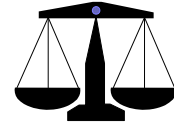




AMERICA'S CUP 32

AMERICA'S CUP JURY JURY NOTICE JN022 Jury Decision ACJ005 & 006



14 June 2005
10 pages

Applicant: Clan des Team Challenge S.p.A. (“+39”) on behalf of Circolo Vela Dargnano represented by Team +39

Jury Members: *Chairman* Bryan Willis
Members Professor Gabrielle Kaufmann-Kohler
Graham A McKenzie
Henry L Menin
David Tillett

IN THE MATTER of the Protocol governing the 32nd America's Cup

AND

IN THE MATTER of two Applications filed by +39 concerning an interpretation and application of the Deed of Gift, the Protocol and the ISAF Racing Rules of Sailing (RRS) in respect of claims against El Reto and two athletes of unlawful conduct and breaches of fair play and sportsmanship

The first Application

- [1] An Application was filed by +39 on 21st March 2005 (ACJ005).
- [2] The Application alleged that El Reto on behalf of the Real Federaciòn Espanola de Vela represented by Team El Reto (“El Reto”) and Mr Karol Jablonski had unlawfully and in breach of the Deed of Gift, the Protocol, general principals of law and contractual obligations, obtained the services of Mr Jablonski for the El Reto team to the detriment of +39.
- [3] The Application included a request for interim relief pursuant to Article 13 of the Rules of Procedure. The interim relief request included an order requiring the athlete Mr Jablonski to refrain from providing his sailing services to El Reto, to provide for his suspension or expulsion.
- [4] On 24th March, the Jury gave notice to all parties on the Service Address List in terms of the Protocol of the +39 Application. The Jury advised that parties may submit responses by 4th April 12h 00UT with +39 being entitled to submit a reply by 8th April 12h 00UT.

The second Application

- [5] On 25th March, +39 made a further Application (ACJ006).
- [6] The Application also involved El Reto and the athlete Mr Miguel Jáuregui Somme. Although the facts were different, the basis of the Application and the allegations concerning El Reto and Mr Jáuregui were substantially the same as that contained in ACJ005.

Consolidation of the two Applications

- [7] On 4th April, the Jury determined that as the issues were substantially the same in the two respective Applications, the two cases were to be consolidated and dealt with together.

- [8] An amended timetable was provided to all parties on the Service Address List whereby such parties must provide their responses by 7th April 12h 00UT with +39 being entitled to submit a reply by 12 April 12h 00UT.

EI Reto Response

- [9] On 7th April, EI Reto filed a Response. EI Reto disputed the facts concerning both Mr Jablonski and Mr Jáuregui. Confidentiality was also claimed in respect of certain evidence separately made available to the Jury by +39. EI Reto opposed the request for interim relief.

Team Alinghi Submission

- [10] Team Alinghi SA represented by Société Nautique de Genève (“Alinghi”) filed a submission on 7th April.
- [11] It was filed approximately two hours after the time limit set by the Jury for filing responses expired.
- [12] Alinghi made no submissions concerning the substantive claims but did provide submissions concerning the question of jurisdiction.
- [13] Alinghi submitted that the Jury had jurisdiction to hear disputes between Competitors under Article 21.4(b) of the Protocol.
- [14] Alinghi also submitted that the Jury is entitled to hear claims founded in the Racing Rules of Sailing but the Jury should be reluctant to apply Rule 2 of the RRS, which would amount to intervening in a contractual dispute governed by the laws of another jurisdiction. Arrangements between Competitors and third parties such as an employee remain to be governed by the law of the appropriate jurisdiction.

+39 Response

- [15] On 9th April, +39 filed an Application concerning their request of confidentiality of evidence submitted by EI Reto.
- [16] They requested an extension of the 12th April deadline for +39 to submit a Response. EI Reto also requested that a new deadline be provided once the Jury’s decision on confidentiality was made and requested that the submission made by Alinghi be excluded as it was filed out of time.

JN010

- [17] On 19th April, the Jury issued Jury Notice JN010.
- [18] The Jury Notice provided:

“Applicant: +39 – Clan Des Team Challenge S.P.A. (“+39”)

1. *Applications were filed by +39 on 21st March 2005 (ACJ005) and 25th March 2005 (ACJ006) pursuant to Article 5.1 of the Rules of Procedure.*
2. *As the substantive issues are similar in each application, on 4th April the Jury directed that the two cases be consolidated and dealt with together.*
3. *The timetable was amended and all parties on the Service Address List were directed to submit any responses by 7th April 12h 00UT. +39 was entitled to submit a reply by*

12th April 12h 00UT.

4. *El Reto on behalf of the Real Federación Española de Vela (“El Reto”) filed a response on 7th April.*
5. *Team Alinghi SA as representative of Société Nautique de Genève (“Alinghi”) filed a submission on 7th April approximately two hours after the time limit set by the Jury for filing responses expired.*
6. *On 9th April +39 filed an application concerning the request of confidentiality of evidence submitted by El Reto, for an extension of the 12th April deadline for +39 to submit a response. They further requested the Jury to determine a new deadline once the decision on confidentiality was made by the Jury and to exclude the submission made by Alinghi which was filed out of time.*
7. *Both Applications are in relation to athletes who +39 claim have unlawfully left +39 and joined the El Reto team. +39 has sought a number of orders including orders for interim relief under Rule 13 of the Rules of Procedure to restrain the individuals concerned from sailing for El Reto, or their suspension or expulsion pursuant to Article 21.4(c)(viii) of the Protocol.*
8. *To facilitate the matter the Jury has determined that it is appropriate to immediately provide answers, and where appropriate directions, on some of the key issues raised in the applications.*

Answers

9. *With regard to the claims by +39 concerning the individual athletes, the Jury considers that Article 21 of the Protocol does not confer jurisdiction on the Jury to resolve disputes between a Competitor and an employee athlete. Such disputes are required to be dealt with between the Competitor and athlete pursuant to whatever contractual jurisdiction arrangements they may have put in place. For the same reasons, the Jury does not have jurisdiction to order preliminary relief against an employee athlete.*
10. *The Jury does not consider it is required, nor has the power, to authorise a Competitor such as +39 to issue proceedings in a court or other tribunal. A Competitor is permitted to do so in the particular circumstances provided for in Article 22.3 of the Protocol. This includes claims as between Competitors and their employees including claims for breach of confidentiality.*
11. *The Jury considers it has jurisdiction to hear a dispute between Competitors pursuant to Article 21.4(b) of the Protocol where it relates to their participation in the Event as defined in the Protocol. This would include jurisdiction to consider the claim by +39 against El Reto concerning fair play and sportsmanship with reference to the Deed of Gift, Articles 2 and 11.2(a) of the Protocol and the Racing Rules of Sailing.*
12. *Recognising the principles embodied in Article 22.1 of the Protocol whereby the award of the Jury is final and binding and that Article 22.2 of the Protocol prohibits the issue of proceedings or suit in any court or other tribunal against the parties as identified in that Article, it is not the Jury’s intention or desire to have disputes that may arise in the context of the America’s Cup determined other than by the Jury, except in the very limited circumstances provided for in Article 22.3 of the Protocol.*
13. *If +39 chose to issue proceedings against the athletes concerned under, for example Articles 22.3(a) and (d), matters arising in those proceedings are likely to have a significant bearing on the claims by +39 for breaches of fair play and sportsmanship. If, for example,*

proceedings were issued in an Italian court, which in this case is the parties' chosen jurisdiction and it is determined that the contractual arrangements were either of no effect under Italian law or had been properly terminated, this is likely to lead to a different perspective than if the reverse was the case.

14. *For the reasons expressed above, the Jury does not have jurisdiction with regard to claims as between a Competitor and their employees. Therefore the Jury is not in a position to express a view on this aspect of the dispute.*
15. *The Jury therefore declines to grant the applications for interim relief requested by +39 in respect of the individual athletes.*

Fair Play and Sportsmanship claims

16. *Given the above, should +39 wish to continue with those parts of its application concerning breaches of fair play and sportsmanship against El Reto as a Competitor, then the following procedural orders will apply:*
 - (a) *The request by El Reto in its response of 7th April that its evidence be kept confidential will require further submissions and consideration by the Jury. El Reto will be given until 27th April 2005 for an opportunity to refute or explain whether legal privilege will continue to apply to the professional advice they have received as to the interpretation of the letter of intent and to remove any matters from their evidence that they consider are confidential and sensitive in terms of Rule 8.1 of the Rules of Procedure. The Jury will then further review that submission and any amended evidence.*
 - (b) *If the Jury decides to release such evidence, it will be provided to +39 only and +39 will be first required to give a written undertaking to the Jury that any such evidence that is made available to them will only be used for the purposes of this application and cannot and will not be used in any other court or tribunal without the lawful order of any such court or tribunal.*
 - (c) *The submission of Alinghi dated 7th April 2005 is accepted by the Jury.*
 - (d) *In the event that the El Reto evidence is made available to +39 the Jury will provide a short timetable to entitle them to respond. El Reto will not have a further opportunity to then respond to +39. No further or new evidence will be permitted from that point.*
 - (e) *Recognising the seriousness of a claim concerning fair play and sportsmanship subject to completion of the above procedural matters a hearing would be required by the Jury with reference to the provisions of the Protocol and the Racing Rules of Sailing.*
 - (f) *Other procedural directions will be given as the Jury may consider appropriate under Rule 12 of the Rules of Procedure."*
- [19] *The effect of Jury Notice JN010 was that the Jury determined that it does not have jurisdiction pursuant to Article 21 of the Protocol to deal with such disputes between a Competitor and an athlete employee. Should +39 wish to continue the Jury does have jurisdiction to deal with those parts of its Application concerning breaches of fair play and sportsmanship as between the Competitors El Reto and +39.*

+39 Response to Jury Notice JN010

- [20] *On 27th April, El Reto replied to JN010 advising that it did not oppose the Jury releasing their legal advice, provided +39 provided a written undertaking in terms of JN010. El Reto also advised that they wished to retain their request for confidentiality of all of their other evidence.*

- [21] +39 also submitted that in accordance with its Reply of 12th April, it continued to oppose El Reto's request for confidentiality.
- [22] +39 also advised it wished to continue with those parts of its Applications concerning breaches of fair play and sportsmanship in respect of El Reto as a Competitor.
- [23] On 29th April +39 gave such required written undertaking with regard to the El Reto legal advice.

Jury Notice JN014

- [24] On 11th May, the Jury issued Jury Notice JN014. The Jury Notice provided:
1. *On 19th April, the Jury issued Jury Notice JN010 giving procedural directions which would apply should +39 wish to continue with those parts of its Application concerning alleged breaches of fair play and sportsmanship by El Reto.*
 2. *+39 has confirmed its wish to continue with these parts of its application.*
 3. *El Reto has agreed to withdraw its request for confidentiality on the legal privilege to the legal advice they have received as to the interpretation of the Letter of Intent regarding Karol Jablonski and +39. The confidentiality order is therefore amended to the extent that this advice shall be made available to +39 but to no other party.*
 4. *+39 has undertaken to use such evidence only for the purpose of this application and not in any other court or tribunal without a lawful order of any such court or tribunal.*
 5. *+39 is invited to provide a similar undertaking in respect to the legal advice relation to Miguel Jauregui. If +39 decide to provide such an undertaking, it shall do so by sending the undertaking to El Reto with a copy to the Jury, by 16th May.*

Directions

6. *If +39 elects to provide the undertaking with respect to the legal opinion in relation to Miguel Jauregui by 16th May, El Reto is directed to submit a copy of this legal opinion to +39 by 23rd May, and inform the Jury that this has been done.*
 7. *The Jury has considered the request for confidentiality in respect of the other evidence, and notes that +39 would be aware of most if not all of such evidence. The Jury finds no basis for continuing confidentiality as between El Reto and + 39, but does so in respect of the other parties. El Reto is therefore directed to submit to +39 the other evidence which was submitted to the Jury with its Reply on 7th April, by 16th May. El Reto shall inform the Jury when this has been done.*
 8. *The Jury will then give further directions.*
 9. *The provisional date and place for a hearing is: 14th June 2005 at 09h00 UT in the Jury Room, at the Darsena Interior, Valencia.*
- [25] Jury Notice JN014 provided for a number of directions including the provision of undertakings with regard to evidence. The Jury also ruled that there was no basis for continuing confidentiality as between El Reto and +39, but with reference to the provisions of Rule 8.1 of the Rules of Procedure, the Jury ruled that confidentiality in respect of such evidence would continue to apply in respect of all other parties on their Service Address List.

[26] The Jury also advised that a provisional date and place for the hearing was 14th June 2005 at 09h00 UT in the Jury Room at the Darsena Interior, Valencia.

+39 Release of evidence

[28] On 16th May, +39 released to El Reto all of the evidence included in its submission of 7th April other than the Mr Jáuregui legal opinion, which legal opinion was subsequently separately provided to El Reto.

Jury Notice JN017

[28] On 25th May, the Jury issued Jury Notice JN017 which provided as follows:

1. *On 11th May, the Jury issued Jury Notice JN014 giving further directions concerning that part of +39 Application alleging breaches of fair play and sportsmanship by El Reto with which +39 has advised it wishes to continue.*
2. *The undertaking from +39 concerning the legal opinion obtained by El Reto and the release of the confidential evidence from El Reto to +39 as directed in Jury Notice JN014 have been completed.*

Directions

3. *+39 may submit a Response to the El Reto confidential evidence and legal opinion which must reach the Jury Chairman with a copy to El Reto by 31st May 2005 12h00 UT.*
4. *+39 and El Reto shall by 3rd June 2005 12h00 UT by notice to the Jury Chairman identify their witnesses for the hearing and where witness statements have not been filed, include such witness statements. Without approval of the Jury, no further or new evidence will then be permitted.*
5. *+39 and El Reto shall, by 7th June 2005 12h00 UT provide to the Jury Chairman a written submission concerning all relevant evidence and legal submissions relating to those parts of +39's Application relating to claims of breaches of fair play and sportsmanship against El Reto. This shall be provided only to the other party and to the Jury. If the Jury determines that such submissions are not confidential, it will release them to all parties on the Service Address List.*
6. *The Jury will then issue further procedural directions (Rules of Procedure rule 12) which should be anticipated as being similar to those issued in Jury Notice JN011 (ACJ003).*
7. *The provisional date and place for the hearing remains as specified in Jury Notice JN014.*
8. *In accordance with the Draft Guidelines on the Award of Costs (available on www.acjury.org) clause 6, the Jury brings to the attention of +39 that costs are likely to exceed €10,000. However, the costs of the hearing itself should be minimum since four members of the Jury will be in Valencia on 14th June.*

[29] Jury Notice JN017 provided a timetable for +39 to submit a Response to El Reto being by 31st May. +39 and El Reto were required by 3rd June to identify their witnesses for the hearing and where witness statements had not been filed to include such witness statements. +39 and El Reto were also directed by 7th June to provide written submissions concerning all relevant evidence including legal submissions relating to +39's claims of breaches of fair play and sportsmanship by El Reto.

+39 Response to Jury Notice JN017

- [30] On 31st May, +39 submitted a Response concerning the El Reto confidential evidence and legal opinion.
- [31] +39 submitted that Mr Jablonski's termination was not valid and that the legal opinion did not support the actions taken.
- [32] +39 maintained that the evidence supported their allegation that El Reto knowingly and unfairly interfered with the contract of employment between +39 as a Competitor and two of their athlete employees.
- [33] On 3rd June, +39 advised the Jury that they had four witnesses namely:

Mr Luca Devoti
Mr Cesare Pasotti
Mr Christian Tarolli
Mr Eros Paghera

- [34] +39 also provided individual witness statements from each of the four witnesses.

El Reto Response to Jury Notice JN017

- [35] On 3rd June, El Reto in response to Jury Notice JN017 advised that it had four proposed witnesses namely:

Mr Karol Jablonski
Mr Miguel Jáuregui
Representing "UGHI E NUNZIANTE studio legale", Mrs. Fiorell F. Alvino
Mr Manuel Chirivella Bonet, Vice-president of "Desafío Español 2007 S.A."

In addition, El Reto provided a witness statement from Mr Manuel Chirivella Bonet.

+39 Response to the El Reto Response of 3rd June

- [36] On 7th June, +39 submitted to the Jury that the El Reto submission of 3rd June did not comply with Jury Notice Jn017 in that El Reto advised of four witnesses but only provided one witness statement. +39 submitted that the three witnesses who had not provided witness statements should be excluded. +39 also submitted that it should have the right to cross-examine any El Reto witness admitted by the Jury.

El Reto Response to the +39 submission on 7th June

- [37] On 7th June, El Reto submitted that their response of 3rd June did comply with Jury Notice JN017.
- [38] El Reto submitted that other than in the case of the one witness statement included in their submission of 3rd June, the three other witnesses had previously submitted witness statements by way of signed letters from respective athletes dated 5th April and the third witness concerned a written legal opinion.
- [39] El Reto also submitted that the substitution of a legal adviser from the same legal firm who had provided the same legal opinion should be accepted.

Jury Notice JN021

[40] On 10th June, the Jury issued Jury Notice JN021. The Jury Notice answered the +39 and El Reto submissions of 3rd June and provided procedural directions for the hearing.

[41] Such Jury Notice provided:

1. *On 25th May, the Jury issued Jury Notice JN017 giving further directions and a timetable.*
2. *On 7th June, +39 submitted an Application to the Jury asserting that El Reto had not complied with Jury Notice JN017 in that El Reto submitted the witness statement of only one of the four witnesses El Reto had advised would be attending the hearing. +39 submitted and requested that the three other witnesses in question should not be accepted by the Jury.*
3. *On 7th June, El Reto submitted that they had complied with Jury Notice JN017 in that such witness statements had already been previously filed with the Jury by way of two letters signed by Mr Jauregui and Mr Jablonski and by way of the legal opinion which had been provided by a member of the same legal firm.*

Decision

4. *El Reto had previously provided witness statements from Mr Jablonski and Mr Jauregui in the form of letters signed by them dated 5th April and thereby complied with point 4 of JN017. The unchanged legal opinion being presented by a person from the same legal firm complies with the requirements of JN017.*
5. *In point 2 of El Reto's Response of 3rd June, they made it clear that in advising of their four proposed witnesses, they considered that only one of those witnesses had not previously filed a witness statement, and that statement was included. The Jury does not consider that +39 has been prejudiced with this approach, or that El Reto is introducing new evidence.*
6. *The Jury considers that El Reto has complied with the requirements of Jury Notice JN017 and +39's Application of 7th June is dismissed.*

Hearing and Procedures

7. *Pursuant to Article 9.2 of the RoP, the Jury orders that a hearing be held in the presence of the representatives of +39 and El Reto (hereinafter "the Parties") on 14th June 2005 at 10h00 UT in the Jury Hearing Room at the Darsena Interior, Valencia.*
8. *The Jury will consist of four members. Professor Gabrielle Kaufmann-Kohler will not be present. The Jury considers there is an urgent need to resolve the issues in terms of Article 21.1 (c)(i) of the Protocol. The Jury will consider that all parties consent to such reduced number of Jury members, unless written advice to the contrary is received by the Jury Chairman by 11th June.*
9. *Each Competitor, the Race Committee, the Measurement Committee and the Event Authority (ACM) may appoint two observers (Article 9.1 RoP). These parties if they wish to do so, may present a closing statement in accordance with the time allocation to be set by the Jury. If the parties wish to be heard beyond a closing statement, they shall submit such request to the Jury on or before 10th June, indicating the reasons for such a request and the scope and time required. An observer authorised by the Jury representing the America's Cup Press office will also be permitted to be present to report on the proceedings.*

10. *The Jury may order that parts of the hearing be held in private and the Jury may enforce conditions (Article 9.2 RoP). Orders of confidentiality of some evidence being limited to the parties have already been granted by the Jury (Article 8.1 RoP).*
11. *The scope of the evidentiary hearing will be limited to the +39 claims of breaches of sportsmanship and fair play by El Reto.*
12. *The witnesses shall be limited to those persons who have already submitted witness statements as identified in the +39 and El Reto Responses of 3rd June. Witnesses shall not be required to appear where the other party has waived cross-examination and where the Jury does not direct such witness to appear.*
13. *On or before 11th June the Parties shall indicate the approximate time they will need to examine, and respectively cross-examine, each witness, bearing in mind that direct examination will be limited as specified in no 18 below.*
14. *Each party will have time allocated by the Jury to it. Each party shall be responsible for organizing and managing the time allocated to it, being as specified by the Jury who will retain control over the hearing. The Jury will monitor the use of the allocated time.*
15. *On the morning of 13th June, the Chairman of the Jury, by delegation of all members of the Jury, will hold a telephone conference or if convenient, a conference in person in Valencia with the representatives of the parties to discuss any outstanding matters with respect to the organization of the hearing, including the time allocation.*
16. *Each of the Parties shall be responsible for summoning its own witnesses to appear, except where the other party has waived cross-examination of a witness and the Jury does not direct such witness to appear.*
17. *Each party shall advance the costs of appearance of its own witnesses. The Jury may decide upon the appropriate allocation of such costs in the decision.*
18. *The examination of each witness shall proceed as follows:*
 - (a) *the party summoning the witness may briefly examine the witness, if it is considered necessary to complete the witness statement or to explain previous statements made by a witness;*
 - (b) *the adverse party may then cross-examine the witness;*
 - (c) *the party summoning the witness may then re-examine the witness with respect to any matters or issues arising out of the cross-examination; and*
 - (d) *the Jury may examine the witness at any time, either before, during or after examination by one of the Parties.*
19. *Following the witness examination, the Parties may present a closing statement.*
20. *The Jury may, at any time, give such further directions as it deems best to facilitate the hearing (Article 12 RoP) and shall, at all times, have complete control over the procedure. The Jury, as a matter of discretion, may:*
 - (a) *refuse to hear a witness if the Jury considers that the facts with respect to which the witness shall testify are either proven by other evidence or are irrelevant;*

- (b) *limit or refuse the right of a party to examine a witness if the Jury considers that a question has been addressed by other evidence or is irrelevant;*
 - (c) *direct that a witness be recalled for further examination at any time; and/or*
 - (d) *adapt the Parties' time allocation.*
21. *It shall not be improper for counsel, with or without party representatives, to meet with witnesses and potential witnesses for the purpose of establishing the facts relevant to the hearing, preparing witness statements and preparing for hearings.*
22. *Each of the Parties shall arrange for their own witnesses' interpretation of testimony that is not provided in English. They shall each advance their own costs thereof.*

Withdrawal of Applications

- [42] On 12th June 2005 +39 advised the Jury that +39 and El Reto had jointly reached agreement to withdraw the two Applications and they had signed a declaration to this effect including waiving and relinquishing any right, action, claim, complaint, petition, request or obligation in any way relating or connected with the facts underlying the Applications.

Approval of the Jury to withdraw the Applications

- [43] Pursuant to Rule 63.1 of the RRS and Rule 6.6 of the Rules of Procedure the Jury approves the withdrawal of the two Applications.

Costs

- [44] Pursuant to Article 21.3 of the Protocol the Jury awards costs of Euros 30,000 to be paid by +39 within 30 days of the date of this decision.

Ruling Summary

- [45] The Jury does not have jurisdiction pursuant to Article 21 of the Protocol to deal with disputes between Competitors and an athlete employee. The Jury approved the withdrawal of the two Applications. The Jury does have jurisdiction in respect of a dispute between Competitors where the dispute relates to their participation in the Event as defined in the Protocol.
- [46] Costs of Euros 30,000 are awarded to be paid by +39 within 30 days of the date of this decision.



Bryan Willis

America's Cup Jury:

Gabrielle Kaufmann-Kohler, Graham McKenzie, Henry Menin, David Tillett, Bryan Willis (chairman)