



9th January 2012

JURY CASE AC09

JURY NOTICE JN025

DECISION IN RESPECT OF AN APPLICATION FOR INTERPRETATION regarding voting procedures for amendments to the Protocol

APPLICATION

1. On 20th December 2011, the Jury received an Application from Emirates Team New Zealand ('ETNZ') as the representative team of the Royal New Zealand Yacht Squadron requesting an interpretation of the voting procedures to be applied under Article 5.2 of the Protocol at Competitor Forum meetings and in particular when voting relates to a proposed Protocol Amendment under Article 14.1 of the Protocol.
2. Article 5.2 of the Protocol provides:
'Where a vote is required under this Protocol, each Competitor that paid a performance bond on or before 31 May 2011 shall be entitled to one vote on any matter. Additionally, a Competitor that has paid the entry fee pursuant to Article 9.1(c) shall be entitled to vote only on matters concerning the AC World Series and AC45 Yachts; a Competitor that has paid both entry fees under Article 9.1 shall be entitled to vote on any matter.'
3. Article 14.1 of the Protocol provides:
'GGYC and the Challenger of Record may amend this Protocol with the approval of a majority of the Competitor Forum'.
4. ETNZ stated in its Application that the Protocol is not clear as to the procedures to be adopted in respect to voting where a Protocol Amendment involves both the America's Cup World Series (ACWS) and the Regatta (as defined in Article 1.1(rr) of the Protocol). ETNZ stated that prior to Article 5.2 being amended each Competitor was entitled to one vote and decisions were made by a simple majority vote. Voting after 30th April 2011 was tied to the provision of a performance bond which only ORACLE Racing, Artemis Racing and ETNZ provided by such date on the terms as specified in the amended Article 5.2.
5. ETNZ also stated that Protocol amendment No. 8 replaced the performance bond requirements with two entry fees. Under Article 9.1(c) an entry fee of US\$100,000 was to be paid by 1st August 2011 for participation in the ACWS and under Article 9.1(e) an entry fee of US\$200,000 was to be paid by 1st June 2012 for participation in the Regatta including other events held in AC72 Yachts.

6. ETNZ submitted that 'effectively, two separate events have been created': one event being for the ACWS in AC45 Yachts and the other being the Regatta in AC72 Yachts. They submitted that Competitors are not entitled to vote on matters concerning the Regatta and AC72 Yachts until they have paid the entry fee under Article 9.1(e). The ETNZ Application stated: 'The principle is clear – that only Competitors who either provided the original Performance Bond or have paid the Entry Fee due on 1 June 2012 should be entitled to vote in the Competitors Forum on matters relating to the Regatta itself.' ETNZ also submitted they understood that only the Circolo della Vela Sicilia Yacht Club (represented by Luna Rossa Challenge 2013) have paid the entry fees under Article 9.1(c) and (e).
7. ETNZ referred to a Competitor Forum meeting held on 23rd November 2011 when Competitors including those who had only paid the entry fee under Article 9.1(c) were invited to vote on a Protocol amendment in respect of a new Article 60, which contains a code of conduct applying to both the ACWS and the Regatta.

JURY DIRECTIONS (Jury Notice JN021)

8. On 21st December 2011, the Jury issued Directions inviting Parties on the Service Address List to submit a Response to the Application by no later than 30th December 2011.
9. ETNZ was entitled to submit a Reply to any Responses by no later than 2nd January 2012.

RESPONSES TO THE APPLICATION

10. Responses to the Application were filed on 29th December 2011 by America's Cup Race Management (ACRM) and on 30th December 2011 by ORACLE Racing, Luna Rossa Challenge 2013 and Artemis Racing.

ACRM

11. ACRM submitted that Applications 'seeking interpretations are generally unlikely to be out of time under Article 15.10', but to the extent that the Application sought to review the Article 60 Protocol amendment, which was passed by a simple majority vote of all Competitors, which vote was disputed by ETNZ, they are now out of time.
12. ACRM also submitted that Article 14.1 (referred to by ACRM as 'art.') 'should be read as being subject to art. 5.2, otherwise art. 5.2 would be largely rendered redundant. There is no distinction between the words 'approval' in art. 14.1 and 'vote' in art. 5.2.' ACRM further submitted that 'Art. 5.2 confers a restricted right to vote on those Competitors which have paid only the entry fee payable under 9.1(c) on matters concerning the AC World series and AC45 yachts.'
13. They submitted there are not two separate events and all Competitors have entered both the ACWS and the Regatta and at this point no Competitor has given notice it will not be entering the Regatta.
14. With regard to the vote on the Protocol Amendment concerning Article 60, ACRM stated that they have 'permitted all Competitors to vote on matters that affect the AC World series, even if the matter in question may also affect the Regatta'. They further submitted that it would be contrary to Article

5.2 to deny a Competitor that has paid the entry fee under Article 9.1(c) the right to vote on a Protocol Amendment that applies to the ACWS series.

ORACLE RACING

15. ORACLE Racing submitted that ‘the commercial model for the 34th America’s Cup reflects the need to build the long-term sustainability of the America’s Cup and includes the provision of a pathway for competitors to join the America’s Cup community.’
16. ORACLE Racing also submitted that there are not two separate events and there should not be a separate vote for each event as ‘This suggestion is not practical as it may easily lead to situations where there are different rules for the AC World Series and the Regatta.’ If a Protocol amendment is ‘proposed that concerns the AC World Series (even if it also concerns the Regatta) then all Competitors are entitled to vote.’
17. With regard to Article 60, ORACLE Racing submitted that Article 15.10 provides for a 14-day time limit to file an Application when a party was aware of the circumstances. 20th October 2011 was the relevant date on which ETNZ was aware ‘of the voting procedures adopted by ACRM’ and as they failed to lodge an Application within 14 days of ‘the 20 October 2011 vote, or even the 20 November 2011 vote, ETNZ has now foregone the right to question the voting procedure and result of previous Protocol amendments’.

LUNA ROSSA CHALLENGE 2013

18. Luna Rossa Challenge 2013 submitted that ‘In the Competitors Forum, the approval of issues that affect the Regatta require the simple majority of the votes of Competitors who have indeed timely provided the performance bond or paid the Regatta entry fee.’ They did not consider that the new Article 60 Protocol amendment had been validly passed, as there was no simple majority of the Competitors entitled to vote on such Protocol amendment.

ARTEMIS RACING

19. Artemis Racing submitted that ‘The Protocol is not set up to deal with two events’ and that to have two votes for each matter ‘is not a pragmatic approach and may result in unintended consequences.’ However Artemis Racing would accept having a vote for the period from the present to the end of the ACWS AC45 Yacht period (1st July 2013) and one vote from that same date to the end of the Event for Competitors that have put up the performance bond or paid all the entry fees required under the Protocol.
20. Artemis Racing further submitted that ‘if a matter impacts a Competitor, it should be entitled to vote on that matter’ but ‘any matter that only relates to AC72s will only be voted on by the Competitors who have committed financially to the final Event by paying all entry fees and any matter which impacts ACWS should be voted on by all the Competitors’. If a matter impacts on both the ACWS and the Regatta they submitted ‘the most pragmatic approach is to be inclusive and have all Competitors vote on it’.

ETNZ's REPLY

21. On 2nd January 2012 ETNZ submitted a Reply, which stated that their 'request for interpretation is not a Protest alleging non compliance with the rules and is not governed by the time limit specified in Article 15.10 of the Protocol'. ETNZ stated they did not agree with the ACRM view on timeliness as ETNZ consider that all Competitors should 'first seek to resolve issues of interpretation between themselves in the first instance before applying to the Jury'. They have been unable since the Competitor Forum vote on 20th November 2011 through e-mail exchanges (copies were provided) to understand how ACRM interpreted Article 5.2. ETNZ noted that Protocol Amendment No. 11 in respect of Article 60 has still not been posted on the America's Cup website.
22. ETNZ stated they did not agree with the interpretation by ACRM of Article 5.2 'in allowing Competitors who have only paid the entry fee under 9.1(c) to vote on issues that involve both the ACWS and the Regatta. We consider the actual wording of 5.2 prohibits such an approach'. ETNZ submitted that the word 'only' contained in Article 9.1(c) 'clearly limits such a Competitor to ACWS and AC45 matters and prohibits it from voting on matters concerning anything else, in our view therefore they are not entitled to vote on any provisions which concern both ACWS and the Regatta'.
23. ETNZ stated they agreed with the conclusion of Luna Rossa Challenge 2013 referred to in paragraph 18 above.
24. ETNZ accepted that 'the wording of Article 5.2 is capable of being interpreted differently'. ETNZ noted that Artemis Racing stated in its Response 'that almost all of those teams have stated their intention to participate in the Regatta subject to their ability to obtain proper funding' but ETNZ commented that in their view 'very few of those teams will be competing in the Regatta. Intention is irrelevant'.
25. ETNZ submitted that their understanding of the Article 5.2 Protocol Amendment was to allow the 'second tier' teams who had not paid performance bonds 'to vote on ACWS matters alone and not on any Regatta issue unless and until they had paid the entry fee'. ETNZ noted that 'second tier' teams do not currently vote on AC72 class rule changes notwithstanding that such changes are required to have the unanimous consent of all Competitors.
26. ETNZ also submitted that in their view 'it would be inequitable and highly prejudicial to ETNZ and Luna Rossa, and any future teams who pay the Regatta Entry Fee, to allow Competitors who have not provided a performance bond or paid the Entry Fee the right to vote on Protocol amendments affecting the Regatta'. ETNZ acknowledged that ACRM has had to balance the 'competing interests' of the 'second tier' teams and in interpreting Article 5.2 has had to make a call on what is more 'unfair'.

TIME LIMIT

27. This is an Application for an Interpretation of the Protocol under Article 15.4(a) in the Jury's capacity as an arbitral body and not a 'protest' alleging non-compliance with any Rule. Therefore the fourteen-day time limit referred to in Article 15.10 does not apply.

DISCUSSION

28. The Jury agrees that there is only one 'event', but that the event has two parts, each of which has its own entry fee requirements under Article 9.1.
29. The rules of the Event (defined in Article 1.1(y) as 'the Regatta, the ACWS, and any Special Events') are constructed such that Competitors challenge for the 34th America's Cup in accordance with Article 9.1. To compete in the Regatta, Competitors must also comply with the Protocol requirements for the Regatta itself. ('Regatta' defined in Article 1.1(rr) as 'the America's Cup Challenger Series, the America's Cup Defender Series (if any) and the Match'.)
30. Article 5.2 does not specifically address if a Competitor which has only paid the entry fee pursuant to Article 9.1(c) may vote on matters concerning the Regatta when those matters also concern the ACWS and AC45 Yachts.
31. Article 5.2 envisages an entitlement that separates the ACWS and AC45 Yachts from the Regatta when voting. The words 'additionally' and 'only' tend to indicate a right to vote to those Competitors competing only in the ACWS and should therefore be interpreted to be limited to such series and AC45s. In addition, Article 5.2 confers an entitlement on a Competitor which has 'paid a Performance Bond on or before 31 May 2011' or 'has paid both entry fees under Article 9.1' to vote on any matter.
32. To vote on matters concerning the Regatta, whether or not they also concern the ACWS and AC45 yachts, a Competitor must have satisfied the entry requirements to compete in the Regatta. It is open to any Competitor to establish that right by paying the entry fee of US\$200,000 by 1st June 2012 required under Article 9.1(e). It may be that some Competitors will not pay such entry fee.

DECISION

33. Only those Competitors which have complied with the requirements to compete in the Regatta are entitled to vote on matters concerning the Regatta, whether or not those matters also concern the ACWS and AC45 Yachts.
34. Where a proposed Protocol Amendment affects both the ACWS and AC45 Yachts and the Regatta, only those Competitors which have paid the performance bond or met the entry requirements of Article 9.1(e) are entitled to vote.
35. Where a proposed Protocol amendment affects both ACWS and AC45 Yachts, and the Regatta, a separate vote could be taken with those Competitors who have met the requirements of Article 9.1(c) only entitled to vote concerning the ACWS and AC45 Yachts, and those Competitors who have paid the performance bond or met the entry requirements of Article 9.1(e) entitled to vote in any ballot concerning both the ACWS and AC45 Yachts and the Regatta.

PROTOCOL AMENDMENT NO.11 – ARTICLE 60 ('PROTECTING THE REPUTATION OF THE AMERICA'S CUP')

36. The Application did not seek to review or set aside the votes taken by a majority of all Competitors at the Competitor Forum meetings held on 20th October and 20th November 2011. Had the Application sought to do so, the

provisions of Article 15.10 would have applied. The Jury considers that ETNZ, being present at the meetings, 'were aware of the circumstances' concerning the entitlement to vote on those respective dates, as were the other Competitors. Accordingly, Competitors are now precluded from questioning the result of the Protocol amendments to date.

AWARD OF COSTS

37. ORACLE Racing submitted that as the Application was solely by ETNZ, all costs should be borne by ETNZ. ACRM, Luna Rossa Challenge 2013 and Artemis Racing did not make a submission on costs.
38. ETNZ submitted that the ORACLE view on costs could not be substantiated. In ETNZ's view the Application was 'only required as a result of inadequate wording of the amendment to Article 5.2'. ETNZ submitted that their Application was made in the best interests of and for the benefit of the Event and the costs should be borne by the Event.
39. With reference to the Jury Guidelines for the Award of Costs and Expenses published on 13th August 2011, the Jury finds that although the Application was at the request of ETNZ, it is of benefit to all Competitors and to the Event in clarifying future voting rights on Protocol amendments. The Jury considers it is just and equitable that there is no award of costs.



David Tillett

JURY: David Tillett (Chairman), John Doerr, Josje Hofland, Graham McKenzie, Bryan Willis.