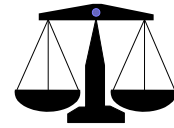




AMERICA'S CUP 32

AMERICA'S CUP JURY JURY NOTICE JN026 Jury Decision ACJ008



27th June 2005
12 pages

Applicant: **Challenger Commission, by its representative on behalf of the Challengers**

Jury Members:

<i>Chairman</i>	Bryan Willis
<i>Members</i>	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 an Application filed by the Challenger Commission in respect of an interpretation of Article 21.4(d) of the Protocol in respect of jurisdiction and Article 5.9 of the Protocol concerning neutral management and obligations under Article 5.8 of the Protocol concerning the Meteorological Data Service.

The Application

- [1] An Application was filed by the Challenger Commission on 23rd May 2005.
- [2] The Application sought a ruling that the Challenger Commission through its appointed representative has standing to seek relief from the Jury for alleged breaches by SNG, the Defender, the Event Authority, the Regatta Director and all Officials (including the Race Committee) of Articles 5.8 and 5.9 of the Protocol.
- [3] The Challenger Commission considered that the Event Authority, the Regatta Director and Regatta Officials (the Race Committee) had improperly exercised the applicable discretion and failed to comply with their obligations under Articles 5.8 and 5.9 of the Protocol.
- [4] The Application concerned the establishment and management of a programme of a Meteorological Data Service ("MDS") to collect and supply meteorological and oceanographic data for the benefit of all Competitors.
- [5] The Application included a request for interim relief seeking an order that ACM and the Race Committee immediately make available to all Challengers the MDS data.
- [6] The Challenger Commission also sought an exemplary award to be charged against the 10% share of net surplus revenue to ACM under Article 4.2(c) of the Protocol, such award to be applied to the costs of the Challengers.

Timetable for submissions

[7] On 25th May, the Jury advised all parties on the Service Address List of the Application. The Jury issued Jury Notice JN018 in respect of a timetable.

[8] Jury Notice JN018 provided:

I attach an Application from the Challenger Commission to which I have allocated the Case Reference Number ACJ008.

The Jury has set the following initial timetable:

31st May 2005 12h00 UT for submissions from any of the parties on the Jury Service Address List (including Competitors). Submissions to be limited to the following matters:

- (a) whether the CC has standing to seek relief from the Jury (see 1.3 of the Application); and*
- (b) whether individual Challengers be permitted to make submissions (see 5.1 of the Application.)*

The Jury will then decide on these issues and issue further directions.

Submissions in respect of Jury Notice JN018

[9] Submissions in respect of Jury Notice JN018 were filed by the Regatta Director, AC Management Limited (“ACM”) as the Event Authority under the Protocol, BMW Oracle Racing on behalf of Golden Gate Yacht Club (“BMW Oracle”), the Challenger Commission and Team Alinghi SA on behalf of Société Nautique de Genève (“Alinghi”).

[10] The Regatta Director submitted that he did not intend to reply to Jury Notice JN018 but reserved the right to make further submissions should the Jury invite them.

[11] The Challenger Commission submitted that under the Protocol, the Challenger Commission was entitled to represent the Challengers in all matters except the limited number of matters reserved to the Challenger of Record.

[12] The Challenger Commission also submitted that Challengers, notwithstanding that the Challenger Commission has filed the Application in their representative capacity, in addition should individually be entitled to make submissions if they wished to do so. The Challenger Commission further submitted that the Challengers were being prejudiced as Alinghi was the only subscriber to the MDS system and were continuing to receive data.

[13] In addition, the Challenger Commission sought interim relief to the effect that:

- [i] the Challengers be able immediately to subscribe to the MDS programme without prejudice to the claims of the Challenger Commission;
- [ii] the proposed MDS Subscription Agreement be deemed subject to a right to rescind that Agreement;
- [iii] in the alternative that ACM and the Race Committee immediately make available to all Challengers the MDS data and supporting information.

[14] ACM submitted that the Challenger Commission does have standing to seek relief from the Jury in terms of Article 21.4(d) of the Protocol. ACM submitted that the Challenger Commission should only be entitled to act on behalf of those Challengers who have requested the Challenger Commission to represent them. ACM also submitted that a

number of conditions should also be required to be satisfied by the Challenger Commission.

[15] Alinghi submitted that the Challenger Commission did have standing to seek relief from the Jury subject to certain safeguards which were similar to those submitted by ACM.

[16] Alinghi also submitted that where individual Challengers have elected to be represented by the Challenger Commission, they should not be entitled to make more than one submission.

Jury Notice JN019

[17] On 2nd June, the Jury issued Jury Notice JN019.

[18] Jury Notice JN019 provided:

1. *On 25th May the Jury distributed the Application to Parties, and invited responses on two issues (on which it set a deadline of 31st May)*
 - (a) *whether the CC has standing to seek relief from the Jury (see 1.3 of the Application); and*
 - (b) *whether individual Challengers be permitted to make submissions (see 5.1 of the Application).*
2. *On 31st May, the Jury received submissions from the Chairman of the Challenger Commission and the Event Authority (Americas Cup Management). A submission was received from BMW Oracle 'strongly supporting' the Challenger Commission's application.*
3. *On 31st May the Jury Chairman received an email from Hamish Ross (Alinghi) stating he was abroad and not able to communicate until his return to Valencia on the evening of 2nd June. He requested an opportunity to give the Defender an opportunity to consider the Challenger Commission's latest submission and to make a submission in response, and asking the Jury to 'refrain from making any determination' until his return.*

Decisions and Directions

4. *The Jury accepts the submissions of ACM, Alinghi and the Challenger Commission that the Challenger Commission has standing to seek relief from the Jury in relation to Protocol articles 5.8 & 5.91 in so far as it represents those Challengers supporting the Application.*
5. *The Challenger Commission is required to provide to the Jury Chairman by 6th June:*
 - (a) *evidence that it has on the same basis as all other Challengers formally agreed to be bound by the Provisions of the Deed of Gift and the Protocol;*
 - (b) *to confirm who it has appointed as its one representative and evidence of the Challenger of Record Approval in compliance with Articles 6.3(b) and 6.4 of the Protocol; and*
 - (c) *the identity of each of the Challengers it is representing in this Application.*

6. *By supporting the Challenger Commission's Application, the Protocol does not provide that a Challenger will lose its standing as a Party (See also Jury Rules of Procedure Rule 1.72). Any Challenger may make its own responses whether or not it supports the Challenger Commission's Application.*
7. *All parties are now invited to submit Responses to the substantive matters in the Application. Replies must be received by the Jury Chairman by 6th June 12h00 UT.*
8. *The Challenger Commission (representing those Challengers which have elected to support its position) may then submit a Reply which shall be received by the Jury Chairman by 9th June.*

Request for Interim Relief

9. *The Jury will consider the request for interim relief only after it has considered the Responses from parties on this issue.*

Reasons

10. *Detailed reasons will be provided when the written decision on the Application is delivered.*

1 Protocol article 5.8 Meteorological Data Service: The Race Committee shall, at the request of the Event Authority, establish and manage a meteorological and oceanographic data collection service at the Venue and make the data available to Competitors electronically on a cost recovery basis....

5.9 Neutral Management: SNG, the Defender, the Event Authority, the Regatta Director, the Challenger Commission, the Challenger of Record and all Officials shall: (a) each act in the best interests of all of the Competitors, consistent with Article 2, in organising and managing the Event, and in developing the rights referred to in Article 4.1(c); and (b) not favour the interests of the Defender over those of the Challengers nor the interests of the Challengers over the Defender.

2 Rules of Procedure, rule 1.7: 'PARTY means any person or entity over whom the JURY has jurisdiction under the PROTOCOL, including but not limited to all Competitors, the Race Committee, the Measurement Committee, the Event Authority (ACM), SNG and all Officials.'

- [19] The Jury determined in Jury Notice JN019 that the Challenger Commission has standing in respect of this Application and required it to provide to the Jury Chairman the matters referred to in paragraph 5 of JN019. The Jury also determined that a Challenger may make its own Responses whether or not it supports the Challenger Commission's Application in this matter.
- [20] The Jury advised it would consider the request for interim relief after it has considered the Responses from the parties.
- [21] In compliance with paragraph 5 of JN019, the Challenger Commission provided the required documentation to the Jury Chairman. The Challenger Commission also confirmed that it was representing all eleven Challengers in respect of this Application.

Alinghi Application to review timetable in Jury Notice JN019

- [22] On 3rd June, Alinghi requested the Jury to amend the timetable.
- [23] On 5th June, the Challenger Commission submitted that it agreed with Alinghi regarding the proposed revision to the timetable. The Challenger Commission repeated its request for interim relief.
- [24] As a result of the Alinghi and Challenger Commission submissions, on 5th June the Jury issued Jury Notice JN020.

[25] Jury Notice JN020 provided:

1. *On 2nd June the Jury published Jury Notice JN019 setting a timetable for responses:*
 7. *All parties are now invited to submit Replies to the substantive matters in the Application. Replies must be received by the Jury Chairman by 6th June 12h00 UT.*
 8. *The Challenger Commission (representing those Challengers which have elected to support its position) may then submit a Reply which shall be received by the Jury Chairman by 9th June.*
2. *The Jury required the Applicant (the Challenger Commission) by 3rd June to provide (a) evidence that it has on the same basis as all other challengers formally agreed to be bound by the Provisions of the Deed of Gift and the Protocol, (b) confirmation as to who it has appointed as its one representative, and evidence of the Challenger of record Approval in compliance with Articles 6.3(b) and 6.4 of the Protocol; and (c) the identity of each of the Challengers and evidence that they have authorised the Application and the submissions the Challenger Commission may make.*
3. *These requirements have now been satisfied. The Jury notes that all eleven Challengers support the Challenger Commission's Application.*
4. *On 3rd June the Jury received 'Application and Submissions' dated 3rd June/30th May from Société Nautique de Genève ("Alinghi") expressing the view that parties opposing the Challenger Commission Application should be allowed time to consider the responses of those parties supporting the Application. The Jury has accepted this document as a submission in relation to the case ACJ008 (and not, as suggested by Alinghi, anew case ACJ009).*
5. *On 4th June the Jury received a submission from the Challenger Commission concurring with Alinghi on the question of submission deadlines, and proposing a deadline of 11th June for Replies by parties supporting the Application. The submission also addressed the question of Interim Relief.*
6. *The Jury accepts Alinghi's argument and the Challenger Commission's proposal regarding submission deadlines. The deadline for Responses from ACM, Alinghi, and the Regatta Director (who it is now clear are the Respondents) is set back to 8th June 12h00 UT.*
8. *The deadline for Replies from the Challenger Commission and the Challengers is set as 11th June, 12h00 UT.*
9. *The Jury gives no directions at this time regarding Interim Relief.*

Submissions in respect of the substantive matters

[26] On 6th June, South African Challenger 2007 representing Royal Cape Yacht Club ("Team Shosholoza") provided a submission to the Jury that they considered the current MDS programme unfair to the smaller America's Cup teams. In particular, Team Shosholoza submitted that the price was unnecessarily excessive, the number and density of weather buoys was excessive and the cost recovery principle as proposed would result in a double payment. They submitted a substantially reduced MDS expense was considered as reasonable and sufficient to provide Competitors with what they needed. Their submission supported the Challenger Commission Application.

Regatta Director Submission

- [27] On 7th June, the Regatta Director provided a submission pursuant to Jury Notice JN019 in respect only of paragraph 7 and 9 of such Jury Notice. The Regatta Director noted that on 31st March 2004 he advised the Event Authority, the Challenger of Record and the Defender that no agreement had been reached concerning an MDS system as provided for in Article 5.8 of the Protocol.
- [28] The Regatta Director provided a historical background concerning the development of the MDS programme. The Regatta Director noted that he was “not happy that he was forced to make choices for an MDS programme” and that the Challenger of Record and Defender had been unable to agree.
- [29] The Regatta Director submitted that there had been extensive discussions and advice concerning an MDS programme. The Regatta Director’s approach was consultative over a considerable period of time.
- [30] The Regatta Director advised that as a part of the discussions, he had advised he intended to make his determination of an MDS programme based on a range of criteria including a programme large enough so that it satisfied the needs of all Competitors, that was fair, that was credible, that was achievable and was fiscally sound. The Regatta Director also noted that the position was that as a result of no agreement being reached by 31st March 2004, the MDS programme could not be compulsory in respect of all Competitors.
- [31] The Regatta Director advised that in the interim ACM Management had sent periodic updates to all Competitors and prospective competitors with the first phase of the MDS buoys becoming operational on 1st June 2004. A folder containing the submission with a substantial number of exhibits was separately provided to the Jury.
- [32] The Regatta Director also submitted that he had complied with the provisions of the Protocol in making his determination and providing an MDS programme. It was submitted that the Application of the Challenger Commission did not provide any substantive evidence to the contrary.

ACM submission

- [33] ACM submitted that the Challenger Commission Application should be rejected as it did not meet the timing limits provided for in Article 21.10 of the Protocol which provides for a time limit of seven days to protest from the time when the protester could reasonably have been aware of the circumstances justifying the protest.
- [34] ACM also submitted that the Race Committee and Race Director had made its decision in a fair and reasonable manner and had complied with Articles 5.8 and 5.9 of the Protocol.
- [35] ACM also submitted that they were prepared to consider a cost recovery method whereby the total MDS costs are divided by the number of subscribers.

Alinghi submission

- [36] Alinghi submitted that it opposed the Application from the Challenger Commission and opposed any alteration to the MDS system.
- [37] Alinghi also included its view on the background concerning the MDS programme and the meeting and discussions that occurred.
- [38] Alinghi submitted that the Challenger Commission’s Application was out of time unless the Jury finds that there is a good and substantial reason for the failure on the part of the

Challenger Commission to meet the seven day time limit as provided for in Article 21.10 of the Protocol.

- [39] Alinghi also submitted that the Challenger Commission was in breach of Article 6.3(d) of the Protocol because it was attempting in effect to amend the Protocol and alter the rights of Competitors who had entered into an agreement to receive the MDS data.
- [40] Alinghi submitted that the Challenger Commission had tendered no evidence to support its allegations that the Regatta Director and other Officials were in breach of the neutral management requirements of the Protocol and had properly exercised their discretion and not failed to meet the obligations under Articles 5.8 and 5.9 of the Protocol.
- [41] Alinghi further submitted that allegations from the Challengers that the MDS gives Alinghi an ability to obtain detailed data of the Challenger yachts performance, especially during the 2007 racing and the Challenger Selection Series, lacked any scientific or practical basis and was unsupported by evidence.
- [42] Alinghi submitted that the cost arrangements proposed by ACM favour the Challengers against the financial interests of Alinghi. Alinghi acknowledged that the cost arrangements may however not end up being in strict compliance with the terms of the Protocol which requires the MDS to be charged on a cost recovery basis. Alinghi accepted the Challengers proposal on the MDS costs to the extent that it should be applied on a strict recovery basis and met equally by all of those Challengers who subscribe to the MDS.

BMW Oracle Racing submission

- [43] On 10th June, BMW Oracle submitted that at all times they had acted in a representative capacity for all the Challengers and they continued to push for a scaled down weather programme suitable for the majority of Competitors. They submitted that ACM had adopted in substance the MDS system proposed by Alinghi without reference to external experts and meaningful compromise to the Challenger requirements.
- [44] BMW Oracle submitted that Alinghi had misrepresented some of the earlier matters concerning the MDS, including the Challenger of Record proposal. BMW Oracle included reference to a number of matters concerning their submission on an MDS proposal to the Regatta Director and the selection process that occurred.
- [45] BMW Oracle further submitted that the specification adopted was that favoured by Alinghi and not a middle ground between the Alinghi proposal and the Challenger of Record Final Proposal. BMW Oracle submitted that ACM did not rely on independent expert advice but rather, advice it received from one of its own personnel.

Challenger Commission Response

- [46] On 11th June, the Challenger Commission filed a Reply/Response to the submissions of ACM, the Regatta Director and Alinghi.
- [47] The Challenger Commission submitted that they had complied with the seven day requirement. The most recent correspondence concerning the Subscription Agreement received by the Challenger Commission from ACM was dated 20th May and includes an absolute rejection of their compromise proposals.
- [48] The Challenger Commission also submitted that even if there were earlier dates when the Challenger Commission could have submitted its Application, they identified a number of reasons why in their submission they should be entitled to continue with the Application.

- [49] The Challenger Commission further submitted that the respective parties ought to be allowed the opportunity to achieve an amicable settlement without the requirement of a Jury proceeding.
- [50] In respect of neutral management, the Challenger Commission submitted that it is a continuing violation of the neutral management obligations for ACM and the Regatta Director to continue to implement the MDS in spite of the information provided by the Challengers.
- [51] The Challenger Commission submitted that it did not accept that Alinghi is not advantaged by its ability to conduct reconnaissance of the Challengers by receiving the MDS data and produced supporting statements to this effect.
- [52] The Challenger Commission submitted that, pending a final decision, interim relief should be immediately granted to enable the Challengers to subscribe for and obtain the MDS programme without prejudice to their position and without prejudice to the Jury to reform and further consider the MDS programme.

Alinghi procedural claim

- [53] On 11th June, Alinghi submitted a letter to the Jury claiming that the submissions from BMW Oracle and the Reply filed by the Challenger Commission did not comply with the Jury's Rules of Procedure. They submitted that the BMW Oracle submission was both in title and in substance new with both new submissions and new evidence introduced.
- [54] Alinghi further submitted that they, the Race Director and ACM should be entitled to file a supplementary Response without any further rights of reply. The BMW Oracle submission included new evidence. Alinghi submitted that it was fair and reasonable for them to be given an opportunity to respond.

Mediation and Resolution of Application

- [55] Upon the suggestion of Alinghi, a mediation meeting took place on 15th June between two members of the Jury, namely Bryan Willis and Graham McKenzie, and one representative from the Challenger Commission (George Clyde), the Race Committee (Dyer Jones), ACM (Michel Bonnefous), Alinghi (Hamish Ross) and BMW Oracle (Russell Green).
- [56] At the outset of the mediation meeting, all the persons in attendance confirmed that they agreed to a mediation being attempted and that, if the mediation failed and the Application had to proceed before the Jury, the two Jury members would not be barred from sitting on the Jury and the decision would not be challengeable as a result of their participation in the mediation. It was also agreed that the discussions held during the mediation could not be referred to or used outside the mediation. Other procedural matters concerning the conduct of the mediation were agreed.
- [57] As a result of the mediation meeting, Societé Nautique de Geneve and The Golden Gate Yacht Club entered into an amendment of the Protocol as follows:

AMENDMENT NUMBER 8 TO THE PROTOCOL GOVERNING THE THIRTY- SECOND AMERICA'S CUP DATED 2 MARCH 2003 AND SUBSEQUENTLY AMENDED ON 21 JANUARY 2004

1. ***Société Nautique de Genève***
2. ***The Golden Gate Yacht Club***

BACKGROUND

- A. *The parties are signatories to the Protocol Governing the Thirty-Second America's Cup dated 2 March 2003 as subsequently amended (the **Protocol**) made in accordance with the terms of a Deed of Gift dated 24 October 1887.*
- B. *The parties have agreed to further amend the Protocol in accordance with Article 18.1 of the Protocol as set forth in this document.*

AGREED AS FOLLOWS

1. Article 4.3(b) (ii) (A) –Distribution to the Defender

Existing language:

“(A) one half to be distributed to the Defender less the Defender's share of the cost of a consolidated weather programme, or similar programmes, if any;”

be replaced by:

“(A) one half to be distributed to the Defender; ”

2. Article 43.(b)(ii)(B) – Distribution to the Challenger

Existing language:

“(B) the remaining one half, less the Challengers' shares of the cost of a consolidated weather programme, or similar programmes, if any, shall be distributed to the Challenger Commission for payment of its costs if in excess of the amounts received by the Challenger Commission pursuant to Article 3.6; and”

be replaced by:

“(B) the remaining one half, shall be distributed to the Challenger Commission for payment of its costs if in excess of the amounts received by the Challenger Commission pursuant to Article 3.6; and”

3. Article 5.8 - Meteorological Data Service:

Existing language:

*“5.8 **Meteorological Data Service:** The Race Committee shall, at the request of the Event Authority, establish and manage a meteorological and oceanographic data collection service at the Venue and make the data available to Competitors electronically on a cost recovery basis.*

If such service is established, it may be declared compulsory for all Competitors (including compulsory cost-sharing), if so agreed by the Defender, the Challenger of Record and the Event Authority before 31 March 2004. Competitors may be prohibited under the terms of such agreed service from collecting and/or using meteorological and oceanographic data from any other sources other than the service or those freely available in the public domain.”

is replaced by:

“5.8 Meteorological Data Service: *The Race Committee shall, at the request of the Event Authority, establish and manage a meteorological and oceanographic data collection service at the Venue and make the data available to Competitors electronically.*

Net costs of the meteorological and oceanographic data service will be borne by the Event Authority as an expense under Article 4.3(a) of the Protocol, provided that in the event that the Event Authority fails to achieve a positive net surplus revenue as described in Article 4.3(a) of the Protocol, the net costs of the service shall be borne by the Event Authority and all Competitors in the same proportion as net surplus revenues would have been distributed in accordance with Article 4.3 (b) of the Protocol if the Event Authority had achieved a positive net surplus revenue.

No Competitor shall use or otherwise apply at anytime prior to conclusion of the 32nd America’s Cup any data received from the Meteorological and Oceanographic Data Service in combination with other electronic data to gauge or otherwise analyse the performance of any other Competitor, without that other Competitor’s prior written approval.”

4. The following new paragraph (h) is added to Article 11.2 after paragraph (g) as follows:

“(h) Tracking any other Competitor’s yacht using shore based radar or lidar.”

Dated this day of June 2005

Signed by Société Nautique de Genève

Signed by The Golden Gate Yacht Club

Costs Submissions

- [58] On the 21st June the Jury invited submissions concerning what if any costs should be awarded by the Jury in respect of the Application. Submissions were required to be received by 12 noon, local time on 24th June.
- [59] Submissions concerning an award of costs were received from Alinghi, ACM, BMW Oracle and the Challenger Commission.
- [60] Alinghi provided two separate submissions. The first submission was that costs should be awarded by the Jury exercising its discretion under Article 21.3 of the Protocol as it has done previously. Alinghi also submitted that they would consent to a proposal whereby the costs be borne by all Competitors equally.
- [61] Alinghi’s second submission included that the Challenger Commission offered no evidence in support of serious allegations concerning officials, that it failed to identify how the MDS could be used to obtain performance information, that its conduct required additional work and the Challenger of Record had made an additional submission with additional evidence which also required additional work.
- [62] ACM supported the submission of Alinghi except the submission that they considered exclusively related to Alinghi concerning the Defender ultimately bearing half of the costs not awarded. ACM also submitted that the successful outcome of the mediation was

evidence that the Challenger Commission's only serious claim concerned funding the MDS and did not, contrary to numerous allegations made, relate to the MDS itself and the lack of neutral management.

[63] BMW Oracle submitted that the Jury should not award costs in this case. The reasons for this submission included the question asked of the Challenger Commission's standing which was not set out in the Protocol, the MDS affects all Competitors and involved ACM, the Race Committee and the Regatta Director. It also submitted that the outcome final was an amendment to the Protocol, which illustrates the matter was of universal application and the matter was resolved by mediation without the need of a Jury hearing.

[64] The Challenger Commission submitted that as contemplated in the draft Jury Cost Guidelines, this was a matter of universal application or for the benefit of a significant number of Competitors. They submitted that the conduct of the parties also suggested no costs should be awarded against any party.

[65] The Challenger Commission also submitted that it did not agree with the costs being borne by all twelve Competitors equally and that no award of costs should be made, but having the Jury's costs subsumed as a part of the Event expenses was the correct result.

Costs Award

[66] Having reviewed the Parties' submissions the Jury finds that certain factors may be regarded as supporting placing some burden on the Challenger Commission, but that others heavily weigh in favour of not awarding costs in this matter and should prevail.

[67] The factors within the first category are the following:

- The Challenger Commission made a number of allegations, which required briefing and consideration by the Jury, and were not pursued once the financial aspect was resolved in the mediation. This showed that the primary concern may have been a cost problem, rather than one of misuse or mismanagement of the MDS;
- It was on the proposal of Alinghi that the Application was settled by mediation, which resulted in a saving of cost by all parties.

[68] By contrast, the following factors heavily weigh in favour of a 'no costs' decision:

- The resolution is of universal application; it not only benefits all Competitors but also ACM, the Race Committee, the Regatta Director and the Event as a whole;
- The matter was resolved by way of mediation, without the time and expense involved in a full hearing and decision;
- The matter was resolved at the time of Acts 4/5 when all involved were present at the venue.

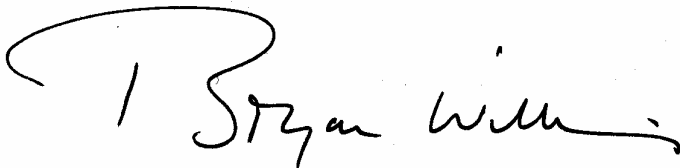
[69] Weighing all these factors and applying the discretion conferred on it by the Protocol, the Jury finds it just and equitable to award no costs.

Resolution

- [70] The Jury takes notice that ACM agreed to:
- (i) immediately facilitate access by those Competitors that did not currently have access on signing a confirmation of intent; and
 - (ii) provide a Subscription Agreement reflecting the Protocol changes to existing subscribers and to Competitors referred to paragraph (i).
- [71] The Jury has received written confirmation that the Protocol has been amended in accordance with the Agreement set out in paragraph [57] above.
- [72] As a result of the signing of the amendment to the Protocol referred to in paragraph [57] above, the Challenger Commission requested its Application be withdrawn. All parties consented to such outcome.
- [73] The Jury accepts the Application to Withdraw and hereby closes the proceedings in respect of this Application.

Summary

- [74] By consent of all the parties to the Application, the Protocol was amended to provide that the costs of the MDS as proposed by the Race Committee be met by ACM. The Protocol amendment also provided that should ACM not achieve a net surplus revenue, the net costs of the MDS are to be borne by ACM and the Competitors in the same proportions as any net surplus revenues would be distributed in terms of the Protocol. All Competitors were entitled to obtain immediate access to the MDS accordingly. All parties consented to the outcome. The Application was accordingly withdrawn and the proceedings closed.
- [75] No costs are awarded primarily because the resolution is of universal application and for the benefit of all parties.
- [76] The Jury commends the Parties for agreeing to mediation which it considers to be a particularly efficient method to resolve disputes, when appropriate.

A handwritten signature in black ink that reads "Bryan Willis". The signature is written in a cursive style with a large, sweeping initial "B".

Bryan Willis

America's Cup Jury:
Gabrielle Kaufmann-Kohler, Graham McKenzie, Henry Menin, David Tillett, Bryan Willis (chairman)