

 **33rd America's Cup**

AMERICA'S CUP ARBITRATION PANEL



ACAP 33 / 01

Decision

September 7, 2007

APPLICANT:

- Société Nautique de Genève ("**SNG**" or the "**Applicant**")

IN THE MATTER of the Protocol governing the 33rd America's Cup (the "**Protocol**").

AND

IN THE MATTER of an application filed by SNG on July 20, 2007 in respect of the validity of the challenge of Club Nautico Español de Vela ("**CNEV**") for the 33rd America's Cup.

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THE PROCEEDINGS

[1] On July 20, 2007 at 19.42 Central European Time (“**CET**”), corresponding to 13.42 New York time, the 33rd America's Cup Arbitration Panel (“**ACAP 33**” or the “**Panel**”) received an application from SNG (acting through Team Alinghi) (the “**Application**”) in respect of the validity of the challenge made by CNEV on July 3, 2007 for the 33rd America’s Cup.

[2] The Application read:

“There has been issued raised by prospective competitors in the 33rd America's Cup, including the Golden Gate Yacht Club, as to the validity of the challenge of Club Nautico Espanol de Vela. SNG as Trustee of the America's Cup makes an application to the Panel for a declaration that the challenge received from Club Nautico Espanol de Vela on 3rd July 2007 and accepted by SNG on the same date, is a valid challenge under the terms of the Deed of Gift of 24th October 1887, and that SNG is obliged to meet that challenge under the terms of the Deed of Gift.

SNG understands the Challenger of Record is intending to make a substantially similar application on Monday, if they do so SNG would withdraw this application unless there is good reason to continue with it.

We look forward to the Panel's directions and timetable for party submissions in due course”.

[3] On July 23, 2007 at 9.33 CET, the Panel received an email from SNG supplementing the Application, which read as follows:

“I confirm SNG would like to proceed with it's application in light of reports of an apparently subsequent filing in the New York Supreme Court by Golden Gate Yacht Club on substantially the same issues, rather than withdraw the

application. It would like the matter to be determined as soon as possible but recognising the need to allow for all interested parties to have an opportunity to make submissions.

SNG can file its submissions on 24 hours notice.

It is appropriate that sporting issues are resolved by the dispute resolution bodies established by the sport rather than in the courts, a concept which is strongly endorsed, in relation to the America's Cup, in the Mercury Bay opinion of the New York Court of Appeals the highest appellate court with jurisdiction to rule on matters arising under the Deed of Gift.

Finally, there is a small typographical in the application , the word "issued" in the first line should have read " issues" which needs to be corrected."

[4] On July 23, 2007, the Panel issued **Directions no 1** which stated:

“APPLICATION

1 The 33rd America's Cup Panel (ACAP 33) has received an application from SNG (acting through Team Alinghi, SNG) on Friday, July 20, 2007 at 7.42 p.m. (Swiss time) (the Application).

2 The Application read as follows:

"Dear Professor Peter,

There has been issued raised by prospective competitors in the 33rd America's Cup, including the Golden Gate Yacht Club, as to the validity of the challenge of Club Nautico Espanol de Vela. SNG as Trustee of the America's Cup makes an application to the Panel for a declaration that the challenge received from Club Nautico Espanol de Vela on 3rd July 2007

and accepted by SNG on the same date, is a valid challenge under the terms of the Deed of Gift of 24th October 1887, and that SNG is obliged to meet that challenge under the terms of the Deed of Gift.

SNG understands that Challenger of Record is intending to make a substantially similar application on Monday. If they do so SNG would withdraw this application unless there is good reason to continue with it.

We look forward to the Panel's directions and timetable for party submissions in due course."

- 3** *The Application was supplemented by mail received from SNG on July 23, 2007 at 9.33 a.m. which read as follows:*

"Dear Professor Peter

Thank you for your email.

I confirm SNG would like to proceed with it's application in light of reports of an apparently subsequent filing in the New York Supreme Court by Golden Gate Yacht Club on substantially the same issues, rather than withdraw the application. It would like the matter to be determined as soon as possible but recognising the need to allow for all interested parties to have an opportunity to make submissions.

SNG can file its submissions on 24 hours notice.

It is appropriate that sporting issues are resolved by the dispute resolution bodies established by the sport rather than in the courts, a concept which is strongly endorsed, in relation to the America's Cup, in the Mercury Bay opinion of the New York Court of Appeals the highest appellate court with jurisdiction to rule on matters arising under the Deed of Gift.

Finally, there is a small typographical in the application , the word "issued" in the first line should have read " issues" which needs to be corrected."

Directions and Timetable

- 4** *SNG to inform ACAP 33 by **July 24, 2007 at 5.00 p.m.** whether any Challenges have been made, and if so what Challengers have already formally declared that they accept the terms of the Protocol, and that SNG has accepted them as Challengers to the 33rd America's Cup, so that they can be advised of and be given the opportunity to participate in the present proceedings. The persons to whom such advice is to be provided are to be advised to ACAP 33, including contact details of the applicable representatives of GGYC.*

- 5** *SNG shall, by **Wednesday July 25, 2007 at 5.00 p.m.** provide in writing their full case.*

- 6** *CNEV shall, by **Friday July 27, 2007 at 12.00 a.m.**, submit in writing their full case.*

- 7** *GGYC is invited, by not later **than Friday, July 27, 2007 at 5.00 p.m.**, to inform ACAP 33, SNG and CNEV whether they are willing to take part to these proceedings and, if so, (i) as a party, submitting to the jurisdiction of ACAP 33, or (ii) by presenting their case, without prejudice to the existence and/or jurisdiction of ACAP 33 including the basis and reasons therefore.*

- 8** *Should GGYC decide to participate in the present proceedings whether under 7 (i) or (ii) above, GGYC is invited to present its response to the Application by not later than **Tuesday August 14 2007 at 12.00 a.m.***

- 9** *Should any party consider they are not able to meet any part of this timetable they may request an extension of time which request should include the reasons for such extension and requested extended date(s).*
- 10** *Pursuant to clause 34 (b) of the Protocol:*
"The Arbitration Panel shall only proceed upon payment of an application fee by the applicant which the Arbitration Panel shall fix being its estimate of total costs to resolve an arbitration. Such application fee shall be paid to the Arbitration Panel."
ACAP 33 considers that it is difficult for it to estimate the total costs of these proceedings at this stage. An advance on costs of EURO 25'000 shall however be required from SNG, to be transferred on the following account: [...]
- 11** *Any reference made herein to date or time shall be deemed to be Spanish time (which is equal to Swiss time).*
- 12** *Any communication shall be made by e-mail to all three members of ACAP 33 with a copy to all participants in these proceedings, currently SNG, CNEV GGYC (subject to their confirming that they will participate in the present proceedings) and possible other participants (see 1 above), unless expressly directed otherwise.*
- 13** *Further directions will be issued as may be appropriate.*
- 14** *An opportunity will be given by further directions for any party who chooses to participate in this case to respond to other parties submissions".*

[5] On July 24, 2007 at 16.52 CET, the Panel received a notice from AC Management (“ACM”) which read:

“1. REPRESENTATION

This notice is made by AC Management SA (“ACM”) in the frame of ACAP 33 / 01 dated 23RD July 2007 in which the Arbitration Panel invited SNG to inform ACAP 33 whether any Challenges have been made, and if so what Challengers have already formally declared that they accept the terms of the Protocol, and were accepted as Challengers to the 33rd America’s Cup, so that they can be advised of and given the opportunity to participate in the proceedings.

2. GENERAL CONSIDERATIONS

This notice is respectfully made by ACM and not by SNG, to the extent the Protocol governing the 33rd America’s Cup provides that yacht clubs wishing to become a Challenging Competitor shall apply by completing and submitting a Notice of Entry in a form to be issued by ACM, and that ACM may accept or reject any entry received at its sole and entire discretion (article 4).

3. NOTICE

As per its request, ACM hereby informs ACAP 33 that, in addition to CNEV, two Challenges have been made to date, who each formally declared that it “unconditionally agrees and accepts to be bound by the terms of the Deed of Gift, the Protocol and all applicable rules and obligations referred to in such Protocol, including but not limited to those which will be contained in the documents listed in article 2.5 of the said Protocol, and any amendment to such Protocol or such rules and obligations that may be issued from time to time”.

These Challenges are the following:

1. Yacht Club:

ROYAL CAPE YACHT CLUB [“RCYC”]

PO BOX 772

CAPE TOWN
8000
REPUBLIC OF SOUTH AFRICA
Tel.: +27 021 4211354
Fax: + 27 021 4216028
e-mail: info@rcyc.co.za

Representative:

RAYMOND CRAIG MIDDLETON
C/O ROYAL CAPE YACHT CLUB
PO BOX 772
CAPE TOWN
8000
REPUBLIC OF SOUTH AFRICA
Tel.: +27 021 5931620
Fax: +27 021 5931714
e-mail: craig@quantumsails.co.za

2. Yacht Club:

ROYAL THAMES YACHT CLUB LIMITED [“RTYCL”]
60, KNIGHTSBRIDGE
LONDON, SW1X 7LF
UNITED KINGDOM
Attn.: The Secretary, Captain David Freeman, LVO, Royal Navy
Fax.: + 44 0(20) 7245 9470
e-mail: secretary@royalthames.com
Tel.: + 44 0(20) 7235 2121

Representative:

TEAMORIGIN LLP
80, STRAND,
LONDON, WC2R 0NN

UNITED KINGDOM

Attn: Sir Keith Mills (Team Principal)

Fax: + 44 020 7152 4300

Email: keithmills@teamorigin.com

Tel.: + 44 020 7152 6600”

[6] On July 25, 2007, the Panel issued **Directions no 2** which stated:

- “1 ACAP 33 has issued first directions in this case on July 23, 2007 (copy enclosed; Directions no 1).*
- 2 In point 4 of Directions no 1, SNG was invited to advice ACAP 33 as to what Challengers, in addition to the Challenger of Record, had declared that they accept the terms of the Protocol and were accepted as Challengers of the XXXIII America's Cup.*
- 3 Within the deadline set by ACAP 33 an answer was given by ACM, not by SNG. Pursuant to the Protocol, ACM is in fact competent in that respect. ACM's reply dated July 24, 2007 is enclosed.*
- 4 Pursuant to ACM's e-mail, two Challengers have now accepted the terms of the Protocol and been accepted as Challengers, namely Royal Cape Yacht Club, Cape Town, Republic of South Africa (RCYC), acting through Raymond Craig Middleton, Cape Town, Republic of South Africa, and Royal Thames Yacht Club Limited, London, United Kingdom (RTYCL), acting through Teamorigin LLP, London, United Kingdom.*

Directions and Timetable

- 5 Both RCYC and RTYCL, as well as ACM, are entitled to take part in the present proceedings and, in addition to the all three ACAP 33 members and to the parties already mentioned under point 12 of Directions no 1,*

shall directly receive all and any submissions, responses or communication, by e-mail.

6 *RCYC and RTYCL may by **Tuesday August 14, 2007** at 12.00 a.m. (Swiss time), provide their respective submissions in respect of the case.*

7 *Further directions will be issued as may be appropriate including an opportunity to respond to any submissions received.”*

[7] On July 25, 2007 at 13.44 CET, the Panel received an email from SNG which read:

“Owing to the imminent venue announcement and other related announcements this afternoon, I have been requested to seek from the Panel an extension of time until 1700hrs Friday 25th July 2007. I appreciate this may cause the rescheduling of other submission for which SNG apologises.”

[8] On July 25, 2007 at 13.47 CET, the Panel received an email from CNEV which read:

“The Challenger of Record does not oppose to Alinghi's petition, on the contrary, we fully understand their reasons for requesting an extension of the period.

We would like to have two or three days after SNG application for the submission of our, so we kindly ask that if SNG petition is accepted, CNEV is given a new term for submission until August 1, 2007.”

[9] On July 25, 2007, the Panel issued **Directions no 3** which stated:

“1 ACAP 33 has received from SNG today at 13.44 p.m. the following application:

“Dear Professor Peter

Owing to the imminent venue announcement and other related announcements this afternoon, I have been requested to seek from the Panel an extension of time until 1700hrs Friday 25th July 2007. I appreciate this may cause the rescheduling of other submission for which SNG apologises."

- 2** *ACAP 33 has thereafter received from CNEV at 13.47 p.m. the following application:*

"Dear Professor Peter,

The Challenger of Record does not oppose to Alinghi's petition, on the contrary, we fully understand their reasons for requesting an extension of the period.

We would like to have two or three days after SNG application for the submission of our, so we kindly ask that if SNG petition is accepted, CNEV is given a new term for submission until August 1, 2007."

Directions and Timetable

- 3** *Both applications are accepted by ACAP 33 and the respective deadlines are extended accordingly."*

[10] On July 27, 2007 at 13.06 CET, the Panel received a notice from ACM which read:

"1. REPRESENTATION

This notice is made by AC Management SA ("ACM") in the frame of ACAP 33 / 01 dated 23^d July 2007 in which the Arbitration Panel invited SNG to inform ACAP 33 whether any Challenges have been made, and if so what Challengers have already formally declared that they accept the terms of the

Protocol, and were accepted as Challengers to the 33rd America's Cup, so that they can be advised of and given the opportunity to participate in the proceedings.

A first notice was made by ACM on 24th July 2007, informing the Arbitration Panel of the entry of ROYAL CAPE YACHT CLUB and ROYAL THAMES YACHT CLUB LIMITED. The present notice is to inform the Arbitration Panel of an additional entry.

2. GENERAL CONSIDERATIONS

This notice is respectfully made by ACM and not by SNG, to the extent the Protocol governing the 33rd America's Cup provides that yacht clubs wishing to become a Challenging Competitor shall apply by completing and submitting a Notice of Entry in a form to be issued by ACM, and that ACM may accept or reject any entry received at its sole and entire discretion (article 4).

3. NOTICE

As per its request, ACM hereby informs ACAP 33 that, in addition to CNEV, ROYAL CAPE YACHT CLUB and ROYAL THAMES YACHT CLUB LIMITED, an additional Notice of Entry was received on 25th July 2007 and accepted on 26th July 2007. This new Challenge is namely:

Yacht Club:

ROYAL NEW ZEALAND YACHT SQUADRON

101 Curran Street

Westhaven

Auckland 1147

New Zealand

Attn: Mr J.C. Crawford

Tel.: + 64 93 60 68 09

Fax: + 64 93 60 68 02

e-mail: n/a

Representative:

TEAM NEW ZEALAND

c/o ROYAL NEW ZEALAND YACHT SQUADRON

101 Curran Street

Westhaven

Auckland 1147

New Zealand

Attn: Mr Grant Dalton

Tel.: + 64 21 923 023

Fax: + 64 93 606 802

e-mail: grant.dalton@emiratesteamnz.com

ACM confirms that this additional Challenge formally declared that it “unconditionally agrees and accepts to be bound by the terms of the Deed of Gift, the Protocol and all applicable rules and obligations referred to in such Protocol, including but not limited to those which will be contained in the documents listed in article 2.5 of the said Protocol, and any amendment to such Protocol or such rules and obligations that may be issued from time to time”. ”

[11] On July 27, 2007, the Panel issued **Directions no 4** which stated:

“1 In point 4 of Directions no 1, SNG was invited to advise ACAP 33 as to which Challenger(s), in addition to the Challenger of Record, had declared that it (they) accept(s) the terms of the Protocol and was (were) accepted as Challenger(s) in respect of the XXXIII America's Cup.

2 Pursuant to an e-mail received by ACAP 33 from ACM on July 27, 2007 (copy enclosed), another Challenger has now accepted the terms of the Protocol and been accepted as Challenger, namely Royal New Zealand Yacht Squadron (RNZYS) of Auckland, New Zealand, acting through Team New Zealand, Auckland, New Zealand.

Directions and Timetable

- 3** *RNZYS is entitled to take part in the present proceedings and, in addition to the three ACAP 33 members and to the parties already mentioned under point 12 of Directions no 1 and under point 5 of Directions no 2, shall directly receive all and any submissions, responses or communications, by e-mail.*
- 4** *RNZYS as well as, for the avoidance of doubt, all parties hereto and GGYC receive herewith copy of Directions no 1 through no 3.*
- 5** *RNZYS may, by **Tuesday August 14, 2007 at 12.00 a.m.** (Swiss time), provide its submission in respect of the case.”*

[12] On July 27, 2007 at 15.50 CET, the Panel received an email (enclosing a submission) from SNG which read:

“Submissions

I attach submissions made on behalf of SNG. Due to the size of the attachments, I will send these by separate emails so that there is a good chance of them being received without problems.

I have sent a copy to the representative CNEV, and will await the Panel's directions as regards other parties.

Confidentiality

As regards any party who is not an entered competitor in the 33rd America's Cup, SNG strongly believes they should not be given access to submissions made to the Panel unless they have agreed to become a party to the arbitration. The reason for this that at least one party, GGYC, has filed an application in the Supreme Court of New York, it is believed access to SNG's application to the Panel and it will result in a considerable advantage to GGYC

in those proceedings if it does not commit to participate in the arbitration, but receives the submissions. As a consequence, SNG requests that all submissions to the Panel remain confidential to the Panel and to parties who have agreed entered the 33rd America's Cup, or have agreed to become parties to the arbitration. This should include periods after the Panel has delivered its decision.

Notwithstanding this, SNG fully supports and endorses GGYC being given every opportunity to become a party and to make submissions to the Panel. Any additional time given to SNG or another party should in fairness be extended to GGYC and other parties.

SNG also recommends if this has not already occurred that copies of the Panel's invitation to become a party to the proceedings be faxed and couriered to other interested parties, including GGYC.”

- [13] Pursuant to its submission attached to its aforesaid email dated July 27, 2007, SNG asked the Panel to confirm that:

“[...] 13.1 The challenge of Club Nautico Español de Vela is a valid challenge under the terms of the Deed of Gift. SNG is obliged to meet the challenge of Club Nautico Español de Vela.

13.2 Société Nautique de Genève is under a legal obligation as holder of the America's Cup and Trustee of the America's Cup to accept the challenge of Club Nautico Español de Vela both by virtue of the terms of the Deed of Gift, the past decisions of the New York State courts, and the history and tradition of the America's Cup. It is also under an express legal obligation not to consider another challenge until the challenge of Club Nautico Español de Vela has been decided.

13.3 Société Nautique de Genève as trustee of the America's Cup determined that the challenge of Club Nautico Español de Vela complied with the terms of the Deed of Gift in a manner consistent with similar decisions made by past

trustees, and with the decisions of the New York State courts. SNG was mindful that in addition to complying with the terms of the Deed of Gift, the club, albeit newly formed, was the Real Federacion Española de Vela, a challenger in the 32nd America's Cup and would be represented by Desafio Español a strong and credible competitor.

13.4 Société Nautique de Genève and Club Nautico Español de Vela reached terms satisfactory to them by mutual consent as to the conduct of the 33rd America's Cup. No other party is entitled to disturb those arrangements. It remains open for prospective challengers to review those terms and decide whether or not to apply to participate in the competition."

[14] On July 27, 2007 at 17.12 CET, the Panel received a letter from Golden Gate Yacht Club's ("**GGYC**") lawyers Latham & Watkins LLP, New York (James V. Kearney), challenging the Panel's jurisdiction and the validity of CNEV's challenge and some Articles of the Protocol, which read:

"The Golden Gate Yacht Club ("GGYC") has received notice that Societe Nautique de Geneve ("SNG") and Club Nautico Espanol de Vela ("CNEV") plan to submit to arbitration the validity of the challenge of CNEV.¹

The format and process set up for this arbitration in The Protocol Governing the Thirty Third America's Cup ("Protocol") violate the most basic principles of justice and independence common to illegitimate adjudicatory bodies and are an affront to the most basic sensibilities common to all law abiding people. A dispute resolution proceeding in which the parties to the proceeding are in agreement (in this case CNEV and SNG), and in which the judges may be removed, and the rules of procedure may be changed, at any time and for any reason by the parties to the arbitration, will be viewed by the public and the sailing community as nothing more than a kangaroo court.

¹ *Unsigned letter from Henry Peter, Chairman of the arbitration panel, captioned "ACAP 33 / 01: Application filed by SNG on July 20, 2007, in respect of the validity of the challenge of Club Nautico Espanol de Vela (CNEV) for the 33rd Americas Cup," dated July 23, 2007.*

The arbitration process will further damage the sport of yachting as it will be viewed with no more validity, and no less frivolity, than CNEV's attempt to meet the annual regatta requirement for the Challenger of Record by holding a sailing school.² Its continuation day to day will provide compelling on-going proof that SNG's Protocol for the 33rd America's Cup was designed by SNG to put the fox in charge of the henhouse.

The question presented to the arbitration panel by SNG is whether it violated the terms of the Deed of Gift and its legal duty to comply with and enforce those terms under New York law by accepting CNEV's challenge. In a transparent attempt to lend legitimacy to the arbitration panel, SNG in its letter to the arbitration panel dated July 23, 2007, ironically refers to a New York Court of Appeals decision captioned Mercury Bay Boating Club v. San Diego Yacht Club and argues that it "is appropriate that sporting issues are resolved by the dispute resolution bodies established by the sport rather than in the courts."

In fact, as the arbitration panel must be aware, the Mercury Bay opinion held that the New York courts have the authority to interpret the trust instrument, the Deed of Gift, and determine whether a successor trustee, in this case SNG, has complied with its terms. Indeed, the Mercury Bay opinion refers to amicus briefs submitted jointly on behalf of "renowned yachtsmen from the United States, Great Britain and Australia and yacht clubs of undisputed standing" for the proposition that the court has jurisdiction over the

² *The Deed of Gift requires that a bona fide yacht club challenge for the Cup. Pursuant to the Deed of Gift, "[a]ny organized Yacht Club of a foreign country, incorporated, patented, or licensed by the legislature, admiralty, or other executive department, having for its annual regatta an ocean water course on the sea, or on an arm of the sea, or one which combines both, shall always be entitled to the right of sailing a match of this Cup " Demonstrating its failure to comply with the terms of the Deed of Gift regarding an annual regatta, CNEV sought to hold a sham regatta after its purported challenge for the America's Cup which was announced by the Spanish Sailing Federation on July 13, 2007, the very same day that the regatta was supposed to take place. Reports have indicated that the sham regatta was actually a sailing training session.*

administration of the Deed of Gift. Mercury Bay Boating Club, Inc. v. San Diego Yacht Club, 76 N.Y.2d 256, 278 (N.Y. 1990).

GGYC is disappointed that Henry Peter, appointed chairman of the arbitration panel, would even consider SNG' s application to arbitrate knowing the panel lacks jurisdiction over this issue. Mr. Peter, in his book entitled, "Arbitration in The America's Cup," concedes that "the New York State Supreme Court . . . has jurisdiction over the Deed of Gift" to decide upon the "interpretation of the deed of gift" and whether a "challenge was valid." Henry Peter, Arbitration in the America 's Cup, (2003), p.4.

Indeed, the panel's willingness to engage in this arbitration in the face of this legal precedent suggests its members are beholden to the parties who appointed them in a secret document and who retain the power to remove them. The Protocol, published only two days after SNG won the 32nd America's Cup, states that SNG and CNEV "have agreed in a separate document on the names of the Arbitration Panel members." See Protocol ¶ 24.2. The letter has never been publicly disclosed, to our knowledge, nor has the identity of the arbitrators; and until we received notification from Mr. Peter, we did not even know he was the panel's chairman. Nor have we yet been advised of the names of the other members.

Not only does this arbitration panel lack jurisdiction, the clubs opposed to SNG and CNEV on the issue presented are frozen out from the adjudication since they will not and cannot have standing before the arbitration panel. Under the Protocol only a yacht club accepted as a Challenger has standing before the panel; but to become a Challenger, a yacht club must submit to the terms of the Protocol which includes granting SNG the power to disqualify any Challenger who disputes the binding effect of the Protocol. An adjudicatory proceeding over the validity of the Protocol in which a yacht club must accept the Protocol before they can challenge its validity, while SNG retains the right

to terminate their standing if they challenge any provision of the Protocol, is a fatally flawed proceeding.

It offends basic notions of justice that one side to a dispute, SNG and CNEV collectively, would retain hegemonic control over an adjudicatory panel and its proceedings while the other side remains powerless.³ Moreover, any real adversary can be disqualified from the competition just for disputing a provision of the Protocol. See Protocol ¶ 2.7(d).

Moreover, SNG and CNEV retain the sole power to modify anything they desire regarding the arbitration, including but not limited to the powers of the arbitration panel, the jurisdiction of the arbitration panel, procedures of the arbitration panel, and even the official language of the arbitration panel. See Protocol ¶ 36.1. The issue of whether CNEV is a legitimate challenger is not contested by CNEV or SNG and their masquerading as adversaries while the real adversaries are rendered impotent is not a legitimate legal proceeding but rather a mockery of justice. Civilized countries have long done away with such tribunals and no legitimate arbitration panel would agree to operate under these conditions. This may explain the striking omission from the 33rd Protocol of the requirement in the 32nd Protocol that arbitration panel members be "fair minded and possess good judgment."

It is subterfuge to have SNG and CNEV's hand picked arbitrators, replaceable at their whim, sitting in a forum and under rules wholly controlled by SNG and CNEV, and judging an issue that the parties to the arbitration do not dispute. The disgrace and shame brought upon the America's Cup by this charade threatens to inflict a crippling blow to the sport. This arbitration, if it chooses to proceed, will not and cannot have any involvement from GGYC, and will be viewed with the same disdain by the public and sailing community as CNEV's sham regatta."

³ SNG's letter to the Panel of July 20, 2007 expects that CNEV would make an application to the Panel on July 23, 2007 but did not disclose how SNG knew this information.

[15] On July 28, 2007, the Panel issued **Directions no 5** which stated:

“1 Within the deadline set in Directions no 1, i.e. Friday July 27, 2007 at 5.00 p.m., GGYC have submitted their reply and reasons thereof to ACAP 33 through a letter dated July 27, 2007 from their lawyers Latham & Watkins LLP, New York (James V. Kearney).

Directions and Timetable

2 GGYC submission is enclosed hereto for parties to this case's consideration.

3 For all parties' information, the members of ACAP 33 are:

- Chairman: Professor Henry Peter, Lugano, Switzerland. Henry Peter is a lawyer. He was member of the Arbitration Panel of the 31st America's Cup and member of the Jury of the 32nd America's Cup;

- Members:

.Graham McKenzie, Auckland, New Zealand. Graham McKenzie is a lawyer. He was member of the Jury of the 32nd America's Cup.

.Dr. Luis Cazorla Prieto, Madrid, Spain. Luis Cazorla Prieto is a lawyer.

ACM will issue full particulars of all three members of ACAP 33 by **August 2, 2007. A copy will be directly sent by ACM to all addressees hereof.**

*4 To the best of ACAP 33's understanding, GGYC's letter means that they have decided not to take part to the present proceedings any further. **GGYC** is however invited to confirm this expressly by **Tuesday August 7, 2007 at 6 p.m.**, Swiss time., or, alternatively, to take part to this case as provided in Directions no 1. GGYC's letter dated July 27, 2007 and the*

detailed reasons contained therein shall in any event remain part of the present proceedings and be duly considered by ACAP 33.

- 5 Alinghi, acting on behalf of SNG, in providing its submission on July 27, 2007 requested that it be kept confidential and confined only to the parties taking part in this case. ACAP 33 considers that it is important for its proceedings to be transparent as a matter of principle and that there must be a substantive reason for granting any confidentiality order. It does not appear to ACAP 33 that any such reason exists in this case, at least at this stage. ACAP 33 however recognises that where a prospective party to a case is not an accepted Challenger for the 33rd America's Cup and where they have expressly chosen not to participate in a given case there is no proper basis for them to receive from any party copies of any further submission, document or, generally, communication. In any event, when this case will have been decided, the full written decision will be made publicly available.*
- 6 Accordingly, unless GGYC advises that it wishes to take part in this case as aforesaid, no further communication or document regarding these proceedings will be sent to GGYC.*
- 7 Subject to the aforesaid, the timetable set in ACAP 33's previous Directions remains unchanged.*
- 8 Further directions will be issued in due course.”*

[16] On July 31, 2007, ACM published a press release on its website (www.americascup.com) publically announcing the nomination of the Panel members and providing Panel members profiles.

[17] On August 1, 2007 at 17.01 CET, the Panel received a submission from CNEV in support of the SNG Application and submission.

[18] On August 2, 2007 at 19.28 CET, the Panel received an email from ACM which read:

“ACM is hereby respectfully asking for some clarification as to whether it may provide a submission in respect of the case.

Indeed, point 5 of the Directions no 2 dated 25th July 2007 provides that "both RCYC and RTYCL, as well as ACM, are entitled to take part in the present proceedings and [...] shall directly receive all and any submissions, responses or communication, by e-mail" whereas point 6 thereof sets forth that "RCYC and RTYCL may by Tuesday August 14, 2007 at 12:00 a.m. (Swiss time), provide their respective submissions in respect of the case" without referring to ACM.

I would therefore be thankful if you could clarify the situation, it being specified that ACM would normally use the possibility of providing such a submission.”

[19] On August 6, 2007, the Panel issued **Directions no 6** which stated:

“1 With its submission filed on August 1, 2007 at 17.01 CNEV requested:

"6.2 We would also want to offer the testimony of relevant officers of the Royal Spanish Sailing Federation and Club Nautico Espagnol de Vela to support our statements in this submission. Either this testimony may take place in writing through affidavits or by means of oral in a testimony hearing, or both, as the Arbitration Panel deems more convenient."

2 On August 2, 2007, at 19.28, ACM pointed out that Directions no 2 dated 25th July 2007 provides that

"both RCYC and RTYCL, as well as ACM, are entitled to take part in the present proceedings and [...] shall directly receive all and any submissions, responses or communication, by e-mail"

whereas point 6 thereof sets forth that

"RCYC and RTYCL may by Tuesday August 14, 2007 at 12:00 a.m. (Swiss time), provide their respective submissions in respect of the case"

without referring to ACM.

Directions and Timetable

- 3** *CNEV is instructed to submit all testimonies in writing in the form of affidavits to be filed with ACAP 33 and sent to all parties hereto by **Thursday August 14, 2007 at 12.00 a.m.** (Swiss time).*
- 4** *ACAP 33 reserves the right to hear the witnesses and the parties on the occasion of a hearing, if any.*
- 5** *ACM is entitled to file a submission by **Thursday August 14, 2007 at 12.00 a.m.** Copy thereof shall simultaneously be sent to all three members of ACAP 33 as well as to all parties hereto within such deadline.*
- 6** *Further directions, if appropriate, will be issued in due course."*

[20] On August 8, 2007 at 12.54 CET, the Panel received a submission from ACM which read:

“1. REPRESENTATION

This submission in the frame of ACAP 33 / 01 is filed by AC Management SA (“ACM”) based on the Arbitration Panel’s Directions no 6 dated 6th August 2007 whereby the Arbitration Panel entitled ACM to file a submission by 14th August 2007.

2. SUBMISSION

The Protocol governing the 33rd America’s Cup (the “Protocol”) gives ACM the competence to accept or reject entries at its discretion (art. 4.4), except however for what concerns the acceptance of the Challenger of Record which remains within the competence of the America’s Cup Trustee, SNG (art 3.1).

The Protocol further gives ACM the competence to define the content of the Notice of Entry and the documents that will be presented with the Notice of Entry (art. 4.3). A copy of the Notice of Entry issued by ACM is attached hereto as Schedule 1. This Notice of Entry is also posted on AC33 entry section of ACM’s website (<http://www.americascup.com>).

This Notice of Entry sets forth the requirements to challenge, based on the Deed of Gift which terms are reminded under points 2.2 to 2.5 of said Notice. Basically, the requirements to qualify are that the yacht club:

- (i) is not domiciled in Switzerland;*
- (ii) is an organised yacht club;*
- (iii) is incorporated, patented or; licensed by the legislature, admiralty or other executive department of the state in which it is domiciled; and*

- (iv) *has or will have an annual regatta on the sea or an arm of the sea.*

ACM carefully reviewed the documents which were provided by CNEV, i.e. the Notice of Challenge of 29th June, SNG's acceptance and the relating Notarial Deed of 3^d July, as well as the Notarial Deed of CNEV's incorporation and initial statutes of 19th June 2007, CNEV's internal rules of 19th June 2007, the Notarial Deed relating to the revised statutes of 27th June 2007, as well as CNEV registration with the competent "Registro de Entidades Deportivas de la Comunitat Valenciana" (Registry of Sportive Entities of the Valencian Community) on 28 June 2007.

In addition, CNEV provided documents evidencing that it organizes several regattas on the sea, in particular the information relating to the Optimist Regatta which took place on 13th and 14th July 2007 as well as the Notice of Regatta for the "Vuelta España a Vela 2007" which are attached to CNEV's submission of 1st August.

In their respective Submissions of 27th July and 1st August, SNG and CNEV further explained and demonstrated that CNEV meets the qualifications to challenge required in the Deed of Gift.

As mentioned above, these qualifications are also applied to Challenging Competitors and compliance therewith is systematically examined by ACM when receiving an application to become a Challenging Competitor from a yacht club.

In this respect, should CNEV's challenge have been an application subject to ACM's assessment and approval, ACM would have accepted it without restriction.

Moreover, CNEV's application being the first challenge received by the trustee of the 33rd America's Cup, ACM believes that SNG had the obligation to accept it, as per the provisions of the Deed of Gift.

ACM is therefore fully supporting SNG's acceptance of CNEV as Challenger of Record and believes there is no doubt as to its validity.

One could even argue that the question raised by some prospective competitors with respect to the validity of CNEV's challenge is in reality nothing but an attempt to ultimately modify the arrangements made by the Defender and the Challenger of Record, as reflected in the Protocol they have mutually agreed in accordance with the terms of the Deed of Gift.

ACM respectfully underlines the gravity of any such attempt which could seriously affect the stakeholders, protagonists and all participants of the 33rd America's Cup and have severe consequences on the Event, including as concerns the commitments made by the hosts of the Event: Valencia, the Comunidad Valenciana and Spain.

3. SUBMISSION

In view of the above, ACM respectfully submits that CNEV's challenge as Challenger of Record is valid and that any attempt to question its validity should be disregarded."

[21] On August 13, 2007 at 16.06 CET, the Panel received a submission from RTYCL which included *inter alia*:

"[...]

5. Impact of uncertainty

5.1 Until the application before this Panel in this matter is decided and until the matters raised in the Complaint are resolved or settled, there is uncertainty as to the terms upon which RTYC may compete in the 33rd America's Cup and indeed uncertainty as to whether or not RTYC will be permitted to compete in the 33rd America's Cup.

5.2 This uncertainty damages RTYC's ability to raise funds from sponsors (which understandably wish to know whether the party they wish to sponsor will indeed take part in the event), to employ staff, to plan, to know whether and to what extent to expend further funds on all matters relevant to becoming an effective challenger and ultimately jeopardises RTYC's ability to become a viable competitor.

5.3 A quick decision from this Panel declaring CNEV's challenge and the Protocol valid will provide the certainty RTYC needs, will save RTYC and its representative TEAMORIGIN from potentially wasting substantial sums of money and will ultimately make for a more competitive event."

[22] On August 14, 2007 at 11.53 CET, the Panel received two affidavits from CNEV in support of its submission, one by Mr. Manuel Chirivella, Chairman of CNEV and Vice-Chairman of the Spanish Royal Sailing Federation ("**SRSF**") (dated August 13, 2007), and one by Mr. Gerardo Pombo García, Chairman of SRSF (dated August 10, 2007) (see below point [55] to [57]).

[23] On August 16, 2007, the Panel issued **Directions no 7** which stated:

"1 Following ACAP 33's Directions no 1 through 6, the following has been received:

- on July 27, 2007, a submission by SNG;*
- on July 27, 2007, a letter from GGYC;*
- on August 1, 2007, a submission by CNEV;*
- on August 8, 2007, a submission by ACM;*
- on August 13, 2007, a submission by RTYCL;*
- on August 14, 2007, from CNEV, affidavits by Mr. Manuel Chirivella (Chairman of CNEV and Vice-Chairman of the Spanish Royal Sailing Federation) and Mr. Gerardo Pombo Garcia (Chairman of the Spanish Royal Sailing Federation).*

2 In its previous Directions, ACAP 33 has reserved further directions with regard to additional submissions and/or to hearing witnesses and/or the parties.

3 No party has requested to file further submissions and/or documents and/or affidavits and/or to be heard and/or that witnesses or experts be heard.

4 In its submission, RTYCL, page 5, has insisted on the urgency of the matter since:

"5.1 Until the application before this Panel in this matter is decided and until the matters raised in the Complaint are resolved or settled, there is uncertainty as to the terms upon which RTYC may compete in the 33rd America's Cup and indeed uncertainty as to whether or not RTYC will be permitted to compete in the 33rd America's Cup.

5.2 This uncertainty damages RTYC's ability to raise funds from sponsors (which understandably wish to know whether the party they wish to sponsor will indeed take part in the event), to employ staff, to plan, to know whether and to what extent to expend further funds on all matters relevant to becoming an effective challenger and ultimately jeopardises RTYC's ability to become a viable competitor.

5.3 A quick decision from this Panel declaring CNEV's challenge and the Protocol valid will provide the certainty RTYC needs, will save RTYC and its representative TEAMORIGIN from potentially wasting substantial sums of money and will ultimately make for a more competitive event."

Directions and Timetable

- 5** *It is believed that each party has received all of the aforesaid submissions, letter and affidavits. Should this not be the case, such party is invited to inform ACAP 33's Chairman by **Monday August 20, 2007 at 5.00 p.m.** (Swiss time). The relevant document will be forwarded forthwith to such party.*
- 6** *Should any party, having or not filed a submission so far, desire to file a (further) submission in view of the aforesaid submissions, letter and affidavits, it is invited to do so by **Thursday August 23, 2007 at 5.00 p.m.** (Swiss time).*
- 7** *Should any party desire to express itself or submit the testimony of witnesses or experts on the occasion of a hearing, it is invited to state so by **Tuesday August 21, 2007 at 5.00 p.m.** (Swiss time).*
- 8** *Further directions will be issued in due course."*

[24] On August 17, 2007 at 04.15 CET, the Panel received an email from SNG which read:

“In response to the Jury’s Directions No. 7, SNG responds as follows:

- 1. It confirms receipt of the documents listed.*
- 2. It does not seek to make further submissions in response.*
- 3. It does not seek a hearing in the matter because it believes the relevant issues and evidence is sufficiently clear and are uncontested.*
- 4. SNG supports the statements made by RTYC regarding the desirability for an early determination.*

One matter in SNG’s submission which has been kindly brought to SNG’s attention by Counsel for CNEV. It concerns paragraph 11.4 and comments made about Don Gerardo Pombo Garcia. He was not a member of the America’s Cup Arbitration Panel during 2000 - 2003, his brother was hence the confusion. The words “He was a member of the America’s Cup Arbitration Panel during the 31st America’s Cup” should be deleted from Paragraph 11.4 of SNG’s submission.”

[25] On August 24, 2007, the Panel issued **Directions no 8** which stated:

“1 In points 5, 6 and 7 of its Directions no 7, ACAP 33 has stated:

“5 It is believed that each party has received all of the aforesaid submissions, letter and affidavits. Should this not be the case, such party is invited to inform ACAP 33’s Chairman by Monday August 20, 2007 at 5.00 p.m. (Swiss time). The relevant document will be forwarded forthwith to such party.

6 Should any party, having or not filed a submission so far, desire to file a (further) submission in view of the aforesaid submissions, letter and affidavits, it is invited to do so by Thursday August 23, 2007 at 5.00 p.m. (Swiss time).

7 Should any party desire to express itself or submit the testimony of witnesses or experts on the occasion of a hearing, it is invited to state so by Tuesday August 21, 2007 at 5.00 p.m. (Swiss time)."

2 *Within the deadlines set in Directions no 7, SNG has submitted a reply to ACAP 33 on August 17, 2007 at 04:15am as follows:*

"In response to the Jury's Directions No. 7, SNG responds as follows:

- 1. It confirms receipt of the documents listed.*
- 2. It does not seek to make further submissions in response.*
- 3. It does not seek a hearing in the matter because it believes the relevant issues and evidence is sufficiently clear and are uncontested.*
- 4. SNG supports the statements made by RTYC regarding the desirability for an early determination.*

One matter in SNG's submission which has been kindly brought to SNG's attention by Counsel for CNEV. It concerns paragraph 11.4 and comments made about Don Gerardo Pombo Garcia. He was not a member of the America's Cup Arbitration Panel during 2000 - 2003, his brother was hence the confusion. The words "He was a member of the America's Cup Arbitration Panel during the 31st America's Cup" should be deleted from Paragraph 11.4 of SNG's submission."

3 *Within the deadlines set in Directions no 7, no party has informed ACAP 33 that it had not received all of the submissions mentioned under point 1 of Directions no 7, no party other than SNG has filed or requested to file a further submission, letter or affidavit, and no party has expressed its desire to be heard or submit the testimony of witnesses or experts on the occasion of a hearing.*

Directions and Timetable

- 4 *Subject to yet unforeseen developments, ACAP 33 considers that it now disposes of all necessary elements in order to render its decision.*
- 5 *Should any other Challenger accept the terms of the Protocol and be accepted as Challenger of the XXXIII America's Cup before ACAP 33's decision is rendered, ACAP 33 reserves the right to grant said Challenger the opportunity to file a submission.*
- 6 *Further directions, if appropriate, will be issued in due course."*

[26] On August 30, 2007 at 13.45 CET, the Panel received a notice from ACM which read:

"1. REPRESENTATION

This notice is made by AC Management SA ("ACM") in the frame of the Arbitration Panel's Directions 23rd July and 24th August 2007 in which the Arbitration Panel invited SNG to inform ACAP 33 of new entries of Challengers having accepted the terms of the Protocol, whose challenge was accepted as Challenging Competitor.

Two notices were made by ACM on respectively 24th and 27th July 2007, informing the Arbitration Panel of the entry of ROYAL CAPE YACHT CLUB, ROYAL THAMES YACHT CLUB LIMITED and ROYAL NEW ZEALAND YACHT SQUADRON. The present notice is to inform the Arbitration Panel of an additional entry.

2. NOTICE

ACM hereby informs the Arbitration Panel that, in addition to CLUB NAUTICO ESPANOL DE VELA, ROYAL CAPE YACHT CLUB, ROYAL THAMES

YACHT CLUB LIMITED and ROYAL NEW ZEALAND YACHT SQUADRON, an additional Notice of Entry dated 10th August 2007 was accepted by ACM on 30th August 2007.

This new Challenging Competitor is namely:

Yacht Club:

DCYC – DEUTSCHER CHALLENGER YACHT CLUB e.V. [“DCYC”]

Nepomukweg 4-6

D- 82319 STARNBERG

Attn.: Mr Willy Kuhweide – Commodore

Tel.: +49 (0) 8151 3238

Fax.: +49 (0) 8151 28222

e-mail: info@dcyc.de

Representative:

UNITED INTERNET TEAM GERMANY

Deutsche Challenge S.L.U.

Muelle de Nazaret s/n

Port America’s Cup – Base 2

46024 VALENCIA

Spain

Attn.: Mr Michael Scheeren – Syndicate Chief

Tel.: +49 (0) 171 7875382

Fax.: +34 (0) 96 320 4471

e-mail: m.scheeren@ui-team-germany.de

ACM confirms that this additional Challenging Competitor formally declared that it “unconditionally agrees and accepts to be bound by the terms of the Deed of Gift, the Protocol and all applicable rules and obligations referred to in such Protocol, including but not limited to those which will be contained in the documents listed in article 2.5 of the said Protocol, and any amendment to

such Protocol or such rules and obligations that may be issued from time to time”.”

[27] On August 30, 2007, the Panel issued **Directions no 9** which stated:

“1 In point 5 of its Directions no 8, ACAP 33 has stated:

“Should any other Challenger accept the terms of the Protocol and be accepted as Challenger of the XXXIII America's Cup before ACAP 33's decision is rendered, ACAP 33 reserves the right to grant said Challenger the opportunity to file a submission.”

2 Pursuant to an e-mail received by ACAP 33 from ACM on Thursday, August 30, 2007 at 1.45 p.m. (CET) (copy enclosed), another Challenger has now accepted the terms of the Protocol and been accepted as Challenger, namely Deutscher Challenger Yacht Club (“DCYC”) of Starnberg, Germany, acting through United Internet Team Germany, Valencia, Spain.

Directions and Timetable

3 DCYC is entitled to take part in the present proceedings and, in addition to the three ACAP 33 members and to the parties already mentioned under point 12 of Directions no 1, under point 5 of Directions no 2 and under point 3 of Directions no 4, shall directly receive all and any submissions, responses or communications, by e-mail.

4 To that effect, DCYC receives herewith copy of the following documents:

- SNG's Application dated July 20, 2007;*
- The submissions received by ACAP 33 from SNG (on July 27, 2007), GGYC (through a letter received on July 27, 2007 from their counsel Latham & Watkins LLP (James V. Kearney)), CNEV (on*

August 1, 2007), ACM (on August 8, 2007) and RTYCL (on August 13);

- *Two affidavits received by ACAP 33 from CNEV on August 14, 2007, one by Mr. Manuel Chirivella, Chairman of CNEV and Vice-Chairman of the Spanish Royal Sailing Federation (dated August 13, 2007), and one by Mr. Gerardo Pombo García, Chairman of SRSF (dated August 10, 2007); and*
- *ACAP 33's Directions no 1 through no 8.*

5 *DCYC may, by **Tuesday, September 4, 2007 at 5 p.m. (CET)**, produce a submission in respect of the case.*

6 *Further directions will be issued as appropriate.”*

[28] On August 31, 2007 at 20.58 CET, the Panel received an email from SNG which read:

“The Members of the Jury are likely to be aware from media reports of additional ex-parte proceedings instituted by GGYC last week, which resulted in a procedural order of the Supreme Court. Copies of the order and the documents filed have now been posted by GGYC on its home page and can be accessed at <http://www.ggyc.com/>.

In short, the order accelerates by nine days the time by which SNG must file its first response GGYC's filings, but is restricted to the ex-parte application for an expedited trial, for SNG to provide the location of the match sought by GGYC, and provide the rules and regulations of such match. The date for filing the response is 1500hrs 5th September 2007 and a hearing has been setdown for 1400hrs 10th September 2007 (all NY time) to address these issues.

The order does not affect SNG's application to the Panel or the work of the Panel.

SNG is will make available to the Panel the documents it files with the Court in response.”

[29] On September 4, 2007 at 11.42 CET, the Panel’s Chairman received an email from DCYC which read:

“Please see the mail I sent to the Challenger and Michel.”

The email mentioned by DCYC was sent to all other Challengers and ACM on September 4, 2007 at 11.28 CET, and read:

“We have read the documents about the arbitration panel and we don’t wish to delay the process with details.

So we concur in and agree to the submission made by SNG and we respond to your invitation CNEV as being valid and binding.”

[30] On September 5, 2007 at 20.48 CET, the Panel received an email from CNEV which read:

“CNEV would like to update certain aspects of its submission:

a) ***Regatta organised by CNEV called Vuelta España a Vela.*** *As advanced in our submission dated August 1, this regatta has started on September 3 . It is organised by CNEV, RFEV and the company Deportevents. This competition is sailed in boats RO 340 of 34 feet and there are 10 boats competing. The regatta is divided in 7 races starting September 3 in Ceuta (Spanish territory in North Africa) and finalising September 22 in Badalona (near Barcelona). The first race, Ceuta-Cadiz, has been completed. Full information is available in Spanish on www.vueltavela.com.*

In the last paragraph of the first screen, it can be read "the Vuelta España a Vela is organised by the Real Federación Española de Vela, Deportevents and Club Nautico Español...". The fact that the CNEV is one of the organising bodies it can also be read in the notice of race attached to our first submission.

We attach herewith the translation of the news appearing on the RFEV webpage www.rfev.es in which they refer to this regatta. We also attach several news that are available on internet about this regatta, this last in Spanish.

- b) **Certifications from RFEV and Federacion de Vela de la Comunidad Valenciana.** in these certificates is certified that CNEV is a licenced club at both state and local autonomous community level. These certifications have been obtained due to GGYC suggestion that the CNEV was not properly licenced in the New York litigation case.*
- c) **Incorporation documents.** We also attach the Incorporation Public Deed and by-laws of CNEV and the translation of this first deed, the second in which there are certain amendments (not relevant to this case) is being translated and will be filed next week.*

We believe that these documents do not affect other parties' arguments or submissions and simply update the situation. Therefore in our opinion should be accepted by the ACAP without further requirements.

We are sending the documents mentioned above in subsequent e-mails."

- [31] On September 6, 2007 at 09.53 CET, the Panel received an email from CNEV enclosing CNEV's Incorporation Deed dated June 19, 2007 (and its translation in English), CNEV's Articles of Incorporation (and its translation in English), a report from the "Conselleria de Cultura, Educacio i Esport" dated June 20, 2007 requiring

some amendments to be made to the CNEV's Articles of Incorporation, and an official certificate dated June 28, 2007 issued by the "Conselleria de Cultura, Educacio i Esport" of the Community of Valencia confirming that CNEV had been registered in the Register of Sport Entities of the Community of Valencia.

[32] On September 6 and 7, 2007, all members of the Panel met in Lugano, Switzerland for its final deliberation.

THE PARTIES' POSITION

[33] Out of the five submissions received by the Panel, four (from CNEV, ACM, RTYCL and DCYC) support SNG's submission. GGYC, in the letter from its lawyers dated July 27, 2007, strongly opposed SNG's position.

1. IN FAVOR OF SNG'S SUBMISSION

[34] CNEV, ACM, RTYCL and DCYC submitted that they agree with SNG's position. They provided additional comments in their respective submissions.

[35] CNEV, in its submission dated August 1, 2007, quoted the decision of the New York Court of Appeals of April 25, 1990 (the Mercury Case):

"[...] Ultimately [...] it must be the contestants, not the courts, who define the traditions and ideals of the sport."

[36] ACM pointed out in its submission dated August 8, 2007 that:

"One could even argue that the question raised by some prospective competitors with respect to the validity of CNEV's challenge is in reality nothing but an attempt to ultimately modify the arrangements made by the

Defender and the Challenger of Record, as reflected in the Protocol they have mutually agreed in accordance with the terms of the Deed of Gift.

ACM respectfully underlines the gravity of any such attempt which could seriously affect the stakeholders, protagonists and all participants of the 33rd America's Cup and have severe consequences on the Event, including as concerns the commitments made by the hosts of the Event: Valencia, the Comunidad Valenciana and Spain."

[37] In its submission dated August 13, 2007, RTYCL stated:

"[...]

3.1 [...] in submitting its Challenge, it [RTYCL] accepted CNEV's challenge as a valid challenge under the terms of the Deed of Gift and has accepted CNEV as Challenger of Record.

3.2 Further, RTYC has, in submitting its Challenge, accepted the Protocol as an arrangement made by mutual consent between SNG and CNEV satisfactory to both, in accordance with the terms of the Deed of Gift.

3.3 By accepting the Protocol unequivocally on its terms, RTYC accepts (amongst other things) the procedures and authorities under which the Protocol may be amended and pursuant to which further America's Cup rules may be created, communicated and challenged. RTYC voluntarily submitted to take part in the 33rd America's Cup on these terms and is now bound contractually to continue to accept these terms."

[38] In this respect, ACM also underlined in its submission that it systematically examines these qualifications *"when receiving an application to become a Challenging Competitor from a yacht club."*

[39] RTYCL's submission also read:

"[...] 3.6 RTYC would be aggrieved if a third party, in this instance GGYC, which has not challenged as required under the Protocol and does not have the necessary locus to influence the amendment of the Protocol or the creation or amendment of the rules envisaged by the Protocol is able effectively, by submitting a complaint to the New York or any other court and/or succeeding in its claim, to subvert the contractual jurisdiction of this Panel and thereby circumvent the right of legitimate challengers under the Deed of Gift and the Protocol to have their case heard on all matters regarding the 33rd America's Cup by this Panel."

[40] Moreover, RTYCL claimed that:

"Until the application before this Panel in this matter is decided and until the matters raised in the Complaint are resolved or settled, there is uncertainty as to the terms upon which RTYC may compete in the 33rd America's Cup and indeed uncertainty as to whether or not RTYC will be permitted to compete in the 33rd America's Cup

This uncertainty damage RTYC's ability to raise funds from sponsors (which understandably wish to know whether the party they wish to sponsor will indeed take part in the event), to employ staff, to plan, to know whether and to what extent to expend further funds on all matters relevant to becoming an effective challenger and ultimately jeopardises RTYC's ability to become a viable competitor.

A quick decision from this Panel declaring CNEV's challenge and the Protocol valid will provide the certainty RTYC needs, will save RTYC and its representative TEAMORIGIN from potentially wasting substantial sums of money and will ultimately make for a more competitive event."

2. AGAINST SNG'S SUBMISSION

- [41] GGYC strongly opposed SNG's position in its letter sent to the Panel's Chairman on July 27, 2007.
- [42] On more than one occasion, namely on July 23, 2007 (Directions no 1) and on July 28, 2007 (Directions no 5), GGYC was formally invited to take part in the proceedings, including on a without prejudice basis. However, GGYC chose only to file their attorneys' letter dated July 27, 2007, which is part of the formal case record (see point [14]). Nevertheless, in reaching its decision, the Panel has considered GGYC attorneys' letter dated July 27, 2007 and also considered the contents of all of the material placed on GGYC's website up to the date of this Decision, including the documents filed with the Supreme Court for the State of New York.
- [43] In the said letter (see point [14]) and a press release of August 22, 2007 included on the GGYC website, GGYC claimed that "*the Protocol violates the most basic principles of justice and independence common to all legitimate adjudicatory bodies*" and that the Panel lacks jurisdiction over the Application.
- [44] Regarding the validity of CNEV and its challenge, GGYC's concerns were stated to include that:
- *"It is not a bona fide yacht club.*
 - *It was created and is controlled by Real Federación Española de Vela (RFEV), which is itself not a yacht club.*
 - *It was formed for the sole purpose of making a challenge only days before its challenge was made and accepted.*
 - *Contrary to the Deed it has never held an annual regatta anywhere, and*
 - *It appears to have accepted the loss of Challenger rights in the new Protocol in a way that no genuine Challenger who was seeking a fair contest would."*

[45] Moreover, GGYC also stated that:

“We believe that the protocol must be rejected in order to protect the status of the America’s Cup as a genuine sporting contest.

We do not believe this protocol is valid, fair, or in the spirit of racing that the Cup stands for. It is clearly not the result of the mutual consent process between a defender and a legitimate challenger that is prescribed in the Deed of Gift.

Our chief concerns about the Protocol are:

- *It is invalid because SNG entered into it with an invalid Challenger, CNEV.*
- *The defender, through the company it has formed to manage the event, America’s Cup Management (ACM) can reject any entry – even if it complies with all requirements. Once disqualified, there is no provision for the challenger to contest this ruling. See AC 33 Protocol clauses 2.7 (d), 4.4*
- *ACM have the power to appoint the event authority, and all officials. (The Challenger of Record (see below) can only object on grounds of neutrality of judgment. See Protocol clause 5.4*
- *ACM can impose any rule on any team. See Protocol clause 5.4 (b)(d)*
- *The new Protocol does away with the independent Challenger Commission which represented well all challengers in AC 32. See Protocol clause 10.1*
- *The defender will unilaterally create a new design rule governing the boats to be raced, with seemingly only very minor input from the COR; and can develop this rule well in advance of advising challengers so that they have a much shorter window to develop a rival boat. See Protocol clause 14.1*

- *The Defender gains the right to gain valuable information and advantage by participating in the Challenger selection series, but Challengers will not be permitted to participate in any Defender series. See Protocol clause 13.5”*

[46] In respect of the Panel as such and its Rules of Procedure, GGYC stated *inter alia* that:

[...]

The format and process set up for this arbitration in The Protocol Governing the Thirty Third America's Cup ("Protocol") violate the most basic principles of justice and independence common to illegitimate adjudicatory bodies and are an affront to the most basic sensibilities common to all law abiding people. A dispute resolution proceeding in which the parties to the proceeding are in agreement (in this case CNEV and SNG), and in which the judges may be removed, and the rules of procedure may be changed, at any time and for any reason by the parties to the arbitration, will be viewed by the public and the sailing community as nothing more than a kangaroo court.

[...]

[...] the panel's willingness to engage in this arbitration in the face of this legal precedent suggests its members are beholden to the parties who appointed them in a secret document and who retain the power to remove them.

[...]

Moreover, SNG and CNEV retain the sole power to modify anything they desire regarding the arbitration, including but not limited to the powers of the arbitration panel, the jurisdiction of the arbitration panel, procedures of the arbitration panel, and even the official language of the arbitration panel. See Protocol ¶ 36.1. The issue of whether CNEV is a legitimate challenger is not

contested by CNEV or SNG and their masquerading as adversaries while the real adversaries are rendered impotent is not a legitimate legal proceeding but rather a mockery of justice. Civilized countries have long done away with such tribunals and no legitimate arbitration panel would agree to operate under these conditions. This may explain the striking omission from the 33rd Protocol of the requirement in the 32nd Protocol that arbitration panel members be "fair minded and possess good judgment."

It is subterfuge to have SNG and CNEV's hand picked arbitrators, replaceable at the their whim, sitting in a forum and under rules wholly controlled by SNG and CNEV, and judging an issue that the parties to the arbitration do not dispute."

THE ISSUES AT STAKE

[47] The following three different issues arise in the present case:

1. Jurisdiction of the Panel
2. Eligibility to challenge
3. Compliance of the Protocol with the Deed of Gift

THE FACTS

1. SNG

[48] On July 3, 2007, SNG, a yacht club organized under the laws of Switzerland, defended its title in the 32nd America's Cup sailing match with RNZYS, and won the 32nd America's Cup match in Valencia. SNG is therefore currently the holder and

trustee of the America's Cup in accordance with the terms of the Deed of Gift dated 24 October 1887 (the "**Deed of Gift**").

2. CNEV

[49] CNEV has filed with the Panel documents which record the following:

1. On June 19, 2007, a Deed of Incorporation of CNEV was executed in front of a Public Notary in Madrid;
2. On June 20, 2007, the legal department of the local authority, namely the "*Conselleria de Cultura, Educacio i Esport*", required some amendments to be made to CNEV's Articles of Incorporation;
3. On June 27, 2007, CNEV's Articles of Incorporation were amended by Notarial Deed executed in Valencia in order to comply with the aforesaid June 20, 2007 requirements;
4. On June 28, 2007, an official certificate was issued by the "*Conselleria de Cultura, Educacio i Esport*" of the Community of Valencia confirming that CNEV had been registered in the Register of Sport Entities of the Community of Valencia as a corporation in compliance with the laws of Spain.

[50] In its email to the Panel dated September 5, 2007 and in the documents attached to the same, CNEV submitted certificates declaring that CNEV "*is a sport corporation legally constituted within the Government of the Comunidad Valenciana*" and that "*it holds the Club license from June 20, 2007*" (Certificates by D. Manuel Cabrera Aynat, Secretary of the Sailing Federation of the Valencian Community, and D. Gerardo Pombo Garcia).

[51] CNEV's Deed of Incorporation dated June 19, 2007, submitted by CNEV on September 6, 2007, provides that:

"[...]"

FIRST

[...] the following resolutions have been adopted by unanimous vote:

- 1) To incorporate a sports company denominated “[CNEV]” which corporate domicile for the purpose of the notices shall be [...], which will be subject to Law 4 of December 20th, 1993 concerning Sports Activities of the Generalitat of Valencia.*
- 2) The corporate purpose of the Club shall be that detailed under Article Number 1 of the Articles of Incorporation, this is to say, the promotion of water sports activities, and in particular, the promotion of sailing practices through the organization of national as well as international regattas with in the national territory.*
- 3) To approve the Articles of Incorporation that shall rule the sports company, which are attached [...].*
- 4) To designate the first Board of Directors that will be made up by the following persons*

Chairman: Mr. Manual José Chirivella Bonet

Vice-Chairman: Mr. José María Martín Puertas

Treasurer-Secretary: Mr. José Angel Rodríguez Santos

Board Member: Mr. Luis Francisco Merino Bayona

[...]

SECOND

This deed shall be registered with the Registry of Sports Companies of the Autonomous Community of Valencia.

[...]

In agreement with the provisions of Article 17 bis of Notary Publics, this document enjoys the condition of public instrument, and its contents are presumed complete and truthful.”

[52] On July 3, 2007, upon conclusion of the 32nd America’s Cup Match, SNG received a written challenge for the America’s Cup from CNEV. With the challenge, CNEV submitted documents regarding its incorporation and organization, as well as its

other qualifications to serve as Challenger of Record under the Deed of Gift. This challenge was accepted and signed by SNG on the same day.

[53] On July 14, 2007, CNEV organized a regatta of the Optimist Class in Santander⁴.

[54] CNEV also organized with RFEV and the company Deportevents the Regatta “*Vuelta a España a Vela*” that started on September 3, 2007 and is scheduled to finish on September 22, 2007. This regatta is sailed on boats RO 340 of 34 feet and is divided into seven races starting on September 3 in Ceuto (Spanish territory in North Africa) and finishing on September 22 in Badalona (near Barcelona). The regatta is 776 nautical miles long and stops in several cities on the south coast of Spain, namely Cadiz, Malaga, Cartagena, Alicante, Valencia and Castellon. Ten boats are competing in this regatta⁵.

[55] The two affidavits submitted by CNEV on August 14, 2007 support these facts.

[56] The affidavit by Mr. Manuel Chirivella dated August 13, 2007 reads:

- “1. *I am the Chairman of the Club Nàutico Español de Vela (CNEV) and the Vice-Chairman of the Spanish Royal Sailing Federation (RFEV), Challenger of the XXXII America's Cup.*

2. *The project headed by RFEV in the XXXII America's Cup was a success and the Sponsors assure their intention to maintain or increase their budgets for the XXXIII America's Cup before the termination of the XXXII. Given that we have for a new resources campaign it was decided by the RFEV to be a Challenger in the next Cup. It also considered the possibility of being Challenger of Record in order to help the next venue to be Valencia.*

⁴ See the affidavit by Mr. Manuel Chirivella, infra point [56] and CNEV's submission dated August 1, 2007.

⁵ See the documents attached to the email received by the Panel from CNEV on September 5, 2007, supra point [30].

3. *Our lawyers consider that the possibility of being a Royal Federation Challenger may be disputed, and advised the incorporation of a Club in order to formalize the Challenge. RFEV resolved, to incorporate a Club for this purpose, with certain conditions to be met*

(i)Continuity of the same philosophy as in the XXXII America's Cup.

(ii) The Club should represent the entire Spanish Sailing Community.

(iii)The Club should have real content.

(iv)The Club has to fulfill all the requirements of the Deed of Gift.

4. *On June 19, 2007 the Club was incorporated and included the following people:*

(a) Manuel Chirivella, Vice-Chairman of the Royal Spanish Sailing Federation. He won the "Copa del Rey" in 1999 in IMS. He has won also in IMS "Copa de la Reina" in 1993, 1995 and 1999.

(b) José Maria Martin, second Vice-Chairman of the Royal Spanish Sailing Federation and chairman of the Madrid Federation.

(c) José Angel Rodriguez, third Vice-Chairman of the Royal Spanish Sailing Federation. He is also Chairman of the Galician Federation. He is an International Umpire.

(d) Luis Merino, Vice-Chairman of the Royal Spanish Sailing Federation. He is Chairman of the Royal Yacht Club of Malaga

(e) Gerardo Pombo, the Chairman of the Royal Spanish Sailing Federation, and previously the technical secretary during 20 years. He was the captain on the Spanish Olympic sailing team of Barcelona 92. He is a member of the Spanish Olympic Committee.

All of them are members of the RFEV, so RFEV controls the decisions to be taken by the new incorporated Club.

5. *The main activities that the Club has been carrying out are:*

- (a) *Negotiating a collaboration agreement with the CAR (Center of Sailing Training in Santander where the Spanish Sailing Olympic Team is trained). As a first activity we organized a Regatta the 14th of July of the Optimist Class. The promotion of sailing among young people is a priority for the CNEV.*
 - (b) *Organizing Several Regattas. Due to the short time since the incorporation there is, in the short term, only one that will take place during the month of September: la "Vuelta España a Vela". There are other Regattas under consideration. The organization of Regattas is the main activity of the Club and all the members of the board have huge experience in this field, on top of that the RFEV will give full support to this end.*
 - (c) *We will organize the "Club Nautico Español de Vela Annual Regatta", "Trofeo Desafio Español". We want to do that in Valencia, open to several classes specially RN.*
 - (d) *I hereby formally undertake on behalf of CNEV to maintain the above referred Regatta Annually for all the time that the XXXIII America's Cup will last.*
6. *I have read the submission of SNG and I found it correct in relation to the facts related to CNEV with only a minor error where Getardo Pombo is confused with his brother Fernando who was for a short period of time Chairman of the Arbitration Panel in the XXXI America's Cup."*

[57] The affidavit by Mr. Gerardo Pombo García dated August 10, 2007 reads:

"1. I am the Chairman of the Spanish Royal Sailing Federation (Real Federacion Espanola de Vela). This Federation is incorporated under the law 10/1990 of 15th of October and is at body who has as purpose the supervision, control, organization, etc of all activities related with Sailing in all the territory of Spain. Is the only Federation of Sailing that exists in

Spain and represent Spain in front of the International Federation and any other Sportive Organism. The Federation is affiliated to the International Sailing Federation (ISAF), the European Sailing Federation (EUROSAF) and Off Shore Racing Congress (ORC). Is also member of the Olympic Spanish Committee. In the XXXII America's Cup the Royal Spanish Federation was a Challenger. The reason why we acted as Challenger was in order to try to solve the problem that existed because of the dispute among different Yacht Clubs which were difficulting to obtain the necessary recourses for having an Spanish Team in the XXXII America's Cup.

- 2. I have read the Affidavit signed by Manuel Chirivella and I agree with the content of the same.*
- 3. It is one of the activities of the Royal Spanish Federation the organization and promotion of national and international Regattas inside the Spanish territory and the Federation count with enough recourses far organizing Regattas in Spain.*
- 4. The RFEV fully support CNEV and announce that it will give enough support for organizing Regattas in a regular basis.*
- 5. RFEV is the responsible of CAR (Center of High Rendiment of Santander), and we are currently negotiating with the CNEV a close relationship in order to promote the America's Cup in the young Spanish Sailors we plan to establish regular Regattas which would be promoted and organized by CNEV the winners of such Regattas will be invited by CNEV to the headquarters of the Team Desafio Espanol.*
- 6. The 14th of July it took place a regatta of Optimist Class organized in Santander by CNEV.*

7. *CNEV together with RFEV organized la "Vuelta a Espana a Vela" that will take place between the 1st and 24th of September in Class RO 34."*

3. THE PROTOCOL

[58] On July 3, 2007, CNEV and SNG signed the Protocol. The Protocol states in its "Background" section, that "*B. Société Nautique de Genève has received and accepted a notice of challenge from the Challenger of Record in accordance with the Deed of Gift.*"

[59] On July 5, 2007, the signed Protocol was publicly released.

4. OTHER CHALLENGERS

[60] The following other Challengers have been accepted by the Defender, through ACM: RCYC, RTYCL, RNZYS and DCYC⁶.

[61] Upon applying to take part to the 33rd America's Cup, all Challengers have formally declared in their respective Notice of Entry (paragraph 3. "Bound by the Protocol") that they "*unconditionally agree and accept to be bound by the terms of the said Deed of Gift, the Protocol, and all applicable rules and obligations referred to in such Protocol including but not limited to those which will be contained the documents listed in Article 2.5 of the said Protocol, and any amendment to such Protocol or such rules and obligations that may be issued from time to time.*"

[62] In the same Notice of Entry (paragraph 4. "Arbitration and Dispute Resolution"), all Challengers have stated that they "*unconditionally agree and accept to be bound by the dispute resolution provisions of the Protocol and by the decisions rendered by the Measurement Committee, Sailing Jury and the Arbitration Panel in accordance with such provisions of the Protocol.* [The relevant Challenger] *further unconditionally submit to the exclusive jurisdictions of the Measurement Committee,*

⁶ As seen in the description of the Proceedings (see supra [1] to [32]).

Sailing Jury and the Arbitration Panel as provided in the said Protocol and agree and undertake not to resort to any other court, or tribunal in respect of any matter regarding the 33rd America's Cup."

5. GGYC'S CHALLENGE

[63] On July 11, 2007, GGYC's representatives delivered a letter to the President of SNG which disputed the validity of CNEV's challenge, claiming that CNEV "*was not a bona fide yacht club*" and that it had "*not performed any of the duties of the Challenger as contemplated by the Deed of Gift*". GGYC "*demand[ed] recognition as the legitimate Challenger of Record of the 33rd America's Cup*", as its challenge was "*a bona fide challenge*" and as it is "*fully prepared to meet all of the obligations of the Challenger*". Accordingly, on July 11, 2007, GGYC's representatives hand-delivered to SNG's Secretary-General at the SNG clubhouse in Geneva a challenge to sail the 33rd America's Cup.

6. THE NEW YORK LAWSUIT

[64] On July 20, 2007, GGYC filed a suit against SNG in the Supreme Court for the State of New York⁷ (which was served on SNG on August 17, 2007⁸) seeking a Court ruling on the legitimacy of the Protocol, and in particular seeking "*(i) a declaration that CNEV's challenge and the Protocol are void; (ii) a declaration that GGYC's challenge is valid; (iii) that judgment be entered in favor of GGYC and against SNG enjoining SNG from promulgating rules and regulations pursuant to the Protocol and directing SNG to reject CNEV's challenge; (iv) that judgment be entered in favor of GGYC and against SNG enjoining SNG to accept GGYC's notice and implement the terms of the Deed of Gift by participating with GGYC in the establishment of a protocol through a consensual process and failing that to proceed with the match under the rules expressly set forth in the Deed of Gift; and*

⁷ Copies of the such Supreme Court proceedings were obtained from GGYC's website (www.ggyc.com).

⁸ See the press release published on August 28, 2007 on the 33rd America's Cup website "Golden Gate Yacht Club v. Société Nautique de Genève: Arbitration/Litigation status (as of 24 August 2007)".

(v) that GGYC shall have all such further and other relief as is just and proper in this case”.

- [65] On August 22, 2007, GGYC applied to the same Court to seek an expedited schedule for the case commenced by GGYC’s complaint under which discovery (the exchange of information between the parties) would be completed in September and trial would be held in October, and a preliminary injunction requiring that SNG (i) provide GGYC with SNG’s club sailing rules and (ii) identify where a two-team match between SNG and GGYC in July 2008 would be held⁹.
- [66] On August 22, 2007, the Court granted an order sought by GGYC requiring SNG to promptly answer a request to speed up the legal process for resolving its proposed new rules for defending the next America’s Cup¹⁰. The order only set a schedule for the parties’ submissions on GGYC’s application and did not address the substance or the merits of the Application¹¹. SNG’s written response to the motion was due to be filed 5 September and a hearing on the motion before the New York Court is scheduled for 10 September¹².

⁹ Ibid.

¹⁰ See the press release published on August 22, 2007 on GGYC’s website “Golden Gate granted court order to advance America’s Cup resolution”.

¹¹ See the press release published on August 28, 2007 on the 33rd America’s Cup website “Golden Gate Yacht Club v. Société Nautique de Genève: Arbitration/Litigation status (as of 24 August 2007)”.

¹² Ibid.

[67] In its email to the Panel dated August 31, 2007, SNG stated:

“In short, the order accelerates by nine days the time by which SNG must file its first response GGYC's filings, but is restricted to the ex-parte application for an expedited trial, for SNG to provide the location of the match sought by GGYC, and provide the rules and regulations of such match. The date for filing the response is 1500hrs 5th September 2007 and a hearing has been setdown for 1400hrs 10th September 2007 (all NY time) to address these issues.

The order does not affect SNG's application to the Panel or the work of the Panel.”

DISCUSSION OF THE ISSUES

1. JURISDICTION OF THE PANEL

[68] In its letter dated July 27, 2007, GGYC has questioned the validity of the Protocol. GGYC has not, however, alleged that, as such, the arbitration clause contained in the Protocol is invalid.

[69] It is a well known principle of international arbitration that the validity of an agreement, on the one hand, and the validity of the arbitration clause contained therein, on the other, are two separate and autonomous issues. This is sometimes referred to as the principle of “autonomy of the arbitration clause” or as the doctrine of “separability”.

[70] This has been explained by leading authors as follows:

“Most arbitration agreements are, however, contained in an arbitration clause inserted in the main contract. It is primarily in these cases where the autonomy of the arbitration clause is an issue, i.e. the interaction between

the status of the main contract and the jurisdiction of the arbitrator, What happens if the main contract is deemed to be void or illegal ?, What is the effect of the arbitration clause after the termination of the main contract ? This is the realm of the “doctrine of separability”, Further, the autonomy of the arbitration agreement has a bearing on the question of whether the law governing the rest of the contract also extends to the arbitration agreement.

The doctrine of separability recognises the arbitration clause in a main contract as a separate contract independent and distinct from the main contract. The essence of the doctrine is that the validity of an arbitration clause is not bound to that of the main contract and vice versa.. Therefore the illegality or termination of the main contract does not affect the jurisdiction of an arbitration tribunal based on an arbitration clause contained in that contract. The obligation to resolve all disputes by arbitration continues even if the main obligation or indeed the contract expires or is vitiated.

Separability protects the integrity of the agreement to arbitrate and plays an important role in ensuring that the parties intention to submit disputes is not easily defeated, In this way it also protects the jurisdiction of the arbitration tribunal. While the doctrine of competence-competence empowers the tribunal to decide on its own jurisdiction, the doctrine of separability ensures that it can decide on the merits.”¹³

[71] No party to this case nor GGYC have challenged the validity of the arbitration clause as such. It therefore does not appear necessary to address the issue. Because, however, third parties may be affected by the present decision and/or by decisions which this Panel could be taking in the future, it has nonetheless appeared appropriate for this Panel to also discuss whether it has jurisdiction to rule on its own jurisdiction, before reviewing whether it has jurisdiction in this particular case.

1.1. Issues

[72] Accordingly, two different issues are to be decided:

- First, the competence of the Panel to rule on its own jurisdiction;
- Second, if so, the Panel's jurisdiction to rule on the present matter.

1.2. Applicable rules and discussion

1.2.1. The competence of the Panel to rule on its own jurisdiction

1.2.1.1. The Protocol

1.2.1.1.1. The provision of the Protocol

[73] The Panel acquires competence to rule on its own jurisdiction from the Protocol itself. Indeed, Article 23 of the Protocol provides that *“The Sailing Jury and the Arbitration Panel shall have the power to determine their respective jurisdiction upon receiving an application. In case of doubt on whose jurisdiction shall prevail, the Arbitration Panel shall determine jurisdiction. Its decision shall be final and binding”*.

1.2.1.1.2. New York arbitration law

[74] The Protocol provides in Article 26(a) (Rules of Procedure) that:

“Both the Arbitration Panel and the Sailing Jury shall act in accordance with New York arbitration law.”

¹³ See J. Lew, L. Mistelis and S. Kröll, *Comparative International Commercial Arbitration*, The Hague / London / New York (Kluwer Law International) 2003, Chapter 6, 6-8 to 6-10, pg. 102.

The Panel therefore considers it appropriate to assess whether “*New York arbitration law*” contains any provision which could prevail on the aforesaid Article 23 of the Protocol.

[75] “*New York arbitration law*” is codified in article 75 of the New York Civil Practice Law and Rules (“**CPLR**”).¹⁴

[76] It does not appear to this Panel that article 75 of CPLR contains any provision regarding the issue at stake.

1.2.1.1.3. U.S. arbitration law in general

[77] In respect of the issue in the United States in general, Gary Born has said: “*In the absence of a detailed guidance from the FAA [Federal Arbitration Act], U.S. Courts were historically divided over the extent to which an arbitrator had the authority to rule on his own jurisdiction under the FAA. [...] this uncertainty was largely resolved in the United States by the Supreme Court’s decision in First Options of Chicago, Inc. v. Kaplan*”¹⁵.

[78] In *First Options of Chicago, Inc. v. Kaplan*¹⁶, a decision delivered in 1995, the US Supreme Court addressed, *inter alia*, what it defined as the “*who*” question. The issue in that respect is whether the primary power to decide on the arbitrability of the dispute lies with the arbitrators or with a Court of law. The US Supreme Court ruled that the answer to the “*who*” question (i.e. what the US Supreme Court also refers to “*the standard of review question*”) depends on whether the parties agreed to arbitrate that particular issue, in other words did the parties agree to submit the arbitrability question itself to arbitration.

¹⁴ See A. Sim, *To waive or not to waive : New York and federal law on waiver of the right to compel arbitration*, 43 N.Y.L Sch. L. Review 609.

¹⁵ G. Born, *International Commercial Arbitration: Commentary and Materials*, page 84 (2000).

¹⁶ *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995). See also W. Park, *The Arbitrability Dicta in First Options v. Kaplan: What Sort of Kompetenz-Kompetenz Has Crossed the Atlantic?*, 12 Arb. Int’l 137 (1996).

[79] The US Supreme Court then went on to address the question as to the criteria that should be applied by a Court when deciding whether the parties had agreed to submit the arbitrability question to arbitration (i.e. what the US Supreme Court refers to as “*how*” a Court should decide). Although the US Supreme Court stated that, generally, the Courts should apply ordinary state law principles that govern the formation of contracts, it added an important qualification with respect to the context where a court is called upon to decide whether a party had agreed that arbitrators should decide arbitrability. In that respect, the US Supreme Court stated that courts should not assume that the parties agreed to arbitrate unless there is clear and unmistakable evidence that they did so.

[80] As already mentioned in point [73] of this decision, Article 23 of the Protocol provides that “*The Sailing Jury and the Arbitration Panel shall have the power to determine their respective jurisdiction ...*”. Accordingly, the parties to the Protocol have clearly, expressly and unmistakably agreed that the arbitrators, i.e. the Panel, would have the power to decide on the question of arbitrability. Consequently, applying the First Option v. Kaplan test, the Panel considers that it has the power to rule on its own jurisdiction.

1.2.1.2. The principle of competence-competence

[81] Third parties, which are not a Party to the Protocol, might be affected by the present decision. It therefore appears appropriate to note that, since the Panel is technically an arbitral tribunal, the general principle known as “*competence-competence*” applies.

[82] Pursuant to the competence-competence principle, the Panel has competence to rule on its own jurisdiction.

1.2.1.2.1. Meaning of the principle of competence-competence

[83] The principle of competence-competence “recognises the competence of the arbitral tribunal to rule on its own jurisdiction [...]”¹⁷. Craig, Park and Paulsson have stated that “In its simplest formulation, competence-competence means no more than that arbitrators can look into their own jurisdiction without waiting for a court to do so. In other words, when one side says the arbitration clause is invalid, there is no need to halt the proceedings and refer the question to a judge”¹⁸. This rule is seen by Fouchard Gaillard and Goldman as “among the most important [...] rules of international arbitration”¹⁹.

1.2.1.2.2. Justification of the principle

[84] Poudret and Besson have written that the principle of competence-competence is “essentially based on a practical rationale, namely to avoid that a party which disputes the jurisdiction of the arbitral tribunal prematurely seizes the courts, or obstructs the arbitral process”²⁰. The rule is thus “intended to ensure that a party does not succeed in delaying the arbitral proceedings by alleging that the arbitration agreement is invalid or non-existent”²¹ and that, above all, “[...] the most solid justification for the principle [...] lies in the presumed will of the parties to confer on the arbitrators the power to decide all aspects of their dispute, including jurisdiction, while the courts retain the power to control their decision but not to take their place”²².

¹⁷ J.-F. Poudret, S. Besson, *Comparative Law of International Arbitration*, para. 457 et seq (2007).

¹⁸ L. Craig, W. Park, J. Paulsson, *International Chamber of Commerce Arbitration*, para. 28.07 (1998).

¹⁹ P. Fouchard, E. Gaillard, B. Goldman on *International Commercial Arbitration*, para. 650 (1999).

²⁰ J.-F. Poudret, S. Besson, *Comparative Law of International Arbitration*, para. 457 (2007).

²¹ P. Fouchard, E. Gaillard, B. Goldman on *International Commercial Arbitration*, para. 660 (1999). See also E. Gaillard, *Les Manoeuvres Dilatoires des Parties et des Arbitres dans l'Arbitrage Commercial International*, 1990 Rev. Arb. 759.

²² J.-F. Poudret, S. Besson, *Comparative Law of International Arbitration*, para. 457 (2007).

1.2.1.2.3. A widely recognized principle

[85] Fouchard, Gaillard and Goldman have underlined that “*The competence-competence principle is now recognized by the main international conventions on arbitration, by most modern arbitration statutes and by the majority of institutional arbitration rules*”²³. As a consequence, the basic position that an international arbitral tribunal has jurisdiction to consider and decide on its own jurisdiction must be regarded as a generally accepted principle of international arbitration law, which is, absent contrary indication by the parties, incorporated into international commercial arbitration agreements²⁴.

[86] The principle is recognized by leading international arbitration conventions. As an example, Article 41(1) of the ICSID Convention provides that “*The Tribunal shall be the judge of its own competence*” (see also Article V para. 3 of the 1961 European Convention).

[87] The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the New York Convention, deals with the conditions for recognition and enforcement of foreign arbitral awards. According to van den Berg, although the Convention is silent on the issue of competence-competence (for the reason that it “*only deals with the conditions for recognition and enforcement of awards*”²⁵), pursuant to such Convention “*it would make sense that an arbitrator be permitted to rule provisionally on issues pertaining to his competence, subject to subsequent judicial control*”²⁶.

²³ P. Fouchard, E. Gaillard, B. Goldman on *International Commercial Arbitration*, para. 653 (1999).

²⁴ See International Law Commission, *Model Rules on Arbitral Procedure With a General Commentary*, Arts. 1(3), 9 (1958), II Y.B. I.L.C. 83 (1958) (Art. 1(3): “If the arbitral tribunal has already been constituted, any dispute concerning arbitrability shall be referred to it.”; Art. 9: “The arbitral tribunal, which is the judge of its own competence, has the power to interpret the compromis and the other instruments on which that competence is based.”); ILC, *Memorandum on Arbitral Procedure, Prepared by the Secretariat*, Doc. A/CN.4/35, II Y.B. I.L.C. 157, 165 (1950) (“it seems well-established that the tribunal has the right to judge as to its own powers (competence de la competence)”; *Award in Case of the Betsey (Lord Chancellor Loughborough)*, in J. Moore, *International Arbitrations* 326-27 (“the doubt respecting the authority of the commissioners to settle their own jurisdiction was absurd; and that they must necessarily decide upon cases being within or without, their competency”).

²⁵ P. Fouchard, E. Gaillard, B. Goldman on *International Commercial Arbitration*, para. 654 (1999).

²⁶ A. J. van den Berg, *Court Decision on the New York Convention*, in *The New York Convention of 1958*, ASA Special Series No. 9, para. 222 (August 1996).

- [88] Competence-competence is also recognized in most of the main international arbitration rules (see Article 6.2 of the ICC Rules, Article 23.1 of the LCIA Rules, Article 21 of the ICSID Rules, Article 21.1 of the Swiss Rules).
- [89] The doctrine of competence-competence has been affirmed by international arbitral tribunals regardless of the applicable law of the seat. The vast majority of arbitration tribunals' conclusions lends support to the doctrine's status as a general principle of international law. This is confirmed by the virtually complete absence of any contemporary arbitral award, under any legal system, denying the existence of the competence-competence principle. In that respect, the *TOPCO v. Libya* preliminary award on jurisdiction, is very widely and frequently mentioned and can thus be considered a leading precedent. In such case, the arbitration tribunal declared that "*International case law has continuously confirmed that arbitrators are necessarily the judges of their own jurisdiction...*" and based its decision primarily on "... a customary rule, which has the character of necessity, derived from the jurisdictional nature of the arbitration, confirmed by case law more than 100 years old and recognized unanimously by the writings of legal scholars"²⁷. In another frequently mentioned award rendered pursuant to the ICC Rules, the arbitral tribunal explained that "[t]he principle of 'competence-competence' is widely recognized by doctrine and jurisprudence"²⁸.
- [90] There is broad acceptance of the competence-competence doctrine by the UNCITRAL Model Law (art. 16(1)), and by "*most recent laws on arbitration*"²⁹, notably in Europe (for example, English³⁰, German³¹, French³², Belgian³³, Dutch³⁴,

²⁷ *Texas Overseas Petroleum Co v. Government of the Libyan Arab Republic*, Nov. 27, 1975 Preliminary Ad-hoc Award, 17 I.L.M. 1 (1978), IV Y.B. Comm. Arb. 177 (1980).

²⁸ *Final Award in ICC Case No. 8938*, XXIVa Y.B. Comm. Arb. 174, 176 (1999).

²⁹ P. Fouchard, E. Gaillard, B. Goldman on *International Commercial Arbitration*, para. 655 (1999).

³⁰ See Arbitration Act 1996, s. 30.

³¹ See ZPO, Art. 1040(1).

³² See NCPC, Art. 1466. See also, as an example, the *Zanzi* decision (the French *Cour de cassation* ruled in a very general manner that it "is for the arbitrator to determine his own jurisdiction"), 1999 Rev. Arb. 260.

³³ See Belgian Judicial Code, Art. 1697(1).

³⁴ See Code of Civil Procedure, Art. 1052(1).

Italian³⁵ and Swiss³⁶ law have adopted it). Also, “Recent decisions have confirmed the principle, giving it a very broad scope”³⁷.

[91] In England, the arbitrability of a dispute as to whether an agreement to arbitrate exists (and therefore the recognition of the competence-competence principle) is now beyond doubt: Pursuant to Section 7 of the English Arbitration Act 1996 (“separability”) *“Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffective, and it shall for that purpose be treated as a distinct agreement”*³⁸. Competence-competence is enshrined in the English Arbitration Act 1996 at Section 30: *“Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to - (a) whether there is a valid arbitration agreement; (b) whether the tribunal is properly constituted; and (c) what matters have been submitted to arbitration in accordance with the arbitration agreement”*.

1.2.1.2.4. Effects of the Competence-competence Doctrine

[92] It is generally considered that the principle has “both positive and negative effects”³⁹. Fouchard, Gaillard and Goldman assert that *“The positive effect of the competence-competence principle is to enable the arbitrators to rule on their own jurisdiction, [...]. However, the negative effect is equally important. It is to allow the arbitrators to be [...] the first judges of their jurisdiction. In other words, it is to allow them to come to a decision on their jurisdiction prior to any court or other judicial authority, and thereby to limit the role of the courts to the review of the award. The principle of competence-competence thus obliges any court hearing a claim*

³⁵ See ICCP 2006, Art. 817(1).

³⁶ See PILS, Art. 186(1).

³⁷ P. Fouchard, E. Gaillard, B. Goldman on *International Commercial Arbitration*, para. 655 (1999).

³⁸ See also *Harbour v. Kansa* [1992] 1 Lloyd's Rep 81; 1993 1 Lloyd's Rep 455.

³⁹ P. Fouchard, E. Gaillard, B. Goldman on *International Commercial Arbitration*, para. 660 (1999).

*concerning the jurisdiction of an arbitral tribunal [...] to refrain from hearing substantive argument as to the arbitrators' jurisdiction until such time as the arbitrators themselves have had the opportunity to do so*⁴⁰.

[93] The Panel therefore determines it has jurisdiction to rule on its own jurisdiction.

1.2.2. The Panel's jurisdiction to rule on the present matter

[94] Article 21 of the Protocol provides that *"Any dispute, protest or claim arising out of or in relation to this Protocol and/or the Applicable Documents, the interpretation or breach thereof, shall be resolved by arbitration in accordance with the provisions of this Protocol, except if and where otherwise expressly set forth in this Protocol. Such arbitration shall be final and binding"*.

[95] Pursuant to Article 1.1(d) of the Protocol, an *"Applicable Document means any document made under authority of this Protocol and includes the documents referred to in Article 2.5"*. The documents referred in Article 2.5 include *"(a) the Deed of Gift"* and *"(b) this Protocol"*.

[96] Consequently, such as in the present case, the disputes, protests or claims in relation to the Protocol and/or the Deed of Gift shall be resolved by arbitration.

[97] Moreover, Article 22 of the Protocol provides that *"There shall be two dispute resolution bodies: a Sailing Jury, which shall interpret provisions or resolve disputes of a sporting or technical nature arising under the Competition Regulations, the Notices of Race, the Sailing Instructions and the Racing Rules, and an Arbitration Panel, which shall interpret all other provisions of this Protocol or resolve other disputes. The Sailing Jury and the Arbitration Panel shall in making any determination give effect to all provisions of this Protocol"*.

⁴⁰ Ibid.

[98] SNG's Application regards the compliance of the Protocol with the Deed of Gift. It therefore is a "other disputes" as referred to in Article 22 of the Protocol. As a consequence, the Panel has jurisdiction to rule on the present case.

1.3. Conclusion

[99] The Panel determines that (i) it has the competence to rule on its own jurisdiction and that (ii) it has jurisdiction to rule on the present matter. The other issues are therefore properly able to be considered by the Panel.

2. ELIGIBILITY TO CHALLENGE

2.1. Issue

[100] The Panel has been asked whether the challenge for the 33rd America's Cup made by CNEV on June 29, 2007 is a valid challenge pursuant to the Deed of Gift.

2.2. Applicable rules

[101] The Deed of Gift dated 24 October 1887 contains the following provision relating to eligibility to challenge for the 33rd America's Cup:

"Any organized Yacht Club of a foreign country, incorporated, patented, or licensed by the legislature, admiralty, or other executive department, having for its annual regatta an ocean water course on the sea, or on an arm of the sea, or one which combines both, shall always be entitled to the right of sailing a match of this Cup, with a yacht or vessel propelled by sails only and constructed in the country to which the Challenging Club belongs, against any one yacht or vessel constructed in the country of the Club holding the Cup".

[102] The qualifications that a challenging yacht club has to meet are in summary:

- (a) The yacht club must be “an organized yacht club”;
- (b) It must be “foreign”;
- (c) It must be “incorporated, patented or licensed”; and
- (d) Have an “annual regatta” on an “ocean course on the sea, or on an arm of the sea, or one that combines both”.

[103] The Deed of Gift provides that a yacht club meeting these criteria “*shall always be entitled to the right to sailing a match for this Cup*”. This means that a club holding the Cup cannot, if the criteria set forth in the Deed of Gift are met, deny a yacht club a match for the Cup.

[104] It is not challenged that CNEV is a Spanish yacht club. Accordingly, it is of a foreign country in respect of SNG.

[105] The issues in the present Application are therefore the following:

- (a) Is CNEV an organized yacht club?
- (b) Is CNEV incorporated, patented or licensed?
- (c) Does CNEV have an annual regatta on an ocean course on the sea, or on an arm of the sea, or one that combines both?
- (d) Did therefore SNG as trustee have an obligation to accept CNEV’s challenge?

2.3. Discussion of the submissions

2.3.1. Preliminary comment

[106] The Panel accepts SNG’s submission that historically one of the traditions of the America’s Cup is a broad and liberal interpretation of the requirements of the Deed of Gift as regards the qualifications of challenging yacht clubs and receiving of challenges. The concept has been to permit rather than deny entry to Challengers.

It would appear that this liberal approach is consistent with the terms of the Deed of Gift and with New York law as applied by New York courts with regard to the America's Cup.

- [107] The Panel notes that SNG stated that in 1984 the then Trustee of the America's Cup, the Royal Perth Yacht Club of Western Australia Inc, petitioned the Supreme Court of the State of New York as to whether the Chicago Yacht Club was entitled to challenge. The issue was whether the Chicago Yacht Club, which held regattas on Lake Michigan, met the obligation in the Deed of Gift to have an annual regatta on "ocean water course on a sea, or an arm of the sea, or one that combines both". Despite Lake Michigan being more than 1500 kilometers from the sea, the Court declared that "...the Deed of Gift entitles the Chicago Yacht Club, a club of a foreign (i.e. competing) country as contemplated on the Deed of Gift, to enroll and compete as a contestant for the "America's Cup" "⁴¹.
- [108] RNZYS challenged for the America's Cup for the 26th Match held in 1987, the 28th Match held in 1992, and the 29th Match in 1995. Its challenges were accepted by the then Trustee, Royal Perth Yacht Club of Western Australia Inc. and for 1992 and 1995 by the San Diego Yacht Club. Following RNZYS victory in the 29th Match, it became the Trustee of the America's Cup from 13th May 1995 until its defeat in the 31st Match on March 2, 2003. SNG's submission that throughout such periods RNZYS was neither incorporated, patented nor licensed by any authority has not been disputed, including by RNZYS.
- [109] A letter dated November 30, 2000 from the New York Yacht Club⁴² (the first trustee of the America's Cup from 1857 until 1983) to RNZYS, in which it expressed its views on challenger entries, after recommending that a challenger should be capable of becoming a trustee should it win, states "*The New York Yacht Club also believes that it is in the best interests of the America's Cup and within the spirit and*

⁴¹ The Royal Perth Yacht Club of Western Australia (N.Y. Sup. Ct.) Order dated 20th September 1984, Index no. 18436/84.

⁴² Attached as Annexure 7 to SNG's submission.

the intent of the Deed of Gift, that as many eligible yacht clubs as possible should be permitted to compete”.

2.3.2. What constitutes “an organized yacht club”?

[110] There is no specific guidance in the Deed of Gift as to what constitutes an “organized yacht club”.

[111] CNEV provided SNG with evidence that it is organized under the laws of Spain pursuant to the requirements of Spanish law for a club of its nature, and that it has board of directors, rules, and a head office and other facilities. It was incorporated, adopted Articles of Incorporation, made arrangements for sailing events including its annual regatta and appointed officers. The Articles of Incorporation of CNEV include provisions on respect of:

1. *“CNEV is a private sports club endowed with its own legal personality and with the capacity to act in order to achieve its goals and purposes [...] and in particular the promotion of sailing practices through the organization of national as well as international regattas within the national territory [of Spain]”* (Article 1 of CNEV’s Articles of Incorporation);
2. *“The duration of [CNEV] shall be unlimited”* (Article 5 of CNEV’s Articles of Incorporation);
3. Chapter II provides for *“Types of Members, Admission, Rights and Obligations”*;
4. Chapter III concerns *“About loosing the condition of Member”*;
5. Chapter IV provides for *“Temporary leave of Members and their return”*;
6. Chapter V provides for *“Responsibilities of the Club”*;
7. Chapter VI provides for *“Correspondence with other water sports clubs”*;
8. Chapter VII provides for *“Representation and Management”*;

9. Chapter VIII provides for “*Documents*”;
10. Chapter IX concerns “*About the Company’s economy*”;
11. Chapter X concerns “*Modification of the Articles of Incorporation and dissolution of the Club*”.

[112] Also, in its submission in the present case and in the two affidavits which it filed (see supra point [55] to [57]), CNEV added information as to the composition of its Board of Directors, which is formed by a Chairman and four Vice Chairmen.

Decision

[113] The Panel considers that the CNEV submissions and evidence establish that CNEV is an organized yacht club under the laws of Spain and meets the terms of the Deed of Gift.

2.3.3. What constitutes “incorporated, patented or licensed”?

[114] A yacht club must be incorporated, or have some other official governmental registration or recognition. There is no requirement in the Deed of Gift as to when or for how long the yacht club must be incorporated. In the Panel’s view, under New York law there is no basis for inserting terms or requirements into the Deed of Gift that do not otherwise appear in the text.

[115] Pursuant to the applicable Spanish law (“Ley del Deporte de la Comunidad Valenciana” nb 4 of December 20, 1993, Clause 42 paragraph 3), a sporting club must file for registration in the Register of Sport Entities of the Community of Valencia. CNEV’s Articles of Incorporation were executed by Notarial Deed on, respectively June 19 and 27, 2007 (see above point [49]). CNEV was entered in the Public Register of Sport Entities of the Community of Valencia on June 28, 2007. Accordingly, CNEV has been properly incorporated and this occurred before July 3, 2007.

[116] In its submission, SNG identified the officers of CNEV (see supra point [56]) being persons well-known in the international sailing community, who have been associated with prior America's Cups and who are fully familiar with what is needed in order to be a Challenger for the America's Cup.

[117] SNG also submitted by way of further background:

- (a) On 17 December 2004, SNG accepted a challenge for the 32nd America's Cup from the Real Federacion Española de Vela because SNG considered that it complied with the requirements of the Deed of Gift.
- (b) During 2005 SNG received correspondence from the New York Yacht Club and the RNZYS expressing concern at the acceptance of a challenge from Real Federacion Española de Vela, the Royal Spanish Sailing Federation, claiming that the challenge should have been through a yacht club, not a federation of yacht clubs.
- (c) The letters received were a result of intensive lobbying by BMW Oracle's Mr. Tom Ehman who was at the time Chairman of the Challengers Commission. The members of the Challengers Commission at their subsequent meeting on 4th February 2005 refused to become involved in the issue, and the issue was not raised or protested during the 32nd America's Cup by any competitor, including GGYC.
- (d) Partly in response to the concerns raised, and to endeavour to avoid doubts for the 33rd America's Cup, the Spanish Sailing Federation challenged through a yacht club representing all of Spain, rather than itself or through a local yacht club that may not attract support from all of Spain.
- (e) CNEV will be represented by Desafio Español. This is an established and credible competitor in the America's Cup.

[118] The Panel accepts SNG's submission that there are several historical examples of recently formed yacht clubs to challenge for the America's Cup whose challenge has been accepted by past trustees including the New York Yacht Club, the San Diego Yacht Club and the RNZYS. The examples submitted by SNG are:

- (a) Secret Cove Yacht Club was incorporated on 29th December 1980, three months after the conclusion of the 1980 Cup. It had only been in existence for three months when it made its challenge on 30th March 1981, which was eventually accepted by the New York Yacht Club. Secret Cove had been formed for the sole purpose of challenging for the America's Cup. A recently published authoritative and comprehensive history of the America's Cup noted: *"The challenge came from the Secret Cove Yacht Club of Calgary, an organisation that, for a considerable time, had difficulty in gaining acceptance for its challenge by the New York Yacht Club. Initially, the Canadians were refused entry, but, after six months, the NYYC agreed it was a genuine organisation and not a commercial venture. It had, however, been formed solely for the purpose of challenging, as Marvin McDill, the syndicate head, wished to avoid provincialism within this frequently divided country. He wanted to challenge through a club that had no ties, as he wanted to be able to work with all Canadian sailing clubs without being attached to one of the elitist organisations of the Canadian yachting establishments"*⁴³.

The purpose and intent in forming the Secret Cove Yacht Club was similar to the purpose and intent of the Royal Spanish Sailing Federation in forming CNEV.

- (b) The Mercury Bay Yacht Club which challenged on 15th July 1987 was incorporated on 30th September 1986, less than 9 months before, and operated out of a derelict car on a beach, which was well publicized and photographed at the time.
- (c) An Australian challenger for 1995, Southern Cross Yacht Club, was incorporated on 19th April 1993, immediately prior to challenging, and was accepted by San Diego Yacht Club. The aforesaid author wrote *"oneAustralia's challenge was through the Southern Cross Yacht Club. This Club was created especially for the challenge, whose spiritual headquarters*

⁴³ Page 70, Volume 2, "An Absorbing Interest: The America's Cup 1851-2003 – A History", by Bob Fisher, John Wiley & Sons Ltd, Chicester, England 2007.

were at Red Rocks Point, a headland in Victoria, south east of Melbourne”⁴⁴.

- (d) A second Australian challenge for 1995, the Australian Yacht Club, was similarly formed and incorporated for the purpose of challenge and whose challenge was accepted by the San Diego Yacht Club. The author of the above history wrote of this challenge “...Syd Fisher’s Australian challenge which was lodged by the Australian Yacht Club, another organisation created especially for an America’s Cup Challenge”⁴⁵.
- (e) In 2000, Dennis Connor challenged through the Cortez Sailing Association. The challenge was accepted by RNZYS. Searches of public records in California show that it does not appear to have been incorporated until 12th August 2002, more than 2 years after it competed in the 2000 America’s Cup.

[119] In the Panel’s view, the Deed of Gift does not require a yacht club to have been incorporated or otherwise in existence for any particular period prior to acceptance of its challenge. The Deed of Gift also does not require that a challenging club be incorporated for any purpose other than challenging for the America’s Cup. Accordingly, there would be no basis under the Deed of Gift for the Trustee to reject a challenge from a yacht club just because that club is new.

[120] CNEV was incorporated for the purpose to challenge in the 33rd America’s Cup in order to avoid further controversies about the capacity of the Royal Sailing Federation to become Challenger under the Deed of Gift and, which is more relevant, the availability of such federation to become trustee under the Deed of Gift. As CNEV claims in its submission, it is “*not a ‘ghost’ club but is simply a new Club with the firm intention of being a normal Club and eager to organize Regattas at the Sea*”.

⁴⁴ Ibid Page 180, Volume 2.

⁴⁵ Ibid Page 180, Volume 2.

[121] The Panel deems it appropriate to comment in that respect about the statements made by GGYC⁴⁶ that SNG only has “*masquerading as adversaries*”⁴⁷ and that clubs opposed to SNG and CNEV “*are frozen out from the adjudication*”⁴⁸. GGYC chose not to fully participate in this arbitration which it was invited to do, including on a without prejudice basis. Four other clubs, all of which are of substance, namely RCYC, RTYC, RNZYS and DCYC, have had their challenges accepted and have been a formal part throughout this case. None of such challenging clubs have submitted that they support the GGYC views.

Decision

[122] The Panel considers that the submissions and evidence from CNEV and SNG establish that CNEV meets the requirements of being “*incorporated, patented or licensed*” in terms of the Deed of Gift.

2.3.4. What constitutes an “annual regatta”?

SNG’s submission

[123] SNG submitted that there is no requirement in the Deed of Gift that an annual regatta be held before a challenge is made by a yacht club.

⁴⁶ See GGYC’s letter to the Panel’s Chairman dated July 27, 2007 (point [14]).

⁴⁷ *Ibid.*, page 3, paragraph 2.

⁴⁸ *Ibid.*, page 2, last paragraph.

[124] SNG further submitted that, as a matter of practice among America's Cup participants, it is recognized that a regatta need not be held before a challenge is made. This concept was affirmed by the then America's Cup Arbitration Panel appointed under the Protocol Governing the 31st America's Cup in a decision delivered on 17 December 2000 in respect of SNG's then challenge for the America's Cup. The Panel ruled at paragraph 16:

"[16] Neither the Deed of Gift nor the Protocol have any provision requiring the annual regatta to have been held prior to the lodging of a challenge, nor that the annual regatta must have been held more than once. The only requirement is that the challenging club must be a yacht club "having for its annual regatta an ocean water course on the sea [...]" If it has such a regatta, it is eligible".

[125] Such 31st America's Cup Arbitration Panel decision and the lack of SNG holding an annual regatta prior to challenging was never contested by GGYC whilst a competitor in the 31st America's Cup. SNG submitted that under the provisions of the then applicable Protocol, if SNG would have been ineligible to proceed to the Match for the America's Cup against the then defender, GGYC's representative would have proceeded to that Match to compete for the America's Cup.

[126] As another example, Secret Cove Yacht Club of Canada, which challenged for the 1983 Cup, was a newly formed club when it challenged and had never held an annual regatta at the time of its challenge. Its first annual regatta was at the time of acceptance scheduled for many months later, on 10th October 1981. Notwithstanding that Secret Cove had never before held a regatta, the New York Yacht Club ultimately accepted its challenge.

Decision

[127] The Panel determines that CNEV was not required to hold an annual regatta prior to acceptance of its challenge.

[128] The Panel further determines that CNEV fulfills the “annual regatta” requirement of the Deed of Gift⁴⁹. On July 13 and 14, 2007, CNEV held an Optimist Regatta in Santander⁵⁰. It confirmed, before acceptance of its challenge, that it will hold annual regattas on the sea throughout the duration of the 33rd America’s Cup. It has now organized the “Vuelta a España” Regatta, that is currently taking place from September 2 to September 24, 2007⁵¹.

2.3.5. Trustee duties

[129] Under the terms of the Deed of Gift, SNG submitted that it is obliged to accept the first valid challenge it receives.

[130] The Deed of Gift provides in the last sentence of its 11th paragraph “*And when a challenge from a club fulfilling all the conditions required by this instrument has been received, no other challenge can be considered until the pending event has been decided*”.

[131] The Deed uses the word “event” in this passage rather than the word “match” or “races” which are frequently used elsewhere. This indicates an intention to cover a wider potential time period than just the match itself.

[132] The New York Supreme Court described the limited options available to the trustee when it receives a valid challenge in its ruling regarding the Mercury Bay case when it considered the validity of the Mercury Bay Boating Club’s challenge:

“Therefore, in the face of a properly tended challenge, San Diego Yacht Club, having accepted the cup pursuant to the terms of the Deed may either accept the challenge, forfeit the cup, or negotiate agreeable terms with the

⁴⁹ See CNEV’s submission and the affidavit by Mr. Manuel Chirivella.

⁵⁰ See affidavits by Mr. Manuel Chirivella and Mr Gerardo Pombo García, and Annex A to the submission of CNEV.

⁵¹ See affidavit of Mr. Gerardo Pombo García, Annex B to the submission of CNEV and documents filed by CNEV on September 5, 2007.

challenger....Accordingly, the relief requested by the parties is granted solely to the extent of declaring that Mercury Bay Boating Club has tended a valid challenge and that San Diego yacht club must treat it as such in accordance with the terms of the Deed".⁵²

This particular decision in the Mercury Bay case was not appealed, and remains good law on how SNG should act when presented with a challenge which on its face is valid.

[133] SNG as trustee of the America's Cup submitted that it determined that the challenge of CNEV complied with the terms of the Deed of Gift in a manner consistent with similar decisions made by past trustees, and with the decisions of the New York State Courts.

Decision

[134] As soon as a challenge "*has been received from a club*", the Deed of Gift, by stating that "*no other challenge can be considered*", does not permit any consideration to another challenger. The Deed thus does not permit to negotiate with several potential challengers of record.

[135] Nothing in the Deed of Gift leaves it open to a third party to question those terms agreed as acceptable by the trustee and the Challenger of Record. If invited to participate, a challenger has the freedom to enter the competition or not at the agreed terms.

[136] No one is obligated to compete. If it wants to compete, this has to be under the rules agreed by SNG and CNEV. This has been the position of America's Cup Challengers for a long period of time.

⁵² Mercury Bay Boating Club Inc. v. San Diego Yacht Club and Royal Perth Yacht Club of Western Australia Inc (N.Y. Sup. Ct.) (Judgment dated 25th November 1987, Index No. 21299/87 and 21809/87).

[137] The first challenge received by SNG, as trustee, was from CNEV and, as such, SNG was obliged to accept CNEV's challenge.

2.4. Conclusion

[138] The Panel determines that CNEV's challenge meets the requirements of the Deed of Gift.

[139] The challenge for the 33rd America's Cup made by CNEV on July 3, 2007 entitles CNEV to challenge for the America's Cup as Challenger of Record, and SNG is obligated to accept (as it was the first valid challenge it received).

3. COMPLIANCE OF THE PROTOCOL WITH THE DEED OF GIFT

3.1. Issue

[140] The Panel now turns to the issue whether the Protocol signed by SNG and CNEV meets the requirements of the Deed of Gift.

[141] The Panel considers that this issue can be usefully subdivided in 2 sub-issues, namely:

- (i) Does the Protocol comply with the Deed of Gift?
- (ii) Should some specific clauses be reconsidered by the Defender and the Challenger of Record?

3.2. Applicable rule

[142] Pursuant to the Deed of Gift, "*the Club challenging for the Cup and the Club holding the same may, by mutual consent, make any arrangement satisfactory to both as to the dates, courses, number of trials, rules and sailing regulations, and any and all*

other conditions of the match, in which case also the ten months' notice may be waived."

3.3. Discussion

3.3.1. Does the Protocol comply with the Deed of Gift?

- [143] SNG submitted that the Deed of Gift contemplates that the club challenging for the Cup and the Club holding the Cup should make reasonable efforts to make satisfactory arrangements regarding the Match to be held. They submitted it is recognized by the New York State Court of Appeals in the Mercury Bay opinion that there is no duty on either party when arriving at mutual consent.
- [144] Pursuant to the Deed of Gift, "*any arrangement*" can be made "*by mutual consent*" provided these requirements are "*...satisfactory to both [the Defender and the Challenger of Record]*". Here, SNG and CNEV have so agreed in the Protocol, and that agreement should be recognized under the Deed of Gift.
- [145] If they fail to agree, the Deed of Gift specifies in detail how the match is to take place. If there is no mutual consent, one of those default terms is that the match is to be "*sailed subject to its [the Defender's] rules and regulations so far as the same do not conflict with the provisions of this Deed of Gift*". Subject only to a few provisions which are expressly stated in the Deed of Gift, the donor thus intended for the Defender to establish the rules where there is no agreement.
- [146] There is, in particular, no obligation on the Defender and the Challenger of Record to hold a challenger selection series. This is confirmed by the judgment of the Supreme Court of the State of New York⁵³ delivered in the *Mercury Bay* case:

⁵³ Mercury Bay Boating Club Inc. v. San Diego Yacht Club and Royal Perth Yacht Club of Western Australia Inc (N.Y. S. Ct) (Judgment dated 6th April 1988, Index No. 01569/88).

“Under the terms of the deed, unless the parties can agree to another format, the parties must sail a 1-on-1 match race for the cup. Significantly, nowhere in the deed is the possibility of a challenger elimination series mentioned and in fact, throughout much of its history, the America’s Cup has been held as a match race. The multinational format was introduced relatively late in the events history, in the 1950s [sic – the first multinational series was held in 1970]”.

“Examination of the deed and the America’s Cup traditions make it clear that the multi-nation elimination format is permissible under the mutual consent clause, but absent mutual agreement a multi-nation series may not be forced upon the competitors”.

This judgment was not appealed and remains good law.

- [147] Under the Deed of Gift, the right of competing is for the first club to challenge. The competition among challengers, the so-called Challenger Selection Series, may – but does not have to – be created by mutual agreement of Defender and Challenger of Record, who are free to do it or not. Therefore, if potential challengers have no right to compete, they have no right to object the Protocol.
- [148] If there is no obligation to hold a Challenger Selection Series, there can be no duties owed to other actual or potential challengers regarding how that series is structured. In any event, there can be no duty owed to potential challengers who may or may not enter the next competition.
- [149] SNG and CNEV reached terms satisfactory to them by mutual consent as to the conduct of the 33rd America’s Cup. No other party is entitled to disturb those arrangements, although it remains open for prospective challengers to review those terms and decide whether or not to apply to participate in the competition. As CNEV stated in its submission, *“No one is obligated to compete but if it wants to compete it has to be under the rules agreed by [SNG] and [CNEV].”*

3.3.2. Should some specific clauses be reconsidered by the Defender and the Challenger of Record?

[150] The Panel does not have the power to amend the Protocol. It however has the power to state that one or more provisions of the Protocol do not comply with the Deed of Gift. Without stating absolutely that specific clauses of the Protocol are not complying with the Deed of Gift, the Panel deems that it is accordingly also entitled to state that it would be preferable to reconsider some clauses of the Protocol and to invite the parties thereto to do so. This was for instance suggested by the 32nd America's Cup Jury in its decision April 6, 2007 (Case ACJ025, point [59] (iii) "*... the Jury recommends that a Protocol change is made which could be limited to this particular case.*").

[151] GGYC, in its letter to the Chairman of this Panel dated July 27, 2007 (see supra point [14]), has raised doubts about a number of matters including the following:

- Right of the Defender and Challenger of Record to dismiss and replace the Panel members;
- Right of the Defender and Challenger of Record to change the language of the proceedings;
- Right of the Defender and Challenger of Record to change the Panel Rules of Procedure;
- Right of the Defender and Challenger of Record to modify the powers of the Panel;
- Right of the Defender and Challenger of Record to modify the jurisdiction of the Panel;
- Right of the Defender and Challenger of Record to cancel a team which has been accepted as Challenger by the Defender.

[152] A general principle governing international arbitration is that the parties are free to agree on the modalities of appointment or substitution of the members of the

arbitration tribunal, about its seat and about all other issues which shall govern the procedure of the arbitral process.

- [153] Since the clauses which are criticized by GGYC are the result of an agreement reached by the parties to the Protocol (both the initial parties as well as the four yacht clubs which adhered thereto at a later stage without any reservation), this Panel considers that the aforesaid clauses of the Protocol are valid.
- [154] The Panel however recognizes that some of the concerns raised by GGYC should be considered. It is in fact quite seldom for a party to appoint an arbitration panel the members of which can be revoked at any time. This might not be disturbing in an isolated matter considering that, in such case, it is a generally accepted principle in international arbitration that the parties to the litigation fully control the arbitration process⁵⁴. As a consequence, if all parties to such specific case jointly agree, they have the right to modify the procedure or even to terminate the case, which includes the right to revoke the arbitrators' assignment.
- [155] The question at stake here is however different. It is in fact not about two specific parties which are litigating about a specific case in front of a specific arbitration tribunal. It is about the rules governing the functioning of an arbitration panel which is set up with an almost institutional function, for an unknown but in any event a plurality of forthcoming cases, involving a plurality and not yet known number of parties. Also, only two of these parties (the Defender and the Challenger of Record) do, under the current wording of the Protocol, enjoy the rights which are criticized by GGYC. This creates or might create an inequality of treatment amongst all parties which accept to submit to the jurisdiction of the Panel.

⁵⁴ P. Fouchard, E. Gaillard and B. Goldman on *International Commercial Arbitration*, para. 752 et seq (1999) ("The primacy of the parties' agreement").

[156] For these reasons, the Panel is of the opinion that it would be appropriate for the Protocol to be reconsidered by SNG and CNEV in respect of the following points:

- Right to dismiss and replace the Panel members (Article 24.3 of the Protocol);
- Right to change the arbitration seat (Article 25 of the Protocol);
- Right to change the language of the proceedings (Article 27 of the Protocol);
- Right to change the law applicable to the proceedings (Article 26(a) of the Protocol);
- Right to modify the jurisdiction of the Panel (Articles 21 and 23 of the Protocol);
- Right to modify the powers of the Panel (in general).

[157] In addition, it would be appropriate for consideration to be given to amending the Protocol whereby once the Rules of Procedure have been agreed and enacted pursuant to clause 26(c) of the Protocol, the Rules of Procedure might only be revoked or amended following consultation with this Panel and approval by the same.

[158] GGYC has also stated in its letter to the Panel dated July 27, 2007 that “*An adjudicatory proceeding over the validity of the Protocol in which a yacht club must accept the Protocol before they can challenge its validity, while SNG retains the right to terminate their standing if they challenge any provision of the Protocol, is a fatally flawed proceeding*”. The Panel considers that this issue can be properly solved by interpreting the Protocol as it stands. In fact, as a matter of principle, an accepted Challenger is entitled to submit to the Panel any issue regarding the Protocol, including its provisions. By doing so, it is thus not in breach of the Protocol and its standing as Challenger cannot, for this simple reason, be terminated. Pursuant to Article 35 of the Protocol (“*Resort to Courts Prohibited*”) – but this is a different issue – , there would be a breach of this Protocol if a “*person or entity, including its officers, members and employees, having the right to make an*

application to the Sailing Jury or the Arbitration Panel hereunder [...] resort to any other court or tribunal than the Sailing Jury or the Arbitration Panel.”

[159] The Panel’s suggestion that the above matters be reconsidered does not mean that, as a consequence, the Protocol as it stands does not comply with the Deed of Gift.

3.4. Conclusion

[160] The Panel determines that the Protocol signed by SNG and CNEV on July 3, 2007 complies with the Deed of Gift.

[161] The Panel however believes that it would be appropriate for the Defender and the Challenger of Record to reconsider the Protocol in respect of certain specific points referred above at points [155] and [156].

SUMMARY OF THE DECISION

[162] The decision of the Panel is the following:

- The Panel (i) has the competence to rule on its own jurisdiction and (ii) also has jurisdiction to rule on the present matter;
- The challenge for the 33rd America’s Cup made by CNEV on July 3, 2007 (i) is a valid challenge entitling CNEV to challenge for the America’s Cup as Challenger of Record and (ii) SNG is obligated to accept (as it was the first valid challenge it received);
- The Protocol signed by SNG and CNEV on July 3, 2007 complies with the Deed of Gift; and
- Although this does not affect the compliance of the existing Protocol with the Deed of Gift, the Panel believes that SNG and CNEV should consider

amending the Protocol in respect of some of its provisions as stated in point points [155] and [156].

PUBLICATION OF THE DECISION

[163] This decision shall be immediately published by ACM by placing it on the 33rd America's Cup website (www.americascup.com).

COSTS

[164] Article 34(b) of the Protocol provides that:

“The Arbitration Panel shall award all costs it has or will incur to resolve the arbitration to one or more parties to an application as it considers equitable provided that the starting basis shall be that the losing party or a party seeking an interpretation will be liable for all costs to resolve the arbitration.”

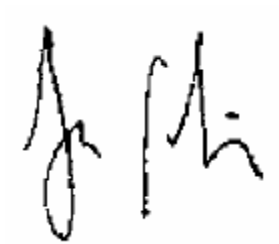
[165] The Panel was required in the circumstances of the case to carry out substantive activity and give consideration to significant issues raised by GGYC. The case is important and complex. Although no party required a hearing, recognizing the significance of the case the Panel members met in person prior to delivering the decision. The time spent by Panel members was accordingly substantial. Pursuant to Article 34(b) of the Protocol, the Panel costs on the Application are fixed at EURO 86,900 (Eighty Six Thousand Nine Hundred).

[166] This Application has been made by SNG in order to obtain clarification about fundamental issues. The only opponent is GGYC, which has however chosen to limit its direct involvement in these proceedings to the filing of a letter, and which has not challenged and/or been accepted as Challenger.

[167] Accordingly, all costs shall be payable by SNG. Taking into account their advance on costs of EURO 25.000. SNG shall pay to the Panel the balance amounting to EURO 61,900.

[168] This is a unanimous decision.

The America's Cup Arbitration Panel

A handwritten signature in black ink, appearing to be 'H. Peter', written in a cursive style.

Professor Henry Peter, Chairman

Graham A. McKenzie and Professor Luis María Cazorla Prieto, Members