



AMERICA'S CUP 32

AMERICA'S CUP JURY JURY NOTICE JN036



21st April 2006
Mascalzone Latino-Capitalia Team
APPLICATION ACJ014

To: Challengers and Defender, ACM, Chief Measurer (“Parties”)

6 Pages

Mascalzone Latino-Capitalia – 1 Question

Applicant: Mascalzone Latino-Capitalia on behalf of Reale Yacht Club Canottiere Savoia (“Mascalzone Latino”)

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

AND

IN THE MATTER of an Application filed by Mascalzone Latino concerning the interpretation of Article 7(f)(ii) of the Protocol.

The Application – Jury Notice JN033

- [1] On 13th March 2006 an Application was filed by Mascalzone Latino-Capitalia team on behalf of the Reale Yacht Club Canottiere Savoia (“**Mascalzone Latino**”).
- [2] With Mascalzone Latino's agreement, it was decided that this case would be the first to test the new America's Cup Jury Electronic Case Facility (**ECAF**). There was an initial short delay to enable all Parties to be provided with passwords and to establish ECAF.
- [3] The question submitted by Mascalzone Latino in its Application was, whether with reference to Article 7(f)(ii) of the Protocol, the procedure for inspection of the Hull of a Competitor's New ACC Yacht which is to be carried out “at its place of construction”, may occur in:
 - (a) the country of construction; or
 - (b) only at the exact location of construction, namely the boatyard.
- [4] On 23rd March, the Jury issued Jury Notice JN033 which Notice was posted on the same date on the message board of the ECAF. The Jury Notice formally advised all Parties of the Application and provided directions and a timetable. Jury Notice JN033 provided:
 - [1] *The Jury has received a submission from Alessandra Pandarese on behalf of the Reale Yacht Club Canottiere Savoia dated 13th March 2006 which submission has been posted on the message board of the America's Cup Jury Electronic Case Facility (ACJECAF).*
 - [2] *In support of its submission, Mascalzone Latino also filed a statement/letter from Marine Composite dated 1st March 2006 as signed by Vittorio Urbinati which submission has been posted on the message board of ACJECAF.*

[3] *The question submitted by Mascalzone Latino in its Application is whether with reference to Article 7(f)(ii) of the Protocol, the procedure for inspection of the Hull of a Competitor's New ACC Yacht which is to be carried out "at its place of construction", may occur in:*

(a) *the country of construction; or*

(b) *only at the exact location of construction, namely the boat yard.*

[4] *The Application included a request that as the letter from Marine Composite dated 1st March 2006 referred to "the hull of the yacht sail number 90", which sail number has not yet been publicly announced, although no order of confidentiality in terms of the Rules of Procedure is now requested, all Parties that were notified of the Application are requested to keep this sail number information confidential. The basis of such request is that Mascalzone Latino has not yet made a public announcement of the new yachts sail number. The Jury invites all such Parties to meet this request.*

Directions and timetable

[5] *A report from the Measurement Committee with regard to Articles 7(f)(i) and (ii) of the Protocol is required by the 27th of March 2006. This report is to be provided to all Parties via ACJECAF.*

[6] *Parties wishing to respond to the submission, must do so via ACJECAF by the 3rd of April 2006.*

[7] *Submissions in response in accordance with the timetable set in paragraph 6 are requested to include the following:*

(a) *Jurisdiction of the Jury to consider the Application, with reference to Article 21.4(a) of the Protocol;*

(b) *The interpretation of Article 7(f)(ii) of the Protocol;*

(c) *If the Jury has jurisdiction, and if the Jury should find that Mascalzone Latino is in breach of Article 7(f)(ii) of the Protocol what is the appropriate penalty with regard to Article 21.4 of the Protocol.*

[8] *Mascalzone Latino may respond to any submissions by the other Parties by 10th April 2006. Any such response is to be made available to all other Parties via ACJECAF.*

No further responses

[9] *Unless new or unexpected matters arise, it is not intended that there will be any further opportunity for Parties to respond to this Application."*

Technical Directors Report

[5] On 24th March, the Technical Director as Chairman of the Measurement Committee issued a report. Such report was posted on the ECAF.

[6] The Technical Director's report set out the background to the matter. The report stated that a Hull inspection had not been carried out at the boatbuilder's yard, but the Hull had been inspected on the dock in the Port of Livorno, Italy. The Technical Director's report noted "*given that a member of the Measurement Committee did not visit the boatyard where the Hull was constructed, no affirmation can be made that construction did actually take place in Italy*".

Mascalzone Latino request to file an additional submission

[7] As a result of the Technical Director's report, Mascalzone Latino advised the Jury that they requested the opportunity to file an additional submission concerning the place of construction of the Hull.

Amended timetable and directions

- [8] On 28th March, the Jury issued Jury Notice JN034. Such Jury Notice granted Mascalzone Latino's request to file an additional submission and provided an amended timetable and directions. Jury Notice JN034 provided:

- [1] *Mascalzone Latino has requested the opportunity to file an additional submission following the receipt of the Measurer's report, concerning the place of construction of the Hull.*
- [2] *The Jury grants the request as there will be no prejudice to any other Party. Any such additional submission by Mascalzone Latino is to be posted on ACJECAF by Wednesday 29th March 2006.*

Amended Timetable and directions

- [3] *The Jury timetable set out in JN033 in respect of the Parties opportunity to respond (paragraph [6]) and the opportunity for Mascalzone Latino to respond (paragraph [8]) will no longer apply.*
- [4] *Parties wishing to respond, must now do so via ACJECAF by the 10th April 2006. This is intended to give Parties sufficient time to also consider the additional submission from Mascalzone Latino.*
- [5] *In addition to the matters identified in paragraph [7] (a) (b) and (c) of JN033, Parties are also requested in any Response to include a response in respect of the matters raised in the additional submission from Mascalzone Latino.*
- [6] *Mascalzone Latino may then respond to any submissions by the other Parties via ACJECAF by the 14th April 2006."*

Mascalzone Latino additional submission

- [9] On 29th March, Mascalzone Latino posted its additional submission on the ECAF. Such additional submission (referred to as a second submission by Mascalzone Latino) included a request for confidentiality in respect of Exhibit 3. They requested that the material contained in Exhibit 3 not be distributed to the Parties in accordance with Rule 8 of the Jury Rules of Procedure on the basis that *"the evidence contains the pictures of the new Hull that the Team require it to be kept confidential at this stage, as they show sensitive shape details of the Hull"*.

Errata Corrige

- [10] On 1st April, Mascalzone Latino posted to ECAF advice that the first paragraph of point 2 of their second submission dated 29th March contained a typographical error so that the sentence should read *"the Team did do so inadvertently as stated in our earlier submission"*.

Order for confidentiality

- [11] On 3rd April, the Jury issued Jury Notice JN035. Such Jury Notice granted Mascalzone Latino's request for an order for confidentiality in respect of Exhibit 3. Jury Notice JN035 provided:
- [1] *Mascalzone Latino have requested an order for confidentiality in respect of exhibit 3 of their further submission dated 29 March 2006.*
- [2] *As advised in their further submission, exhibit 3 contains a number of photographs of the Hull being the subject of their application.*
- [3] *The Jury is satisfied that in terms of Rule 8.1 of the Rules of Procedure, Exhibit 3 contains material that is confidential and an order for confidentiality should be granted. An order is granted accordingly.*

[4] This order for confidentiality does not extend to the Measurement Committee.”

Alinghi submission

- [12] On 7th April, Team Alinghi SA as the representative of Société Nautique de Genève (“Alinghi”) posted a submission on ECAF in response to Jury Notice JN033.
- [13] Alinghi submitted that the Jury has jurisdiction within the terms of Article 21.4(d) of the Protocol. Alinghi submitted that the role of the Measurement Committee in relation to Article 7(f) of the Protocol is limited to inspection and where appropriate, the issue of a certificate confirming compliance with that provision.
- [14] Alinghi also submitted that the phrase “*place of construction*” was intentionally used over the wording “*country*” with the intent that the yacht is to be inspected at the construction yard where the yacht has been laminated or otherwise constructed.
- [15] Alinghi also referred to the Jury, a decision of the previous America’s Cup Arbitration Panel ACAP01/1, which involved an application by Société Nautique de Genève which Alinghi submitted was analogous to the present Application. Alinghi noted that the Jury is not bound by previous decisions of the America’s Cup Arbitration Panel. A copy of ACAP01/1 was included in the Alinghi submission.
- [16] On 10th April, Alinghi posted on ECAF a further copy of ACAP01/1 which then included page 5 of the America’s Cup Arbitration Panel decision which had previously been missing.

No other Parties submissions

- [17] No other Parties filed a submission in response to Jury Notice JN033.

Mascalzone Latino chose not to respond

- [18] Mascalzone Latino chose not to respond to the Alinghi submission.

Decision

Jurisdiction

- [19] The Jury has jurisdiction under the Protocol to consider the Application. The Jury is empowered under Article 21.4(a) to resolve all matters of interpretation of the Protocol Article 21.4(d) of the Protocol further empowers the Jury to “*resolve any dispute, deadlock or impasse between any Competitor... or any Official...*”. The word Official is interpreted in Article 1.1(x) of the Protocol as including the Measurement Committee in that it is “*any other person or entity assisting with the organisation or management of the Event*” (article 1.1(x)(ii)).

Place of construction

- [20] Article 7(f)(ii) provides that “*a Competitor shall arrange for a member of the Measurement Committee to inspect the Hull of that Competitor’s New ACC Yacht at its place of construction...*”. The Jury does not accept Mascalzone Latino’s submission that the words “*its place of construction*” can be interpreted as the country of construction. The Jury considers that the words “*place of construction*” are to be interpreted as the exact location or boatyard where the Hull of a Competitor’s New ACC Yacht is physically constructed.

- [21] The Jury considers that Mascalzone Latino failed to comply with Article 7(f)(ii) of the Protocol in that they did not arrange for a member of the Measurement Committee to inspect the Hull of Mascalzone Latino's New ACC Yacht at the boatyard where it was constructed. The Jury accepts the report of the Technical Director. Although the Measurement Committee could not inspect the Hull at its place of construction (the boatyard), the Technical Director was able on very short notice to inspect the Hull at the Port of Livorno where the Hull was about to be loaded onto a ship for transport to Valencia. The Measurement Committee considered they were then unable in terms of Article 7(f)(ii) of the Protocol, to provide the affirmation in accordance with Article 7(f)(i) of the Protocol as to the Hull's place of construction.
- [22] The Technical Director noted in his report that he "*has no reason to have any doubt*" that the Hull was constructed in Italy. On the evidence before it, the Jury is satisfied that the place of construction of the Hull of ITA90 was in Italy.

Breach

- [23] The Jury finds that Mascalzone Latino breached Article 7(f)(ii) of the Protocol in that it failed to arrange for a member of the Measurement Committee to inspect the Hull at the boatyard where the Hull was constructed. Any breach of the Protocol is viewed by the Jury as serious.

Penalty

- [24] The Jury accepts that the breach by Mascalzone Latino was inadvertent and as soon as they realised the possible implications of their position, they took the appropriate course of action and notified the Measurement Committee followed by filing an Application with the Jury. They have been open and co-operative throughout.
- [25] The Jury accepts the submission by Alinghi that "*no discernable advantage has been gained by the Applicant nor has another Competitor suffered a disadvantage*". (Paragraph 4.1 of the Alinghi submission).
- [26] Article 21.4(c) of the Protocol empowers the Jury "*to impose any penalty on a Competitor the Jury believes to be just and equitable*".
- [27] In these particular circumstances where the breach was inadvertent, where the matter was promptly brought to the attention of the Measurement Committee and the Jury and where there has been full disclosure of what occurred with no advantage gained or disadvantage to other Competitors, the Jury in this particular instance is prepared to impose as a penalty, a censure. In imposing a censure, the Jury has also taken into account the quantum of the award of costs.

Costs

- [28] With reference to the Jury Guidelines for the Award of Costs published on 27th August 2005, the Jury considers that this decision is not of "*a universal application or for the benefit of a significant number of Competitors or the Event*". Rather than there being a doubt about the possible interpretation of Article 7(f) of the Protocol, it appears the situation that gave rise to the Application by Mascalzone Latino came about primarily as a result of them simply overlooking the provisions under the Protocol with regard to inspection of the Hull of their New ACC Yacht at the boatyard prior to shipment to Valencia.

[29] The Jury awards costs of €12,500, such payment to be made by Mascalzone Latino within thirty (30) days of the date of this decision to the Event Authority.

Summary of the Decision

[30] The answer to the question submitted by Mascalzone Latino concerning the interpretation of Article 7(f)(ii) of the Protocol with regard to the interpretation of "*place of construction*" is, it is to occur at the boatyard or exact location of construction of the Hull rather than at a place that is in the country of construction.

[31] Based on the evidence before it, the Jury is satisfied that the Hull of ITA90 was constructed in Italy.

[32] Mascalzone Latino breached Article 7(f)(ii) of the Protocol.

[33] The penalty for such breach of the Protocol is a censure.

[34] Costs are awarded of €12,500 to be paid to ACM by Mascalzone Latino within thirty (30) days of the date of this decision.

A handwritten signature in black ink, appearing to read "Bryan Willis". The signature is fluid and cursive, with a large initial "B" and a long, sweeping underline.

Bryan Willis

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