

UNION INTERNATIONALE MOTONAUTIQUE

DECISION NO. [7/2021]

IN THE CASE ICA [1/2020]

DELIVERED BY THE

UIM INTERNATIONAL COURT OF APPEAL

SITTING IN THE FOLLOWING COMPOSITION

PROF. ESQ. BRUNO TASSONE (PRESIDENT), ESQ. RUI BOTICA SANTOS AND ESQ. FRANCESCO DE BEAUMONT

in the proceeding between:

Tobias Munthe-Kaas, represented by Esq. Andreas Messelt Ekker (hereinafter the “Appellant”)

– *Appellant* –

v/

Union Internationale Motonautique (hereinafter the “UIM”), represented by the Prosecuting Body, in the person of Mr. Kimon Papachristopoulos (hereinafter “Respondent”)

– *Respondent* –

1. THE PARTIES

1.1 Tobias Munthe-Kaas is a driver (hereinafter the “Driver”) taking part the International Ordinary Event F2 race in Tønsberg, Norway, held on August 7-9, 2020 (hereinafter the “Race”).

and

1.2. Union Internationale Motonautique (hereinafter the “UIM”) is the world governing body for all Powerboating activities, represented by Mr. Kimon Papachristopoulos in his capacity of the Prosecutor, who is also the UIM Statutory Legal and represents UIM before the International Court of Appeal (hereinafter “ICA”) pursuant to Art. 3, Para. 1, of ICA Procedural Rules adopted by the UIM Council on March 16, 2018 (hereinafter the “ICA Rules”).

2. BACKGROUND

2.1 The Appeal is directed against the decision of August 8, 2020, taken by OOD after the end the Race (hereinafter the “ODD Decision”) to disqualify the Driver (hereinafter the “Sanction”) according to UIM Rule 307.02 of the UIM Circuit Rules (hereinafter the “Rules”), together with the Jury Decision of August 9, 2020 upholding the Decision (hereinafter the “Jury Decision”) and rejecting the Driver’s timely protest, so confirming that the said Rule had been violated.

3. THE PROCEEDING

3.1 On August 11, 2020, the Appellant notified UIM the Intention to Appeal and the related nos. 4 Exhibits against the Jury Decision and, with a subsequent note, UIM acknowledged the reception of the above and of the deposit required by the Rules.

3.2 With a subsequent note UIM also communicated to the Appellant the deadline for the filing of further Grounds of the Appeal, notified on August 20, 2020 (hereinafter the “Appeal”), together with nos. 9 Exhibits (incorporating the previous ones).

3.3 With a note of September 20, 2020, UIM communicated to other potentially interested Third Parties the deadline and formalities to take part in the proceeding, without receiving no notification and/or the subsequent Written Observations.

3.4 With a subsequent note of September 25, 2020, UIM sent to the Appellant the list of eight judges drawn from the “UIM ICA list of judges” among whom at least three were to be nominated by the ICA President, as per Art. 2.4 of the ICA Rules, without receiving no objection.

- 3.5 On October 25, 2020, the Respondent filed the Prosecutor’s Brief.
- 3.6 On October 29, 2020, the Appellant – together with his lawyer Esq. Andreas Messelt Ekker – filed a Response to the Prosecutor’s Brief, filing nos. 3 further Exhibits.
- 3.7 After the appointment of the ICA Hearing Panel on the same date, on November 13, 2020, the UIM Secretary proposed different dates for the hearing, which was finally scheduled for December 1^o, 2020, but then postponed to December 17, 2020, under the request of the Appellant.
- 3.8 During the said hearing the Parties declared that there was not any urgency in the definition of the case – as the Panel decision would affect the final outcome of any ongoing competition –, discussed the Appeal lodged by the Appellant and the objections raised by the Respondent as per allegation resumed below, Mr. Tor Linnerud was heard as witness and the video filed by Appellant as Exhibit no. 7 “TBG2020_ovenfra.mp4” (hereinafter the “Video”) was examined together with him.
- 3.9 At the end of the hearing both Parties asked to be permitted to call other witnesses to be heard and to comment on the declarations of Mr. Linnerud, with Final Submission to be filed after the Christmas break, with the Panel reserving all decisions.
- 3.10 On December 22, 2020, the Panel filed an Ordonnance resolving that (i) it was not necessary to hear other witnesses to decide the case and (ii) both Parties were given the deadline of January 11, 2021, to file written Final Submissions.
- 3.11 The Ordonnance was sent to the Parties on January 15, 2021, together with an extension up to January 25, 2021, for the filing of their Final Submissions, after the related amendment of the same Ordonnance.
- 3.12 On January 25, 2021, both Parties filed their Final Submissions.
- 3.13 Before the (non-binding) 30 days established by the ICA Rules, the Panel communicated that its Decision would be taken after such a term, with no objections raised by the Parties.
- 3.14 Therefore, the present Decision was made within the further 30 days after such term, expiring on March 26, 2021.

4. SUMMARY OF THE PARTIES’ DEFENSES

- 4.1 The Appellant alleges that the Sanction is invalid for the following reasons.
- 4.2 After finishing the above race in the second position starting from the sixth one with his Boat no. 77 (hereinafter the “White Boat”), the Driver was confronted by the other competitor Frode Sundsdal running with Boat no. 7 (being also part of the Organizing Committee), who complained for the Driver not maintaining his lane and moving him into the other side of the course, so that he started and ended the race in the fourth position, anticipating that the Driver would be disqualified.

- 4.3 Before the prize giving ceremony of 18:30, the Driver met the OOD (Tor Linnerud) and the F2 supervisor Morten Bjerknæs in dialog, stating that he would not accept any sanction without the filing of a due protest by Mr. Sundsdal.
- 4.4 The ceremony did not start on the scheduled time and while the Driver was waiting for the awarding of the prizes the OOD told him he had been disqualified for not keeping the lane according to Rule 307.02, while the related results' list was posted at 18:43 and the said ceremony was held at 19:00.
- 4.5 Slightly after the Driver was communicated the evidence grounding the Sanction and consisting of the said Video, shooting the start of the Race.
- 4.6 Therefore, the Driver filed a protest at 19:37 challenging both the violation of the said Rule and the proportionality of the Sanction.
- 4.7 After 20:00 the Driver was called into the Jury meeting with the jury formed by sole Jarle Hagane, who checked the Video with the Driver and proposed to turn the Sanction into one lap penalty.
- 4.8 Under the refusal of the Driver, he informed him not to be competent to decide the case – being the cousin of Frode Sundsdal – and scheduled a meeting for the next morning.
- 4.9 On August 9, 2020, after the Driver had submitted other private videos as evidence in his favor, he met with the Jury, formed by the said Jarle Hagane as Chairman, by Sverre Grytnes and Kristoffer Gulbrandsen as Members, with Øyvind Dreier Sivertsen serving as Secretary.
- 4.10 Mr. Hagane declared that he had been authorized by the Norwegian Motorsport Federation to be part of the Jury, which confirmed the Sanction after commenting on the Video together with the Driver.
- 4.11 With the Appeal the Driver claims that he committed no violation, as results from the Video, and there were not official cameras/videos, nor any report about the Rule 307.02 infringement communicated by the Race Judges to the OOD and to the Jury.
- 4.12 In particular, he goes, his White Boat was pushed by another boat and, after his slight deviation from the original path, the Orange Boat – who had still plenty of space – crossed his line much behind him, even though its driver had full space to continue straight.
- 4.13 Furthermore, the Driver filed a mail by Morten Bjerknæs – an F2 Supervisor who unofficially assisted Mr. Linnerud in taking the ODD Decision – which stated that it was not taken complying with the due procedural rules, as Mr. Sundsdal provided the ODD with private video recordings never mentioned as evidence, nor shared with the Driver, without filing a protest. The statement also alleges that there were no reports from either the Race Judges or the Pontoon Marshal, while the Jury Decision stated there has been a report from the Pontoon Marshal leading to the Sanction.

- 4.14 As a consequence, Appellant alleges the violation of Rule 1.4.1 (for conflicts of interest for the reasons above), of Rule 102.03 (for lack of any Pontoon Marshal report), of Rule 204.02 (for the Jury not been present at the Drivers' Briefing), of Rule 321.01 (because the results were posted at 18:43 and the Official Prize giving ceremony started at 19:00, while it should be held more than 1 hour after 18:43) of Rule 402.01 (as the Jury consisted initially of only the Chairman), of Rule 402.02 (considering that the Chairman of the Jury was the cousin of Frode Sundsal, who in turn was both a driver and member of the Organizing Committee), of Rule 404.03 (for lack of a protest on the part of the latter and of any written notice by the OOD, nor any minutes of the Jury meetings), of Rule 403.05 (because the Jury established they could only remove or not the penalty, without changing it).
- 4.15 Eventually, the Appeal indicates as witnesses Morten Bjerknæs (F2 Supervisor during the event) and Kristoffer Gulbrandsen (one of the Jury Members).
- 4.16 According to the Prosecutor the Driver did not hold his lane – when starting from the sixth position – and crossed the course of the Orange Boat that started from the fifth position, which was forced to cross the backwash of the Appellant's Boat, as results from the Video.
- 4.17 Therefore, the Driver violated Rule 307.02.
- 4.18 Eventually, the Prosecutor indicates Mr. Linnerud as witness, reserving to name other witnesses in the course of the proceeding.
- 4.19 In its Response to the Prosecutor's Brief the Appellant further elaborates on the said arguments and asks ICA to declare (A) the Jury Decision null and void for procedural reasons, (B) the Driver not to have been violated Rule 307.02, and that, in any case, (C) the penalty to be applied be no more than a yellow card.
- 4.20 Under Point (A) the Appellant adds to the previous challenges that the Jury was not composed until Saturday (August 8) night after the Race, or most likely, Sunday morning (August 9), that its Members were not indicated in the Jury Decision and that there was no UIM Commissioner nor during the Race, nor within the Jury, which heard the case only on Sunday.
- 4.21 Under Point (B) the Appellant adds to the previous challenges that a statement of the Orange Boat's driver Mr. Johan Österberg contradicts the Prosecutor's allegation according to which it had to cross the backwash of the Appellant's Boat "due to the appellant's deviation to the left" into the Orange Boats lane.
- 4.22 Under Point (C) the Appellant adds to the previous challenges that Rule 307.02 states that the alternative penalties for breaching the Rule are disqualification, one lap penalty or a yellow card, depending on the severity, and that disqualification in this case is excessive, nor in line with similar cases.
- 4.23 The Appellant furthermore indicates as witnesses Mr. Johan Österberg, driver of the said Orange Boat starting from the fifth position.

5. ADMISSIBILITY AND JURISDICTION

- 5.1 The ICA acknowledges that the Appellant lodged his Appeal in conformity with the (said) UIM International Court of Appeal and Procedural Rules.
- 5.2 Even though the ICA's jurisdiction has not been challenged, ICA confirms their jurisdiction to decide the case.

6. THE HEARING AND THE FINAL SUBMISSIONS

- 6.1 During the hearing held on December 17, 2020, the Appellant were present in person and together with his lawyer Esq. Andreas Messelt Ekker, while UIM was represented by Mr. Kimon Papachristopoulos, all of them via skype connection.
- 6.2 The President of the Panel formally asked the Parties to state whether they had any objection with regard to the way the proceeding had been managed up to the hearing and/or whether they felt that their right to defend themselves had been guaranteed.
- 6.3 The Parties declared they had no objection and accepted the three ICA Judges above mentioned as members of the Panel.
- 6.4 During the hearing the Parties fully discussed the grounds of the Appeal lodged by the Appellant and the objections raised by the Respondent, with further allegations in addition to the written ones already filed.
- 6.5 With regard to the Appellant's Response to the Prosecutor Brief, the latter pointed out that all procedural mistakes made by the ODD and/or the Jury, if any, can be remedied during the present proceeding, that any ODD can ascertain an infringement by its own initiative as per Rule 406.02 (without a previous protest), and that the Jury composition was of no importance as the Jury Decision would have been the same.
- 6.6 Furthermore, he alleged, the Jury could evaluate the violation of Rule 307.02 independently of the Pontoon Marshal report and on the basis of the Video, which clearly proves the said infringement.
- 6.7 Under a request of the Panel, the Parties declared that the Decision was likely rendered right after the race at stake.
- 6.8 The Panel took a short break to decide how to proceed and decided to hear Mr. Linnerud, as witness called by the Prosecutor, commenting on the Video together with him and the Parties.
- 6.9 Mr. Linnerud declared – among other things – that the Video was presented to him as OOD by Frode Sundsdal, but that he cannot remember at which time; that he was not able to see the infringement at the beginning; that the Orange Boat was going right because hit by the wave generated by another Boat on the left, in particular by the Boat starting on the fourth position (hereinafter the "Red Boat").

- 6.10 The witness also declared that he was assisted by the F2 Supervisor Mr. Morten even though he was not officially an OOD, who helped him reaching the Decision, and that he did not take part in the Jury on Sunday, but communicated his opinion to Mr. Hagane, who consulted to Mr. Kristoffer Gulbrandsen and Mr. Sverre Grytnes.
- 6.11 The Prosecutor pointed out that according to the Video, after the crossing of the lane by the Orange Boat the distance between the White Boat and the Red Boat diminishes and that they seem to converge, which shows the White Boat not keeping his lane.
- 6.12 Finally – as anticipated – both Parties asked to be given the possibility to address Final Submissions and the Panel pronounced the above Ordinance before coming to the following final decision.
- 6.13 In his Final Submissions Appellant underlines that prior consultations among the Jury Members makes the Jury Decision null and void for the subsequent violation of Rule 402.01, apart from the recalled conflicts of interest.
- 6.14 Furthermore, Appellant points that Mr. Linnerud confirmed that he had little or no experience of boat racings, so having to aski the support of Mr. Morten Bjerknees, whose written statement, in turn, confirms the Appellant’s position.
- 6.15 Finally, Appellant comments on the Video stressing that the alleged violation of Rule 307.02 does not clearly result and that, on the contrary, a different view is given by the Orange Boat driver in his statement, which reads as follows: *“Regarding the start n the last heat of Tønsberg GP 2020. I had a really bad start from lane 5 (orange/black boat), and lost vision due to the sidewash from boats next to me. I then decided to move on the outside of boat 77 to get a clear sight. Boat 77 was never in my lane, but the sidewash from the boats next to me made me choose to go out”*.
- 6.16 In his Final Submissions the Prosecutor requests that the Pontoon Marshall, Mr. Flemming Harboe, and Driver of the Orange Boat, Mr. Johan Österberg, shall be heard as witnesses.
- 6.17 Indeed, according to the Prosecutor the Pontoon Marshal had a best view on the scene and will be able to testify about the courses of the boats, while the Driver of the Orange Boat could clarify all inconsistencies between the Video and his statement.
- 6.18 Eventually, the Prosecutor invokes the right of the Parties to present any evidence they deem fruitful (according to Rules 404.03 and 405).

7. DECISION

- 7.1 The Appeal is to be sustained.
- 7.2 The Panel shares the Prosecutor’s opinion that an OOD may take a decision whatever the source of the information is and without a previous protest (provided that they are turned into evidence and made available as such if his decision is then challenged).

- 7.3 The Panel also shares the general approach of the Prosecutor to the UIM Rules, as a too formal interpretation of them would hinder the speediness in which decisions have to be made and reviewed during a sport competition.
- 7.4 Therefore – for example – it is irrelevant that the Jury was not present at the Driver’s Briefing (if it was the OOD and he gave all the relevant information to drivers) or that the said Jury examined the gathered evidence without a written report made by the Pontoon Marshal.
- 7.5 On the other count, the further allegation that all procedural errors can be remedied during the proceeding in front of the ICA, does not imply that those errors have no consequence and, in particular, that they cannot make a sanction invalid.
- 7.6 Leading to the present case, ICA has already stressed out in their previous decision the importance of the protest, as a viable tool to decide all divergencies about a penalty and the race results within the context of the event.
- 7.7 Notwithstanding the statements of the Parties during the hearing, the declarations of Mr. Linnerud do not make clear exactly when – after the race – the Sanction was verbally communicated to the Driver, but it is undisputed that the disqualification was mentioned (in writing) only in the results posted at 18:43, which made impossible for him to lodge a protest *before* the official publication of those results.
- 7.8 Furthermore, it is undisputed that there had not been (provisional) results posted an hour in advance to the final ceremony held at 19:00, which would have made possible for the Driver to protest against the Sanction in front of the International Jury and have the Sanction confirmed, changed or annulled before the prize giving.
- 7.9 To this purpose Rule 403.03 – significantly headed “Right of protest” – provides that:
A protest can be lodged against the posted provisional results or against any decision made by the Race Committee or against one or several competitors.
- 7.10 Furthermore, as per Rule 403.04:
A protest regarding the qualification of a boat, a motor, or a driver must be made before the first drivers briefing. [...] The only exception to the above is when the protester can prove the facts were not given to him before the drivers briefing, then a protest can be lodged up to one hour after the posting of the results.
Any other protest must be lodged within one hour of the first results being posted with the following exceptions [...].
A protest against any other decision, posted after the posting of the first results can be lodged within one hour after the posting of this decision
- 7.11 Finally Rule 321.01 reads as follows:
Prize giving cannot take place until at least 1 hour after posting of provisional results and NOT BEFORE the technical post-race inspection is finished and a protest time against its results has expired. The Race Jury, in the meantime, must not be dismissed.

- 7.12 The Panel deems that the violation of the fundamental Rules about the protest and the right of the Driver to have his case decided before the final ceremony – without any reason alleged for the related postponement – is enough to declare the Jury Decision and the previous ODD Decision null and void.
- 7.13 Just for the sake of completeness – and apart from general considerations about the apportionment of the burdens of proof between the parties during ICA’s proceedings, which exceed the present case –, the invalidity of the Jury Decision surely shifts on the Prosecutor the burden to prove that a prior (and correct) decision would have led to the same result and that the infringement did occur.
- 7.14 Nevertheless, all the evidence gathered is uniquely oriented in the opposite direction, considering the said Orange Boat driver’s statement that is Johan Österberg, the Video itself, the uncertain position the OOD Mr. Linnerud about the infringement and the fact that the Jury Decision offers no motivation at all about the reasons why the ODD Decision was to be confirmed and the infringement took place.
- 7.15 For the said reasons, the Panel does not need to hear other witnesses, also in the light of Art. 6 of the European Convention on Human Rights, according to which each proceeding shall end “*within a reasonable time*” and the related principle, recognized by various European supreme courts and Constitutions, about the consequent duty to pursue the “economy of trial resources”.

8. COSTS OF THE PROCEEDING

- 7.16 According to Art. 10 Para. 5 of the Rules, for the sustained Appeal the deposit is to be returned to the Appellant.
- 7.17 In the light of above, the Appellant is not charged with other costs.

ON THESE GROUNDS

The UIM International Court of Appeal, expressing its verdict together with the final motivation, unanimously rules that:

- (i) The above ODD Decision, the above Sanction and the above Jury Decision, leading to disqualify Appellant according to Rule 307.02 of the applicable UIM Circuit Rules are to be cancelled;
- (ii) The Appeal lodged by the Driver is to be sustained, with all consequences on the final rankings of the related championship;
- (iii) The Appeal fee is to be restituted by the UIM to the Appellant;
- (iv) All other motions for relief are dismissed.

March 25, 2021.

Prof. Esq. Bruno Tassone
(President of the Panel)

Esq. Francesco De Beaumont
(Judge)

Esq. Rui Botica Santos
(Judge)