BEFORE THE ISAF DISCIPLINARY COMMISSION

ISAF CASE 2013/009/DC

IN THE MATTER OF:

DIRK DE RIDDER (NED)

34th AMERICA'S CUP

DECISION

1. DECISION

1.1 Having considered all the submissions made to the Panel and the evidence made available to it, the first decision of the Commission in this case is attached.

1.2 Under Rule of Procedure 14, the Respondent has the right to request that the Panel reconsider this Decision. If the Respondent requests this, the Panel will convene a hearing in order to hear any submissions.

1.3 The Respondent may also make submissions to the Panel before it proceeds to the question of sanction. If the Respondent wishes a hearing to address to the Panel on this point, again the Panel will convene a hearing in order to do so.

2. ORDERS

2.1 Therefore the Panel orders:

(a) the Respondent shall inform the Chief Executive Officer no later than 1 February 2014 if he requests reconsideration of this Decision under Rule of Procedure 14 and shall by that time provide the full reasons for such a request;

(b) the Respondent may make any submissions on sanction to the Chief Executive Officer and may request a hearing before the Panel to address it on sanction no later than 1 February 2014;

(c) if the Respondent requests a hearing, he shall provide with that request his availability for a hearing;

(d) the Confidential Appendix to this Decision shall not be disclosed outside the parties to this case; and

(e) the Chief Executive Officer is to communicate this Decision forthwith.

Charlie Manzoni QC
Panel Chairman

ISAF Disciplinary Commission

22 January 2014

Contents

INTRODUCTION

1. On 7 September 2013 the Jury of the 34th America's Cup ("**the AC Jury**") sent a report ("**the AC Jury Report**") to the International Sailing Federation ("**ISAF**"), and 3 Member National Authorities of ISAF ("**MNAs**"), in accordance with the Racing Rules of Sailing (AC Edition) ("**RRSAC**") rule 69.2(c). The reference to RRSAC rule 69.2(c) in the AC Jury Report ought to be read as a reference to RRSAC rule 69.1(c).

2. The AC Jury Report concerns a matter which is known as "**AC Case 31**" and relates to allegations of serious misconduct by four sailors, all who were members of Oracle Team USA ("**OTUSA**"). Without descending to the detail of all the allegations, the AC Jury Report concerns modifications to the forward king post of AC45 boat 4 (known as "Oracle Spithill") during June 2012, at the venue of the AC45 Regatta in Newport Rhode Island, in circumstances where the four sailors knew that such modifications were in breach of the AC45 Class Rule.

3. During August 2013 the AC Jury held various meetings, and issued various Jury Notices in respect of these matters. Ultimately the Jury reached conclusions concerning Mr de Ridder, as set out in Jury Notice JN116 that:

    3.1. He gave the instruction or direction to add the weight to the forward king post.

    3.2. He knew the weight had been added.

    3.3. He knew it was a breach of the AC45 Class Rule.

    3.4. He did not tell the truth at the hearing in this regard.

    3.5. The AC Jury was comfortably satisfied that this conduct was a gross breach of a rule and of good sportsmanship.

4. Consequently it reached a finding of a breach of gross misconduct[1] and it excluded Mr de Ridder from further participation in any role in the 34th America's Cup under RRSAC 69.1(b)(ii). In addition, as is required under RRSAC rule 69.1(c), the AC Jury issued the AC Jury Report to the Member National Authority of Mr de Ridder

[1] Throughout this decision we use the phrase "gross misconduct" as a shorthand for a finding of a gross breach of a rule, good manners or sportsmanship or bringing the sport into disrepute, which is the conduct that RRSAC rule 69 is aimed at preventing.

and to ISAF. The Jury made no recommendation to ISAF or the MNA.

5. Under ISAF Regulations 8 and 35.1 the appropriate body of ISAF to address the AC Jury Report is the Disciplinary Commission, and on 30 September 2013, in accordance with its published procedures, the Disciplinary Commission appointed a Panel ("**the Panel**") to address the AC Jury Report insofar as it relates to Mr de Ridder.

6. The Panel consists of Mr Charlie Manzoni QC (HKG) as Chairman and Professor Jan Stage (DEN) and Mrs Ana Sanchez del Campo Ferrer (ESP).

7. On behalf of the Disciplinary Commission, pursuant to Rule 2 of the Disciplinary Commission Rules of Procedure ("**the Rules of Procedure**") the Panel is tasked to determine whether the allegations in the AC Jury Report are true, whether any applicable rule has been broken and if so what sanction (if any) should be imposed.

8. This is the decision of the Panel.

9. The same Panel was also appointed to consider the AC Jury Report insofar as it relates to the other three sailors, but clearly the Panel must address the AC Jury Report individually in respect of each sailor, as different allegations, and different considerations, apply to each of them. Although at one stage it was thought that it might be appropriate to consider all four matters contemporaneously, it soon became apparent that it would not be expeditious to delay the resolution of matters relating to Mr de Ridder pending the other matters. Consequently the Panel has proceeded independently in respect of all four sailors. This is the first decision of the Panel to be issued concerning the AC Jury Report.

10. The AC Jury also went on, in a different hearing, to consider the position under Article 60 of the America's Cup Protocol, which Article seeks to protect the integrity of the America's Cup and of the sport of sailing. In Jury Notice JN117, the AC Jury penalised OTUSA, under Articles 60 and 15.4, one point for each of the first two races of the Match (as defined in the Protocol) in which they would otherwise score a point. That decision is a decision made under the Protocol, and is not the subject of any consideration by the Panel, save that the record of that decision is one of the background facts that informs the circumstances and seriousness of the incidents that the Panel has to address.

PROCEDURAL HISTORY

11. The AC Jury, consisting of David Tillett IJ (AUS) as Chairman, John Doerr IJ (GBR), Josje Hofland IJ (NED), Graham McKenzie (NZL) and Bryan Willis IJ (GBR) issued

the AC Jury Report to ISAF, and the MNAs Yachting Australia (in respect of one sailor), Yachting New Zealand (in respect of two sailors) and Koninklijk Nederlands Watersport Verbond (in respect of Mr de Ridder) on 7 September 2013.

12. In the AC Jury Report, the AC Jury summarised as against each sailor the findings it had made following its hearings, recorded the decision it had reached, the penalty it had imposed within its own jurisdiction (which is an "event" jurisdiction) and either made a recommendation to ISAF and the relevant MNA that no further action be taken, or expressly declined to make any such recommendation. It attached Jury Notices JN116 and 117.

13. It became apparent to the Panel during the course of the proceedings that Jury Notices other than simply JN116 and JN117 had some relevance to the matters under consideration, and as a result the Panel has visited the AC Jury Website at https://noticeboard.americascup.com/jury/jury-notices , on which all Jury Notices that are not restricted as to their publication are published. The Panel has downloaded and read the following additional Jury Notices 101, 103R, 106, 108R, 110R, 114 and 115R.

14. By letter dated 20 September 2013, ISAF notified Mr de Ridder of the appointment of the Panel, and enclosed a copy of Rules of Procedure and the Directions given by the Vice-Chairman of the Disciplinary Commission. In those Directions, the Disciplinary Commission appointed the Panel, and adjourned the proceedings pending receipt of the decision of Mr de Ridder's MNA, (Koninklijk Nederlands Watersport Verbond) under RRSAC 69.2(a). A similar direction had been made in respect of all four cases under consideration of the Panel relating to the AC Jury Report.

15. The decision of Koninklijk Nederlands Watersport Verbond ("**the MNA Decision**") was received on or around 23 October 2013, and is dated 23 October 2013. In the MNA Decision, the MNA decided that it was not appropriate to conduct a hearing and decided that no further action was to be taken by the MNA in this matter.

16. The Dutch MNA decision was the first decision of the various MNAs to whom the AC Jury Report had been made. The Panel took no action immediately in the hope that the other MNA decisions would follow shortly and it would be possible to progress all four matter contemporaneously. However, although one other MNA decision was received on or around 25 October 2013, at the time of writing two others have not been received.

17. By letter dated 21 November 2013, ISAF informed Mr de Ridder of the Panel's decision to proceed with its investigations relating to him. The Panel also decided to, and did, grant the Dutch MNA Participant status under Rule 6.2 of the Rule of Procedure.

18. By directions issued on the same date, the Panel ordered:

    a. Koninklijk Nederlands Watersport Verbond to submit to ISAF any submissions it may wish to make on the AC Jury Report by 1700 UTC on 2 December 2013.

    b. The Respondent to submit to ISAF his Response to the AC Jury Report by 1700 UTC on 9 December 2013, including any evidence he wished to rely upon in Response.

    c. The AC Jury to submit to ISAF any additional material concerning the AC Jury Report in the light of the comments made by Koninklijk Nederlands Watersport Verbond and the Response and evidence given by the Respondent that the AC Jury wished to place before the Panel, by 1700 UTC on 23 December 2013.

    d. The Respondent to submit to ISAF any final Reply submissions or evidence he wished to rely upon or place before the Panel in the light of the foregoing by 1700 UTC on 13 January 2013.

19. Koninklijk Nederlands Watersport Verbond did not make any submission, and indicated by email to ISAF that it did not wish to.

20. By letter dated 3 December 2013 Messrs Anderlini & McSweeney LLP, lawyers acting on behalf of Mr de Ridder wrote to ISAF asking the Panel for a "pre-hearing evidentiary ruling" concerning the ability of Mr de Ridder to produce and refer to transcripts, witness statements and other "trial evidence" that was adduced before the AC Jury in the hearings that the AC Jury conducted and which formed the basis of the AC Jury Report.

21. The reason that Anderlini & McSweeney considered that they needed a ruling from the Panel was that the AC Jury had ordered, by JN101, and further by paragraph 80 of JN115R that all matters concerning AC Case 31 remain confidential. The Panel was not privy to the detail or rationale of those orders, and by letter dated 4 December 2013 from ISAF the Panel informed Anderlini & McSweeney that it did not consider that it had any jurisdiction to interfere with any duty of confidentiality that Mr de Ridder may owe to the other sailors, or the AC Jury, in respect of matters that were presented to the AC Jury.

22. The Panel expressly recognised that if any such duty of confidentiality caused a difficulty to Mr de Ridder in the presentation of his case to the Panel, that was a matter which it would have to take into account, both as to his defence and as to

whether it was satisfied that the allegations made in the AC Jury report were true, but that it was unable to make the order that had been requested, and that any such request should be directed to the AC Jury.

23. However, the Panel confirmed that it was content to proceed on the basis that if any material from AC Case 31 was referred to or seen by the Panel it would remain confidential to the investigation and would be referred to in any decision in a way that preserves its confidentiality. That was a reference (although not expressly made in the letter) to Rule 13.2 of the Rules of Procedure.

24. By Jury Notice JN123 the AC Jury lifted the confidentiality order concerning the transcripts and statements made in AC Case 31 for the purposes of these proceedings, on the basis that it remains confidential to the Disciplinary Commission.

25. On 14 December 2013 the AC Jury issued JN124, which gave a slightly wider release of the information and evidence before the AC Jury, on the basis that the name of one sailor was redacted, given that the case against him was dismissed by the AC Jury.

26. The Panel has drafted this decision on the basis that it will use the utmost care to retain the confidential nature of the material that it has been made privy to. As a result, the Panel has addressed all of the confidential evidential material in an appendix, which will not be published (as is permitted by rule 13.2 of the Rules of Procedure). In the main body of this decision, which will be published, the Panel has addressed the submissions made, but not addressed the evidence in detail. It has simply recorded its factual conclusions based on that evidence. The rationale for those factual conclusions is explained in detail in the Confidential Appendix.

27. On 9 December 2013 Mr de Ridder made his submissions, which consisted of an eight page submission, together with six exhibits.

28. On 23 December 2013 the AC Jury made its submissions which consisted of three pages of submission and a six page exhibit.

29. On 7 January Mr de Ridder made his final submissions, which consisted of a six page submission. In that submission he did not indicate that he thought a hearing was necessary, but rather he left it to the Panel to decide whether a hearing was necessary. All that he requested was that if a hearing was to be convened, that it be done by electronic means.

30. On the basis that all the material before the panel is documentary, and largely consists of transcripts of live evidence, the Panel does not consider that a hearing is necessary. As Mr de Ridder has left the decision to the Panel, it has decided not to do so.

31. The Panel notes that under rule 14.2 of the Rules of Procedure, Mr de Ridder has the right to request the Panel to reconsider any decision it makes within 10 days of notification of that decision. Further, the Panel does not think that Mr de Ridder has particularly concentrated his submissions on the question of an appropriate sanction in the event that the Panel finds against him. As a result, in the light of the conclusions the Panel has reached, it has concluded that the appropriate course is:

    31.1. To issue this decision without reaching any conclusions on sanction.

    31.2. To notify Mr de Ridder of this decision, and invite him to make submissions on sanction at the same time as any request he may wish to make for the Panel to reconsider its decision.

    31.3. To give Mr de Ridder a further opportunity to request a hearing in respect of any reconsideration he may ask for, and on sanction, if he considers it to be appropriate.

    31.4. To make, and issue, its decision on sanction once that process is concluded.

THE FRAMEWORK OF THE RULES

32. It is necessary for the Panel to satisfy itself that it has the appropriate jurisdiction to adjudicate on the AC Jury Report, and to assess the scope of that jurisdiction. In some ways this requires an investigation of the obvious, because no party has challenged jurisdiction and it is clear that the RRSAC make express reference to ISAF, and expressly requires ISAF to investigate the AC Jury Report. However for the purposes of addressing the scope of the jurisdiction, it is necessary to delve a little deeper into the underlying foundation of the competition, and Mr de Ridder's acceptance (or otherwise) of the relevant rules.

THE AC JURY'S JURISDICTION

33. The America's Cup is ultimately governed by the Deed of Gift dated 1887, as subsequently amended and interpreted by the New York Supreme Court. However the details of any individual challenge has, in more modern times, usually been governed by a protocol agreement entered into between the Defender and the Challenger of Record, which is also required to be adhered to by any additional challenger.

34. The protocol in respect of the 34th America's Cup, as subsequently amended ("**the Protocol**"), was made between the Golden Gate Yacht Club, as Defender, and Club Nautico di Roma as Challenger of Record. The parties to these proceedings have not provided the Panel with a signed copy of the Protocol, but an unsigned copy appears

on the website official noticeboard of the 34th America's Cup at http://noticeboard.americascup.com. The following provisions of the Protocol are relevant:

By the Definitions Section, Article 1

> ***America's Cup World Series ("AC World Series")*** *means a series of regattas to be held in each of 2011, 2012 and 2013 (but does not include ACCS, ACDS and the Match) where the overall winner is declared the World Champion for that year.*
>
> ***Competitor*** *means a Defender Candidate or Challenger.*
>
> ***Challenger*** *means a yacht club (and its representative team) whose challenge has been accepted by GGYC and, for the avoidance of doubt includes the Challenger of Record.*
>
> ***Defender Candidate*** *means a team selected by GGYC to participate in the America's Cup Defender Series, if any.*
>
> ***Event*** *means the Regatta, the AC World Series and any Special Events.*
>
> ***Jury*** *means the International Jury appointed under Article 15.*
>
> ***Match*** *means the series of races between the Defender and the Challenger for the America's Cup.*
>
> ***Regatta*** *means the America's Cup Challenger Series, the America's Cup Defender Series (if any) and the Match.*

By Article 13

> *13.1. The Event shall be governed by:*
> *(a) the Deed of Gift;*
> *(b) this Protocol;*
> *(c) the AC72 Class Rule, except for regattas that do not use the AC72 Class Rule, the AC45 Class Rule; and*
> *(d) the ISAF Racing Rules of Sailing (America's Cup Edition) ("RRSAC").*

By **Article 15** the scope of Jurisdiction and powers of the AC Jury were set out:

> *15. JURY AND DISPUTE RESOLUTION*
> *15.1. (a) There shall be a Jury of five persons.*

(b) The Jury and its Chair will be appointed by ISAF in consultation with ACRM by 31 October 2010.

…

15.2. Jury members:

(a) shall possess knowledge of America's Cup history and the Deed of Gift;

(b) shall possess good general knowledge of yacht racing and yacht clubs;

(c) shall have good commercial knowledge and experience;

(d) shall be known to be fair-minded and to possess good judgment; and

(e) may be a resident or citizen of any country, including a country of a yacht club participating in the Event and/or a member of a yacht club participating in the Event.

…

15.4. The Jury shall act both as a jury under the RRSAC and as an arbitral body, with the following powers

(a) to resolve all matters of interpretation of the Rules other than the class rules in Article 13.1(c) except as provided in Article 15.4(f);

(b) to resolve disputes between Competitors, GGYC, Challenger of Record, the Competitor Forum, the Event Authority, ACRM, or any Official that cannot be resolved by the terms of any Rule;

(c) to resolve all matters where it has been given the power to do so by this Protocol;

(d) to impose penalties for breaking a Rule as prescribed in the Rule, or when no penalty is prescribed the Jury may impose penalties it believes to be just and equitable including:

(i) censure;
(ii) fine;
(iii) order a partial or full forfeiture of a Challenger's performance bond;
(iv) order loss of existing or future points, scores or races;
(v) award points or races to another Competitor;
(vi) disqualify a Competitor from any race, series or the Event;
(vii) order a reduction in the number of sails permitted; and/or

(viii) to order the suspension or expulsion of any individual from the Event.

…

(h) to determine the jurisdiction of the Jury in accordance with the terms of this Protocol; and

…

15.7. The Jury shall establish its rules of procedure consistent with the Rules.

…

15.12. The Jury shall act as an arbitration body. The legal seat of the Jury is the State of New York. However, the Jury may carry out actions that fall within its jurisdiction at the Venue, or other places it deems appropriate, or by correspondence or other means of communication at a distance. The Jury proceedings shall be governed by the U.S. Federal Arbitration Act and by the New York Convention of 1958 on the Recognition and Enforcement of Arbitral Awards. The Jury shall act fairly and impartially, provide equal treatment and a fair opportunity to be heard given the circumstances in which the decision must be made.

15.13. Any decision and/or award of the Jury shall be final and binding.

15.14. A Competitor shall not resort to any court or tribunal where the Jury has jurisdiction. For the avoidance of doubt, this requirement does not apply to:

(a) a third party claim not referred to in Article 15.4(b);

(b) any loss or damage to property or person;

(c) any person who is allegedly in breach of any confidentiality undertaking or restrictive covenant entered into with any Competitor;

(d) seeking any Court or any lawful authority to exercise its inherent jurisdiction to oversee and guide the administration of the Deed of Gift; and

(e) the enforcement of contractual or property or other rights not based on or derived from the Rules. A Competitor that breaks this rule shall cease to be eligible for the Event and for entitlements under Articles 5, 27 and 41, unless the Jury determines the breach was inconsequential in which case they may apply another penalty."

35. In the RRSAC Definitions Section it states that:

"*In interpreting these Rules, the Definitions in Article 1.1 of the Protocol shall apply.*"

36. The RRSAC make regular reference to the "Jury", which is a defined term under the Protocol.

37. From these provisions it is clear that:

37.1. The RRSAC are rules which govern the Event.

37.2. The Event includes the AC World Series (which was the series sailed in AC45 Yachts) and the AC Jury has jurisdiction over it.

37.3. AC Jury is appointed as both an arbitral body as between the participants, and as an international jury under the RRSAC.

37.4. Any reference to "the Jury" in RRSAC is a reference to the Jury appointed under Article 15 of the Protocol.

37.5. The AC Jury was empowered to reach the conclusions that it did concerning both the underling facts relating to the incident and that they amounted to gross misconduct.

37.6. Any decision of the AC Jury is final and binding for matters under its jurisdiction, i.e. in respect of the Event.

38. The RRSAC provisions are not precisely the same as the normal edition of the Racing Rules of Sailing ("**the RRS**"), but reflect a similar position. Under the RRS, an International Jury, if appointed to an event, is appointed in accordance with Appendix N, and if it is so appointed, its decisions are final and binding as set out in Appendix N. However, the Panel is concerned not with the normal position, but with the particular position under the RRSAC. Consequently the next section of this decision addresses the RRSAC.

THE RRSAC AND ISAF

39. The RRSAC defines the Rules as:

"*(a) The rules in this book, including the Definitions, Introduction, preambles and the rules of relevant appendices, but not titles.*

(b) ISAF Regulation 19, Eligibility Code; regulation 21, Anti Doping Code;

(f) The sailing instructions; and

(g) The documents described in Protocol Articles 13 and 4.3(k)"

RRSAC 2 provides that

"*Competitors shall comply with the rules and act at all times in compliance with recognized principles of sportsmanship and fair play. A yacht may be penalized under this rule only if it is clearly established that these principles have been violated. A disqualification under this rule shall not be excluded from the yacht's series score."*

RRSAC 3 provides that:

"*By participating in a race conducted under these racing rules each Competitor agrees:*

(a) to be governed by the rules

(b) to accept the penalties imposed and other action taken under these rules, subject to appeal and review procedures provided in them, as the final determination of any matter arising under the rules, and

(c) with respect to any such determination, not to resort to any court of law or tribunal."

RRSAC 69 provides:

69.1 Action by the Jury

(a) When the Jury, from its own observation or a report received from any source, believes that a person associated with a Competitor may have committed a gross breach of a rule, good manners or sportsmanship, or may have brought the sport into disrepute, it may call a hearing. The Jury shall promptly inform the individual in writing of the alleged misconduct and of the time and place of the hearing. If the individual provides good reason for being unable to attend the hearing, the Jury shall reschedule it.

(b) If the Jury decides that the person committed the alleged misconduct it shall either:

(i) warn the person or

(ii) impose a penalty by excluding the person and, when appropriate, disqualifying a yacht, from a race or the remaining races or all races of the series, or by taking other action within its jurisdiction. A disqualification under this rule shall not be excluded from the yacht's series score.

(c) The Jury shall promptly report a penalty, but not a warning, to the national authority of the person and to the ISAF.

(d) If the person does not provide good reason for being unable to attend the hearing and does not come to it, the Jury may conduct it without the person present. If the Jury does so and penalizes the person, it shall include in the report it makes under rule 69.1(c) the facts found, the decision and the reasons for it.

(e) If the Jury chooses not to conduct the hearing without the person present or if the hearing cannot be scheduled for a time and place when it would be reasonable for the person to attend, the Jury shall collect all available information and, if the allegation seems justified, make a report to the relevant national authority and to the ISAF.

69.2 Action by a National Authority or Initial Action by the ISAF

(a) When a national authority or the ISAF receives a report alleging a gross breach of a rule, good manners or sportsmanship, or a report alleging conduct that has brought the sport into disrepute, or a report required by rule 69.1(c) or 69.1(e), it may conduct an investigation and, when appropriate, shall conduct a hearing. It may then take any disciplinary action within its jurisdiction it considers appropriate against the competitor or yacht, or other person involved, including suspending eligibility, permanently or for a specified period of time, to compete in any event held within its jurisdiction, and suspending ISAF eligibility under ISAF Regulation 19.

(b) The national authority of a competitor shall also suspend the ISAF eligibility of the competitor as required in ISAF Regulation 19.

(c) The national authority shall promptly report a suspension of eligibility under rule 69.2(a) to the ISAF, and to the national authorities of the person or the owner of the yacht suspended if they are not members of the suspending national authority.

69.3 Subsequent Action by the ISAF

Upon receipt of a report required by rule 69.2(c) or ISAF Regulation 19, or following its own action under rule 69.2(a), the ISAF shall inform all national authorities, which may also suspend eligibility for events held within their jurisdiction. The ISAF Executive Committee shall suspend the competitor's ISAF eligibility as required in ISAF Regulation 19 if the competitor's national authority does not do so.

RRSAC rule 75 provides:

"*Competitors shall comply with ISAF regulation 19, Eligibility Code.*"

RRSAC Rule 78.1 provides:

> *"Competitors shall ensure that the yacht is maintained to comply with the class rule and that her measurement certificate, if any, remains valid."*

40. It appears that the definition of "*Competitors*" contained within the Protocol does not strictly include individual sailors operating as part of a crew, although arguably it may include any individual who is a member of a Defender Candidate. At face value that gives rise to the surprising result that an individual who operates as part of a crew of a Competitor is not himself subject to the Rules.

41. However, various provisions of the RRSAC refer to "*competitors*", either with a capital "C" or sometimes without one, and cannot possibly amount to a reference to the Competitor as strictly defined in the Protocol and can only be sensibly construed as a reference to an individual. For example, RRSAC 1.2 requires that "*Each competitor is individually responsible for wearing a personal flotation device adequate for the conditions".* RRSAC 78 requires competitors to comply with ISAF Regulation 19, Eligibility Code and the Eligibility Code is a document which is specifically targeted at individuals. However, other parts of the RRSAC refer to "crew" (such as for example RRSAC 40), and thus give the impression that the "crew" are not included within "competitor".

42. The ISAF Eligibility Code is somewhat more express in its applicability to individuals (and crews of a yacht), than the RRSAC (or the RRS for that matter) in that it expressly refers to the requirements relating to individuals.

43. However it states at Regulation 19.3 that:

> *"A boat that races with, as part of her crew, a competitor who is in breach of this Code shall be disqualified from all such races*"

44. Consequently, it is possible that RRSAC 75 is referring simply to Regulation 19.3 of the Eligibility Code when it requires compliance with that Code, but the Panel believes that is rather unlikely to have been in the intention of the draftsman.

45. In the light of these somewhat conflicting provisions, there is a perfectly respectable argument that the word "competitor" within the RRSAC should be given a somewhat wider definition that would strictly appear from the face of the Protocol. The view could be taken that the word competitor in the RRSAC includes more than the narrow reading of "Competitor" in the Protocol. It could include the individual yacht club, the team that sailed the boat on behalf of the yacht club in any individual event, and also the individuals that formed that team. If that is correct, rules 2 and 3 would apply the RRSAC directly to Mr de Ridder.

46. However, the Panel does not need to resolve that question because there are four

independent manners in which the Panel considers that Mr de Ridder is clearly subject to the RRSAC and the jurisdiction of ISAF.

47. First, there is a body of English law to the effect that participation in an event is sufficient to infer a contract to abide by the rules (see for example *Modhal v British Athletic Federation (in administration)* [2002] 1 WLR 1192, English Court of Appeal). The Panel does not suggest that this question is in fact governed by English law, but the reasoning is compelling and it sees no reason why it should not be applied whichever law is relevant. It is also apparent from the case of *Juno SRLv s/v Endeavour* 58 F.3d 1, which is referred to further below, that a similar position probably applies under US law.

48. Further in this respect, although the Panel has not seen the complete chain of contracts between the Golden Gate Yacht Club, OTUSA and Mr de Ridder, or if there are such contracts, between Mr de Ridder and the Organizing Authority of the America's Cup, it is highly likely in the context of the America's Cup that there are terms, either express or implied, that would compel Mr de Ridder to comply with the RRSAC, and would subject him to the disciplinary jurisdiction of the body that governs the sport of sailing, namely the jurisdiction of the AC Jury, and in the event of gross misconduct, ISAF as provided for expressly within RRSAC 69.

49. As a matter of evidence, one of the witnesses to the AC Jury in the hearing of AC Jury Case 31 confirmed that all employees were subject to the Rules. In the light of the position on confidentiality, this is dealt with in paragraph 1 of the Confidential Appendix.

50. Secondly a direct contractual nexus is not in any event a necessary precondition to a disciplinary jurisdiction of the body that governs the sport and the event, although the lack of contractual nexus may affect the scope of any sanction it imposes. The jurisdiction that the Disciplinary Commission is exercising is one to assess the extent to which the AC Jury Report, as it applies to Mr de Ridder, is true, and if so, whether to impose a sanction on him. Subject to what is said below under the heading "Scope of Jurisdiction", one of the sanctions that may be imposed is to remove his Competition Eligibility or ISAF Eligibility under ISAF Regulation 19. Effectively that would be a decision by ISAF not to allow him to participate in future events that it governed. It is open to ISAF (subject to the normal rules of procedural fairness) to make that decision in relation to any person that it legitimately considers should not participate in its events, even without any direct contractual nexus.

51. It is no doubt for this reason that RRSAC 69 expressly provides that the Jury can make a report to ISAF in respect of "*a person associated with a competitor*" (which Mr de Ridder clearly is), and ISAF is permitted to take disciplinary action against that "*other person involved*".

52. Thirdly, it is clear that the 34th America's Cup is an event that requires ISAF Eligibility for all crew under Regulation 19 because under Article 15 of the Protocol an International Jury was appointed by ISAF, and ISAF Regulation 19.6(e) indicates that consequently ISAF Eligibility is required.

53. Mr de Ridder has ISAF Eligibility. The conditions for such Eligibility are that the competitor meets the following conditions:

> "…
> *(c) he has agreed to be governed and bound by the regulations and any other requirements issued by ISAF*"

54. Thus, by accepting ISAF Eligibility, which facilitated his participation in the America's Cup, and utilising it in order so to participate, he has bound himself to be governed by both the ISAF Regulations and any other requirements issued by ISAF. One such requirement issued by ISAF in relation to the America's Cup is the RRSAC.

55. Fourthly, Rule 3.2 of the Rules of Procedure provides that:

> "*A Respondent shall raise any objection to the jurisdiction of ISAF or the Commission within seven days of either being served a Report under rule 9.1 or otherwise when notified in writing of the proceedings concerning him by ISAF. If the Respondent fails to do so, or otherwise proceeds in the case in a manner that indicates acceptance of these rules he shall be deemed to have irrevocably accepted the jurisdiction of ISAF, the Commission and these Rules."*

56. Mr de Ridder was served with the AC Jury Report, and a copy of the Rules of Procedure on 20 September 2013 and has not objected to the jurisdiction. Further, his participation in these proceedings is consistent only with his acceptance of the jurisdiction.

CONCLUSIONS ON EXISTENCE OF THE JURISDICTION

57. Consequently we are satisfied that Mr de Ridder is properly subjected to the jurisdiction of the ISAF disciplinary process.

58. RRSAC 69.2(a) provides that ISAF may take disciplinary action within its jurisdiction, including suspension of Competition Eligibility or ISAF Eligibility under Regulation 19. Under Regulations 8 and 35.1, ISAF has resolved that the disciplinary functions of ISAF shall be exercised by the Disciplinary Commission. Consequently we are also satisfied that the Disciplinary Commission is indeed the correct body to assess the AC Jury Report, and has valid and proper jurisdiction to do so.

THE SCOPE OF THE JURISDICTION

59. There are two issues which arise in relation to the scope of the jurisdiction that the Disciplinary Commission must exercise in this case:

    59.1. The source and nature of the power to impose a sanction.

    59.2. The status and effect of the AC Jury Decision in AC Case 31.

The Power to impose a sanction

60. There are two matters which in the Panel's view provide an unfettered jurisdiction on the Panel (within the normal confines of ISAF jurisdiction).

    60.1. In the light of the text of RRSAC 69, to which Mr de Ridder was subject, there was a clear and express intention that in relation to a report under RRSAC 69.1(c) ISAF should have jurisdiction to take:

    > "*any disciplinary action within its jurisdiction it considers appropriate against the competitor or yacht or other person involved, including suspending eligibility, permanently or for a specified period of time, to compete in any event held within its jurisdiction, and suspending ISAF eligibility under ISAF Regulation 19."*

    Consequently, a wide discretion has been provided by way of the RRSAC.

    60.2. Under the Rules of Procedure, Rule 13.3, the Disciplinary Commission is given a wide discretion to impose any of the sanctions listed in that rule. Hence, in respect of any report that is made to the Disciplinary Commission, and which it investigates, the sanctions listed under Rule 13.3 are open to it. Thus once the existence of the jurisdiction of the Panel is established, it is wide and unfettered other than by reference to what might be described as the natural limitations of ISAF's jurisdiction.

61. We note that Regulation 19.14 of the ISAF Regulations provides an express jurisdiction for ISAF to suspend Competition and ISAF Eligibility "*for breach of RRS 69.1(a)"*. RRS 69.1(a) is one of the normal racing rules of sailing, and is not, on the face of it, the same as RRSAC 69.1(a) in at least two respects: (i) the text of RRSAC 69.1(a) is different to RRS 69.1(a) and (ii) RRSAC is a different edition of the rules of sailing to RRS.

62. In the 34th America's Cup the RRS did not apply, and hence on the face of Regulation 19 alone it would not be open to the Panel to reach any conclusion that there has been a breach of RRS69, but for the reasons set out above the Panel's jurisdiction is derived from the RRSAC themselves[2].

The status and effect of the AC Jury Decision in AC Case 31

63. The Protocol identifies that the decision of the AC Jury is final and binding. That is consistent with the normal position under the RRS Appendix N, which similarly provides that any decision of an international jury in relation to any matter arising at a regatta is considered to be final and binding and not subject to any appeal. Indeed, it is a well recognised concept within the sport of sailing as a whole that the decision of an international jury is final.

64. It will therefore come as a surprise, and no doubt a source of some concern, to many if the Disciplinary Commission is free under the overall framework of the rules and ISAF Regulations to re-consider the decision of an International Jury and, if appropriate, reach findings of primary fact and inferences of secondary fact which are different to those reached by the International Jury and/or to apply the rules framework to the facts differently to the way the International Jury has done.

65. In its submissions to the Panel, the AC Jury makes this very point. It contends that its decision is final and binding not only as a matter of the proper interpretation of the Protocol and the RRSAC, but also because the AC Jury is constituted as an arbitral body under the US Federal Arbitration Act and no application has been made under s. 10 of that Act to set aside the decision of the AC Jury in AC Case 31. It says that the Disciplinary Commission has no jurisdiction to set aside the award (although the AC Jury submissions, at paragraph 6, refer to "allegations" in this context), and it is not the function of the Disciplinary Commission to set aside the "*findings in the [AC Jury] report*". Further, the AC Jury has referred the Panel to the decision of the United States Court of Appeals First Circuit case of *Juno SRL v s/v Endeavour* 58 F.3d 1, which it says is authority for the proposition that if there is a jurisdiction to re-assess the underlying material the Panel should only set aside the decision of the AC Jury where its conclusions are shown to be clearly erroneous.

66. In the Panel's view, on a proper interpretation of the rules framework, and the different jurisdictions of the International Jury, the MNAs and the Disciplinary Commission, there is a clear obligation on each to reach their own conclusions. That

[2] In this context the Panels notes that RRS 69.1(a) has been changed in the RRS 2013 - 2016 to provide an express obligation not to commit acts of gross misconduct etc. That obligation was only implicit in the older version of the RRS. The RRSAC are based upon the old wording of the RRS, and the new wording of the RRS does not carry forward into the RRSAC. In this decision the Panel has been careful to apply the precise wording of the RRSAC, and not the new wording of the RRS 2013-2016.

obligation carries with it an obligation to make an assessment of the evidence before it, and to determine whether the AC Jury Report is true. Inevitably that requires the Disciplinary Commission (or MNA) to assess the underlying material, and to reach conclusions which may be different to those reached by the AC Jury, albeit based on the same underlying incident. If the Panel does not agree with the decision of the AC Jury, it is not bound by its conclusions, and it will reach conclusions both of fact, and/or of application of the RRSAC to the facts, which may be different to the AC Jury, if the Panel considers it appropriate to do so.

67. In the following paragraphs the Panel will explain why it has reached this conclusion.

68. The AC Jury has jurisdiction over the 34th America's Cup. Subject to the terms of the RRSAC and the Protocol, it is free to reach decisions concerning that event, and within the jurisdiction that is placed upon it by the Protocol and the RRSAC. But its jurisdiction does not extend beyond that event (similarly with any other international jury operating under the RRS). The jurisdiction of any such jury applies to the relevant event, and the relevant event only. Within that context its decisions are final and binding. Hence competitors cannot seek to overturn any decision of an international jury by way of appeal or review, and consequently its decision will create a finality of results for that event[3]. Such a position is logical and sensible for sporting events, particularly important ones, in which it is desirable that the final result is known at the time, and cannot be changed at a later stage.

69. However the jurisdiction of the MNAs and ISAF is different. The MNAs hold a national jurisdiction and when a report is made to an MNA concerning an infraction of RRS 69 at a particular event (which may not be within its jurisdiction, but which concerns a sailor that operates under its jurisdiction), the MNA is obliged to investigate that alleged infraction for the purposes of deciding whether and to what extent it ought to impose a sanction which is wider than the event itself, but limited to matters within the MNA jurisdiction. Different MNAs may have different rules as to the effect and/or weight that they should attach to the International Jury decision and each MNA will give effect to its own rules[4].

70. ISAF has a different jurisdiction to both the MNAs and an international jury. It is assessing the matter from an international perspective, and in its position as the world governing body of the sport. ISAF Regulation 8 establishes the Disciplinary Commission and sets out its terms of Reference:

[3] In this context the Panel is not considering the position of anti-doping offences under the World Anti-Doping Code, to which different considerations as to the finality of decisions apply.

[4] For example, albeit in a different context, under the 2009 World Anti Doping Code, Article 3.2.3 facts established by an unappealed decision of a competent court or tribunal are irrebuttable evidence against an athlete unless reached in violation of the principles of natural justice.

"8.15.1 The Disciplinary Commission has been established by the Executive Committee in accordance with Regulation 8 in order to carry out ISAF's disciplinary functions under the Racing Rules of Sailing and the ISAF Regulations.

…

8.15.6 The Commission shall independently exercise the functions allocated to it. Regulation 8.5 does not apply to the Commission, but it shall report to the Executive Committee on how it has carried out its functions.

8.15.7 The Commission shall adopt and publish its own rules of procedure to govern its meetings, hearings and operations. The Commission shall publish its decisions unless it believes it is inappropriate to do so.

8.15.8 The Disciplinary Commission shall:

(a) exercise ISAF's disciplinary functions under the Racing Rules of Sailing and the ISAF Regulations (where those functions are allocated to it by ISAF Regulation and in particular Regulations 19, 35, 36 and Appendix 5);

(b) publish guidance on dealing with misconduct and discipline in the sport of sailing and guidelines for sanctions for misconduct;

(c) ensure ISAF's disciplinary procedures are fit for purpose and kept up to date, reflecting best practice across other Olympic sports;

(d) operate in a transparent and fair manner;

(e) issue advice and guidance to MNAs and ISAF Race Officials on the investigation and hearing of misconduct cases;

(f) promote fair sailing and the principles of sportsmanship; and

(g) when requested to do so, advise other ISAF bodies and committees on disciplinary matters.

71. Under the Rules of Procedure dated 27 August 2013 the Disciplinary Commission identified its role as including to "*determine whether or not any allegations in Reports are true"*. The definition of Reports within the Rules of Procedure clearly includes the AC Jury Report.

72. Consequently, when exercising its own jurisdiction, different to that of the AC Jury, the Disciplinary Commission is under an obligation to decide, in a fair and transparent manner, whether the allegations made by the AC Jury in the AC Jury Report are true. Inevitably that requires the Panel to consider the evidence before it, and reach its own conclusions as to the matters alleged. It is not bound by the findings of the AC Jury and is entitled to reach different conclusion, and indeed bound to do so if it considers it appropriate.

73. Notwithstanding this, one element of the evidence before the Panel is the fact that the AC Jury has spent a considerable period of time investigating the matter, and has spoken directly to many people who were involved. They have had presentations from several lawyers representing those involved, and have heard live evidence from many witnesses. It is inevitable that they have been more closely connected to the underlying facts than the Panel has. Further, it was their express task to investigate and properly to assess the material that was before them, to make findings of fact based on that material, and to assess whether, in their view, there was gross misconduct in the context identified above.

74. There is no doubt that the AC Jury consists of widely respected people within the sport, and indeed they have been appointed under Article 15 of the Protocol because they:

> *(a) shall possess knowledge of America's Cup history and the Deed of Gift;*
>
> *(b) shall possess good general knowledge of yacht racing and yacht clubs;*
>
> *(c) shall have good commercial knowledge and experience;*
>
> *(d) shall be known to be fair-minded and to possess good judgment;*

75. In such circumstances, whilst the decisions and findings of the AC Jury are not binding upon the Panel, they are evidence that the Panel will give appropriate weight to, provided that the Panel is satisfied that the AC Jury decision was reached in compliance with rules of natural justice, with due procedural fairness, and is objectively reasonable.

76. In reaching this conclusion, the Panel does not suggest that it should be profoundly, or even substantially, influenced by the findings of the AC Jury. The Panel must make its own assessment of the underlying evidence, and will reach its decision as to the primary facts based upon that assessment. The findings of the AC Jury will not influence those primary findings, but they will provide a reference point against which the conclusions of the Panel can be measured. Thus if the Panel provisionally reaches different conclusions to the AC Jury based upon the underlying material, then

the Panel will no doubt wish to examine the reasons why it has done so and to test its own assessment by reference to the assessment undertaken by the AC Jury, before finalising its conclusions. That is all part of a natural decision making process based on the evidence presented to the Panel, and does not in any way elevate the status of the AC Jury Decision.

77. In relation to the status of the AC Jury as an arbitral body, it is quite clear from clause 15.4 of the Protocol that it is indeed an arbitral body under the Federal Arbitration Act, and the arbitration agreement is contained within that clause. However, it is not clear how that arbitration agreement applies directly to Mr de Ridder, particularly in the circumstances of an allegation of gross misconduct.

78. Mr de Ridder did not sign the Protocol, and was not a party to it. As set out above, the Panel accepts entirely that he is subject to the RRSAC, but that is a different proposition to suggesting that he is the subject of a binding arbitration agreement contained within a document he did not sign. There is very difficult law in this area, including a very recent decision of the Court of Appeal in Singapore which set aside an award which purported to bind non signatories. It can properly be described as one of the more controversial areas of debate within international arbitration generally.

79. In the context of rule 69 it is also not clear how an arbitration might arise. Rule 69 is not a classic dispute between two competitors, which the AC Jury is seeking to determine as an arbitral body. It is an investigation which arises from the Jury's own observation or a report received from any source (see RRSAC rule 69.1(a)). Although clauses 15.4(c) and (d)(viii) of the Protocol may provide the source of a jurisdiction of an arbitral body in this context, that is not a necessary construction of clause 15.4, in that those provisions may be referring to the AC Jury in its role of International Jury rather than as an arbitral tribunal.

80. However, the Panel does not need to determine those difficult questions. Even if the AC Jury was acting as an arbitral tribunal in relation to AC Case 31, that does not preclude the Panel from exercising its own jurisdiction, and reaching its own conclusions:

    80.1. The arbitration award (if there is one) can only be JN115R and JN116. The Panel is not exercising any supervisory jurisdiction, or appellate jurisdiction, over those decisions. They are decisions which are event specific. The Panel is investigating the AC Jury Report and not JN115R and JN116.

    80.2. The Panel will not "set aside" JN115R or JN116. Indeed, under the Federal Arbitration Act it would have no power to do so, as s. 10 of the FAA gives that power only to a US Court. Those decisions stand

insofar as they go – which is in relation to the Event itself. The Panel is exercising a different jurisdiction, which does not relate to the Event.

80.3. Those decisions reach findings of fact which are necessary to support the penalties imposed in relation to the Event. By re-assessing the facts by reference to the underlying material, the Panel is not undermining the decisions. It is simply making a determination of the facts necessary to support its own decision about any penalty to be imposed within its own jurisdiction.

81. For similar reasons, the case of *Juno SRL v s/v Endeavour* is not of any assistance. In that case, the US Court of Appeals decided that a district court's findings made during a "bench trial" would only be interfered with in the event that they were clearly erroneous. This Panel is not exercising any form of appellate jurisdiction over the AC Jury, but is exercising its own independent jurisdiction.

82. The case also decided that the District Court ought not to have overturned the decision of an International Jury relating to the responsibility for a collision which occurred between two yachts competing in a yacht race under an older version of the RRS. Under the RRS the windward boat was required to keep clear and was therefore fully responsible for the collision (as found by the International Jury). However, the district court held that the International Regulations for the Prevention of Collisions at Sea (COLREGS) required the leeward, overtaking, boat to keep clear and hence it found the leeward boat responsible (with a deduction because the windward boat had failed to take appropriate avoiding action). The Court of Appeals decided that the RRS were binding as between the competitors and that by agreeing to them they had waived the right to rely upon COLREGS as between themselves. The Court was complimentary about the dispute resolution process contained within the RRS, through the International Jury system, and held, almost as a matter of policy, that the District Court should not have interfered with it.

83. In the Panel's view that is a wholly different situation to that which applies here. The district court was imposing its own view of the rights and wrongs effectively in substitution of that of the International Jury and it was that approach which was held to be wrong. The Panel is not imposing its own views in substitution, but rather is forming its own views in order to use them for a different purpose to that of the International Jury. The decision of the International Jury continues to have effect at all times and will remain binding in respect of the Match regardless of the outcome of the Panel's decision. Consequently the decision does not assist a submission that the Panel ought not reach its own conclusions, or ought only to differ from the conclusions of the AC Jury in the event that they are clearly erroneous.

84. The Panel must reach its own conclusions based upon its own assessment of the

material before it. That is the basis upon which the Panel has reached its decision.

THE AC JURY REPORT

85. The AC Jury Report, insofar as it relates to Mr de Ridder is in the following terms:

> *"Findings*
> *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.*
>
> *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.*
>
> *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.*
>
> *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 from the Measurement Committee). The Jury considers his explanation as unconvincing and does not accept this as a credible explanation.*
>
> *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.*
>
> *The Jury is satisfied that Dirk knew that the weight had been added to the forward king post, knowing it was in breach of the AC45 Class Rule, during the Newport Regatta.*
>
> *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.

The Jury is comfortably satisfied that:

Dirk gave the instruction or direction to add the 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:
The Jury is comfortably satisfied that this conduct was a gross breach of a rule and of good sportsmanship.

Penalty:
Dirk is excluded from further participation in any role in the 34th America's Cup. RRSAC Rule 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.

RECOMMENDATION TO KNWV & ISAF:
The Jury makes no recommendation"

MR DE RIDDER'S SUBMISSIONS

86. In Mr de Ridder's submissions dated 9 December 2013 he made the following points, although the summaries are the Panel's summaries:

86.1. That the impact of the case before the MNA and this Panel, and the media coverage of the issue which underlies them has had an enormous impact on both Mr de Ridder and his family. It has caused him professional difficulty in negotiating contracts with professional sailing teams such as for the Volvo Ocean Race, and it has created for him, his wife and his children, the need to answer questions and explain the position socially on many occasions. He asks the Panel to consider those circumstances when assessing the case. This is a point which really goes to the question of sanction and hence the Panel does not address it any further within this decision.

86.2. He notes that three members of the AC Jury are also members of the ISAF Disciplinary Commission and of the ISAF Review Board. He hopes that he can trust the Panel to assess the case independently and objectively, and that it will reach a decision different to the AC Jury if that is justified, but he reserves

the right to bring the fairness of the proceedings to the attention of a further tribunal.

86.3. He contends that hearsay evidence is not admissible, or should not be admissible in the circumstances of this case for the following reasons:

(i) There is a distinction between the Rules of Procedure Rule 12.3 and Section K.13 of the ISAF Judges Manual (which he says excludes hearsay evidence).
(ii) That the Rules of Procedure were approved by the Disciplinary Commission on 27 August 2013, which was in the middle of the AC Case 31, which Mr de Ridder describes as "*remarkable timing"*.
(iii) Human rights prevent the use of hearsay evidence in a matter such as this.
(iv) The hearsay evidence used by the AC Jury was "*rumour speculation and presumption"*.

86.4. He contends that AC Jury has wrongly preferred the evidence of Bryce Ruthenburg over others, and he says that Mr Ruthenburg's evidence is contradictory of that given by others. He contends that the if the AC Jury accepted the evidence of Mr Ruthenburg it ought logically to have accepted the entirety of his evidence, which would have led to very different conclusions in relation to, for example, Sailor X (who is a sailor known only as Sailor X as a result of the confidentiality order imposed by the AC Jury).

86.5. He contends that the interview notes prepared by the AC Jury of interviews which he attended are inaccurate and do not explicitly identify that he later gave false evidence to the AC Jury during the hearing of the case (as the AC Jury have found). He also contends that the AC Jury placed undue pressure on him during the interviews, seemingly (although not expressly) leading to a conclusion that the answers he gave were extracted under some form of duress. Further he says that there was confusion during the interview as a result of an interruption by Russell Coutts, again seeming to lead to a conclusion (which has not been expressed) that the answers he gave during his interview are in some way inaccurate or have been misconstrued.

86.6. He suggests that the AC Jury has reversed the burden of proof upon him, requiring him to prove a negative proposition (i.e. that he did not give any instruction to place the weight in the king post) and that it is inappropriate for the AC Jury to have done that.

87. In his final submissions Mr de Ridder effectively repeats many of the points that he

made in his original submission. But he added a proposition that the Panel should re-consider the case on its own merits, and reach its own conclusions. As has been indicated above, the Panel agrees with him on that for the reasons already expressed.

88. He also added a new point, namely that no illegal lead was found in the forward king post of OTUSA boat 4. As a result, he contends that the AC Jury could not have reached the conclusions that it did against him.

89. Given the Panel's conclusions on the nature of the obligation on the Panel to assess the underlying material and make its own assessment, it is strictly un-necessary for it to address many of the criticisms made by Mr de Ridder. But given the circumstances of this case, and the high profile of the Event, and of all people concerned, the Panel feels that it is appropriate to address everything that has been raised before it, even if it is not a necessary element of the decision.

MEMBERS OF THE AC JURY AS MEMBERS OF THE DISCIPLINARY COMMISSION.

90. It is not entirely clear whether Mr de Ridder is in fact challenging the independence of the Panel, or the validity of any decision that it makes, as a result of the proposition that members of the AC Jury are also members of the ISAF Disciplinary Commission. In his submissions he states that he hopes he can trust that the Panel will approach the matter independently, objectively, and if appropriate reach a conclusion different to the AC Jury. However, he reserves the right to bring the fairness of these proceedings to the attention of other legal institutions.

91. In the Panel's view his trust is well placed. The Panel makes it clear that as a matter of fact it has approached this case entirely independently, and all the functions of the Disciplinary Commission have been performed by the Panel from the moment it was formed. Prior to the appointment of the Panel, the case was handled by a legally qualified ISAF staff manager from a different department to one that dealt with the AC Jury to ensure the independence of the process. There has been no involvement by any of the AC Jury Members in anything to do with this case other than in their capacity as a participant. The Panel is completely uninfluenced by the fact that the AC Jury Members are also members of the Disciplinary Commission or the ISAF Review Board, and it has assessed the evidence before it objectively and independently.

92. Given Mr de Ridder's express reservation, it is appropriate for the Panel to address the issue concerning the appropriateness of individuals sitting as an International Jury as well as being members of the ISAF Disciplinary Commission and the ISAF Review Board.

93. As a matter of principle the Panel does not see any difficulty in the Disciplinary

Commission exercising its functions though individual panels, each of which act independently and autonomously (pursuant to the Rules of Procedure) in individual cases. A panel has delegated to it the full authority of the Commission and is not supervised by the full Commission in any way. The effect of that manner of operation is that the panels remain independent and are able to perform their function irrespective of the identity of the individual, or body, that makes a report which is to be investigated. Provided the panel in any individual case performs its functions independently and judiciously, with a proper regard to due process, the constitution of the remainder of the Disciplinary Commission, or of the Review Board is irrelevant to the propriety of the ultimate decision of the panel, or even of the Disciplinary Commission if and to the extent that any decision is deemed to be made by the Disciplinary Commission as a whole.

94. Equally, although it does not yet arise, in the Panel's view the same would apply to the position as between the Disciplinary Commission and the Review Board.

95. There are analogies in other spheres of judicial decision making. Perhaps the strongest example is the Federal Court of Australia. That Court sits at both first instance and appellate level. When sitting at appellate level against first instance decisions of the Federal Court, the Judges will be sitting on appeal from other Judges of the Federal Court. There is no question that the mere fact that all Judges are Federal Court Judges can disqualify them from sitting on appeal from decisions of other Federal Court Judges. Hence, the mere fact that members of an International Jury are also members of the Disciplinary Commission, and/or the Review Board does not of itself invalidate any decision of the Disciplinary Commission or the Review Board. The Decisions need to be assessed on their own merits.

96. That position is re-emphasised in this context of this case, because the jurisdiction of the Disciplinary Commission is somewhat different to that of the AC Jury, as set out above. Hence this decision is not an appeal against the AC Jury Decision, but rather is a set of proceedings designed, amongst other things, to investigate the truth of the report that has been made by the AC Jury and in the light of the conclusion it reaches to address an appropriate sanction within the jurisdiction of ISAF. The decision made by the AC Jury in the AC Jury Case 31 is only one of the factors that the Panel takes into account when assessing those questions.

97. But in any event there are two factors which indicate that Mr de Ridder has agreed to confer jurisdiction upon the Disciplinary Commission, notwithstanding that it counts amongst its members persons that have been appointed to the AC Jury, and further that he has agreed to the jurisdiction of the Panel in particular. As a result, in the Panel's view it is no longer open to Mr de Ridder to make any suggestion of lack of independence or bias simply on the grounds of identity.

98. First, a copy of the Rules of Procedure was sent to Mr de Ridder by letter from ISAF dated 20 September 2013, together with notification of the constitution of the Panel. Under clauses 3.2 and 5.4 of the Rules of Procedure Mr de Ridder was given a period of seven days to object to the jurisdiction of the Disciplinary Commission and/or to the constitution of the Panel. Mr de Ridder did not make any such objection, and as a result must be taken to have waived any right to object to the legitimacy of the decision of the Panel on the grounds of the identity of the Panel Members, or on the grounds that it could not operate fairly because members of the AC Jury are also members of the Disciplinary Commission.

99. Secondly, Mr de Ridder has participated in these proceedings by way of making submissions on the merits of the matter before the Panel. In the circumstances, particularly having not made any objection as to the jurisdiction of the Disciplinary Commission or the Panel, the Panel considers that he has waived any right which he may have had (which the Panel does not believe that he did have in any event) to object on these grounds.

HEARSAY EVIDENCE AND OTHER CHALLENGES TO DUE PROCESS IN AC CASE 31

100. Mr de Ridder challenges the legitimacy of Rule 12.3 of the Rules of Procedure, which states that:

> "*The Commission is not bound by any rules of civil evidence or procedure and may give such weight and credibility to evidence, including hearsay evidence, as it may think fit.*"

101. In the Panel's view the challenge is misplaced. It is not necessary to embark on a long legal analysis of the rule against hearsay, its rationale, its provenance and its current status. However, it is fair to say that the rule against the admissibility of hearsay evidence is widely recognised to be a highly technical rule which can often hinder as much as assist in the search for justice. It only has a place in courts or tribunals in which the strictest of rules of evidence are applied, and in many sophisticated legal systems it has now been abolished for civil disputes. Its place is even less sure in an inquisitorial system such as was the AC Jury, and such as these proceedings.

102. In the Panel's experience rules such as Rule 12.3 are common in the rules of sporting bodies. The Panel can see no basis to suggest that Rule 12.3 is improperly made, or is in any way itself improper. Mr de Ridder refers to section K.13 of the ISAF International Judges Manual which says:

> "*Hearsay evidence is evidence given by a person who has no direct knowledge; he has simply heard it from another party. For example, in support of his claim that there was a collision, a party to the protest might say John Smith, bow # 32, told me that he also saw the collision."The only question the*

> *chairman should ask when such a statement is made is "Is John Smith going to come to the hearing to give evidence?" If the answer is no, then the statement by the party is meaningless. On the whole, hearsay evidence should be disregarded.*"

and he questions why a different standard should apply as between a protest hearing and the Disciplinary Commission.

103. Section K.13 of the Judges Manual does not preclude the admissibility of hearsay evidence. It simply amounts to a caution to those hearing protests about the weight that should be put on hearsay statements. That caution is, of course, well made, and is recognised within any legal system. It is also well recognised by the Panel. Hearsay statements rarely prove the contents of what was said, and inevitably have to be viewed with caution. However, they are admissible, and when viewed in the correct light, having regard to the weight that should be placed upon them, and in the light of all the surrounding circumstances, they can be a useful tool in the overall analysis which a fact finder is required to undertake.

104. The Panel notes, as an aside, that Mr de Ridder himself wishes to rely upon hearsay evidence in his submission, where he has said:

> "*Meanwhile Piet has informed me in person that …..*"

105. Mr de Ridder makes two further points about Rule 12.3, and the admission of hearsay evidence in the AC Jury Case 31:

105.1. That there is a "remarkable" coincidence about the date of adoption of the Rules of Procedure (namely 27 August 2013) which he says was in the middle of the AC Case 31.

105.2. That it breached his human rights because no adequate safeguards were afforded him in his defence of the allegations made against him.

106. The Panel does not consider that there is anything remarkable about the date of adoption of the Rules of Procedure given that the Disciplinary Commission was created in May 2013, and was required to draft, and then have approved by the ISAF Constitution Committee, its rules of procedure. To achieve that within a period of between three to four months is perfectly reasonable within a body the size and complexity of ISAF. The Panel does not address this issue further.

107. The process before the AC Jury is an inquisitorial and investigative process. It is not an adversarial process in which the AC Jury is bound to take into account only the evidence presented to it by the parties. It has an obligation to investigate. Clearly it

must give the parties adequate opportunity to present their case, and it must allow them a fair opportunity to address the case which is being made against them. The Panel is satisfied from the evidence which has been presented to the Panel that the AC Jury operated in an entirely appropriate manner with a proper regard for fairness and what one might describe as the rules of natural justice and due process.

107.1. It investigated what had happened by ordering investigations and reports from, for example, the Measurement Committee.

107.2. It conducted interviews with many people that had been involved. Those interviews were not held in front of all concerned, but were conducted privately between AC Jury members (or some of them) and the interviewees. A lawyer acting for OTUSA (and, so the Jury say, also acting for all the individuals) was present at all interviews. In the circumstances the Panel does not see anything wrong with that process. Having read the transcript of what occurred at the hearing, the evidence relied upon to make the final decision was all presented with all parties present, and no reliance was placed on interview notes of persons who were not called as witnesses.

107.3. It held an oral hearing at which witnesses were called, evidence taken and an opportunity was given to the lawyer representing Mr de Ridder to cross examine each witness.

107.4. Mr de Ridder's lawyer was given an opportunity to present an opening statement, and a closing statement, and to call any witnesses that he wished. He was also given an opportunity to address the Jury on the appropriate sanction, and mitigating circumstances.

107.5. The full details of the procedural history of the process are set out in the relevant Jury Notices and summarised in JN116. The Panel does not repeat it here, but it is clear from that procedural history that due process was followed.

107.6. The Panel has read the transcript of the entire evidential phase of AC Case 31, and is completely satisfied that Mr de Ridder was given every opportunity to present his case and rebut any case against him.

108. As to the particular submission made by Mr de Ridder, there is only one element of hearsay evidence against which the objection has been made. That is the conversation that Bryce Ruthenberg said he had with Andrew Walker in which Mr Ruthenberg related what Mr Walker told him (for more details please see paragraph 27 *et seq*. of the Confidential Appendix). That element of the evidence is only one aspect, and the

Panel does not think that it is a critical piece of evidence, without which any finding against Mr de Ridder must fail. Neither does it think that the admission of this evidence in AC Case 31 infringed the human rights of Mr de Ridder, even assuming that human rights law is applicable to the proceedings (which is a matter that the Panel expresses no view upon).

109. The remainder of the submission of Mr de Ridder in this respect is a general complaint that the AC Jury has used "*rumours speculation and presumption as evidence for the claim made by Bryce*". Particulars are set out in the letter from Mr de Ridder's lawyer to the AC Jury dated 6 September 2013, which is enclosed at Exhibit 1 to his submissions.

110. That letter makes wide ranging allegations, and suggests that the process conducted by the AC Jury was fundamentally flawed such that none of the parties received a fair hearing. There are six particulars given, and the Panel addresses each of them to the extent necessary. The AC Jury has addressed this letter at Exhibit 1 to its submissions.

110.1. <u>There is a lack of connection between the alleged rule violations and punishment</u>. This relates to the fact that the alleged violations occurred in July 2012 in respect of the AC45s, and the punishment concerned the Match (as defined in the Protocol), which took place in August 2013 in AC72s. The Panel does not think that there is anything in this complaint for two reasons:

(a) Although, if correct, it may be relevant to the sanction imposed by the AC Jury, it does not affect the process or the validity of the findings reached in respect of the alleged rule violations. Hence it does not have any impact on the findings of the AC Jury.

(b) The Panel does not in any event think that it is a correct complaint. Under the Protocol the Event, as defined, is a composite event comprising (amongst other things) the AC World Series and the Match. It is entirely apposite for the AC Jury to impose a sanction in respect of one element of the Event for a rules violation in respect of another asp ect of the Event, particularly when that rules violation relates to gross misconduct.

110.2. <u>Application of the Wrong Standard of Liability</u>.

(a) It is said that the AC Jury applied the wrong test to liability, in that they used what is described as the "*simple negligence*

standard ("knew or ought to have known")" instead of a finding of "*knowingly and intentionally*". The Panel does not think that this is correct. The AC Jury quite clearly found, in paragraphs 74 and 76 of JN116, that Mr de Ridder gave instructions to add the weight (which he can only have done knowingly), knew that the weight had been added (which is a finding of knowledge), knew that it was in breach of the AC45 Class Rule (which is a finding of knowledge) and did not tell the truth (which is a finding of dishonesty). It expressly reached all those findings on the basis of comfortable satisfaction. Without making any decision as to the necessary test under RRSAC 69, but assuming for this purpose that "*Knowingly and intentionally"* is the correct standard, it is clear that the AC Jury was satisfied to that standard, and made factual findings which justify a conclusion of gross misconduct. The "comfortable satisfaction" test is a well known test within sporting bodies and, as the AC Jury state in their submissions and record at paragraph 19 of JN115R, its proposed use was brought to the attention of Mr de Ridder's lawyers, and no objection was taken at any stage.

110.3. Conflicts of Interest and appearance of impropriety.

(a) It is said that the AC Jury "*acted as investigator, cop, prosecutor, witness, judge, jury and executioner."* and that as a result the AC Jury Decision is invalid. Ignoring the hyperbole of this statement, the Panel does not think that it is a legitimate complaint. Under RRSAC 69 it is the obligation of the AC Jury to take action if it observes itself, or receives a report concerning a gross breach of a rule, good manners or sportsmanship. Its role is to investigate such matters, and to reach a conclusion, and to decide what sanction it considers appropriate in the circumstances. That role under rule 69 has been well defined in the sport of sailing for many years. It is appropriate and does not in itself invalidate any decisions reached at the end of the process. The process is not unfair simply because the AC Jury undertake their own investigations. By conducting interviews as part of that investigatory process, Jury members do not conflict themselves from sitting as part of the Jury, and do not inevitably have to offer themselves as witnesses as has been suggested.

(b) The AC Jury says that Mr Phil Bowman, and occasionally

Thomas F. Ehman, who represented OTUSA and all individuals concerned, were present at all the interviews that were conducted, and hence Mr de Ridder had representation at the interviews, and was able to call those persons to give evidence if he wished. That proposition has been challenged in Mr de Ridder's reply submissions because he says that Mr Bowman (who attended Mr de Ridder's interviews) did not represent him personally, but instead represented OTUSA.

(c) The Panel accepts it as factually accurate that either Mr Bowman or Mr Ehman attended all interviews. The Panel does not know the precise detail of Mr Bowman's engagement, or the extent that the interests of the individuals and OTUSA were coincident. However, it accepts that the hearing was delayed as a result of the individuals subsequently obtaining individual representation. The Panel is also comfortably satisfied that if any individual wanted to see the notes of any interview, they would have been able to have obtained those notes, either by asking Mr Bowman, or alternatively asking the AC Jury to release them. It follows that Mr de Ridder cannot complain about not knowing what was said in the interviews.

(d) The Panel is also satisfied that if any pressure was applied to Mr de Ridder during his interview, as he seems to allege, Mr Bowman would have stepped in to protect him, whether or not Mr Bowman was acting directly for Mr de Ridder, or just for his employer, OTUSA. The Panel does not accept the suggestion, made for the first time in his submissions, that any undue pressure was applied to Mr de Ridder during the interview process, or that the answers he gave are in any way tainted as a result of the manner of the interview.

(e) The AC Jury also say that a two hour directions hearing was held on 22 August 2013 to explain the process that the AC Jury intended to undertake, and that counsel for Mr de Ridder did not object to the proposed procedure.

110.4. <u>Refusal to release evidence to parties and violations of Fair Principles for Taking Evidence.</u>

(a) It is said that the AC Jury conducted interviews with many people but did not release the notes of those interviews to the

parties. The Panel does not think that there is anything in this complaint. There is no obligation, either express or implied, for the Jury to disclose the entirety of the material it has obtained by way of its investigation, and the fact that it has not done so does not make the proceedings unfair. The Jury's own rules of procedure dated 22 May 2013, at rule 9.1.5, expressly state that if a person has given a statement, but does not attend the hearing, then the Jury will not consider the statement. That rule is entirely right and proper, as it is then only the witnesses that attend the hearing, and who Mr de Ridder had an opportunity to cross examine, whose evidence is taken into account when assessing the case against him. There is nothing to suggest that the AC Jury acted in breach of this rule. Further, Mr de Ridder was allowed an opportunity to call any witness that he wished to call, and if he felt that somebody could give relevant evidence, particularly having regard to the fact that persons representing his employer attended all interviews with all people, he was free to ask them to come along and give that evidence. He did not need to see the interview notes compiled by the Jury in order to make that decision.

(b) The AC Jury also says that Mr de Ridder's lawyer did not ask to see the notes of records of interview. That proposition is not challenged by Mr de Ridder in his reply submissions and the Panel accepts it as factually accurate. It may be the case that the lawyer did not ask to see the notes because of an underlying view, possibly held by everybody, that they were confidential. But in the circumstances it is not now open to Mr de Ridder to complain about not seeing the notes if he did not ask for them at the time, even if that failure to ask was driven by a view that they were confidential, even if that view subsequently proves to be erroneous.

110.5. Refusal to allow adequate time to prepare a defence.

(a) The allegations against Mr de Ridder were raised in Jury Notice JN103 dated 19 August 2013, the AC Jury having received a report from the Measurement Committee on 15 August 2013 about the weight in the King Posts. The Match was due to commence on 7 September 2013. A hearing was scheduled for 22 August 2013, but was adjourned to 26 and 27 August at the request of amongst others, Mr de Ridder, apparently because of a change of legal counsel from Mr Bowman to Mr Anderlini. From the evidence that the Panel has seen no suggestion was made at the time that there was inadequate time to prepare a

defence. The letter of 6 September 2013 does not identify the way in which the defence was prejudiced. The Panel does not think that an inadequate time was allowed, and does not think that the complaint is legitimate. It was appropriate for the AC Jury to hold the hearing and reach its findings prior to the Match, and the Panel does not think that any prejudice was caused to Mr de Ridder's defence as a result.

110.6. Unauthorised release of transcript hearings.

(a) This allegation relates to what happened after the hearing. It does not affect the fairness of the hearing itself or the validity of the decision reached. The Panel does not need to address this matter further. However, the AC Jury says that when the release of the transcript came to light there was a motion by Mr Anderlini to disqualify the Jury. That motion was withdrawn when the unauthorised release of the transcripts was rectified. It is not open to Mr de Ridder now to complain about the matter as one of procedural fairness when he has withdrawn a motion to have the Jury dismissed on this very basis.

111. Overall, the Panel is of the view that the process undertaken by the AC Jury was appropriate, fair, and even handed. It does not think that the criticisms levied against it are valid. The Panel finds that the AC Jury was entitled to act as it did, and was entitled, from a procedural perspective, to reach the conclusions that it did.

REVERSAL OF THE BURDEN OF PROOF

112. The Panel does not believe that the AC Jury did reverse the burden of proof as Mr de Ridder alleges. They analysed the evidence, and came to a conclusion based upon that evidence. They were entitled, and indeed obliged, to do exactly that.

113. However whatever position the Jury may have taken, the Panel does not believe that the Panel have reversed the burden of proof in its own analysis. The Panel has undertaken the exercise of assessment with a completely open mind, and has addressed itself carefully to the evidence presented to it. The Panel is satisfied that its conclusions are derived from a careful analysis of that evidence, and have not required that Mr de Ridder prove that he did not instruct weight to be added to the forward king post.

THE UNDERLYING MATERIAL AND EVIDENCE AS TO WHAT HAPPENED

114. Before Mr de Ridder's final submission, there was no dispute that approximately 1.8 kgs of weight was added to the forward king post of Oracle boat 4 on or around 26 July 2012 in Newport.

115. The dispute, insofar as Mr de Ridder was concerned, was whether he instructed that to happen and whether he knew about it. He denies both. A consequence of the findings of the AC Jury is that they have found that he lied to them whilst giving evidence. He denies that too.

116. However, in his final submissions Mr de Ridder now seems to deny that lead was added to the forward king post at all. In the light of this new challenge, the Panel has addressed the evidence on this aspect too.

117. The Panel has read very carefully the entire transcript of the evidence which was heard by the Jury, and has read all of the exhibits submitted by Mr de Ridder. The transcript has been provided to the Panel on the understanding that it is confidential, and that any decision given by the Panel will maintain the confidentiality of the evidence. As a result, the Panel has analysed that evidence in the Confidential Appendix to this Decision. It is therefore not appropriate to make any comment on that material in the body of this decision, as the decision is due to be published in accordance with normal ISAF policy. However, the conclusions drawn from that analysis are set out below.

CONCLUSIONS

118. In the light of the Panel's analysis of the evidence the Panel is comfortably satisfied that:

118.1. There was a conversation between at least Mr Walker, Mr Ruthenberg, and Mr de Ridder in which adding weight to the forward king post of OTUSA boat 4 was discussed.

118.2. The result of that conversation is that Mr Ruthenberg was expected to add the weight to the King Post.

118.3. Mr Ruthenberg did in fact add the weight.

118.4. That result was one that was ultimately directed by Mr de Ridder.

118.5. He knew the weight had been added, or at least that it was going to be added.

118.6. He knew it was a breach of the AC45 Class Rule.

118.7. Mr de Ridder did not tell the truth to the AC Jury.

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 class rules;

119.2. committed a gross breach of good sportsmanship;

119.3. has brought the sport of sailing into disrepute

And he is thereby open to sanction under RRSAC rule 69.

120. The Panel will address the question of sanction in a separate decision.

ENDS