

## **BEFORE THE ISAF REVIEW BOARD**

**CASE 2013/009/RB**

**IN THE MATTER OF:**

**DIRK DE RIDDER (NED)**

**34<sup>TH</sup> AMERICA'S CUP**



## **DECISION**

### **1. INTRODUCTION**

- 1.1 This appeal arises from a decision of the ISAF Disciplinary Commission ("the Commission") to impose a sanction on Mr Dirk de Ridder of the Netherlands ("the Appellant") following a report received from the International Jury of the 34<sup>th</sup> America's Cup and Koninklijk Nederlands Watersport Verbond ("the Dutch MNA").
- 1.2 By a decision of the Commission issued on 28 February 2014, the Appellant's ISAF Eligibility was suspended until 1 September 2017 (with an additional year's suspension until 1 September 2018 that may be imposed if the Appellant broke certain conditions). The Commission directed that the Appellant also be excluded from competing in the 35<sup>th</sup> America's Cup.
- 1.3 The Appellant appeals to the ISAF Review Board against both the Commission's decision to find him liable to a sanction and the level of sanction itself.
- 1.4 The Review Board held a hearing on 25 April 2014 and this is the decision of the Board in this case.

### **2. DISCIPLINARY PROCEEDINGS AT THE 34<sup>TH</sup> AMERICA'S CUP**

- 2.1 The 34<sup>th</sup> America's Cup Match was held in San Francisco, USA in August and September 2013, being won by Oracle Team USA (the Defender of the Cup). The Appellant was a member of the Defender's team. Prior to the Match, and under the terms of the Protocol governing the Cup, a series of regattas known as the America's Cup World Series were held around the world in the AC45 class of boats ("the ACWS"). Under the terms of the governing rules for the Cup, the ACWS was part of the same event as the Cup itself.
- 2.2 The circumstances giving rise to this case are well known. Upon the return of the AC45 boats to the Organizing Authority following the ACWS, the Measurement Committee inspected the boats for compliance with the applicable rules. On this inspection, irregularities with two boats were discovered and were reported to the International Jury by both the Measurement Committee and Oracle Team USA.
- 2.3 The International Jury described the non-compliance of the boats as being:
  - (a) A Kevlar bag containing lead tailings was placed inside the forward king post on boat 4.
  - (b) Heavy ferrous tailings in a plastic bag were found inside the main king post in boat 4.
  - (c) Lead tailings and resin were added to the forward king post on boat BAR.
  - (d) The lengths of the main king posts used on boats 4 and 5 were found to have been extended by the addition of 8mm of carbon composite plate.

- (e) Top end fittings with 80mm spigots were found fitted to the main king posts of boats 4 and 5 (with other boat in the event having 15mm spigots).
- 2.4 The AC45 class rules were 'closed' class rules (i.e. anything not specifically permitted by the class rule is prohibited). The modifications described above were not authorised by the Measurement Committee.
- 2.5 On 19 August 2013, the International Jury issued a notice (JN103) concerning allegations of gross misconduct that had been received by it under RRSAC 69<sup>1</sup>. Prior to that date, the International Jury had been investigating the allegations. As a result of those investigations, the International Jury required that several competitors be required to appear before it in a hearing to determine if they had committed Gross Misconduct<sup>2</sup>.
- 2.6 Notice JN103 recorded the allegation of Gross Misconduct against the Appellant in the following terms:
- “2. Dirk de Ridder, OTUSA sailing team member, was involved in giving instructions and/or directions to shore crew to add weight into a king post of AC45 boat 4, or was aware that such weight had been added, contrary to the AC45 Class Rule”.
- 2.7 A hearing was held before the International Jury between 26 to 28 August 2013 in San Francisco. Each sailor was represented by individual legal counsel, the Appellant by Mr T. Anderlini. Prior to the hearing, a directions hearing was held on 22 August 2014 to agree the conduct of the main hearing itself.
- 2.8 The main hearing was recorded by a court reporter and, following a request from the parties to the hearing, the International Jury ordered that the transcript be kept confidential.
- 2.9 Following the hearing, the International Jury issued its decision on the allegations in notice JN115R. With respect to the Appellant, the International Jury found as follows:
- “FINDINGS IN RESPECT OF DIRK DE RIDDER
64. During June 2012, at the site of the AC45 Regatta in Newport, Rhode Island, Dirk effectively gave instructions or direction to Bryce Ruthenberg and Andrew Walker to add lead to the king post of boat 4, knowing this to be in contravention of the AC45 Class Rule. The instruction or direction may not have been explicit, but it was such that Bryce and Andrew were left in no doubt that they should carry out the work.
65. Dirk disputed that he gave the instruction to put weight in the king post. However, Bryce gave clear evidence that he received the instruction or direction from Dirk and the Jury accepts Bryce as a more credible witness.
66. Furthermore, the signed interview record (exhibit 17) shows that Dirk accepted that he knew the weight had been added to the king post either at the time of the Newport or San Francisco regatta. At the hearing, Dirk disputed that he had said that he knew weight had been put in the king post.
67. Exhibit 17 includes the phrase 'aware of work done in dolphin striker but not amount weight or time'. When cross-examined, Dirk claimed that the word 'weight' was referring to a desire to make the king post longer, which would add weight (a change of less than 100 grams but which would have required permission of the Measurement Committee). The Jury considers his

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<sup>1</sup> By agreement with ISAF, the normal Racing Rules of Sailing were replaced for the America's Cup by the America's Cup Racing Rules of Sailing ("the RRSAC").

<sup>2</sup> In this decision the Board uses the term "Gross Misconduct" to describe the prohibited behaviours set out in RRSAC 69.1(a).

explanation as unconvincing and does not accept this as a credible explanation.

68. Another phrase included in exhibit 17 was 'don't know when aware'. It is the Jury's view from the cross-examination that Dirk had indicated the truth at the pre-hearing interview – that he knew about the weight in the forward king post.
69. The Jury is satisfied that Dirk knew that the weight had been added to the forward king post, knowing it was a breach of the AC45 Class Rule, during the Newport Regatta.
70. Dirk is a very successful and experienced sailor. Like many successful sailors, he has a reputation for attention to detail and a philosophy of many small increments having a significant effect on the performance of the boat. He is assertive by nature and respected by the shore crew.
71. The Jury is comfortably satisfied that:  
Dirk gave the instruction or direction to add weight to the forward king post;  
Dirk knew the weight had been added;  
Dirk knew it was a breach of the AC45 Class Rule;  
Dirk did not tell the truth in the hearing in this regard.

#### DECISION AS TO DIRK DE RIDDER

72. The Jury is comfortably satisfied that this conduct was a gross breach of a rule and of good sportsmanship."

2.10 Following the International Jury's decision on liability, it issued notice JN115 calling a hearing to consider the issue of penalty. That hearing took place on 31 August 2013 and the Appellant was again present and legally represented.

2.11 Notice JN116 records the reasoning of the International Jury on penalty. The International Jury imposed the following penalty on the Appellant:

"109. Dirk de Ridder

Dirk de Ridder is excluded from further participation in any role in the 34th America's Cup. RRSAC 69.1(c) requires the Jury to inform his National Authority (Koninklijk Nederlands Watersport Verbond) and the International Sailing Federation, which bodies may impose further penalties."

2.12 The International Jury issued a report to ISAF and the Dutch MNA on 7 September 2013 ("the AC Jury Report"). The AC Jury Report repeated the International Jury's findings made in notice JN115R and made no recommendation to ISAF or the Dutch MNA on whether or not a further sanction was appropriate.

2.13 For completeness in this decision, the Review Board records that the Appellant sought at that time to appeal his exclusion from the Cup to the ISAF Review Board (ISAF Case 2013/005/RB). The Board dismissed his appeal for lack of jurisdiction on 12 September 2013 and gave further reasons on 3 October 2013.

### 3. PROCEEDINGS BEFORE THE DUTCH MNA

3.1 The proceedings before the Dutch MNA were conducted by its Appeal Committee ("the Zeilraad"). It issued its decision on 23 October 2013 and came to the following conclusion:

"In accordance with the established procedures the KNWV ordered the Zeilraad to conduct an investigation and, when appropriate, conduct a hearing in this matter.

Dirk de Ridder is a member of a Dutch yachting club and therefore within the jurisdiction of the Dutch MNA.

The Zeilraad has applied the rules as stated in the RRCAC [sic] and considered the report sent by the AC jury as a report under rule 69.2(a) of the RRSAC.

The Zeilraad:

- is aware of the extensive work done by the AC Jury;
- noticed the facts found, as worded in the AC Jury-report;
- noticed the wording in reports, particular JN177 [94];
- noticed the Jury has based its decision on the “comfortable satisfaction” standard of proof as used in the RRS 2013-2016, Rule 69.2(c).
- noticed the different recommendations by the AC Jury, regarding the four penalized persons;
- noticed from studies in the archives of appeal cases only one remotely resembles this case, no further reference could be found;
- is aware that it has only limited knowledge of all evidence presented and used by the AC jury.

The Zeilraad further considered that being excluded from further participation in any role in the 34th America’s Cup for a gross breach of a rule and of good sportsmanship, combined with the world wide publicity on TV/radio, Internet and newspapers, is by itself, a severe penalty.

Having considered all evidence, the Zeilraad finds it is not appropriate to impose an additional penalty.”

- 3.2 Therefore, the Zeilraad decided it was not appropriate to conduct a hearing and that no further action would be taken by the Dutch MNA. That decision was reported to ISAF as required by the ISAF Eligibility Code (ISAF Regulation 19).

#### **4. PROCEEDINGS BEFORE THE COMMISSION**

- 4.1 The AC Jury Report was received by ISAF and referred to the Commission as required by ISAF Regulation 35.7. As the Chairman of the Commission was a member of the International Jury, the Vice-Chairman (Professor Jan Stage) considered the AC Jury Report and issued directions assigning it to a Panel of the Commission. The Panel consisted of Mr Charles Manzoni QC (HKG) as Chairman, Professor Stage IJ IU (DEN) and Mrs Ana Sanchez del Campo Ferrer IJ (ESP).
- 4.2 At the same time, the Vice-Chairman directed that the proceedings be adjourned pending receipt of the decision of the Dutch MNA and ordered the ISAF Chief Executive Officer to serve the AC Jury Report, the Commission’s Rules of Procedure and his directions on the Appellant.
- 4.3 On 20 September 2013, the Chief Executive Officer wrote to the Appellant explaining the receipt of the AC Jury Report and the procedure to follow. That letter included copies of the AC Jury Report, the Commission’s Rules of Procedure, the directions issued by the Vice-Chairman and copies of ISAF Regulations 19 & 35 (dealing with eligibility and misconduct). On the same date, the Chief Executive Officer wrote to the Secretary General of the Dutch MNA informing him that the Commission had adjourned the proceedings pending the Dutch MNA’s decision.
- 4.4 On 21 November 2013, following receipt of the Dutch MNA’s decision, the Panel Chairman wrote to the Appellant concerning the case. The Panel at that time granted participant status in the Commission’s proceedings to the Dutch MNA and also set out the timetable for the Dutch MNA, the International Jury and the Appellant to make submissions to the Commission (the last stage of submissions (by the Appellant) to be completed by 13 January 2014). The Panel explained in their letter the purpose of the proceedings as per the Commission’s Rules of Procedure, which were:

- “(a) To determine whether or not allegations in the [AC Jury] Report are true
- (b) Whether any applicable rule or regulation has been broken
- (c) If so what sanction (if any) should be imposed.”

- 4.5 The Panel indicated in its letter that if any of the parties to the case felt a hearing was required, then they should inform the Panel.
- 4.6 On 3 December 2013, the Appellant requested that the Panel order the transcript of the International Jury proceedings be released to the Commission as part of the case.
- 4.7 On 4 December 2013, the Panel wrote to the Appellant and informed him that the Panel had no jurisdiction to order the International Jury to release the transcript. The Panel suggested that such an application be made directly to the International Jury and stated, if the transcript was not forthcoming, then it recognized the difficulty the Appellant would have in presenting his case to the Panel and any subsequent effect that may have on whether or not the Panel could determine of the AC Jury Report as true. Ultimately the transcript was released to the Commission on a confidential basis (and was made available to all the parties in the case).
- 4.8 On 22 January 2014, following receipt of submissions from all the parties, the Panel issued its first decision on behalf of the Commission.
- 4.9 The decision, which the Review Board does not intend to repeat here, runs to 53 pages and covered the following issues:
- (a) The framework of the rules, including:
    - i) The jurisdiction of the International Jury
    - ii) The RRSAC and ISAF's role
    - iii) The Commission's conclusion on the existence of jurisdiction
    - iv) The scope of that jurisdiction, the power to impose sanctions and the status and effect of the AC Jury Report
  - (b) The AC Jury Report
  - (c) The Appellant's submissions, including:
    - i) Objections to the members of the International Jury being members of the wider Commission;
    - ii) Objections to the use of hearsay evidence and other challenges to the process used by the International Jury;
    - iii) Objections to the apparent reversal of the burden of proof
    - iv) Submissions on the underlying material and evidence before the Commission
- 4.10 The Commission's decision included a confidential appendix (as it was based on the transcripts), which provided its reasoning and conclusions on the following issues:
- (a) The requirement to comply with the rules
  - (b) Was weight added?
  - (c) Why was it added and who was responsible?
- 4.11 The Panel found on behalf of the Commission that:
- “119. In the circumstances the Panel is satisfied that the AC Jury Report is true. Further the Panel is satisfied that Mr de Ridder has:
    - 119.1 committed a gross breach of a Rule, namely RRSAC 78.1, which requires boats to comply with the class rules;
    - 119.2 committed a gross breach of sportsmanship;

119.3 has brought the sport of sailing into disrepute

and he is thereby open to sanction under RRSAC rule 69.”

- 4.12 On issuing its decision, the Panel made a number of orders. It provided the deadline for the Appellant to request reconsideration of the decision (as permitted by the Commission's Rules of Procedure) and set the deadline for any submissions on sanction. The Panel stated that the Appellant had the right to request a hearing before it and if he wished the Panel to reconsider, it would convene a hearing to do so.
- 4.13 On 12 February 2014, the Panel issued a decision on sanction. In that decision it noted that the Appellant did not request reconsideration nor a hearing and further noted his submissions on the question of sanction.
- 4.14 On 13 and 14 February 2014, there was correspondence between the Appellant and the Panel concerning the confidentiality of the decisions of the Commission. The Appellant, it appears, had requested that the Commission not publish the decisions and not disclose them to Yachting New Zealand (which the Review Board assumes from the evidence shown to it had requested copies of the decision for the purposes of its investigation into the cases concerning other sailors involved in the America's Cup case).
- 4.15 The Panel came to the conclusion that the full decisions concerning the Appellant could be disclosed to Yachting New Zealand in exchange for legal undertakings to hold them in confidence and subject to the order of the Panel Chairman. With respect to any publication by ISAF, the Panel concluded that its intention would be to order publication of its decisions (except any confidential appendices) once any appeal process before the Review Board was concluded.
- 4.16 Following the issue of its decision, the Appellant exercised his right to request reconsideration of the sanction decision. On 28 February 2014, the Panel issued a reconsidered decision amending to a limited extent its original sanction decision.
- 4.17 The final sanction imposed on the Appellant was as follows:
- “(a) the Respondent is excluded from competing in the next edition of the America's Cup and any events which fall within the terms of any protocol negotiated for that edition (such exclusion to take effect only if ISAF has a jurisdiction over the next edition of the America's Cup;
  - (b) the Respondent's ISAF Eligibility is revoked for a period of five years from 1 September 2013, with the final year of revocation suspended until 1 September 2018 on condition that:
    - i) if the Respondent is found to have committed gross misconduct (in the sense identified in the first decision of the Commission) in any race, or regatta or series of races or at any event in which he competes at any time between the date of this Decision and 1 September 2018:
      - a report shall be made to the ISAF Chief Executive Officer by the Respondent and by the Organizing Authority, Member National Authority or any International Jury, International Umpire, International Race Officer, International Measurer or ISAF Technical Delegate present at the event in any official capacity; and
      - the ISAF Chief Executive Officer shall refer the matter to the Commission for further consideration as to whether the suspension should be removed in light of the matters reported.”

## **5. PROCEEDINGS BEFORE THE REVIEW BOARD**

- 5.1 The Appellant exercised his right of appeal to the ISAF Review Board on 26 February 2014, and following discussions with the Registrar, filed additional submissions on 21 March 2014 (following the issue of the Commission's reconsidered decision).
- 5.2 The Panel, on behalf of the Commission, filed its response on 13 March 2014 and filed a response to the Appellant's further submissions on 26 March 2014.
- 5.3 On 14 March 2014, the Chairman issued directions for the conduct of the appeal, which included convening a hearing to consider the appeal because of the nature of the issues raised in it. The Chairman's directions also included deadlines for the filing of objections to the proposed members of the Board and for the receipt of submissions.
- 5.4 On 18 March 2014, the Appellant filed objections to two proposed members of the Board. On 19 March 2014 the Chairman issued his decision rejecting both objections. The Chairman confirmed that the following members of the Board were appointed to hear the case: Dr Dieter Neupert (SUI) as Chairman, Mr Timo Haß (GER), Mrs Barbara Farquhar (USA), Mr Hans-Kurt Andersen (DEN) and Mr Arve Sundheim (NOR).
- 5.5 In his additional submissions, the Appellant raised the prospect of an adjournment while he considered new evidence that apparently had been discovered and while he considered the prospect of legal proceedings against ISAF. He also requested the Board to hear the case *de novo* and the appointment of an independent registrar to record the hearing.
- 5.6 On 26 March 2014, the Chairman replied to the Appellant on behalf of the Board. He noted that the Appellant had not supplied any new evidence to the Board and therefore refused to consider an adjournment at that time. He explained to the Appellant the nature of the Board's jurisdiction under Article 81(b) of the ISAF Constitution and, in respect of the new evidence, stated:

“With respect to the new evidence or the assessment of factual matters, if the Board considers that the original decision making body has committed an error, then its normal practice is to order the original decision making body reconsider the case. The Board has the power to order that a different panel rehear the case if this is deemed appropriate.

The Appellant has raised issues of new evidence and has questioned the conclusions of the Disciplinary Commission based on the evidence it considered. The Board will consider at the hearing the submissions of the parties on these issues – it is not required to accept the facts found by the Commission as irrefutable. If the Board comes to the opinion that the Appellant's appeal must be upheld, then it will ask for submissions on potential remedy from the parties based on Article 81(b) above before making its final order.”
- 5.7 The Chairman directed that the hearing be digitally recorded.
- 5.8 Due to the nature of the allegations made by the Appellant in his appeal (principally those concerning the improper adoption of the Commission's Rules of Procedure), the Board ordered the Chief Executive Officer to provide a statement on how the Rules of Procedure had been adopted. This was provided on 2 April 2014.
- 5.9 Due to a medical condition diagnosed in the week commencing 14 April, Mrs Farquhar was unable to attend the Board hearing. Following discussions with the Registrar, the Appellant expressly agreed to continue with a four-member Board (having been given this option or the option to continue with a 3-member Board).
- 5.10 On 16 April 2014, the Appellant filed a new objection to Dr Neupert hearing the case. By agreement of the parties, the remaining members of the Board considering this objection and on 24 April 2014 issued their decision rejecting the objection.

## **6. HEARING BEFORE THE REVIEW BOARD**

- 6.1 On 25 April 2014, the Board held a hearing at the offices of the ISAF Secretariat in Southampton, GBR. The following persons were present at the hearing:

Dr Neupert	Chairman of the Review Board
Mr Haß	Review Board
Mr Andersen	Review Board
Mr Sundheim	Review Board
Mr de Ridder	Appellant
Professor Knoops	Lead Counsel for the Appellant
Mrs Knoops-Hamburger	Counsel for the Appellant
Miss Vogelvang	Assistant to Professor Knoops
Mr Manzoni QC	Panel Chairman, ISAF Disciplinary Commission
Mr Napier	ISAF Competitions Manager (Registrar)
Miss Dunn	Assistant to Mr Napier

- 6.2 The order of the hearing was agreed by the parties beforehand, with the hearing of submissions grouped together into errors of law, errors of fact and error of sanction. The agenda included the opportunity for the Appellant personally to address the Board on the case at his request.
- 6.3 At the start of the hearing, the Appellant delivered to the Board a document headed "Trial Brief" which contained the submissions the Appellant would make. This document contained a number of exhibits that had not previously been served on the Board or the Commission. Mr Manzoni did not object to the admission of the exhibits, although he made the obvious point that the Commission had not seen the exhibits so could not comment on them. The Board therefore agreed to consider the exhibits as part of the case.
- 6.4 Following the conclusion of the hearing, the Board explained to the parties it would reserve its decision and communicate it and the reasons for it at a later date.

## **7. PRESENCE OF THE COMMISSION AT THE HEARING**

- 7.1 The Appellant raised a number of objections throughout the hearing as to the presence of the Disciplinary Commission (being present through the Panel Chairman). The Review Board has considered this issue and decides as follows.
- 7.2 Sailing does not operate an adversarial disciplinary process. It has an inquisitorial system in which a protest committee, national authority or ISAF decides the facts of a case and then applies the rules to the facts. In rule 69 proceedings, there is no 'prosecutor' pressing for the conviction of a competitor. This presents an issue in the context of an appeal because there is no party to respond or challenge the appellant's case.
- 7.3 The Review Board's Rules of Procedure therefore provide that the authority that imposed the sanction is the appropriate respondent. Therefore it is entitled to be present to explain its decision before the Board. To have the position otherwise would mean there was no party to provide balance to these proceedings and to counter the Appellant's submissions.



- 7.4 Mr Manzoni took the position that it was not the role of the Commission to respond to the Appellant's submissions as if it was an opposing litigant. The Review Board agrees this was the correct approach. The Commission is required to stand by its written decision (already made) and Mr Manzoni confined himself to drawing the Board's attention to various sections of the Commission's decision or addressing questions of law that arose. The Appellant's counsel was able, and did, challenge Mr Manzoni if he felt he was straying outside of this remit.
- 7.5 The Review Board do not consider that any prejudice was caused to the Appellant by the presence of the Commission and the Board is therefore satisfied that the hearing was fairly conducted in this regard and carried out in accordance with its rules.

## **8. ERRORS OF LAW: ORIGIN OF THE COMMISSION AND ITS RULES OF PROCEDURE; ABSENCE OF COMPETENCE**

- 8.1 The Appellant submitted that the applicable rules and regulations of the 34<sup>th</sup> America's Cup did not include the possibility of review by the Commission, hence the Commission lacked the competence to adjudicate the Appellant's case (beginning from 7 September 2013).
- 8.2 The Appellant then criticised the creation of the Commission as being invalid because the nominations of membership were not received on time as stipulated by ISAF Regulation 5.1.5.
- 8.3 Finally the Appellant argued to the Review Board that the creation of the Disciplinary Commission was accelerated to manufacture jurisdiction over his case, constituting an abuse of process.
- 8.4 The Review Board is, however, of the opinion that it was in the material interest of the Appellant that his case was heard by a specialist disciplinary commission and not just by the ISAF Executive Committee.
- 8.5 Further, the RRSAC established ISAF's jurisdiction over the competitors of the 34<sup>th</sup> America's Cup. ISAF has chosen to assign this authority to the Commission and the Review Board is satisfied from the evidence and submissions that the Commission was properly constituted. ISAF Regulation 5.1.5 does not apply to commissions, it applies to ISAF committees and there is a fundamental difference in the Regulations in this respect. The composition of the Commission is governed by ISAF Regulation 8.15.2.
- 8.6 With respect to the allegations of an improper process used by ISAF to create the Commission, the Review Board has carefully considered the evidence and submissions of the Appellant. The Board can understand the Appellant's opinion based on the timeline of events, but this is misplaced in the Board's view. The Board does not agree there has been any bad faith or improper process – the evidence presented to the Board cannot be considered as showing an improper process. In particular, it is clear from the evidence before the Board that the pending rule 69 cases at the time of the appointment of the Commission were not related to the 34<sup>th</sup> America's Cup, contrary to the Appellant's verbal submissions to the Board.
- 8.7 Further, the Review Board shares the view of the Commission that the Appellant did not object to the jurisdiction of the Commission within the time permitted by its rules, therefore he has waived any right to object on these grounds.

## **9. ERRORS OF LAW: COMPOSITION OF THE COMMISSION AND INTERRELATIONSHIP WITH IMPARTIALITY AS AN ELEMENT OF "NATURAL JUSTICE"**

- 9.1 The Appellant alleges that the members of the Commission were never properly nominated, thus making the Commission an invalid Panel.

- 9.2 The Appellant then criticizes the composition of the Commission with the argument that the Panel Members were involved in overlapping tasks such as the ISAF Constitution Committee and the ISAF Working Party on Rule 69 & Judicial Matters.
- 9.3 The Review Board is, however, satisfied that the ISAF Council properly appointed the members of the Disciplinary Commission and that there is no conflict of interests preventing the Panel Members of hearing the Appellant's case. With respect to the Council appointment, the ISAF Constitution expressly permits an electronic vote of Council (see Article 59). The Commission operates on a strict panel system and no panel member had any involvement with the 34<sup>th</sup> America's Cup. As the Panel had no conflict of interests, the Review Board is satisfied the Panel conducted itself in a fair and proper manner and its decisions explain adequately the correct view of the law and ISAF rules and regulations.
- 9.4 The Review Board has come to the same view with respect to the conflict of interest between the members of AC Jury and the Disciplinary Commission in adopting its Rules of Procedure. There is cross-membership but the Board cannot find any evidence, other than the written and verbal submissions of the Appellant, that the Commission improperly adopted its Rules of Procedure. Evidence is required to back up a claim of bad faith or bias. In addition, the process that was used to adopt the Rules of Procedure involved Commission members who were not involved in the 34<sup>th</sup> America's Cup and the Rules were reviewed independently by the ISAF Constitution Committee.
- 9.5 The Appellant expressed his dissatisfaction with the fact the International Jury did not inform the parties in the proceedings of the new Rules. The Review Board accepts this would have been a simple courtesy and can understand the Appellant's clear unhappiness with this matter. However, it was not a legal requirement and the failure of the AC Jury to do so cannot be said to affect the fairness of its processes as the Commission's Rules of Procedure governed an entirely separate disciplinary process.
- 9.6 Again, it may be repeated that the Appellant has agreed to the jurisdiction of the Disciplinary Commission and of the Panel in particular.

## **10. ERRORS OF LAW: PREJUDICE TO DEFENCE RIGHTS; NON-RETROACTIVITY OF THE RULES**

- 10.1 The Appellant finally complains that the overall procedure of RRSAC 69 was fundamentally transformed by the creation of the Commission and that especially hearsay evidence was allowed, thus violating the principle of non-retroactivity.
- 10.2 The Review Board shares the opinion of the Commission that the adoption of the Rules of Procedure of the Commission created a change only to the extent that there were, prior to their adoption on 27 August 2013, no rules of procedure at all.
- 10.3 Hence, any panel would have been required before that date to determine its own procedure, including taking into account hearsay evidence. It is recognised under English law (under which ISAF proceedings operate) that hearsay evidence is admissible in sports disciplinary procedures provided that it is given appropriate weight. Therefore, it was within the power of the Commission to permit hearsay evidence before 27 August 2013 and after. The Appellant's position has not been altered in this regard.
- 10.4 As the Appellant correctly argues, the Rules of Procedure of the International Jury permitted the use of hearsay evidence only in exceptional circumstances. However, the Review Board cannot see why the Commission should not be allowed to rely to an appropriate extent on the reasoned findings of the International Jury when the Commission's rules allowed it to do so and neither does the Board find that the Appellant's defence rights have been prejudiced. The Board is mindful the Appellant waived his right to a hearing before the Commission and the opportunity to present evidence in a hearing to the Commission. He cannot argue now the Commission's procedures were unfair.
- 10.5 The AC Jury Report is the written decision of the International Jury based on its assessment of the evidence it heard. The Appellant's defence rights have not been harmed because the

Commission placed reliance on the AC Jury Report and the verbatim transcripts of the hearing. The Appellant's counsel had a full opportunity to cross-examine the witnesses involved at the time of the International Jury's hearing and did so.

- 10.6 In any event, the Commission expressly recognised that the AC Jury Report needed to be assessed against the other evidence available and the Review Board is satisfied it gave the AC Jury Report the correct evidential weight.
- 10.7 Hence, neither the adoption of the Rules of Procedure before the Commission, nor the fact that the Rules allow the use of hearsay evidence could have caused any prejudice to the Appellant. If his case had been considered prior to the new Rules of Procedure coming into force, he would have been subjected to the same legal process.

## **11. ERRORS OF LAW: CONCLUSIONS**

- 11.1 Based on the reasons set out above, the Review Board concludes that no errors of law have been made by the Commission, thus dismissing the pertinent submissions of the Appellant.

## **12. ERRORS OF FACT: DISMISSAL OF THE DECISIONS OF THE COMMISSION**

- 12.1 The Appellant criticises that the decisions of the Commission were only based on indirect evidence gathered by the International Jury, mainly statements made by Mr Ruthenberg, unsupported by any direct or forensic evidence.
- 12.2 However, as Mr Ruthenberg admitted that he added weight to the forward king post on OTUSA Boat 4, the Review Board is comfortably satisfied that there was a breach of the AC 45 Class Rules. The Board agrees with the Commission that there is no credible reason for Mr Ruthenberg to mislead the International Jury having admitted his role in the misconduct. The Board notes that Mr Ruthenberg was subject to cross-examination by other counsel, including the Appellant's counsel, before the International Jury.
- 12.3 The Review Board has carefully read the transcripts of the hearing before the AC Jury and in the Board's view it is credible that Mr Ruthenberg did not act on his own initiative but on the instructions or at least clear expectations of people higher up in the chain of command, namely the Appellant. The Board is satisfied this instruction or clear expectation arose following a conversation between Mr Ruthenberg, Mr Walker and the Appellant. In this context, once this fact has been confirmed, it is of lesser importance whether the witnesses recalled the exact dates on which these conversations took place.

## **13. ERRORS OF FACT: QUESTION OF FAIRNESS OF RULE 69 PROCEDURE**

- 13.1 The Appellant submits that several aspects of the procedure did not adhere to the principles of natural justice, namely the possibility to call witnesses, that not all the team members which might have actually been involved in placing the lead were not charged, that the International Jury used leading questions and only paraphrased the answers and finally that the parties were not able to cross examine all the witnesses.
- 13.2 First of all, it has to be taken into consideration that the International Jury was under time pressure as the allegations against the Appellant were raised on 19 August 2013 and the Match was due to commence on 7 September 2013. Hearings had to be adjourned at the request of others, including the Appellant, apparently because he changed legal counsel.
- 13.3 It is not disputed that not only the legal counsel of the Appellant was present at all the interviews, but occasionally also Mr Bowman and Mr Ehman who represented OTUSA, hence the Appellant had representation at the interviews and was able to call those persons to give evidence he wished and who the Appellant would have had the opportunity to cross examine.
- 13.4 The Review Board has the opportunity to review the entire verbatim transcripts of the International Jury hearing and the Board is satisfied it was conducted in a fair and proper manner under the RRSAC and the rules of natural justice. The Board notes that the

Appellant was legally represented and his counsel was given a full opportunity to represent his client to the best of his ability.

- 13.5 Finally the Appellant did not challenge the fact that his lawyer did not ask to see the notes of records of interviews. It is not the Review Board's duty to investigate the tactics of the Appellant's counsel, but finds that such complaints may not be heard at this stage of the procedure.

#### **14. ERRORS OF FACT: NO EVIDENCE TO A "COMFORTABLE SATISFACTION" LEVEL**

- 14.1 The Appellant alleges that the Commission failed to apply the correct standard of proof which should have been that of "comfortable satisfaction", arguing that hearsay evidence could never attain such a level. The Review Board agrees that the allegations against the Appellant were serious and this is a relevant factor when considering the appropriate standard of proof.
- 14.2 However, the findings of the International Jury led to the conviction of the judges hearing the case and the Commission that the Appellant gave instructions or used pressure to add the weight "knowingly and intentionally". The International Jury came to that decision after hearing two days of direct witness evidence and legal questioning of those witnesses. The Commission decided not to accept the AC Jury Report automatically and conducted its own assessment of the evidence before it and came to the same view independently of the International Jury. In these circumstances, such clear findings may in the opinion of the Review Board undoubtedly qualify as "comfortable satisfaction" and the Board is satisfied that the Commission's findings fall within the scope of discretion available to it.

#### **15. ERRORS OF FACT: CONCLUSION**

- 15.1 The Review Board concludes that the procedure of the International Jury under the circumstances was correct as well as the interpretation of its findings by the Commission. There was no reversal of the burden of proof to the disadvantage of the Appellant, nor is there any basis for a rebuke that the assessment of the evidence should not have resulted in the Panel's "comfortable satisfaction".
- 15.2 The pertinent submissions of the Appellant concerning the alleged errors of fact are therefore dismissed.

#### **16. SANCTION: LIABILITY**

- 16.1 Based on the foregoing conclusions, the Review Board is satisfied that the AC Jury Report and its assessment by the Commission are correct. Therefore the Review Board is satisfied that the Appellant has:
- (a) committed a gross breach of a rule, namely RRSAC 78.1, which requires boats to comply with class rules;
  - (b) committed a gross breach of good sportsmanship; and
  - (c) has brought the sport of sailing into disrepute.
- 16.2 Accordingly the Appellant is open to sanction under RRSAC 69.

#### **17. SANCTION: DISPROPORTIONALITY**

- 17.1 The Appellant alleges that the sanction proposed by the Commission was out of proportion for the following reasons:
- (a) he was already punished by the exclusion from the 34<sup>th</sup> America's Cup;
  - (b) the economic effect of the sanction was enormous; and
  - (c) this sanction is unprecedented within the sailing community.

- 17.2 The Appellant further cited the views of the Dutch and the New Zealand MNAs which were also of the opinion that the sanction was exaggerated.
- 17.3 It is settled law that the sanction imposed on a competitor should be proportionate to the offence and must always reflect the extent of the competitor's guilt.
- 17.4 The Commission examined the available case law and especially in the facts of this case, has taken into account that OTUSA, the Appellant's team, took the view that it was a serious violation of the RRSAC and therefore withdrew all of its boats from the America's Cup World Series Regatta.
- 17.5 On the other hand, the Review Board cannot ignore the fact, based on the facts found, that the Appellant was not the direct author of the wrongdoing, but is guilty of endorsing a breach of the rule. The misconduct in question is a serious matter in a self-policed sport such as sailing and even indirect involvement by a competitor must attract a substantial sanction. However the Board notes the Appellant's conduct was indirect involvement and he did not directly modify the boat to be out of class.
- 17.6 Therefore the Review Board is of the opinion that, despite the seriousness of the violation and the potential damage to the sport of sailing, the decision of the Commission is disproportionate. In the Review Board's judgment, a revocation of the Appellant's ISAF Eligibility for a period of three years is appropriate. Such a sanction will not terminate his career and will still enable him to compete in major events after 1 September 2016.
- 17.7 Finally the request of the Appellant that this Decision should not be published by ISAF until the appeal process has been exhausted. However the Review Board is aware that its legal decisions in this case affect other cases being considered by the Commission and therefore this Decision may be communicated by the Commission to parties in cases concerning the 34<sup>th</sup> America's Cup on confidential terms.

## **18. ORDERS**

- 18.1 For the reasons set out in this Decision, the Review Board unanimously modifies the Decision of the Commission and orders:
- (a) the Appellant's ISAF Eligibility is suspended for a period of three years commencing from 1 September 2013;
  - (b) all Decisions in this case (whether by the Board or by the Commission) shall not be published until any appeal to the Court of Arbitration for Sport has been determined (or any appeal period has expired);
  - (c) the Commission may communicate this Decision to parties in cases concerning the 34<sup>th</sup> America's Cup provided those parties are bound by a legal duty of confidentiality not to distribute the Decision further;
  - (d) as per Article 82 of the ISAF Constitution, an appeal against this decision may be filed with the Court of Arbitration for Sport within 21 days of the receipt of this Decision (see CAS Rule 49); and
  - (e) the Registrar is to communicate this decision to the parties forthwith.

**Dieter Neupert**  
**Chairman**

**ISAF Review Board**

**23 May 2014**