

A quick trawl through the Protocol for the 33rd America's Cup, and comparison with the previous Protocols covering the 30th, 31st and 32nd America's Cups, reveals how much the game has been changed by SNG/Team Alinghi and their ACM tentacle – both to maximise financial advantage from the two events and to greatly enhance Team Alinghi's chances of defending the trophy.

The list of obvious differences is broad and deep, going right to the heart of the 150 year old sailing competition:

**1. Challenger of Record:** CNEV is a brand new yacht club but is accepted by SNG as COR for the world's most prestigious and technically complex sailing event. There is no consultation with other challengers as to the basis of the Protocol. Clearly CNEV was formed in Madrid in June 2007, was of questionable competency to act in this regard, and should have deferred to an established and more experienced Challenger.

**2. America's Cup Management (ACM) is established to take on SNG's obligations under the Deed of Gift.** In the 32nd Protocol, the yacht club SNG is represented as the Defender throughout, with some responsibilities being assigned to an entity called the 'Event Organiser' In the newest Protocol, ACM has been substituted in place of SNG and instead of being a Match between yacht clubs as contained in the Deed of Gift, the 33rd Match is effectively between a yacht club and a company, even on sailing matters. The difference being that a yacht club is ultimately answerable to its members, and there is some control on the unwritten sailing traditions and ethics. The company has private shareholding only, is answerable only to its owners, and generally will take a very theoretical and legalistic view of matters, both sailing and business.

**3. Ownership of the Challenger Selection Series:** To date, the Deed of Gift has controlled the America's Cup Match only. The Challenger Selection Series (CSS) has been owned by the Challenger group headed by the Challenger of Record, who acts in the interests of all Challengers. The Challengers have always had the right to choose the venue, regatta dates, selection process, control TV rights, race management and adjudication etc. But in this Protocol ACM becomes the sole control point of both series and effectively the Defender dictates how the Challenger will be selected. For 2007 the two series, and preceding Acts were referred to as the 'Event' however Mutual Consent still prevailed along with effective ownership rights.

Running the two series, and the preliminaries, together has given ACM significant new rights, coupled with absolute marketing power (prior to 2003 handled on a co-operative basis). The Challengers have no control over their event. Control by the Challengers is particularly important over the allocation of TV rights to ensure that there is maximum exposure for the benefit of the individual team sponsors, and to allow team revenue maximisation.

In 2007 the CSS was run jointly by the Challenger of Record and ACM under Mutual Consent. In 2003 and previously the CSS was run by the Challenger of Record with little input from the Defender, who conducted their own selection trials. Arrangement for the Match, prior to 2003 were conducted by bodies such as COR/D (Challenger of Record and Defender). The Challengers previously were responsible for the costs of conducting their selection trials, as was New York Yacht Club with their now legendary trials process up to 1983. Now ACM picks up the costs of running the CSS - along with significantly enhanced revenue opportunities - of which it takes half the Net Surplus and the other half is shared between the Challengers. (The forecasted Net Surplus from the 2007 events are approximately 30 million Euros.)

**4. ACC Class Rules:** ACM has become the rulemaker for the new AC class without being required to consult with others outside the Team Alinghi group. This is contrary to the process adopted for the formulation of the existing ACC Rule and precludes others of having an insight into the shape of the Rule until it is announced. Team Alinghi gain a significant potential advantage beyond the 18 month window granted to the Challengers.

**5. Competition Regulations** are a first for the America's Cup. Previously these have been controlled within the Protocol and other Race Management documents. Like the Class Rule, these are again to be produced by ACM rather than by mutual agreement between the Defender and Challenger of Record. CNEV as Challenger of Record for the 33rd Match is allowed a two week period of consideration. But this must be done on a confidential basis, which presumably means that there is to be no reference to any other Challengers). A similar situation exists for the Event Regulations. Given the very accommodating approach taken to date by CNEV, few would have any confidence in their ability to question these provisions – and they have no power of decision making.

**6. Competitor Commission:** The Challengers Commission of 2007 is replaced by a Competitors Commission which has representation from the Defender and ACM. However it is effectively a discussion group and has which has no power. The 2007 Challengers Commission was a democratic body that represented equally all challengers and stood in the shoes of the Challenger of Record. This was actually an improvement over the COR's role prior to 2007, when the COR could act on its own for the Challengers as a group. Incredibly, under the new Protocol the powers that previously vested with the COR or Challenger Commission lie with the defender-owned ACM.

**7. Selection of Officials:** All positions and committees are appointed solely by ACM without reference to the COR or Challengers. This includes the Technical Director and Measurement Committee. The Challenger of Record can appeal an appointment but only on the basis of neutrality of anyone appointed to a Senior Position on the Race Committee, measurement Committee or an Umpire. The position of Regatta Director has been

disestablished and taken over by ACM. The only exceptions to the absolute power of appointment are that of the Jury and Arbitration Panel which are jointly held between Challenger of Record and ACM.

**8. Racing Rules:** ACM has the absolute power to set the Racing Rules – with no requirement to consult even the Challenger of Record – previously these were handled by the mutually agreed Regatta Director in consultation with the Defender and Challengers. And the Challengers largely controlled the rules governing the CSS with little influence from the Defender.

**9. Regatta date:** Due to ACM wishing to negotiate over a variety of venue options, the Protocol stated that the Match and CCS would be held in the period 2009 to 2011. So while the Defender will have inside information on the intentions of the Defender-owned ACM, the Challengers won't, and therefore are at a serious planning and organizational disadvantage.

Responding to criticism of this very loose arrangement by Golden Gate YC and others CNEV commented: 'As far as not knowing the date and place the 33rd edition of the America's Cup, we would point out that is nothing to do with the Club Náutico Español de Vela, which - like the rest of the participating teams – is awaiting, with interest, a decision on whether the Cup will take place in Valencia, in 2009.' However with venue selection wide open in March 2003 SNG were able to name 2007 as being the year of the 32nd Match and the Deed of Gift further restrains the Match date to a period between May and November. It is difficult to understand why this degree of flexibility is required and it obviously gives the Defender more latitude. Further it is difficult to understand why CNEV, knowing that Valencia was the Spanish preference for a venue and was ready to sail in 2009, would allow a more flexible date arrangement - so that other venues outside Spain could be considered and bought into play if negotiations between ACM and Valencia stalemated.

**10. Entry Rejection:** ACM can reject any competitor's entry – even though they comply with all conditions of entry. There is provision to appeal to the Arbitration Panel – but this right of refusal was not present in the previous Protocol, raising questions as to why it is necessary, or the circumstances in which it would be used.

**11. Qualifying Regattas:** Are stated as being 'likely' to be held in ACC V5 boats – however it is not definite that this will happen, and again there is no reason why this flexibility is required, given that there is a good fleet available.. There has been no announcement on any ongoing ACC event schedule meaning there is no certainty on lead-in events and sponsorship opportunities for Challengers. The eligibility of the ACC V5 yacht under construction for Team Germany is unknown.

**12. Venue selection date** is stated that it 'may be on 31 December 2007, but if not then by some later date to be announced on 31 December 2007.' Again the uncertainty on the timing works adversely for the Challenger where the Defender has inside knowledge and can prepare with better advantage.

**13. Defender can sail in the Challenger Trials:** CNEV claimed that they signed this remarkable clause, giving huge benefits to the Defender on the basis that Competitors may be allowed to build only one boat and it was unreasonable for the Defenders to train alone. Given that ACM had already given themselves the right to set all conditions in terms of the Trials and Match, it seems hard to understand why there would be a restriction to one new boat. The way the Protocol has been drafted it is possible for a set of Defence Trials to be staged along with a Challenger Selection Series and for Team Alinghi to sail a boat in both series!

**14. Length of new Class:** ACM has the sole right to set the new ACC Rule – but the Protocol only states that: 'the new ACC Rules may provide for yachts having a maximum length overall of ninety feet in length overall (sic)'. In reality boats can really be any length that ACM decides. The Deed of Gift states that it is the prerogative of the Challenger to name not the Defender's to determine. Additionally the beam of the Challenger has not been specified as required by the Deed of Gift. If indeed CNEV did challenge in a boat of non-specific length and to a rule which was yet to be written by the Defender then it is arguable whether their Challenge was valid in terms of the Deed of Gift.

**15. Crew and Designer transfer:** ACM continue their fetish with the transfer of crew and designers. In spite of being unable to specify a date for the regatta, except within a range of two years, they don't extend the same flexibility to crew and designers.

Instead, if a crew member is engaged by a Team after 31st August 2007 (ie after the next seven weeks), then they are locked into that team for the duration of the 33rd America's Cup and Challenger Trials.

Effectively all teams will have to disband creating an open market for talent to enable cashflows to be stretched to their maximum in the event of a 2011 event date. Or if the Teams do sign crew and designers early, then the crew and designers have to be certain the Team has accurate strategies and sufficient cashflow to go the whole distance - to avoid being trapped in a poorly funded challenger who will not agree to a release.

The Defender doesn't really have any of these issues as they are making the decisions, have advance knowledge and are assured of 50% of the Net Surplus Revenues from the events. Delay usually means more revenue, so it's a win-win situation for the Defender.

Additionally ACM have given themselves the rights to change the Competition Rules on crew and designer restrictions so as to cover off any unforeseen situations such as occurred in the 2003-2007 cycle with Russell Coutts refusing to sail aboard Alinghi, as the rules at that stage only locked in crew who had sailed aboard a yacht. A retrospective Protocol change soon fixed that issue and Coutts joined the commentary team for the 32nd America's Cup.

**16. Neutral Management wiped:** The Neutral Management of the 32nd Protocol has been wiped and all powers that were previously joint between the Challenger and Defender are now with ACM only. The traditional ownership of events and option of Mutual Consent in the America's Cup itself was altered somewhat in the 32nd Protocol by a concept known as Neutral Management. This was effectively a device to level the playing field and remove the stigma of unfairness which had characterised the America's Cup since its inception, and was vital if the event was to be taken to the level of other professional sports. Removal of the provisions for Neutral Management and usurping the granted and traditional rights of the Challenger by the Defender is a real setback for the event, and puts it into a position that will attract a lot of criticism and negative comment.

It is understandable if ACM are effectively underwriting the event that they have control over decisions which may affect the financial viability of the event. However the concept of Neutral Management was to ensure fairness of competition, while respecting the rights of the parties. Why CNEV signed away this provision is beyond belief.

**17. Yacht Club of Substance:** To avoid the situation where challenging teams could form 'paper yacht clubs', and use these as a device to effect entry, such as happened with the two Australian challengers in 1995, criteria were invoked in the 30th and 31st Protocols requiring all clubs represented by teams to have been in existence for five years; have maintained a membership of at least 200; be financially supported by its membership on a pro-rata basis; operate as a yacht club with yachting activities; and be a member of the national authority of its country. CNEV fails several of these criteria.

In the Terms of Challenge for the 32nd America's Cup the requirements of the previous two Protocols for a Club were modified and eased and CNEV would or could probably be bought into compliance. Dropped was any minimum membership requirement, or establishment duration. The Terms of Challenge for the 33rd America's Cup have not been published, however given what has gone before, it is likely that these will be further eased to accommodate CNEV.

A key point in the letter from GGYC to SNG is their assertion that CNEV is not a bona fide Challenger, as the club was formed just days before signing the 33rd Protocol without 'having for its annual regatta an ocean water course on the sea, or an arm of the sea, or one which combines both..'

This issue was addressed in part by CNEV in a release under the auspices of Desafío Español, in Spanish, which reads as follows in translation:

'With respect to the obligatory nature of the Challenging Club to hold a regatta in open sea waters, as demanded by the Deed of Gift, we would point out that there is no mention of whether such a regatta should take place before, or after, the acceptance of the challenge. With respect to this, we would point out that the Club Náutico Español de Vela, has organized two regattas, which will take place in Santander this month.'

Sail-World understands from Spanish sources that the first of these regattas was scheduled for last weekend in Santander in Optimist dinghies sailed by 13 and 14 year olds. See: [www.rfev.info/rfev/rfev.php?idioma=es&area=a02&seccio=s01&apartat=p01&id=070713\\_05](http://www.rfev.info/rfev/rfev.php?idioma=es&area=a02&seccio=s01&apartat=p01&id=070713_05) Not quite sure if an Optimist regatta is what George Schuyler and friends had in mind in 1887, when they specified that the challenging club had to have its annual regatta on an ocean water course.

Three races were supposed to be sailed on the Friday but had to be cancelled due to winds of just three knots, and similarly on the Saturday. See the report and photos on CNEV's 'annual regatta' at <http://valenciasailing.blogspot.com/>

It is not known when the second event will take place, if indeed this can be done before legal proceedings commence in New York. But does it matter? Why would the Deed have any requirement for an annual regatta if it was something a challenging club could organize in the future? And how can a regatta be 'annual' if it has not already been held at least twice?

In rugby parlance, America's Cup Management, for whatever motives, have screwed the Challenger's scrum.

The only outcome can be that, as in rugby, the scrum is reset and the ball put in play again.

Or will other options be put into the sailing and sponsorship market involving the majority of the America's Cup

teams and sailors?

by Richard Gladwell, Sail-World NZL 4:22 AM Wed 18 Jul 2007 GMT