



AMERICA'S CUP 32

AMERICA'S CUP JURY JURY NOTICE JN054

6th December 2006
Two questions from Alinghi
Jury Decision ACJ021



To: Regatta Director, Challengers and Defender, ACM, Chief Measurer ("**Parties**")

Applicant: Societe Nautique de Geneve represented by Team Alinghi SA known as Alinghi ("Alinghi")

**An Application in respect of the Protocol governing the 32nd America's Cup
AND**

An Application filed by Alinghi asking for interpretations of Article 5.7 of the Protocol

The Application

- [1] An Application was filed by Alinghi on 1 November 2006. The Application concerned the exercise of the Regatta Director's discretion under Article 5.7 of the Protocol in preparing and publishing the Notice of Race ("NOR") and the Sailing Instructions ("SI") for the Match.
- [2] Alinghi (as the Defender) asked the following two questions of interpretation –

First Question

'Other than being consistent with the provisions of the Protocol, consulting with the Event Authority, Defender and Challenger Commission, meeting the commercial requirements of the Event Authority, and meeting the obligations set out in Article 5.9 of the Protocol, does the Regatta Director have a discretion to determine the contents of the Notice of Race and the Sailing Instructions for the Match?'

Second Question

'Is the Regatta Director prevented in the exercise of his discretion to include in the Notice of Race or the Sailing Instructions for the Match an obligation on the respective competitors to exchange their GPS positions during racing with each other and/or with the race committee and the umpires on such conditions as he deems appropriate?'

Jury Notice JN052

- [3] On 2nd November, the Jury issued a Jury Notice JN052 which included directions and a timetable. Jury Notice JN052 provided:

[1] *On 1st November 2006 Alinghi filed an Application requesting interpretations in relation to the Regatta Director's discretion in meeting his obligations described in Protocol article 5.9 in preparing and publishing the Notice of Race and the Sailing Instructions for the Match.*

Directions and Timetable

- [2] *A Party wishing to respond shall submit their Response by 16th November.*
- [3] *Should Alinghi wish to reply, the Reply shall be submitted by 23rd November.*
- [4] *Unless the Jury directs otherwise there will not be any further opportunities for Parties to respond or reply after 23rd November.*
- [5] *The Regatta Director is requested not to publish a Notice of Race before the Jury publishes its decision in this case. This request does not in any way affect the 'consultation process' referred to in Protocol Article 5.7.*

BMW Oracle Racing Submission

- [4] On 14th November BMW Oracle Racing (as both Challenger and Challenger of Record) filed a Response opposing the Application made by Alinghi.
- [5] BMW Oracle Racing submitted that with reference to the Deed of Gift and Article 5.7 of the Protocol, mutual consent of the Challenger and Defender is required for the NOR and SI.
- [6] BMW Oracle Racing submitted that for all of the 12 Sailing Acts that have occurred up until the time of the Application, the Regatta Director consulted with the Defender and the Challenger Commission and achieved their mutual consent. It submitted that the Regatta Director does not have discretion, but rather he is the person who is charged with seeking mutual consent in respect of the provisions of the NOR and SI.
- [7] BMW Oracle Racing submitted that the exchange of GPS data between Competitors has not been mutually agreed. It further submitted that Article 5.7 of the Protocol requires the NOR and SI to be consistent with the provisions of the Protocol and that exchanging GPS data between Competitors would not be consistent with the Protocol.
- [8] BMW Oracle Racing also submitted that the Application had been brought with no reasonable grounds and with mischievous intent and that the Application should be dismissed. It further submitted that the Application is hypothetical.

Email from Emirates Team New Zealand

- [9] On 15th November Emirates Team New Zealand sent an email to the Jury and Competitors and other Parties advising that it had read the submission of BMW Oracle Racing and that Emirates Team New Zealand fully supports and agrees with it. The Chairman of the Jury invited it to file the email as a submission on

ECAF but this did not occur. In terms of the current Jury Rules of Procedure (amended on 27th July 2006) clause 3.2 requires Parties to use the America's Cup electronic case facility (ECAF). The Emirates Team New Zealand submission did not come within any of the exceptions to that requirement. No Party to this case raised objection to this matter. For future reference all Parties are reminded of the ECAF filing requirements under the Jury Rules of Procedure.

Regatta Director Submission

- [10] On 15th November the Regatta Director filed a submission. The Regatta Director took no position on the Application.
- [11] The Regatta Director identified the work he had carried out in preparing a NOR for Act 13, the Challenger Selection Series and the Match.
- [12] The Regatta Director identified what he considered were four fundamental questions.
- [13] The Regatta Director further submitted that he is undecided about the inclusion of a rule requiring the exchange of GPS position data between racing yachts and gave reasons why he currently had that view.

Challenger Commission Submission

- [14] On 16th November the Challenger Commission filed a submission, which submission had the approval of 10 Challengers.
- [15] The Challenger Commission submitted that the answer to the first question proposed by Alinghi was obvious. It submitted that the discretion of the Regatta Director in determining what is contained in the NOR and SI for the Match is limited by the need to comply with the priority of the applicable documents provided for in Article 12 of the Protocol and with the Protocol provisions including Articles 5.9 and 5.7. It further submitted that the contents of the NOR and SI are required to be consistent with the mutual consent provisions of the Deed of Gift, the Protocol, the ACC Rule and Terms of Challenge.
- [16] With regard to Alinghi's second question the Challenger Commission submitted that the question was hypothetical and as such, with reference to section 4.5 of the Jury Rules of Procedure, the Jury should decline to answer the question.
- [17] The Challenger Commission also submitted that without more specific information as to the nature of the proposed GPS exchange system it is impossible to determine its legality, in respect of which it raised a number of doubts.
- [18] The Challenger Commission also noted the Jury's request in JN052 that the Regatta Director not publish a NOR before the Jury delivers its decision on this case and asked that this request be revoked or limited to the Match NOR.

Alinghi Letter requesting clarification

- [19] On 17th November Alinghi filed a letter on ECAF requesting clarification of an inconsistency between the submission of the Challenger of Record (BMW Oracle Racing) which was being supported by Emirates Team New Zealand with that of the Challenger Commission, before Alinghi formulated and submitted its response.

Jury's response to Alinghi's Letter

- [20] The Jury has previously ruled (ACJ008) that under the terms of the Protocol, both the Challenger Commission and individual Competitors, whether they agree or disagree with the Challenger Commission's view, are entitled to file submissions. The Jury considered that it could not require the Challenger Commission to answer Alinghi's request contained in its letter of the 17th November. On the 18th November the Chairman of the Jury, by email, invited the Chairman of the Challenger Commission to respond to Alinghi's letter of 17th November. She declined to do so. On the 20th November the Chairman of the Jury advised Alinghi by email that it should proceed with its Reply in terms of the timetable set in JN052.

Alinghi Reply

- [21] On 23rd November Alinghi filed a Reply to the submissions of the Challenger of Record, the Regatta Director and the Challenger Commission.
- [22] Alinghi submitted that the Challenger Commission should disclose the identity of the 10 Challengers it was supporting in its submission. Alinghi submitted that the confusing opposing submissions from at least one and possibly two Challengers with regard to the first question illustrated the need for such disclosure.
- [23] Alinghi submitted that it did not agree with the submissions in response that raised technical and practical issues if an exchange of GPS data is required. It submitted that these were matters for the Regatta Director to discuss with the Parties with whom he is required to consult and that they did not have to be considered or addressed by the Jury to answer the two questions.
- [24] With regard to the submission from BMW Oracle Racing, Alinghi submitted that it did not agree that the NOR and SI required mutual consent. Nevertheless Alinghi submitted that it was prepared to consent to an Order of the Jury that the NOR and SI be determined by the mutual consent process specified in the Deed of Gift, which would then have the effect of only the Defender and the Challenger of Record being required to agree on a Protocol amendment.
- [25] Alinghi disputed that the Application was made with mischievous intent and provided its view on the background to the matter.
- [26] Alinghi also submitted that the Application was not hypothetical as the Regatta Director had proposed a GPS exchange for the Match in an earlier draft NOR and it wished to resolve any doubts that had subsequently arisen as a result of a difference of view with the Challengers as to the extent of the Regatta Director's discretion.

- [27] With regard to the Regatta Director's submissions, Alinghi submitted that the factors raised by him were proper issues for the Regatta Director's consideration as a part of a separate consultation process. They were not relevant to the Application and the Jury has no power to exercise the discretion being referred on the Regatta Director.
- [28] In respect of the Challenger Commission submissions, Alinghi submitted that recognising that the submissions of the Challenger of Record and Emirates Team New Zealand were markedly different on their interpretation of Article 5.7 of the Protocol than those of the Challenger Commission, it illustrated that the answer to the first question in the Application is less obvious than had been claimed.
- [29] Alinghi also submitted that their Application was not pre-empting or disrupting the consulting process, with consultation ongoing in respect of other NOR issues which did not relate to the Match.

Decision

- [30] The Challenger Commission included in its submission a request to "...promptly revoke the decision of suspending the publication by the Regatta Director of the Notice of Race or at least should limit the suspension of the publication only to the Match Notice of Race." The Jury did not respond to this request as it considered that in JN052 it had only requested and not ordered the Regatta Director not to publish a NOR before the Jury's decision was published. This did not affect any ongoing consultation. The Jury also considered that the timetable it had set was reasonably tight and would allow for a Jury decision to be made well before racing commences in April 2007.
- [31] The Jury does not intend to take up Alinghi's suggestion in its Reply that the Jury make a consent Order that the determination process specified in the Deed of Gift be given effect in respect of establishing a NOR and SI under Article 5.7 of the Protocol. The Jury considers that its answers to the two questions are such that it is not appropriate to further consider that suggestion.
- [32] Alinghi submitted that the Challenger Commission should be required to disclose which of the Competitors it claims to represent in its submission. The status of the Challenger Commission was considered in ACJ008. In Jury Notice JN019 the Jury directed that the Challenger Commission identify the identity of each of the Challengers it was representing in that Application. In the circumstances of this case ACJ021, where the request for disclosure arose after the Challenger Commission had filed its submission, with the Challenger Commission having stated that it was providing a submission for 10 of the 11 Challengers, it was not considered material to the case to consider this matter further. In future cases where the Challenger Commission is not representing all Challengers in any Application or submission, the Challenger Commission may decide that it does not wish to disclose the identities of Challengers, in which case the matter can be considered at the time it arises.

First Question

- [33] 'Other than being consistent with the provisions of the Protocol, consulting with the Event Authority, Defender and Challenger Commission, meeting the commercial requirements of the Event Authority, and meeting the obligations set out in Article 5.9 of the Protocol, does the Regatta Director have a discretion to determine the contents of the Notice of Race and the Sailing Instructions for the Match?'

Answer: Yes.

Second Question

- [34] 'Is the Regatta Director prevented in the exercise of his discretion to include in the Notice of Race or the Sailing Instructions for the Match an obligation on the respective competitors to exchange their GPS positions during racing with each other and/or with the race committee and the umpires on such conditions as he deems appropriate?'

Answer: No, provided that the Regatta Director meets the respective obligations under the governing documents referred to in Article 12.1 of the Protocol.

Leave to make a further Application

- [35] After the Regatta Director has made his decision with regard to the provisions of the NOR and SI for the Match, any Party may make a further Application to the Jury in respect of this matter.

Costs

- [36] With reference to the Jury Guidelines for the Award of Costs published on the 17th August 2006, the Jury considers that the questions asked in the Application were not mischievous and were proper questions for the Jury to address. The Jury decision is of universal application from the point of view that it affects Acts 13, the Louis Vuitton Series, and the Match that are to occur in 2007. The Jury considers that it is just and equitable that Alinghi should meet some of the costs of this Application since it asked for the interpretations. Costs are awarded of €7,500, such payment to be made by Alinghi to the Event Authority within thirty (30) days of the date of this decision.



Bryan Willis

America's Cup Jury:

Graham McKenzie, Henry Menin, Professor Henry Peter, David Tillett, Bryan Willis (chairman)