

AMERICA'S CUP 32



AMERICA'S CUP JURY JURY NOTICE JN050



5th September 2006
Challenger Commission
Use of MDS data during racing
Jury Decision ACJ017

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

Applicant: The Challenger Commission

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

AND

An Application filed by the Challenger Commission regarding the reception of meteorological information, and other information, by yachts while racing as per Article 13.16 of the Protocol

The Application

- [1] An Application was filed by the Challenger Commission on 30th June 2006.
- [2] The Challenger Commission requested an interpretation of Article 13.16 of the Protocol as to whether a yacht while racing is entitled to receive real time meteorological information or other information or advice using radio equipment with reference to Article 15.3(a) of the Louis Vuitton Act 12 Notice of Race (**NoR**).

The Challenger Commission requested answers to the following questions of interpretation (following the same paragraph numbers in the Application):

- 5.2. *Is it allowed by the Rules to receive on the yacht while racing real time meteorological information from any source that is public and readily available to all Competitors at no cost?*
- 5.3 *Is it allowed by the Rules to receive on the yacht while racing real time meteorological information from any source that is public and readily available to all Competitors at no cost; using the radio equipment of NOR 15.3(a)?*
- 5.4 *Is it allowed by the Rules to receive real time meteorological information of the MDS on the yacht while racing?*
- 5.5 *Is it allowed by the Rules to receive real time meteorological information of the MDS on the yacht while racing using the radio equipment of NOR 15.3(a)?*
- 5.6 *While racing, is it allowed by the Rules to receive on the yachts by using the radio equipment of NOR 15.3(a):*
 - (i) *Private weather information; or*
 - (ii) *Tactical advice; or*
 - (iii) *Strategical advice; or*
 - (iv) *Other technical advice?"*

Jury Notice JN041

[3] On 30th June, the Jury issued Jury Notice JN041 which included directions and a timetable. Jury Notice JN041 provided:

[1] *On the 30th June 2006 the Challenger Commission filed an Application requesting an interpretation of Article 13.16 of the Protocol as to whether a yacht while racing is entitled to receive real time meteorological information or other information or advice using radio equipment referred to in Act 12 Notice of Race section 15.3(a).*

Directions and Timetable

[2] *In setting the timetable, the Jury were mindful that Act 12 is scheduled to conclude in 3 days' time and no further America's Cup racing is scheduled for this year. Such circumstances allow a timetable to be set to provide all interested Parties ample time to respond.*

[3] *The Chief Measurer is requested to provide a report by the 3rd July 2006 in respect of any procedures adopted by the Measurement Committee concerning the receiving of any real time meteorological information or other information or advice by yachts while racing.*

[4] *Parties wishing to respond to the Application, must do so by the 12th July 2006.*

[5] *Should the Challenger Commission wish to respond to the report of the Chief Measurer and any responses filed by other Parties, it must do so by the 19th July 2006.*

Chief Measurer's Report

[4] On 3rd July 2006 Ken McAlpine, the America's Cup Class Chief Measurer posted a report on ECAF concerning procedures adopted by the Measurement Committee with regard to receiving any real time meteorological information or other information or advice by yachts while racing.

[5] The Chief Measurer's report referred to NoR of Act 12 Article 15.3 and noted that some of the equipment specified in Article 15.3 could be used to "receive communications or signals originating outside the yacht". The Measurement Committee has required each yacht to put in place a verifiable procedure which enables the committee to be reasonably satisfied that no outside assistance could be received. The Measurement Committee also advised that they were able to provide to the Jury on a confidential basis photos and a description of how each yacht complied with this requirement.

Order for Confidentiality - JN044

[6] On 4th July, the Jury issued Jury Notice JN044. The Jury Notice provided for an order that the photos and descriptions of how each Competitor's yacht meets the Measurement Committee's requirements in respect of outside assistance while racing be kept confidential. Jury Notice JN044 provided:

[1] *On the 3rd July the Chief Measurer Ken McAlpine filed a report in relation to procedures adopted by the Measurement Committee, concerning the receiving of any real time meteorological information or other information or advice by yachts while racing. This report was provided in accordance with JN041.*

[2] *The report included a request to keep confidential to the Jury photos and descriptions of how each Competitor's yacht meets the Measurement Committee's requirements in respect of outside assistance while racing.*

[3] *Pursuant to Rule 8.1 of the Rules of Procedure the Jury is satisfied that such photos and descriptions are confidential; an order that they be kept confidential and made available only to the Jury is granted.*

Mascalzone Latino – Capitalia Team Submission

[7] On 11th July Mascalzone Latino - Capitalia Team filed a submission in support of the Challenger Commission Application.

[8] Mascalzone Latino - Capitalia submitted that as a matter of practice they had interpreted Article 13.16 of the Protocol and NoR 15.3(a) as meaning meteorological data could only be available for use before and after racing, but not during racing. They recognised that a literal reading of these provisions could give rise to doubts regarding interpretation. Mascalzone Latino - Capitalia requested the Jury clarify that such rules do not allow the reception of wind data when a yacht is racing.

Submissions by BMW Oracle Racing

[9] On 12th July BMW Oracle Racing filed a submission supporting the Application made by the Challenger Commission.

[10] BMW Oracle Racing submitted that NoR Article 15.3(a) does not allow a Competitor to carry equipment capable of receiving MDS data, because it is not a public broadcast.

[11] BMW Oracle Racing submitted that rule 41 of the Racing Rules of Sailing (RRS) does not permit equipment to be carried on a yacht that is prohibited under a Notice of Race. If information is to be received under RRS 41 it must be received on equipment that is permitted on the yacht.

[12] BMW Oracle Racing also submitted that it is a principle of yacht racing that a boat should not receive outside help to increase its performance while racing.

[13] They further submitted that the Jury is in a position to interpret and rule on what was or was not permissible to the NoR for Act 12 and that it would be useful if the Jury did so.

Alinghi Request for an extension of time – JN045

[14] On 13th July the Jury issued Jury Notice JN045 which provided for further directions and an extension of the timetable requested by Alinghi as follows:

[1] *On 30th June the Jury issued Jury Notice JN041 which required that Parties wishing to respond to the Application, must do so by the 12th July 2006.*

[2] *On 11th July, by way of an email request from Hamish Ross to the Jury Chairman, Alinghi requested an extension of this time limit.*

[3] *The Jury would normally require such a request to be posted on ECAF so that other Parties would have an opportunity to comment on the request. However, in this instance,*

given that there are no significant time restraints, the Jury has decided that there can be no prejudice to any party in granting the extension.

[4] *Therefore the time by which Parties wishing to respond to the Application must do so, is extended to 19th July 2006.*

[5] *Should the Challenger Commission wish to respond to the report of the Chief Measurer and any responses filed by other Parties, the time by which it must do so is extended to 26th July 2006.*

Alinghi Submission

[15] On 18th July Team Alinghi SA filed a submission.

[16] Alinghi submitted that it does not support the receipt of any meteorological data or other outside assistance by Competitors while racing and that it was never intended that a Competitor receive such data or outside assistance while racing.

[17] Alinghi noted in its submission that Article 13.16 of the Protocol used the term “may use” which is a common phrase appearing in all of the documents listed in Article 12.1 of the Protocol with the exception of the Deed of Gift. Alinghi submitted that such phrase does not impose restrictions or qualifications and it would be a significant departure if it were to be found that the term “may use” did not apply at certain times, such as during racing.

[18] Alinghi submitted that the current RRS 41 contains significant and material alterations compared to the previous edition of the RRS (2001-2004) which did not permit “help in the form of information freely available to all boats.”

[19] Alinghi also submitted that “regrettably the only possible interpretation of Article 13.16 grants each Competitor an unrestricted optional right to receive and use the specified data at any time, including while racing. . .”. Alinghi submitted that in its view it was desirable to modify Article 13.16 of the Protocol to prevent receipt of information while racing but this was solely for the Defender and the Challenger of Record to agree on pursuant to Article 18.1 of the Protocol and the terms of the Deed of Gift.

Submission in reply by the Challenger Commission

[20] On 26th July the Challenger Commission filed a reply to the Alinghi submission of 18th July.

[21] The Challenger Commission noted that all of the Challengers including the Challenger of Record, and the Defender all agree that Article 13.16 of the Protocol was not in their view intended to allow the receipt of MDS or wind data while yachts were racing.

[22] The Challenger Commission submitted that the Protocol, the NoR for Act 12 and the Racing Rules of Sailing complement each other and they are not in conflict.

[23] The Challenger Commission submitted that the Jury has the jurisdiction under Articles 21.4(a) and (d) of the Protocol to rule that receiving wind data on a yacht while racing is unlawful.

Application for a right of reply by Team Alinghi SA

- [24] On 27th July Alinghi filed an application requesting the right to reply to the reply of 26th July filed by the Challenger Commission.
- [25] Alinghi submitted that the Challenger Commission had introduced new material in its reply, contrary to the Jury Rules of Procedure. They also submitted that the Challenger Commission referred to evidence that had not been made available and that the requirements and safeguards imposed by the Jury in ACJ008 with regard to the Challenger Commission making a representative application had not been met.

Challenger Commission submission in reply to the Alinghi Application for Reply of 27 July

- [26] On 27th July the Challenger Commission filed a submission opposing the Application by Alinghi of 27th July for its right to reply to the Challenger Commission submission of 26th July.

Jury Notice JN049

- [27] On 28th July the Jury issued Jury Notice JN049. The Jury Notice provided that Alinghi was entitled to reply to the Challenger Commission submission of 26th July and included further directions and a timetable. Jury Notice JN049 provided:

Alinghi Submission

- [1] *On 18 July 2006 Alinghi filed a Response to the Application by the Challenger Commission dated 30 June 2006.*

Challenger Commission Submission

- [2] *On 26 July 2006 the Challenger Commission filed a Response in respect of the Alinghi Response.*

Alinghi Application for Reply

- [3] *On 27 July 2006 Alinghi filed an Application requesting the right to reply to the Challenger Commission Response of 26 July 2006.*

Directions and Timetable

- [4] *Jury Notice JN045 provided that the Challenger Commission was entitled to Respond to the Report of the Chief Measurer and any Responses filed by other Parties by 26 July 2006. This submission in Reply, in addition to providing a Reply, contained new evidence which had not been previously approved by the Jury.*
- [5] *The same Challenger Commission Response of 26 July was also recorded on ECAF as having been separately submitted by Mascalzone Latino Capitalia Team. The Jury notes that such submission from the Challenger Commission of 26 July was initially incorrectly filed under the name of Mascalzone Latino Capitalia Team. Such submission has since been withdrawn. The only submission is that as filed from the Challenger Commission.*
- [6] *Alinghi submitted in its Response (paragraph 4) that Challengers should not be entitled to be represented by the Challenger Commission in addition to having the right to make individual submissions. The Challenger Commission Application in paragraph 2.3 advised that the Application was authorised by unanimous resolution of all the*

Challengers. In JNO19 (ACJ008) the Jury determined that the Protocol does allow for 'any Challengers to make its own Responses whether or not it supports the Challenger Commissions Application'. The Jury cannot see any basis for changing this determination.

- [7] *In paragraph 5 of its Application of 27 July, Alinghi's submitted that the Challenger Commission in referring to paragraph 2 of its Response to evidence being available to the Jury ". . . upon request. . ." is not properly before the Jury. The Jury does not consider that the evidence which the Challenger Commission refers to is relevant with regard to the questions of interpretation sought in the Application. Any documentary evidence that any Party wishes to introduce for consideration must be included as a part of any material presented to the Jury.*
- [8] *The Jury considers that the Challenger Commission Response of 26 July contains new matters. Therefore Alinghi may reply to the Challenger Commission Response dated 26 July by the 4th August 2006.*
- [9] *After the filing of any reply by Alinghi, the Jury may issue such further directions as it sees fit.*

Alinghi Reply of 1st August

- [28] On 1st August Alinghi filed a Reply to the Challenger Commission's submission dated 26th July 2006.
- [29] Alinghi disputed the Challenger Commission's view on what had occurred between the parties prior to the filing of the Application.
- [30] Alinghi also submitted that there was no basis for distinguishing the terms "Competitor" and a Competitor's "yacht" or "boat" in the manner suggested by Challengers. Alinghi submitted that the Challenger Commission's Application was misconceived in asking the Jury to amend the Protocol which confuses the power to interpret with a power to amend. It submitted that the Jury has power to interpret but does not have the power to amend the Protocol.

Decision

- [31] RRS 41 states, in part:

*"A boat shall not receive help from any outside source, except. . .
(d) help in the form of information freely available to all boats;"*

The Jury considers that the term "outside source" means a source outside the boat.

As noted in paragraph 3.5 of Alinghi's submission of 18th July, RRS 41 as it now stands is significantly different from the previous edition of the Racing Rules of Sailing 2001-2004, when RRS 41 did not have the exception contained in the current RRS 41(d) being the 2005-2008 edition.

- [32] The question of what information is "freely available" was interpreted in Royal Yachting Association case number 5, 2005. That case provided:

QUESTION

Is weather information sent to a mobile phone, to a receiver or to a computer by a weather bureau as part of a dedicated subscription service 'freely available' for the purposes of rule

41(d)? Is the cost of that service relevant? Is information available to all on the internet 'freely available', given that a subscription has to be paid to an internet service provider?

ANSWER

Once a subscription has been paid to a generally available and non-specialised communications service, such as an Internet Service Provider, a telephone service (mobile or terrestrial) or a television licence, any information that is then available to the general public, or is available to all competitors in the event, can be accessed readily and at no further cost (other than the cost, if applicable, of a standard rate call or connection) is 'freely available'. The notice of race and sailing instructions may change rule 41 to widen or narrow this.

The Jury agrees with this interpretation.

Protocol, Article 13.16

[33] Protocol Article 13.16 provides ". . . a Competitor may use weather, wind, sea state or sea current data from:

- (a) any source that is public and readily available to all Competitors at no cost; or
- (b) a consolidated weather programme managed by the Race Committee pursuant to Article 5.8 of this Protocol; . . ."

Louis Vuitton Act 12 Notice of Race

[34] Article 15.1(a) of the NoR for Louis Vuitton Act 12 in respect of communications provided:

"15.1 Except as expressly provided by this NoR, the Sailing Instructions, or by the Regatta Director, a yacht shall not carry on board while racing any equipment capable of;

- (a) *receiving communications or signals originating outside the yacht, including pagers and mobile telephones;"*

[35] NoR 15.3 states, in part:

"15.3 While racing each yacht is permitted to carry on board and to use, including redundant "backup" systems, the following:

- (a) *a radio receiver to obtain public broadcasts, including marine weather advisories, which are generally available at no charge. . ."*

Answers to questions of interpretation

[36] The answers to questions 5.2, 5.3, 5.6 and Costs are by all of the Jury. The answers to questions 5.4 and 5.5 are by a majority of the Jury (Henry Menin, David Tillet and Bryan Willis) in terms of Article 21.6 of the Protocol. As provided for in clause 13.3 of the Jury Rules of Procedure (amended on 27th July 2006) the dissenting opinion of Graham McKenzie is included after the summary of this decision.

[37] The Jury's answers to the specific question contained in the Challenger Commission's Application (following the same paragraph numbers in the Application) are:

5.2 Is it allowed by the Rules to receive on the yacht while racing real time meteorological information from any source that is public and readily available to all Competitors at no cost?
Answer – Yes. Protocol Article 13.16 specifically permits the receipt of such information.

5.3 Is it allowed by the Rules to receive on the yacht while racing real time meteorological information from any source that is public and readily available to all Competitors at no cost; using the radio equipment of NOR 15.3(a)?

Answer – Yes. NoR 15.3(a) specifically allows a yacht to “. . .carry on board a radio receiver to obtain public broadcasts, including marine weather advisories, which are generally available at no charge.”

5.4 Is it allowed by the Rules to receive real time meteorological information of the MDS on the yacht while racing?

Answer – In the absence of a rule prohibiting it – yes. If a rule is included to prohibit it – no. However, MDS information received before racing may be used during racing, in the same way that other helpful information received before the race may be used during racing.

5.5 Is it allowed by the Rules to receive real time meteorological information of the MDS on the yacht while racing using the radio equipment of NOR 15.3(a)?

Answer – No. NoR for Act 12 prohibited the use of equipment capable of receiving the information. Since it would not be possible to receive real time MDS information without using equipment, its receipt would breach the NoR.

5.6 While racing, is it allowed by the Rules to receive on the yachts by using the radio equipment of NOR 15.3(a):

(i) Private weather information; or **Answer - No.**

(ii) Tactical advice; or **Answer - No**

(iii) Strategical advice; or **Answer - No.**

(iv) Other technical advice? **Answer – No**

The reason why the answers to the four questions in 5.6 are ‘No’ is that the Protocol is silent on these questions and RRS 41 prohibits receipt of such information. (RRS 41: ‘A boat shall not receive help from any outside source’)

Costs

[38] With reference to clause 12 of the Jury Rules of Procedure amended on 27th July 2006 and the Jury Guidelines for the Award of Costs published on the 17th day of August 2006 the Jury considers that this decision is of “a universal application or for the benefit of a significant number of Competitors.” Therefore no costs will be awarded.

Summary of the decision

[39] In the context of this case, the Jury interprets the words ‘use’ and ‘receipt’ as having different meanings; to ‘receive’ in the current context is to ‘detect, or pick up broadcast signals’ whereas to ‘use’ is to ‘deploy as a means of accomplishing or achieving something’ (definitions from Concise Oxford Dictionary).

[40] The Protocol specifically permits the use of MDS information data. (Protocol Article 13.16 (b) ‘A Competitor may use weather, wind, sea state or sea current data from ... a consolidated weather programme managed by the Race Committee pursuant to Article 5.8 of this Protocol...’). It is silent on the question as to when it may be used. Therefore it is permitted to be used during racing.

[41] The Protocol is silent on the question as to how or when MDS data may be received, except that the Race Committee must make it available electronically (see Protocol

Article 5.8). Since the data is freely available to all yachts, the exception in sub-section (d) to the basic RRS 41 would apply: ['A boat shall not receive help from any outside source, except ... (d) help in the form of information freely available to all boats']. Consequently, *in the absence of a rule prohibiting receipt of the data during racing*, the data would be permitted to be received at any time.

- [42] To prohibit the receiving of the data during racing, a rule to that effect would be required. Act 12 NoR clause 15.3(a) prohibited the use of equipment while racing capable of receiving the communication which had the effect of prohibiting receipt of the data during racing.
- [43] It was not the intention of the Protocol authors that yachts be prohibited during racing to use the MDS data that had been received up to the time racing commenced. It was not the intention of the Protocol authors to permit the real-time receipt of MDS data during racing.
- [44] In Pre-regattas up to this time, yachts have not been receiving MDS data after the commencement of racing but have used during racing the data received before racing commenced. Competitors are unanimous in the view that this practice should continue and that it would not be a desirable feature of the sport to receive MDS data during racing. The Jury unanimously concurs with this view.
- [45] No costs are awarded as the decision is of universal application.
- [46] The Jury recognises the prime importance of the Protocol and that only the Defender and Challenger of Record have the authority to make changes to it. The Jury's role is to interpret the Protocol when called upon to do so. When interpreting the Protocol, the Jury always takes into consideration its obligations described in Protocol Article 21.9(b):

'The Jury, in making its decisions, shall always give effect to the purpose and intent of this Protocol set out in Article 2 ...'

(Article 2: 'The general underlying purpose and intent of this Protocol shall be to promote a competitive sporting regatta for all Competitors...')

In this case there is more than one view as to the meaning of the Protocol Article 13.16 (b). The majority of the Jury believes that the decision best reflects the purpose and intent of Article 2 and is in the best interest of all the Competitors.

A handwritten signature in black ink, appearing to read 'Bryan Willis', with a large, stylized flourish above the first name.

Bryan Willis

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

Dissenting opinion of Graham McKenzie

- [1] I concur with the decision of the majority in respect of the answers to questions 5.2, 5.3, 5.6 and that no costs be awarded. I have a different view on the answers to questions 5.4 and 5.5
- [2] The majority have drawn a distinction between the term 'use' and 'receipt'. Article 13.16 of the Protocol allows a Competitor to ". . .**use** weather, wind, sea state or sea current data. . .". NoR 15.1 for Act 12 prevents a yacht while racing from carrying any equipment capable of "**receiving** communications. . .".
- [3] In my view this distinction is too fine and is not sufficiently clear or convincing. It appears to be based on looking to find an interpretation within the existing Protocol and NoR that meets the Competitors wish that the rules should not allow yachts while racing to receive MDS or weather information, rather than interpret the ordinary meaning and context of the words as they stand.
- [4] In my opinion the Jury is obliged to interpret the words of the documents as they are drafted even if sometimes such interpretations are not what the drafter intended or the parties want. Certainty in the approach to interpretation is important.
- [5] I agree that the Jury should look to be reasonably pragmatic in its decisions and should take into account the purpose and intent provisions of Article 2 of the Protocol "...to promote a competitive sporting regatta for all competitors..." I do not think the Jury should take an approach to important disputed provisions that could be considered more pragmatically creative, to address what I consider is a conflict between the Protocol and NoR.
- [6] The Defender as one of the drafting parties of the Protocol in its submissions has stated that it did not intend to allow the use of real time MDS or weather information while racing, but stated that in its view Article 13.16 of the Protocol as drafted does 'regrettably' permit it. The Challenger of Record has not made any submission on what was intended when Article 13.16 was drafted.
- [7] The Jury does not have any jurisdiction to amend the Protocol. I think it is undesirable to effectively amend by interpretation a provision of the Protocol when it has been subsequently found it has not been drafted as intended.
- [8] I would support and prefer a change to Article 13.16 of the Protocol. Such a change will require the agreement and mutual consent of the Defender and the Challenger of Record, as provided for in Article 18.1 of the Protocol and the Deed of Gift.
- [9] My answers to questions 5.4 and 5.5 and the reasons are:

5.4 *Is it allowed by the Rules to receive real time meteorological information of the MDS on the yacht while racing?*

Answer – Yes. I interpret Protocol Article 13.16(b) as permitting a yacht to receive meteorological information. Since there are no limits in the Article as to when the information is received, it may be received at any time. The NoR for Act 12 (15.1) prohibited the use of the radio equipment carried on board for the purposes of accessing such meteorological information which would include the MDS data. This therefore creates a conflict between the Protocol and NoR.

I have carefully considered and recognise the merits of the Challenger Commission submission of 26th July that the Protocol, NoR and RRS are able to be construed as complimentary to each other and not in conflict. To reach the view that the Protocol prohibits a yacht while racing from receiving meteorological information in the manner contemplated by the NoR for Act 12 would require clear and unequivocal language which in my view is absent from the Protocol. It is significant that the Protocol expressly prevails over the provisions of the NoR.

Article 12.2 of the Protocol provides that in the event of conflict between documents, the documents listed in Article 12.1 have precedence in the order listed. The Protocol has precedence over the NoR and I have applied such precedence provisions in answering this question.

I fully agree with the suggestion that receipt of MDS data during racing is undesirable but consider that the appropriate way to achieve this is through a change to the Protocol, rather than prohibiting equipment in the NoR.

- 5.5 *Is it allowed by the Rules to receive real time meteorological information of the MDS on the yacht while racing using the radio equipment of NOR 15.3(a)?*

Answer – Yes, the yacht is allowed to receive the information. However, NoR for Act 12 prohibited the use of equipment capable of receiving the information. This is not the appropriate way to prohibit the use of MDS data during racing.