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PETER, Henry


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The America's Cup Arbitration Panel

HENRY PETER

Introduction

Ever since the schooner America sailed against 14 English yachts around the Isle of Wight on 22 August 1851 for what was then officially known as the Royal Yacht Squadron 'One Hundred Guineas Cup', later the America's Cup, contests for the Cup have been embroiled in controversy. Indeed, even after that first race there was a protest.

The purpose of this paper is to provide an outline of the background and the task of the body known as the America's Cup Arbitration Panel which has been installed and issuing decisions throughout the America's Cup XXXI edition, i.e. between 2000 and 2003.

A. Background

1. The origin

The America's Cup began when a small group of New York Yacht Club members decided that an appropriate part of the festivities which were being organised for the first of the Great World Expositions, to be held in England in 1851, would be an important yacht race. Their objective, of course, was to show the superiority of American yachtting.

The then New York Yacht Club commodore, John C. Stevens, wrote to the commodore of the Royal Yacht Squadron, the Earl of Walton. He suggested that a race be convened between the best yachts of both nations. His Lordship thought that was an appropriate plan.

The Americans held trials. They selected America, a yacht which proved to be remarkably fast. It was decided that the race would be conducted in

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* Dr. iur., Professor at the University of Geneva, Member of the 31st America's Cup Arbitration Panel
1 See paper delivered by Master John Faire to LCIA and Arbitrators and Mediators Institute of New Zealand Inc., Arbitration Seminary, February 20, 2003.
conjunction with the Royal Yacht Squadron's regatta which was to be sailed on 22 August 1851. There were seventeen British yachts of all sizes and, of course, the *America*. *America* won the race by 8 minutes.

The race attracted considerable interest. Queen Victoria followed its progress. She is said to have asked her bowman ‘who was second’. There followed that famous reply ‘Ma'am, there is no second’. This has been true ever since.

2. The first dispute

Shortly after the finish of the race the first protest was lodged by the English against *America*. And so began the dispute resolution segment of the history of the America's Cup yachting. It was disputed that the American yacht had won because *America* had passed on the wrong side of the Nab Lighthouse. In short, the British argued that *America* had cut the corner.

The protest, however, was dismissed. The grounds given for dismissal were that the sailing instructions given to the crew of *America* had not specified the side on which she was to pass the Nab. Thus, the very first race was ultimately settled not on the water but by an argument over the Rules.

3. The present Deed of Gift

The Cup known as the *America's Cup* was donated in 1857 by the six owners of the yacht *America* to the New York Yacht Club. It was thereafter twice returned to George Schuyler, the sole surviving donor, when questions arose as to the terms of the trust in which the Cup was to be held. The present Deed of Gift was executed by George Schuyler in 1887. That deed donated the Cup to the New York Yacht Club to be held in trust upon the condition that

any organised Yacht Club of a foreign country (...) having for its annual regatta on ocean water course on the sea, or on an arm of the sea (...) shall always be entitled to the right of sailing a match for this Cup, with a yacht or vessel propelled by sails only and constructed in

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2 "The America's Cup Arbitration Panel, a dispute resolution procedure for a major sporting event", paper presented to the ANZSA Conference on October 11, 2002 by the Honourable Sir David Tompkins, QC.
the country to which the Challenging Club belongs, against any one yacht or vessel constructed in the country of the Club holding the Cup

and that

it shall be preserved as a perpetual Challenge Cup for friendly competition between foreign countries.

Thus, under the Deed of Gift only yacht clubs can race for the Cup. The winner of the Match becomes the holder of the Cup and its sole trustee. Provision is made in the Deed for the Defender (the then current holder) and the Challenger of Record (the first challenging yacht club of any America's Cup edition) to agree on the terms under which a challenge is to be held. If the parties do not agree, the Deed specifies how the challenge is to be competed.

None of the deeds of gift by which the original owners of the America gifted the Cup to the New York Yacht Club contained a method of dispute resolution. Since the Deed of Gift had been executed in the state of New York, it was accepted that the Supreme Court of that state had jurisdiction over matters relating to the Cup.

4. The Mercury Bay Boating Club Challenge

The most famous controversy, which started in 1988, is probably the long legal wrangle in the Courts of New York surrounding what became known as ‘the Big Boat Challenge’. The San Diego Yacht Club had planned to defend the Cup in 1990 or 1991 with the international 12 metre class yachts. Before arrangements were finalised, a New Zealand Yacht Club, the Mercury Bay Boating Club, issued a notice of challenge to the San Diego Yacht Club. For previous Cups, the New York Yacht Club, as trustee, had followed the practice of issuing an announcement, during the course of a Match, whereby if it was successful in defending the Cup it would hold the next race at a certain time and at a certain place, specifying the class of yachts.

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The San Diego Yacht Club did not follow the same course. By failing to take that step it opened the way for a challenge by the Mercury Bay Boating Club, which demanded to sail in a new type of boat, a 90 footer known as the ‘Big Boat’. To justify this unorthodox challenge, Mercury Bay Boating Club advised the San Diego Yacht Club that it sought to compete in a vessel larger than those of recent matches because such a yacht, by ‘utilising technology outside any class of rating rule would be most likely to offer real opportunity of innovative design to the benefit of yachting at large’.

There followed a series of Court applications. The Mercury Bay Boating Club commenced an action in the New York Supreme Court seeking a declaratory judgement that its challenge was valid and an injunction prohibiting the San Diego Yacht Club from considering other challengers until the Mercury Bay Boating Club challenge was decided. The San Diego Yacht Club commenced an action seeking an interpretation of the Deed of Gift authorising the continuation of the traditional 12 metre yacht elimination series which had been employed by the New York Yacht Club and later by the Royal Perth Yacht Club. The San Diego Yacht Club application was rejected by the Court. The Mercury Bay Boating Club challenge was found to be valid.

The Court went on to hold that the San Diego Yacht Club’s options were:

To accept the challenge, forfeit the Cup, or negotiate agreeable terms with the challenger.

Attempts were made to negotiate terms. Nothing came of those negotiations. The result was that in late January 1988, the San Diego Yacht Club announced its decision to race a catamaran whose dimensions were considerably smaller – but notoriously faster - than the mono-hull yacht which had been notified in the Mercury Bay Boating Club challenge. The parties then went back to Court. The Mercury Bay Boating Club asserted that the San Diego Yacht Club was in contempt of Court and argued that the use of a catamaran rendered meaningless the Match to which it was entitled under the Deed of Gift. The Supreme Court denied the application and directed the parties to reserve any protests until after the completion of the America’s Cup races. Those races were held on 7 and 9 September 1988 and

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Ibidem, Section I.
resulted in the San Diego Yacht Club’s catamaran defeating by two races to nil the Mercury Bay Boating Club’s mono-hull New Zealand.

The parties then went back to Court. The Mercury Bay Boating Club moved to have the results of the race set aside and itself declared the winner. To that effect, it contended that the San Diego Yacht Club’s behaviour was unsportsmanlike, antithetical to the concept of ‘friendly competition between foreign countries’ and a ‘gross mismatch’ in violation of the America's Cup Deed of Gift and San Diego's obligations as trustee. On 28 March 1989, Judge Ciparick awarded the America’s Cup to the Mercury Bay Boating Club. The San Diego Yacht Club lodged an appeal. In September 1989 the Appellate Division of the Supreme Court reversed Judge Ciparick’s decision and found that the San Diego Yacht Club’s catamaran was an eligible vessel and that therefore the San Diego Yacht Club was the rightful holder of the America’s Cup.

The Mercury Bay Boating Club lodged an appeal in the State of New York Court of Appeals. That Court, in a decision with five opinions in support and two opposing, concluded that nowhere in the Deed of Gift had the donors expressed an intention to prohibit the use of multi-hull vessels. It also rejected the Mercury Bay Boating Club’s contention that the phrase friendly competition between countries denoted a requirement that the Defender race a vessel of the same type or even substantially similar to the challenging vessel.

The result was that the Cup remained with the San Diego Yacht Club. A lot of uncertainty had however existed for a considerable time. Moreover, the way the Match took place, ending up spending more time and energy in court then on water, proved to be not only highly unsatisfactory but indeed damaging for the image and spirit of the venerable institution.

As a result of such experience the yachting community became convinced that an alternative method of resolving disputes was required.

5. The first ADR experience: the Trustees Committee

Indeed, in view of the highly unpleasant way the Big Boat Challenge had developed, it appeared appropriate to establish an ad hoc dispute resolution body. This was done in the document, known as a ‘Protocol’, which sets out the terms of the Match. At the time when the San Diego Yacht Club held the
Cup, that document was unilaterally drafted by them, as trustee and Defender. Any challenger willing to take part in the competition at those conditions could join. It could thus either ‘adhere’ to the proposed terms or not take part to that edition of the Cup.

Both Protocols established by the San Diego Yacht Club while it was the trustee of the Cup⁵ contained a statement whereby the San Diego Yacht Club believed:

That a mechanism for the resolution of disagreements between the defending yacht club and the challenging yacht clubs without resort to litigation is highly desirable.

If effect, both Protocols provided for what was termed a ‘Trustees Committee’ composed of one representative from each of the previous trustees, i.e. three individuals⁶. It had jurisdiction to settle disputes between participants.

The Committee was empowered as follows:

a) resolve disputes between the San Diego Yacht Club and the Challenger of Record (which may act on behalf of individual challengers) other than disputes concerning the racing rules or any applicable class or rating rule;

b) in the event of disagreement among the challengers, to designate the Challenger of Record; and

c) in the event of a disagreement between the San Diego Yacht Club and the Challenger of Record to determine the mutual consent items which were identified in the Protocol.

The experience was regarded by some as unsatisfactory. The representatives of the trustees were considered to be too closely identified with the participants. Also, their jurisdiction was not exclusive. So when the Royal New Zealand Yacht Squadron through Team New Zealand won the

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⁶ Since, at that time, the Cup had been won over the years by the New York Yacht Club, the Royal Perth Yacht Club and the San Diego Yacht Club.
Cup in 1992, they resolved to institute a different method for the resolution of disputes. The outcome was the enactment, in the Protocol for the America's Cup XXX, of provisions constituting the America's Cup Arbitration Panel (the 'Panel'). These provisions were re-enacted in substantially the same form in the America's Cup XXXI.

B. The 31st (2000-2003) America's Cup

6. The Protocol for the America's Cup XXXI

With its successful defence of the America’s Cup in 2000, the Royal New Zealand Yacht Squadron prepared a further Protocol to govern the America’s Cup XXXI. By agreeing with (and actually taking an active part in drafting) the new Protocol, Yacht Club Punta Ala became the so called ‘Challenger of Record’, i.e. the first yacht club having issued a notice of challenge.

Under the heading ‘Background’ the Protocol, provides:

The Royal New Zealand Yacht Squadron (‘RNZYS’) believes that a form of protocol (as it has come to be known), is a desirable way of mutually consenting to the various items that, in accordance with the Deed of Gift of the America’s Cup dated 24 October 1887 (the ‘Deed of Gift’), may be agreed between the yacht club holding the America’s Cup and the yacht club challenging for that Cup.

RNZYS has received from Yacht Club Punta Ala (‘YCPA’) a notice of challenge which proposes that the terms of this protocol (‘Protocol’) should apply to the Thirty First America’s Cup (‘Match’), together with other items required by the Deed of Gift and this Protocol to be provided by a challenger for the America's Cup, and RNZYS has consented to the class of yacht and other proposals put forward by YCPA.
7. **The applicable rules for the America's Cup XXXI**

The Protocol for the America's Cup XXXI set out the rules which were to apply. They were:

a) the Deed of Gift, the Interpretative Resolutions and the decisions of the Arbitration Panel;

b) the Protocol;

c) the conditions;

d) the racing rules as agreed and adopted by CORD and administered by a jury appointed by CORD; and

e) the international America's Cup class rule version 3.

The Deed of Gift is that of 1887.

The interpretative resolutions are resolutions adopted by past trustees of the America's Cup.

Reference to decisions of the America's Cup Arbitration Panel refers to the Panel appointed under the specific Protocol.

The conditions were, in effect, the notice of race and sailing instructions.

The racing rules adopted were an adaptation of the International Sailing Federation (ISAF's) racing rules of sailing to cover match racing. They are general rules which not only govern the right of way on the race course, but also a number of other matters pertaining to the conduct of a yacht race and a series of yacht races. Because the America's Cup regattas are, at any time, between two yachts only, there is an adaptation of the racing rules to cover what is now commonly referred to as match racing.

Finally, the International America's Cup class rule version 3 provides the specific dimensions and general parameters that a yacht must meet to qualify to be registered as an America's Cup class yacht. The applicable rules were of course a specific modification of the general provisions contained in
the Deed of Gift as to the requirements of a yacht participating in the America’s Cup.

8. The America’s Cup Arbitration Panel

8.1 General

The Protocol established an arbitration panel of five members. Two were to be selected by the Royal New Zealand Yacht Squadron as Defender, i.e. holder of the Cup. Two were to selected by the Challenger of Record, that is the Yacht Club Punta Ala. The fifth member, who, pursuant to Article 22.1 of the Protocol, was to be the Chairman of the Arbitration Panel, was appointed by the four members already selected.

Article 22.2 of the Protocol sets out the criteria for selecting Panel Members:

a) they may be a resident or citizen of any country participating in the Thirty First America’s Cup competition or trials whether or not they have significant interest in the dispute or issue;

b) they shall possess knowledge of America’s Cup history, the Deed of Gift, and the Interpretative Resolutions;

c) they shall possess good general knowledge of yacht racing and yacht clubs; and

d) they shall be known to be fair minded and possess good judgement.

The Royal New Zealand Yacht Squadron appointed Sir David Tompkins QC, a retired Judge of the High Court, and John Faire, a Master of the High Court.

Yacht Club Punta Ala appointed Mr. Donald Manasse, an American lawyer practising at the French Bar in Nice and in the Principality of Monaco, and Professor Henry Peter, the author of this paper.
These four then appointed Professor Fernando Pombo, a Spanish lawyer as chairman. On 17 December 2001, Professor Pombo resigned. He took this step to avoid a potential conflict of interest. On the same day the four members of the Panel appointed the Honourable Michael Foster QC as chairman. He is a retired Federal Court Judge in Australia. He also currently sits as an acting Judge in the Supreme Court and Court of Appeal of New South Wales.

All members of the Panel are, or have been, active yacht racing sailors and have had substantial involvement with the sport. Panel members received no remuneration.

The Panel appointed Martin Foster, a former executive director of the New Zealand Yachting Federation, as its Registrar. His task was to handle the considerable volume of administrative affairs pertaining to the Panel.

8.2 The Panel's jurisdiction

Article 22.3 of the Protocol set out the jurisdiction of the Panel. It provided:

The Arbitration Panel shall be empowered as follows:

a) to resolve all matters of interpretation of any of the documents and rules referred to in Article 14 except where expressly excluded in the provisions of such documents and rules and including, where necessary, the determination of the facts relevant to the matter of interpretation;

b) to resolve disputes (other than those concerning the racing rules or any applicable class or rating rule) between RNZYS and the Challenger of Record;

c) to resolve disputes (other than those concerning the racing rules or any applicable class or rating rule) between RNZYS and an individual Challenger when the Challenger of Record certifies in writing to RNZYS that a majority of the Challengers desire the issue to be resolved by the Arbitration Panel;
d) to resolve disputes (other than those concerning the racing rules or any applicable Class or rating rule) between individual Challengers when one of those Challengers so requests, or between an individual Challenger and the Challenger of Record;

e) to resolve any disagreement between RNZYS and the Challenger of Record and in particular settling the matters referred to in Article 5;

f) to determine matters of nationality and other issues under Article 11;

g) to determine the appropriate penalty under Article 13;

h) to resolve disputes under Article 20; and

i) to resolve any other matters which it is given jurisdiction to determine.

The Protocol also had an interpretation section, namely Article 23. The opening two provisions give general guidance. They provide:

23.1.1 Whenever there is a conflict between the provisions of this Protocol and the Conditions or any other relevant racing rule or document (excluding the Deed of Gift but including the Interpretative Resolutions), the terms of this Protocol shall prevail.

23.1.2 In the interpretation of this Protocol all the provisions hereof shall be construed in such manner as will best promote the purpose and object underlying this Protocol or the particular provision and best ensure that they are given their true spirit, meaning and intent.

8.3 The America's Cup Arbitration Panel rules of procedure

Article 22.6 of the Protocol provided that the Panel had to draft its own procedural rules. These, however, had to be approved by a committee representing the Defender and the Challenger of Record.
The America's Cup Arbitration Panel procedural rules provided for written applications and written responses. Evidence was to be given by affidavit. Provisions were made as to directions as to service. Provisions were also made to deal with confidentiality issues. Confidentiality is a difficult problem in this arena. Indeed, the event is very much about having the fastest yacht. Protecting all aspects of design and arrangements made between the competing clubs and the syndicates representing them and the sailors and their designers are regarded as crucial. This does cause a problem. It is often difficult to ensure that sufficient disclosure is made for other clubs to comment on the material advanced, and, at the same time, to protect the intellectual property rights or contractual arrangements of all parties.

The procedural rules also provided for the holding of conferences and generally gave the Panel appropriate management tools to ensure that applications could be dealt with promptly.

The Protocol authorised the America's Cup Arbitration Panel to hold its hearings and meetings by telephone or by audio visual link up.

With the exception of one hearing, the 31st America's Cup Arbitration Panel decided all applications on the basis of the papers. Panel members discussed applications by exchange of emails and the use of international telephone conference calls. The system worked well and enabled decisions on most applications to be issued promptly.

One application, however, involved a serious challenge, as far as one syndicate was concerned, on the question of compliance. An oral hearing was required and indeed necessary. The Panel assembled in Auckland on very short notice. Deponents were cross-examined during a two day hearing. The decision was issued the next day, and was followed some days later by the reasons. The result was that the sailing programme was able to proceed without delay or amendment, which, in the circumstances, was crucial.

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7 ACAP 02/11 and 02/12.
9. Exclusive jurisdiction

9.1 Prohibition from access to Courts

Article 10.3 of the Protocol provided that each challenger and Defender was deemed to have undertaken that they would not

(... in relation to any matter governed by this Protocol, or in relation to any other matter concerning the Thirty First America’s Cup, issue proceedings or suit in any court or other tribunal against all or any of the following: (...) )

The list included any Challenger, the Defender, any race official, the Measurement Committee and the Arbitration Panel. The Protocol only permitted proceedings in court in respect of claims for property damage, personal injury or breach of confidentiality undertakings or restrictive covenants entered into with the Defender or any Challenger.

It follows from these provisions that, subject to very limited matters, there was no right whatsoever to resort to any court for any reason, including to seek injunctions, or to challenge the Panel’s findings. In other words, the Panel’s jurisdiction was exclusive and its decisions final. Although it has not yet been tested, it would appear that the provision of Article 10.3 would also prevent any party from seeking judicial review of a Panel’s decision on the grounds of lack of jurisdiction, breach of the rules of natural justice, etc.

Article 6.4 of the Protocol provided that no yacht club should be accepted as a Challenger under the Deed of Gift unless it had declared that it had and would comply with the Protocol. Article 10.2 provided that any Challenger who resorted to any court or tribunal other than the Arbitration Panel would be in breach of the Protocol and would accordingly be ineligible to make the declaration required by Article 6 and to be the Challenger for the Match. The combined effect of these provisions constituted a powerful deterrent against any participant resorting to the courts.

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8 Article 10.4 of the Protocol.
9 These provisions became the subject matter of an application to the Panel; see Arbitration Panel decision of September 20, 2002, ACAP 02/06.
9.2 Conflicts of jurisdiction

9.2.1 The Courts of New York versus the Arbitration Panel

As recalled in the Mercury Bay Boating Club case in the New York Court of Appeal's decision of 1990\(^{10}\), the America's Cup is the corpus of a charitable trust created under the laws of New York. As such, the Deed of Gift is governed and shall be construed in accordance with these laws. As a further consequence, any proceeding for amendment or interpretation of the terms and conditions of the Deed may be brought before the Courts of the State of New York.

For the avoidance of doubt, pursuant to the last paragraph of the Deed of Gift of 1887 any club having won the Cup shall enter into an instrument in writing in which it accepts that the said Cup is transferred to it 'subject to the said trust, terms and conditions', which implies that the said laws of New York will always remain applicable and that any proceeding for amendment or interpretation shall be brought before the Courts of New York.

By establishing the Arbitration Panel, the intention of the parties was to dispose of a body which, save for matters on which the International Jury and the Measurement Committee had specific jurisdiction\(^{11}\), was able to issue decisions which were both prompt and final. As is indeed well-known, a fast track resolution mechanism is necessary in sport competition\(^{12}\). This was confirmed, if need had been, by the big boat challenge 1988 experience\(^{13}\).

Although never tested, notwithstanding the provisions of the Protocol the Courts of New York could in some cases have jurisdiction on certain issues. Indeed, the jurisdiction of the Arbitration Panel is established by the Protocol. It is therefore by essence limited for various reasons. It first extends only to the relevant edition of the America's Cup. Also, there may be cases involving one or more party(ies) which have not signed the Protocol. There may be cases where the Protocol is alleged to be in breach of the Deed of Gift or where a party seeks to obtain an amendment thereof.

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\(^{10}\) See 'The Mercury Bay Boating Club Inc. v. the San Diego Yacht Club', 26th April 1990; 76 N.Y. 2d 256; 557N.E. 2d 87; 557 N.Y.S. 2d 851, Section I, first paragraph.

\(^{11}\) See 9.2.2 hereunder.


\(^{13}\) See supra 4.
There is thus a risk that, based on this potential conflict of jurisdiction, an unsatisfied club might resort to strategies aiming at or resulting in creating uncertainty and delaying a final decision. This could occur by acting, eventually unduly, directly before the Courts of New York or by challenging the jurisdiction – or the decisions - of the bodies specifically established on the occasion of any edition of the America's Cup. This would be highly inappropriate.

It is our understanding that the New York Court of Appeals has identified this risk and has expressly stated that it considers its jurisdiction as being both subsidiary, in respect of that of the America's Cup Arbitration Panel (or similar bodies), and limited to strictly legal issues (as opposed to issues deriving from the application or construction of the rules and principles generally applicable to the competition).

In this respect, of interest the decision rendered by the New York Court of Appeals on 26 April 1990 in Mercury Bay Boating Club Inc. vs. San Diego Yacht Club et al. and in particular:

The question of whether particular conduct is ‘sporting’ or ‘fair’ in the context of a particular sporting event, however, is wholly distinct from the question of whether it is legal. Questions of sportsmanship and ‘fairness’ with respect to sporting contests depend largely upon the rules of the particular sport and the expertise of those knowledgeable in that sport; they are not questions suitable for judicial resolution (see e.g., Couch v National Assn for Stock Car Auto Racing, 845 F2d 397, 403; Charles O. Finley & Co v Kuhn, 569 F2d 527, 539). As sporting activities evolve in light of changing preferences and technologies, it would be most inappropriate and counterproductive for the courts to attempt to fix the rules and standards of competition of any particular sport. To do so would likely result in many sporting contests being decided, not in the arena of the sport, but in the courts.

Moreover, the Deed of Gift governing the conduct of the America's Cup competitions contemplates that such issues of fairness and sportsmanship be resolved by members of the yachting community rather than by the courts. The deed provides that where the defending

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and the challenging yacht clubs have not agreed upon the terms of the
match, it is to be conducted as specified in the deed and pursuant to
the rules and regulations of the defending club, so long as they do not
conflict with the deed. (...) In this case, the dispute over the eligibility
of the chosen vessels should have been governed and determined by
the rules of yacht racing promulgated by the International Yacht
Racing Union (IYRU) and followed by the defending San Diego
Yacht Club. Pursuant to these rules, an international jury referees the
match and decides all protests jointly submitted to it by the parties.
The international jury established to resolve all disputes arising out of
the 1988 America's Cup Match was composed of five members, all
IYRU-certified racing judges of vast experience and international
repute, from countries other than the United States and New Zealand.
Despite Mercury Bay's repeated claims of the unfairness of San
Diego's catamaran defense and notwithstanding San Diego's request
that a protest be submitted to the international jury, Mercury Bay
deliberately chose to keep the issue from these yachting experts, who
were of course, best suited to resolve it. Having thus chosen to seek
relief in a judicial forum, Mercury Bay is limited to a resolution of
only the legal issues presented.

And further, as a conclusion to the New York Court of Appeals decision:

Any question as to sportsmanship and fairness, such as the propriety
of races between monohull and multihull vessels, are questions which
the trust instrument appropriately leaves to the expertise of persons
actively involved in yacht racing; they are not questions suitable for
judicial resolution.

The position is confirmed and indeed stressed by chief Judge Watchler,
in his concurring opinion whereby:

More important, perhaps, is that the standard articulated by the
dissent [i.e. the dissenting opinion] would encourage repetition of the
most distasteful innovation of all in this case – resolution of the
competition in court (...).

It is tempting, of course, to confuse our authority to construe the trust
instrument with a license to mold the America's Cup competition in
accord with our notions of sporting ideals. Ultimately, however, it
must be the contestants, not the courts, who define the traditions and ideals of the sport. No one wishes to see the competition debased by commercialism and greed. But if the traditions and ideals of the sport are dependent on judicial coercion, that battle is already lost.

9.2.2 The America's Cup Arbitration Panel, the International Jury and the Measurement Committee

The Protocol and conditions provided for three bodies having separate independent roles depending on which rules applied. Their respective jurisdictions were mutually exclusive. Those bodies were the America’s Cup Arbitration Panel, the International Jury and the Measurement Committee.

Matters pertaining to the yacht racing rules, namely rights of way on the race course and matters generally covered by the Racing Rules of Sailing, were within the exclusive jurisdiction of umpires who acted as referees on the race course and who were members of the International Jury. Umpires could require one of the competing yachts to undertake penalty turns, which were generally 270° turns, if they observed a breach of the Racing Rules of Sailing. The International Jury as a body also dealt with certain matters involving the interpretation or resolution of disputes arising directly out of the Racing Rules of Sailing. In such cases, the International Jury held a hearing.

The Measurement Committee had exclusive jurisdiction to interpret the rules of the America’s Cup class of yacht. Its decisions were final. When a measurement issue or a technical issue arose before the America's Cup Arbitration Panel, it was required to consult the Measurement Committee on that particular issue\textsuperscript{15}. The America's Cup Arbitration Panel was bound by the advice it received. The provision of the Protocol on this matter echoed Rule 64.3 of the Racing Rules of Sailing which requires a yacht club protest committee, when in doubt about a measurement rule, to refer the issue to the appropriate authority. Rule 64.3 binds the protest committee to the reply it receives from the particular measurement authority.

The America's Cup Arbitration Panel was charged with resolving matters which arose out of the Deed of Gift and the Protocol.

Subsequently, a possible grey area surfaced as to the respective jurisdiction of the Arbitration Panel and of the International Jury. It regarded

\textsuperscript{15} See Article 22.4 of the 31st America's Cup Protocol.
the interpretation of, and the resolution of disputes concerning certain matters. Therefore, on 30 October 2002, the signatories of the Protocol executed a ‘Clarification # 1’ pursuant to which:

RNZYS and YCPY agree that, by executing the Protocol, they intended to, and hereby do, assign responsibilities for the interpretation of documents governing racing and the resolution of disputes as follows:

1. The America’s Cup Arbitration Panel (‘ACAP’) remains empowered to interpret and resolve disputes in accordance with Article 22.3 of the Protocol in connection with any matters relating to the Deed of Gift, Interpretive Resolutions, the decisions of the Arbitration Panel and the Protocol, and to mediate any differences in accordance with Article 5.3 of the Protocol.

2. The Jury is responsible for interpreting and resolving the disputes on the LVC and Match Conditions, Sailing Instructions and Racing Rules of Sailing, except where any provision of these rules is in conflict or is originated or connected with provisions of any of the documents listed under 1 above. In this case any questions regarding interpretation of such documents shall be referred by the Jury to the ACAP. The Jury shall be bound by the ACAP’s interpretation.

Despite this clarification, on one occasion an application was filed with the Arbitration Panel and, also, a protest was lodged with the Jury. This was in November 2002. The application aimed at disqualifying the Seattle Yacht Club ‘One World Challenge’ (‘OWC’) for sever breaches of the Protocol. At that time, however, the selection series was in progress and the club racing against OWC deemed that, in order to be on the safe side, it had to challenge OWC’s right to take part in the then ongoing regattas. The view taken by the Jury was that it had to stay its decision until the Arbitration Panel had issued its decision. The right of OWC to race was assessed, subject to a certain penalty. The protest was therefore withdrawn.

16 Arbitration Panel’s decision ACAP 02/11 and ACAP 02/12.
10. Applications to the Panel and Panel's decisions

10.1 The Panel's 22 decisions

The Arbitration Panel issued 22 decisions, the first on 17 December 2000 and the last on 9 December 2002. The importance, complexity and length of the decisions varied considerably. For the sake of convenience, the decisions were referred to by using the abbreviation 'ACAP', which stands for 'America's Cup Arbitration Panel', followed by three numbers, the first two of which were the last numbers of the then current year and the third was the progressive number of the decisions rendered in such year. The numbering took into account decisions rendered by the Arbitration Panel of the 30th Cup and accordingly ACAP 00/6 was the sixth decision rendered during the year 2000 (five having been rendered by the America's Cup XXX Arbitration Panel and this one being the first issued by the Americas' Cup XXXI Panel).

It would be far beyond the ambitions of this paper to comment such decisions. They will be soon accessible in extenso in a book which is due to be published by Kluwer Law under the title 'Arbitration in the America's Cup, the America's Cup XXXI Arbitration Panel and its decisions'. The book shall also include, inter alia, the Deed of Gift of 1887, the America's Cup XXXI Protocol, the Arbitration Panel 2001 Rules of Procedure and the XXXII America's Cup Protocol.

10.2 Three types of applications

Generally speaking, the applicants' applications tended to fall into three general categories. They were:

a. cases where the Panel was asked to rule whether or not a particular course of action might breach the Protocol. These applications were permitted by the Panel when they were seen to relate to real situations and not simply hypothetical ones. The advantage in ruling before a breach occurred is that the club (syndicate) involved could take appropriate action to

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17 Subject to ACAP 02/11 and 02/12 portions of which have been omitted as they may relate to current pending litigation

18 'Arbitration in the America's Cup, the America's Cup XXXI Arbitration Panel and its decisions', co-authors Donald Manasse; John Faire; Michael Foster; Henry Peter; David Tompkins; edited by Henry Peter; Kluwer Law International, 2003.
ensure that the Protocol was not breached. The Panel took the view that a purely hypothetical ruling was not appropriate. In one case which came before the America's Cup Arbitration Panel assembled for the 30th America's Cup, a decision on a hypothetical case had the effect of causing one of the contestants sufficient concern to make an application to the Panel. Unfortunately for the club, the result was the imposition of a penalty;

b. in respect of questions of eligibility. Questions under this heading were whether a particular designer or sailor could be employed by the club (syndicate) without the club (syndicate) breaching the Protocol. Again, the answer that the Panel gave enabled the club (syndicate) to avoid a breach of the rules;

c. cases where there were disputes between clubs (syndicates), one alleging a breach by the other of the relevant rules.

10.3 The first decision: eligibility of Alinghi?

Worthy of highlight, the first decision, ACAP 00/6, rendered on 5 December 2000, which turned out to be quite relevant for Switzerland. The issue put before the Arbitration Panel was whether or not Société Nautique de Genève (Alinghi) (‘SNG’) could indeed take part in the America's Cup. SNG had lodged a challenge by letter dated August 18, 2000. It later turned out that there were doubts as to whether SNG fulfilled the conditions required of a yacht club in order to take part in the America's Cup. SNG therefore submitted an application to the Arbitration Panel seeking ratification of the validity of its challenge.

The issue on whether SNG's challenge was valid revolved on whether it complied with the requirements of the Deed of Gift pursuant to which a yacht club had to have ‘for its annual regatta an ocean water course on the sea, or an arm of the sea’. The Arbitration Panel deemed that a liberal approach should be adopted\(^{19}\). In view of the fact that SNG was holding an annual regatta in Cannes and had undertaken to continue to do so ‘until it ceases to hold the America's Cup or conclusion of its participation in the 31st America's Cup regatta’\(^{20}\), the Arbitration Panel found that SNG was eligible and its challenge therefore valid.

\(^{19}\) ACAP 00/6, nb. [15].
\(^{20}\) ACAP 00/6, nb. [13]
In making its decision, the Panel reviewed previous cases, including a decision rendered by the Supreme Court of the State of New York on September 20, 1984 following a petition regarding the eligibility of the Chicago Yacht Club. The issue was whether or not Lake Michigan was in effect a sea, alternatively an arm of the sea.

Another interesting issue was also raised regarding the location of a future defence in the event SNG should win the Cup. The Royal New Zealand Yacht Squadron petitioned that SNG had to undertake that it would defend the Cup on the occasion of its annual regatta, i.e. in Cannes. The Arbitration Panel stated that this was confusing two issues: (i) that of the eligibility of a Challenger to challenge, and (ii) that of the place at which the successful Challenger should hold the next Match. It stated that the Defender, as trustee, could not subject the acceptance of the challenge to conditions concerning compliance with the Deed of Gift in the event the Challenger was successful.

11. Deeds of waiver and indemnity for Panel members

Soon after their appointment to the Panel, the members sought contractual arrangements, from the participants, that would provide the Panel members immunity from suit. As mentioned, the Panel members were carrying out their function voluntarily and since they received no remuneration, they did not consider it their obligation to obtain the necessary protection. The Panel sought a comprehensive insurance policy and a waiver of and indemnity against any claims which might not be adequately covered by an insurance policy. This issue proved to be both difficult and protracted. The participants agreed that the Panel members should not be exposed to any risk of personal liability, but were not, at least initially, in agreement on how this result was to be achieved.

The problem was that the participants were, in practical terms, the syndicates who were the agents of the clubs, who, under the Deed of Gift, make up the Challengers and the Defender. Whilst a policy of insurance could be, and indeed had been, obtained, the insurer was not prepared to extend that insurance for the period of possible liability, namely six years after the final race in the Match for the Cup. Once the Match would end, the syndicates were likely to be wound up or, even if they were not, to have little

21 ACAP 006, nb. [29].
in the way of assets. The clubs were not prepared to assume a personal liability placing their assets at risk.

The matter was resolved. In summary, the nature of the deeds that the Challengers, the Defender and all the syndicates entered into provided that all parties agreed to:

a) expressly waive any right to claim against Panel members;

b) provide a comprehensive policy of insurance;

c) covenant that whichever club wins the Cup, thereby becoming the Defender for the next Match, will use its best endeavours to renew the insurance coverage on similar terms and to obtain waivers and indemnities from future challenges and to give them itself.

The Panel was satisfied that, whilst not providing the equivalent of judicial immunity against suit, these arrangements provide an acceptable level of protection.

C. The 32nd America's Cup

12. Dispute Resolution during the America's Cup XXXII

On 2 March 2003, Société Nautique de Genève, as Defender, and the Golden Gate Yacht Cub, as Challenger of Record, executed the Protocol which shall govern the America's Cup XXXII. Article 21 of such new Protocol, under the title 'Dispute resolution and jury', provides for the America's Cup XXXII dispute resolution system. It is not our intention nor would it be appropriate for us, as member of the former America's Cup XXXI Arbitration Panel, to comment.

In substance, the new Protocol opts for the merger of the Arbitration Panel and the International Jury. The new body is called 'Jury' and will be composed of five members. The criteria for the selection are essentially the same as those applied in the context of the 31st Cup.
Resort to courts or tribunals other than the Jury, Measurement Committee or any other dispute resolution body agreed by the Defender and Challenger of Record will continue to be considered a breach of the Protocol, the consequence being the ineligibility to take part in the Challengers' selection series or the Match.

The Jury will not be bound by decisions of the previous America's Cup Arbitration Panels or of International Juries, i.e. those of the 30th and 31st America's Cup. Article 21.9(a) however expressly provides that such decisions may be taken into account when making any determination.

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Summary:

The arbitration mechanism put in place during the 31st America's Cup has achieved some notoriety in the past months. The author of the present paper, Professor Henry Peter, a member of the Arbitration Panel, gives insight in the historical roots of the America's Cup arbitration mechanism and in the Panel's work during the 31st edition of the Cup.