decision. In the first, the case is not about an extraordinary legal remedy *per se* since in the event of a significant error the reopening of a hearing is not initiated by the parties in the procedure, but by the Protest Committee *proprio motu*.¹⁰⁸ The same applies in the event when significant new evidence becomes available within a reasonable time.¹⁰⁹ This is actually a facultative option. On the other hand, the Protest Committee will *obligatorily* reopen the hearing upon the request by the

¹⁰³ Rule 64.2

¹⁰⁴ Pursuant to Regatta Rules Abandon means: “a race that a race committee or protest committee abandons is void but may be resailed.”

¹⁰⁵ Rule 64.1

¹⁰⁶ Rule 64.1

¹⁰⁷ See more: Rule 64.1, item (a), (b) and (c)

¹⁰⁸ Rule 66

¹⁰⁹ Rule 66

national authority pursuant to special provisions¹¹⁰ of the Regatta Rules.¹¹¹ The party to the hearing may ask for a reopening no later than 24 hours after being informed of the decision.

Regatta Rules, so to speak, provide for an ordinary legal remedy, namely an appeal that is governed by Section D, Part 5 of the Regatta Rules, which particularly regulates the question of appeal and request to the national authority. If the right to appeal is not denied by a special rule, the party to a hearing may appeal to the Protest Committee's decisions and its procedures, but not the facts found. Likewise, the Boat may complain if she was denied the right to a hearing pursuant to Rule 63.1, specifically if a decision is made in absence, i.e. without a hearing.

As in the case of reopening of a hearing, which may be initiated *proprio motu* by the Protest Committee itself, the second-instance body i.e. the national authority could also be asked for confirmation or correction of its decision (Rule 70.2).

In view of the foregoing, it may also be concluded that in exhaustion of the internal appeal options of its own sports organization, a party with a legal interest may refer to CAS with a reasoned request for arbitration.¹¹² CAS decisions are final and binding and an appeal procedure is possible only in a few exceptional cases. *Obiter dictum*, the CAS decisions may also be appealed to the Swiss Supreme Court in certain circumstances.

5. Conclusion

When the outlined hearing rules and the analysis of *lex sportiva* are added the fact that WS keeps and maintains a case book that is used for interpreting various controversial situations, then the particularity of sports law is quite obvious and unquestionable.

The given analysis pointed to the idiosyncrasies and versatility of sports law as well as its nature and unquestionable existence in the realm of law. The examination of the hearing rules that are international to all regattas in all countries around the world leads to a conclusion that the case is about a special sports-legal superstructure whose *iter iuris* leads even to the Supreme Court in Switzerland.

When analysing the Regatta Rules, it is clear that they were created by having in mind the rules of maritime law, which is confirmed by the explicit reference to the application of the rules of the International Regulations for Preventing Collisions at Sea (COLREG) and the stylization of the provisions dictating rescue of persons and property at sea as well as by the principle relating to the protection of the marine

¹¹⁰ See more: Rule 66 and the refereeing Rules 71.2 or R5

¹¹¹ See more in Regatta Rules: Appendix T - Arbitration

¹¹² See more: Čizmić, Jozo, Momčinović, Hrvoje, Sport Arbitration Tribunal COC - Organisational and Procedural Provisions, Collection of Papers, Faculty of Law of Split, Split, yr. 48, 4/2011, p. 759-773

environment. All this undoubtedly points to the fact that the Regatta Rules contain the *ethos* arising from the most important international instruments of maritime law such as the SOLAS, MARPOL and other conventions.

In view of the particular nature of sports sailing and water sports and of the potential intersection with maritime law, it is possible to talk about a type of “maritime sports law”, especially when the nautical tourism law comes into question. The interdisciplinary nature becomes even more evident when one has in mind that in April 2018 the WS organization for the first time entered the sphere of electronic sports (esports) and in partnership with Virtual Regatta (the leading digital sailing platform) organized the eSailing World Championship ended 30th October 2018 and won by France’s eSailor L1.

The involvement of the matter from the field of intellectual property, video game law, marketing (advertising) law and franchise law, as well as sponsorship in this regard is somewhat inevitable.

Furthermore, the basic postulates of the modern body of *lex sportiva* lead to the conclusion that in 2021, when new (revised) Regatta Rules should come into force, it will certainly be necessary to change the circumstance in which the same body (Protest Committee) that decides in the dispute has the power to initiate proceedings. Thereby it would be brought in line with one of CAS’s “essential requirements of fairness” as set forth in the de Ridder case, specifically with the requirement for legal separation of powers i.e. delimitation between the role of the investigator, the prosecutors and the decision maker (arbitrator).

Apart from seemingly apparent recognition of sports law, which has been shaped and elucidated by generally numerous sports law cases and activities of appropriate bodies and unquestionably tends to continue in the same manner, the remaining provisions of the relevant rules on the hearing procedure seem generally suitable without further critique in this regard as they satisfy both the sport and the law i.e. the legal (sports) principles and most importantly the central principle of fairness, thus providing an adequate legal and equitable approach whilst not completely scarifying the sport for the sake of law and establishing in that sense a particular fine line of delimitation between sports and the law with, interestingly, a certain degree of intertwining i.e. points of contact that in the end, in addition to other aspects of sports law, make sports law so special.

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Gratias tibi, mi bone amice, Dino Hošnjak, dr. med. dent., ago.

