Arbitration CAS 2014/A/3630 Dirk de Ridder v. International Sailing Federation (ISAF), award of 8 December 2014

Panel: Judge Conny Jörneklint (Sweden), President; Ms Anita DeFrantz (USA); The Hon. Michael Beloff QC (United Kingdom)

Sailing
Breach of the America's Cup rule requiring boats to comply with class rules
De novo hearing
Requirements to be observed in disciplinary procedures of sports governing bodies
Standard of proof
Assessment of evidence
Proportionality of the sanction

1. **The virtue of a *de novo* hearing is that, in a hallowed phrase, issues about procedural irregularities in the bodies from whose decisions an appeal is brought *"fade to the periphery"* if indeed they do not disappear beyond it.**

2. **Essential requirements of fairness intended to ensure that justice is not only done but is seen to be done are to be observed in the disciplinary procedures of sports governing bodies: (i) there should be a clear demarcation line between the roles of investigator, prosecutor and adjudicator – in short a legal separation of powers; (ii) there should be a full disclosure of all material in the possession of the prosecution which maybe of assistance to the person charged with a disciplinary offence; (iii) the material on which the adjudicator is invited to base its verdict should be clearly defined to the person charged, and, as far as possible, the adjudicator should be shielded from material potentially prejudicial to the person charged but on which the prosecution does not intend to rely; (iv) there should be a clear demarcation between persons who sit at first instance and those who sit on any bodies to which first instance decisions may be appealed within the same disciplinary structure; (v) a person charged should be informed of and given access to the procedures to be applied in his or her case; and (vi) no change to a disciplinary procedure should be introduced with retrospective effect unless favourable to the person charged. The twin planks of natural justice, *nemo judex in causa sua* and *audi alteram partem*, in so far as not embraced within those six requirements should always be observed. Those requirements are also subject to well-established exceptions such as legal professional privilege, nor do they apply as such to field of play decisions.**

3. **The correct standard of proof to apply is the "comfortable satisfaction" standard widely applied by CAS panels in disciplinary proceedings. According to this standard of proof, the sanctioning authority must establish the disciplinary violation to the comfortable satisfaction of the judging body bearing in mind the seriousness of the**

allegation. It is a standard that is higher than the civil standard of "balance of probability" but lower than the criminal standard of "proof beyond a reasonable doubt". The standard of proof does not itself change depending on the seriousness of the (purely disciplinary) charges. Rather the more serious the charge, the more cogent the evidence must be in support.

4. Bearing in mind, the relevant burden and standard of proof, it is for CAS panels to decide by reference to all the admissible evidence, including live evidence from the witnesses, which version of events it deems more credible.

5. To determine a proportionate sanction the previous sanctions imposed by ISAF and the circumstances should be taken into consideration.

I. PARTIES AND APPEALED DECISION

1. Mr Dirk de Ridder (the "Appellant" or "Mr De Ridder"), born 29 December 1972, is a Dutch national and a professional sailor. Mr de Ridder is a former member of Oracle Team USA ("OTUSA").

2. The International Sailing Federation ("ISAF") is the world governing body for the sport of sailing, officially recognized by the International Olympic Committee.

3. The Appellant appeals the decision dated 23 May 2014 of the ISAF Review Board (the "Decision") finding him liable for breach of the rules of sailing and imposing sanctions in consequence as discussed more fully below.

A. Background Facts

4. Below is a summary of the main relevant facts, as submitted by the parties in their written pleadings and adduced at the hearing. Additional facts may be set out, where relevant, in connection with the legal discussion that follows. Although the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.

5. The dispute between the parties centres on what occurred in the days preceding the final races in a series of regattas known as the America's Cup World Series ("ACWS"), which took place in Newport in June 2012 (the "Newport Regatta") and whether at an informal meeting of some members of the OTUSA crew in Newport prior to boat 4 being put in the water, Mr de Ridder directed or was party to or acquiesced in a suggestion that two shore crew – Andrew Walker and Bryce Ruthenberg – should add weight to the forward kingpost of AC 45 boat 4, contrary to the AC 45 Class Rule. Mr de Ridder denies any involvement on his part in any such breach. The ISAF support the finding of his involvement made below.

6. AC45 Class Yachts belong to a strict one-design class. In consequence, any change to the original specification requires the approval of the Measurement Committee. Corrector weights may be added to bring some yachts to minimum rule weight; when corrector weights are required, the class rule specifies where they are to be mounted.

7. The term "kingpost" refers to the short vertical compression member mounted on the underside of the spine, immediately below the wing rotation point. The forward kingpost is a similar vertical compression member mounted on the underside of the spine below the forestay attachment point. Both the forward kingpost and the main kingpost are sometimes generically referred to as the "dolphin striker". The Panel benefitted at the hearing from Mr de Ridder's clear explanations and helpful diagrams of the technical aspects of what is at issue.

8. The ACWS forms part of the wider 34th America's Cup (AC34), which was held in San Francisco in August and September 2013. On 26 July 2013, the Measurement Committee were notified by America's Cup Race Management ("ACRM") boat builders preparing AC45 yachts for the Youth America's Cup, that the forward kingpost belonging to the AC45 yacht Ben Ainslie Racing ("boat 9" or "BAR") was unusually heavy. It was initially believed by OTUSA that all three AC45 boats maintained by them – boats 4, 5 and 9 – had been modified in an unauthorized manner, prompting OTUSA to retire its boats from all competitions held in the AC45 series and return all prizes to the organizing committee.

9. Mark Turner, OTUSA shore team manager, and Richard Slater, rules advisor to OTUSA, carried out in-house investigations into the apparent *unauthorized modifications*. *Mr Turner confirmed to the Measurement Committee Chairman "that he had determined based on interviews that all three AC45 yachts competing in the ACWS and maintained by OTUSA (Boats 4, 5 and 9) had been modified in similar fashion, and that boats 4 and 5 were modified by the insertion of bags of lead shot into the kingpost. He further reported that he had identified the responsible persons, who included a member or members of the shore team charged with the maintenance of the AC45 yachts, as well as at least one member of the sailing team".* [Measurement Committee Report to Regatta Director August 4, 2013.] It subsequently transpired that there was no evidence that either kingpost on boat 5 had been modified. [Measurement Committee Report to the International Jury August 15, 2013.]

10. Upon receipt of reports that gross misconduct may have occurred, two members of the ISAF International Jury (the "Jury"), Graham McKenzie and Bryan Willis, were appointed to investigate the claims. They interviewed several members of OTUSA who they thought might have been involved in carrying out the unauthorized modifications. Mr de Ridder was interviewed twice, the first time on 13 August 2013 and the second time on 16 August 2013. Mr McKenzie took a handwritten note of both interviews; Mr de Ridder was represented by counsel on both occasions and at the end of each interview he read and signed Mr McKenzie's notes. Mr McKenzie also made handwritten notes of interviews with other crew members including Andrew Walker and Bryce Ruthenberg.

11. During the CAS hearing, the Panel was informed that OTUSA carried out its own internal investigation at the same time as the Jury, led by a Californian lawyer Ms Lee Ann La France. Although Ms La France never concluded her investigation nor prepared a written report, she had two meetings with Mr McKenzie. During the second meeting on 21 August 2013, she

provided an oral account of her interim views. Mr McKenzie typed up a note of what Ms La France told him (the "La France Note"). The Panel will assess what, if any weight is to be given to the La France Note in its discussion on the merits.

B. Proceedings before the America's Cup International Jury; ISAF Disciplinary Commission and ISAF Review Board

12. On 26-28 August 2013, the Jury held hearings on liability in this matter in San Francisco, and on 31 August 2013, the Jury held a hearing on sanction.

13. On 29 August 2013, the Jury issued 'Jury Notice JN115R', its decision on liability regarding the allegation of gross misconduct as described in Racing Rules of Sailing America's Cup Edition (RRSAC) Rule 69:

> *69 ALLEGATIONS OF GROSS MISCONDUCT*
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> *69.1 Action by the Jury*
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> *(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.*
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> *(b) If the Jury decides that the person committed the alleged misconduct it shall either:*
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> *(i) warn the person or*
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> *(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.*
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> *(c) The Jury shall promptly report a penalty, but not a warning, to the national authority of the person and to the ISAF.*
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> *(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.*
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> *(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.*

14. The Jury ruled that they were comfortably satisfied that Mr de Ridder gave the instruction or direction to add the weight to the forward king post; knew the weight had been added; knew it was a breach of the AC45 Class Rule; and did not tell the truth to the Jury in this regard.

15. On 3 September 2013, the Jury issued 'Jury Notice JN116', its decision on sanction. The Jury decided to exclude Mr de Ridder from further participation in any role in the 34th America's Cup. The sanction imposed by the Jury is not subject to appeal. (According to para. 2.13 of the Review Board decision – discussed below – it appears that Mr de Ridder attempted to appeal his exclusion from the Cup to the Review Board, but the Board dismissed his appeal for lack of jurisdiction).

16. On 7 September 2013, the Jury sent a report (the "AC Jury Report") to Mr de Ridder's National Authority ("MNA") and also to the ISAF, for each body to determine whether to impose further penalties, as required by RRSAC Rule 69(1)(c).

17. On 23 October 2013, Mr de Ridder's MNA decided not to impose any additional sanction as it considered that exclusion from the 34th America's Cup together with the attendant publicity was itself a severe penalty.

18. On 30 September 2013, the ISAF Disciplinary Commission (the "Commission") appointed a panel to address the AC Jury Report insofar as it related to Mr de Ridder.

19. On 22 January 2014, the Commission issued its decision on liability ("Liability Decision") finding that Mr de Ridder had committed a gross breach of a Rule, namely RRSAC 78.1, which requires boats to comply with class rules; committed a gross breach of good sportsmanship; had brought the sport of sailing into disrepute, and was thereby open to sanction under RRSAC 69. The Commission gave Mr de Ridder the opportunity to request a reconsideration of the Liability Decision before it considered sanction.

20. Mr de Ridder did not request a reconsideration of the Liability Decision and did not request a hearing but did make submissions on sanction. In these submissions, he raised for the first time the point that he was not actually in Newport at the time when, according to the evidence relied on by the Commission, the meeting at which the instruction to add weight was discussed, took place, or when the weight was then added to the king post.

21. On 12 February 2014, the Commission issued its second decision, which included a partial reconsideration of the Liability Decision ("Reconsideration and Sanction Decision"). The Commission considered it necessary to reconsider the Liability Decision in light of Mr de Ridder's new point. The Commission concluded that the timing of Mr de Ridder's arrival in Newport was not so inconsistent with the evidence previously considered that it excluded the possibility of the Commission's previous conclusions being correct – the effect of it was to narrow the time window in which Mr de Ridder may have been involved. The Commission concluded that the new evidence did not tip the scales or make it no longer comfortably satisfied as to Mr de Ridder's involvement and confirmed the Liability Decision.

22. As to sanction, the Commission decided to (i) exclude Mr de Ridder from any participation in the next edition of the America's Cup, and (ii) revoke Mr de Ridder's ISAF Eligibility for a period of five years from 1 September 2013, with the final year of that revocation suspended until 1 September 2018, subject to certain conditions.

23. On 28 February 2014, further to a request for reconsideration from Mr de Ridder and his MNA, the Commission reconsidered the Reconsideration and Sanction Decision and amended the first part of the sanction. The amended sanction provides that Mr de Ridder is excluded from any participation in the next edition of the America's Cup, with such exclusion to take effect only if ISAF has jurisdiction over the next edition.

24. On 26 February 2014, Mr de Ridder appealed to the ISAF Review Board (the "Board") against both the Commission's decision to find him liable to a sanction and the sanction itself.

25. On 23 May 2014, the Board issued its decision. The Board agreed with the Commission on liability and was satisfied that Mr de Ridder (a) committed a gross breach of a rule, namely RRSAC 78.1, which requires boats to comply with class rules; (b) committed a gross breach of good sportsmanship; and (c) has brought the sport of sailing into disrepute. The Board held that Mr de Ridder was therefore open to sanction under RRSAC 69.

26. In relation to sanction, the Board determined that the decision of the Commission was disproportionate and amended the period of ineligibility to three years, with the consequence that Mr de Ridder would be free to compete in major events after 1 September 2016 (including in theory, the next edition of the America's Cup).

II. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

27. On 12 June 2014, Mr de Ridder filed his statement of appeal at the Court of Arbitration for Sport (CAS) pursuant to Article R48 of the Code of Sports-related Arbitration ("CAS Code"). In his statement of appeal, Mr de Ridder requested the following relief:

Mr De Ridder requests the Court of Arbitration for Sport to proclaim that the decisions made by the Disciplinary Commission were based on insufficient evidence and that the imposed sanction is disproportionate.

Furthermore, Mr De Ridder requests to promulgate that the Disciplinary Commission never had jurisdiction over the case of Mr De Ridder and to annul the decisions made by both the Disciplinary Commission and the Review Board of ISAF.

28. On 23 June 2014, pursuant to Article R51 of the CAS Code, Mr de Ridder filed his appeal brief. In his appeal brief, Mr de Ridder requested the following relief:

1. *Primarily, the defence team of Mr De Ridder requests the Court to annul all the decisions of the Disciplinary Commission, and as the Decision of the Review Board draws on these decisions, to annul this decision as well.*

2. *Furthermore, the defence team of Mr De Ridder respectfully requests the Court to render a new decision in the case of Mr De Ridder instead, dismissing all charges against him and annulling the imposed penalty of ISAF, based on the fact that there is insufficient evidence to convict Mr Dr Ridder of breach of sportsmanship and, therefore, of "ordering" Mr Ruthenberg to place illegal weight in OTUSA Boat 4 or otherwise being involved in the alleged incident.*

3. *Alternatively, the appellant respectfully requests the Court to rule that the imposed sanction is disproportionate and too grave. The imposed penalty is disproportional, especially considering the penalty already imposed on him by the America's Cup jury, in combination with the permanent damage on Mr De Ridder's reputation, private life and economic future and the already imposed sanction by excluding Mr De Ridder from the 34th edition of the America's Cup or to render any decision which is justified in light of the circumstances of the case.*

29. On 26 June 2014, with the Respondent's agreement, the Appellant filed a CD-ROM with all of the applicable Rules and Regulations applying to the case, as well as all the exhibits relied on by him.

30. On 17 July 2014, pursuant to Article R55 of the CAS Code, ISAF filed its answer. It requested that the CAS dismiss the appeal and uphold:

1. *The findings of the International Jury of the 34th America's Cup ("the International Jury"), the International Sailing Federation ("ISAF") Disciplinary Commission ("the Commission") and the ISAF Review Board ("the Board"); and*

2. *To uphold the decision of the Board to suspend the Appellant's ISAF Eligibility for a period of three years from 1 September 2016* [sic: ought to read 2013].

…

3. *In the event that the appeal is dismissed the Respondent seeks a contribution towards its legal fees and other expenses incurred in connection with these proceedings.*

31. By letter dated 23 July 2014, Mr de Ridder made a request to file additional witness statements and to add additional witnesses to his witness list. On 29 July 2014, ISAF objected to Mr de Ridder's request. On 6 August 2014, Mr de Ridder filed additional correspondence. By letter dated 20 August 2014, the CAS Court Office issued procedural directions on behalf of the Panel, including directing the parties to clarify the status of potential witnesses and their role in the procedure; the Panel drew the parties' attention to Article R57 of the CAS Code; and proposed hearing dates.

32. By letters dated 22 and 25 August 2014, ISAF and Mr de Ridder respectively, addressed the issues raised by the Panel. In his letter, Mr de Ridder also filed additional witness statements, to which the ISAF objected. By letter dated 28 August 2014, the CAS Court Office issued further directions on behalf of the Panel, including drawing the parties' attention to the fact that the appeal involves a *de novo* hearing and therefore, any procedural irregularities during the first instance are curable on such appeal.

33. By letter dated 12 September 2014, the CAS Court Office issued procedural directions on behalf of the Panel including, after taking account of the representations made by the parties, the fixing of the hearing for 1 and 2 October 2014; asked the parties to provide contact details for two potential witnesses the Panel wished to hear from: Andrew Walker and Bryce

Ruthenberg; and reiterated that the CAS procedure is a *de novo* hearing by virtue of Article R57 of the CAS Code.

A. Constitution of the Panel

34. By letter dated 22 July 2014, the parties were advised that the Panel constituted to hear this appeal was constituted as follows: Mr Conny Jörneklint (President); Mrs Anita L. De Frantz and the Hon. Michael J. Beloff QC (Arbitrators). No party raised any objection to the constitution of the Panel.

35. Subsequently, and in the light of the hearing dates fixed, it was necessary for ISAF to instruct alternative external counsel. By letter dated 17 September 2014, ISAF advised the CAS Court Office that its replacement counsel was Mr Nick De Marco, barrister with Blackstone Chambers – the same chambers as Mr Beloff. By letter dated 23 September 2014, the parties were advised that Mr Beloff and Mr De Marco were practising in the same chambers and the Appellant was granted a time limit to advise the CAS Court Office whether he wished to challenge Mr Beloff. By letter dated 24 September 2014, the Appellant advised the CAS Court Office that he did not wish to challenge Mr Beloff and wanted the hearing to proceed as scheduled on 1 and 2 October 2014.

B. Hearing

36. By letter dated 17 September 2014, the parties and their witnesses were called to appear at the hearing which was held on 1 and 2 October 2014 in Lausanne. The Panel was assisted at the hearing by Mr Christopher Singer, CAS Legal Counsel, and Ms Louise Reilly, *ad hoc* clerk.

37. At the outset of the hearing, the Appellant's counsel sought to introduce two additional exhibits and to have heard a new witness, Mr Matt Mitchell. After giving the Respondent an opportunity to comment, the Panel deliberated and ruled that the two exhibits were admissible. The Panel also directed the Appellant to produce a witness statement for Mr Mitchell and scheduled his evidence to be heard on the second day of the hearing. Later in the proceedings, the Respondent sought to introduce the La France Note. After giving the Appellant an opportunity to comment, the Panel deliberated and ruled that the La France Note could be admitted and Mr McKenzie could be cross-examined on its contents on the second morning of the hearing.

38. At the hearing, the following witnesses were heard:

1. Sir Russell Coutts, OTUSA CEO, AC45 Skipper (by telephone)
2. Mr Graham McKenzie, Jury member (in person)
3. Mr Paul Henderson, former ISAF President (in person)
4. Mr Mark Turner, OTUSA Shore Team Manager (by telephone)
5. Mr Matt Mitchell, OTUSA Sailor (by telephone)
6. Mr Bryce Ruthenberg, OTUSA Yacht rigger (by telephone)
7. Mr Andrew Walker, OTUSA Yacht builder (by telephone)

8. Mr Jack Caldwell, former Chairman of Review Board (by telephone)

Mr Dirk de Ridder, OTUSA Sailor, a party, was also heard (in person).

39. ISAF also called Prof. Jan Stage, Mr Bryan Willis and Mr Jerome Pels to give evidence. However, as both parties now accepted,this was a *de novo* hearing, and therefore, the ISAF decided that it was no longer necessary for those witnesses to be called, as their evidence related to procedural aspects of the case at the lower levels which were not germane to the matters which the Panel had to decide.

40. Before giving evidence, the President of the Panel invited each of the witnesses to tell the truth, subject to the sanctions of perjury.

Sir Russell Coutts

41. Sir Russell Coutts outlined to the Panel that there are a number of ways of moving weight forward on a boat, including by painting the boat and putting branding on it. One issue which he believes the Jury misunderstood was their assumption that the shore team would need direction from a higher authority in the team to make decisions on a boat; he considers that the shore team is tasked with assembling the boat and getting it ready for racing and so they make many decisions in that respect.

42. Sir Russell referred to the investigation conducted by Ms Lee Ann La France, which was not conclusive; one of the reasons was that Ms La France felt that she would need much more time to draw any proper conclusions. As the AC34 was approaching, OTUSA management did not have any more time. The internal investigation did not continue as Sir Russell felt that the team had been penalized enough and did not see any value in continuing the investigation after the AC34 competition had concluded.

Mr Graham McKenzie

43. Mr McKenzie explained to the Panel how the La France Note came into existence, as set out above at para. 9 of this Award. Mr McKenzie stated that on 21 August 2013, he shared the La France Note with all Jury members as he was authorized to do so. According to him, the La France Note was used for asking questions at the Jury hearing, nothing more, as the allegations contained therein were unfounded and not proven. The La France Note was not, however, shared with the parties.

44. Mr McKenzie stated that he received a lot of information leading up to the Jury hearing orally; for example, other teams were giving different views about what had occurred, which were not recorded in writing. He stated that you cannot exclude receiving other information but all the Jury can rely on is what happens at the hearing.

45. In relation to an email dated 19 September 2013 sent by Mr McKenzie to Matt Mitchell, Mr McKenzie explained that he was requested to contact Mr Mitchell by Hamish Ross (ACRM general counsel), through Brad Butterworth. According to Mr McKenzie, the purpose of the

email was to invite Mr Mitchell – whose own related case is currently pending before the ISAF Disciplinary Commission – to tell the whole truth as in Mr McKenzie's view, the whole truth of who was involved in the unauthorized modifications of the boats had never emerged.

46. As to the case against Mr de Ridder, Mr McKenzie stated that Mr Ruthenberg believed as a result of a conversation that weight was to be put in the forward king post, and that Mr McKenzie believes that Mr Ruthenberg would not have done it by himself. The Jury formed the view that Mr Walker was not telling the truth. Another crew member who was initially named by Bryce Ruthenberg as being present during the conversation in Newport – Sailor X – was able to demonstrate that he was not present at the time the conversation took place and the charges initially brought against him were dropped by the Jury.

47. Mr McKenzie was also questioned about his membership in the Royal New Zealand Yacht Squadron, which was the Challenger at the AC34. Mr McKenzie answered that ISAF conflict of interest rules do not apply to the America's Cup according to the Protocol, and that it is not unusual for members of the Jury to be members of a yacht club. He reminded the Panel that he was only one of five Jury members.

48. As to why the captain of boat 4 in Newport – Piet van Nieuwhuijzen – was never questioned, Mr McKenzie stated Mr van Nieuwhuijzen was no longer a part of OTUSA and was no longer in the USA. Mr van Nieuwhuijzen denied all knowledge of the incident and he was not further questioned or charged under RRSAC 69.

49. In response to a question whether there was any physical evidence that boat 4 ever raced illegally with lead in the king post, Mr McKenzie informed the Panel that there was an admission from Oracle that the boat raced when it was non-class compliant, and an admission from Mr Ruthenberg that he put lead in the kingpost. Ideally, the Jury would see such physical evidence, but Mr McKenzie believed the lead had fallen out or was removed. A few weeks before the America's Cup, OTUSA – the holder of the Cup – came to the Jury and informed it that its boat had been racing non-class compliant for the last two years and it was on that basis, that it had surrendered trophies.

Mr Paul Henderson

50. Mr Henderson informed the Panel, that in relation to the ISAF conflict of interest rules, he believed that Mr McKenzie had an 'immense' conflict of interest and should have recused himself. The New Zealand government is a $30m investor of Emirates Team New Zealand, the challenge came from the Royal New Zealand Yacht Squadron, and Mr McKenzie is a member of the club.

Mr Mark Turner

51. Mr Turner is still involved with Oracle, has known Mr de Ridder for 12-14 years and has worked on various campaigns with him. Mr Turner informed the Panel that 14 members of OTUSA were in Newport under the instruction of Andrew Walker. Mr Turner was only there for two days for a sponsorship arrangement. He checked in with the boats to see how things

were going but was not involved in the set up. There was an experienced shore team. Mr Turner was not involved in any conversation about bringing weight forward. Furthermore, Mr Turner was not aware of any direction from Mr de Ridder to place additional weight in the king post.

52. Mr Turner first became aware of the alleged illegal modifications on 26 July 2013 and thought Andrew Walker and Bryce Ruthenberg were responsible. In response to a question from ISAF's counsel whether Messrs Walker and Ruthenberg told Mr Turner they had been instructed by Mr de Ridder, Mr Turner responded no, that they never told him that; neither Bryce Ruthenberg nor Andrew Walker identified Mr de Ridder and that did not come up as a discussion with Mr Turner at that time. When asked by ISAF's counsel when it first came up, Mr Turner responded that he could not verify when that was said. ISAF's counsel referred to page 123, lines 2-5 of the transcript of the hearing before the Jury (the "Transcript") where Mr Turner informed the Jury that Andrew Walker was in charge of the shore team at Newport and in response to who had carried out the modifications, Mr Turner had responded that it was the shore team; *"if that's what they'd been directed to do"*. Mr Turner confirmed that he had been told at the time that Mr Ruthenberg had been given instruction and that Mr Turner in consequence told Mr Nicholson on 4 August that he believed a sailor had been involved.

53. Counsel for ISAF pointed out that the only reason evidence about boat 4 came to Mr Turner's attention and ISAF was because Andrew Walker and Bryce Ruthenberg voluntarily told Mr Turner about it during his investigation, following the discovery of illegal modifications on the BAR boat. Mr Turner responded that Bryce Ruthenberg volunteered it but he did not get a very clear picture from Andrew Walker as his story changed. Mr Turner stated that Bryce Ruthenberg never said he was directed by Mr de Ridder and did not say he had been pressurized by Mr de Ridder to put the weight in the forward king post.

54. Mr Turner stated that Andrew Walker did not give Mr Turner a name or say who it was or who was part of the group. Mr Turner believes the pressure must have come from a sailor or sailors, but he was never told a name. Andrew Walker never said that Mr de Ridder was the person who gave the instruction and Mr Turner still does not know or have any idea how all this came about. To him, it is very unclear who said what and how the weight addition came about.

Mr Matt Mitchell

55. Mr Matt Mitchell is a former sailor with OTUSA and his disciplinary case is currently before the Commission on charges relating to the BAR boat, which he denies.

56. In relation to the email of 19 September 2014 from Mr McKenzie, Mr Mitchell informed the Panel that he forwarded the email to Mr de Ridder because he thought it was highly unusual for an ISAF official to be talking to him about someone else's case. Mr Mitchell denies that he approached Mr McKenzie through Hamish Ross and stated that he did not ask Mr Ross to contact Mr McKenzie on his behalf. Mr Mitchell informed the Panel that he was completely surprised to receive the email and had no idea what Mr McKenzie was talking about regarding "The Truth". Mr Mitchell also questions why Simeon Tienpont – who admitted pouring resin

into the kingpost of BAR – was not charged with a Rule 69 violation whereas Mr Mitchell was charged.

57. In response to counsel for the Appellant's question whether Mr Mitchell's understanding was that he would give information in return for a favourable ruling, Mr Mitchell responded that he was unsettled by ISAF's approach and sent an email with a letter copied to Mr McKenzie and Jon Napier.

Mr Bryce Ruthenberg

58. As Mr Ruthenberg was called to give evidence at the hearing by the Panel, he was first asked by the President of the Panel if he could confirm the information given to the Jury and interview with Mr McKenzie, which Mr Ruthenberg did. Mr Ruthenberg stated that he did not wish to change anything in his prior testimony and confirmed that he remembered meeting Lee Ann La France. He also confirmed that he accepted the content of a letter dated 19 December 2013, which he wrote to Jon Napier, in which he accepted the allegations made in the AC Jury Report.

59. Mr Ruthenberg met Mr de Ridder in 2007 and said that they got on well; he regarded Mr de Ridder as a friend and good work mate. He also had a good relationship with Andrew Walker who he has known for 12 years and was best man at his wedding. Mr Ruthenberg confirmed that the first time the matter of weight in the forward king post came to light, was when he and Andy Walker told Mark Turner.

60. Mr Ruthenberg stated that Mark Turner and Russell Coutts asked him about the incident prior to the McKenzie interview and he told them what he had done, which was add weight to boat 4 at Newport. Mr Ruthenberg confirmed that he did not stand to gain anything by admitting responsibility. He also confirmed that he knew the work was not permitted so he hid it from the AC measurers, by putting the lead inside the hollow kingpost.

61. Mr Ruthenberg described that he weighed the lead in Andrew Walker's presence and that it weighed about two kilos. In relation to page two of the additional handwritten notes of his interview with Mr McKenzie, Mr Ruthenberg stated that when he mentioned that Mr de Ridder was 'driving it', he meant that Mr de Ridder had instigated the weight forward. Mr Ruthenberg stated that he, Andy Walker and […] were involved in adding the weight and hiding it, and that Dirk de Ridder also knew about it. He initially recalled Sailor X being involved but accepts that was a mistake.

62. Mr Ruthenberg confirmed that his recollection was that Mr de Ridder gave him instruction to put weight in the front kingpost. Mr Ruthenberg agreed with counsel for ISAF that the terms 'front kingpost' or 'dolphin striker' are often used interchangeably. Andy Walker also instructed him and Andy Walker was present when the instruction was given. Furthermore, Mr Ruthenberg confirmed that he was not just instructed to move weight forward generally, but to add it to the front kingpost.

63. Mr Ruthenberg believed that the instruction to place weight was clear, and he would not have carried out this work on his own back as he is simply a rigger in the team that does his job in the team; performance analysis of boats is not his "thing". Mr Ruthenberg stated that Mr de Ridder is very good at performance analysis of boats, and Andy Walker also has knowledge of performance and design of boats.

64. Mr Ruthenberg could not recall exactly when the idea to put weight in the forward kingpost first came up but he agreed that it was before the races at the Newport Regatta. He stated that it would have been during the set-up period which lasted 4 or 5 days and would have been day 1 or 2 of the set up. ISAF's counsel mentioned that the measurement report of Mr Nicholson stated that races began on 27 June, and suggested that the conversation to add weight would have taken place sometime between 22 and 24 June, with which Mr Ruthenberg agreed. Mr Ruthenberg confirmed that his recollection was that he provided the bag for the weight and Mr Walker provided the lead shot and that the idea of adding weight to the forward kingpost came from Mr de Ridder.

65. Since Mr Ruthenberg confessed to what he did, he no longer has a job with OTUSA or in the industry.

66. In response to questions from Mr de Ridder's counsel, Mr Ruthenberg stated again that he did not recall any exact dates. He described that the conversation to move the weight forward took place inside the set-up tent, near the lunch table. He initially recalled that Sailor X was present during the conversation but he agreed that his recollection as to who was there was not accurate and during the Jury hearing, he remembered that Sailor X came to Newport later. Mr de Ridder's counsel suggested that given that Mr Ruthenberg arrived in Newport on 17 June, and the meeting took place 1 or 2 days after he arrived, the conversation about putting weight forward would have taken place between 17 and 20 June, with which Mr Ruthenberg agreed.

67. Mr Ruthenberg stated that he could not recall exactly what was said in the meeting but Andy Walker subsequently told him he was getting pressure from 'Cheese' (Mr de Ridder) to get the job done.

68. Mr Ruthenberg agreed that there were conversations about putting weight low and forward generally and that had been the subject of email correspondence, which included Richard Slater, after the Newport Regatta.

69. Mr Ruthenberg does not recall whether Mr Slater was aware of the idea to put weight forward in the king post but that […] was aware. Mr Ruthenberg recalled that […] was on the boat when Mr Ruthenberg was putting the weight in and that he and Mr Walker were talking to […] as they were adding the weight. Mr Ruthenberg's recollection is that Mr Walker bought the lead in Newport.

Mr Andrew Walker

70. Mr Walker gave evidence that he arrived in Newport the same day as Mr Ruthenberg and he recalled that Mr de Ridder arrived later, on 21 June 2012. He does not remember any meetings and stated that Mr Ruthenberg's recollection of a meeting to discuss putting weight in the forward kingpost was false. He also stated that he was not put under pressure by Mr de Ridder to put weight anywhere but he was generally under pressure given the nature of the job. He stated that there were lots of discussions within the whole team about how to make the boat go faster, including putting weight forward by adding extra layers of paint and heavier graphics. He recalls seeing Piet van Nieuwhuijzen before the measurement, as he was the boat captain so he came out to Newport early to sort the boat out.

71. In response to questions from ISAF's counsel, Mr Walker disputed that he is in a higher position than Mr Ruthenberg and stated that the first he knew of the weight being put in the forward kingpost was when Mr Ruthenberg told him he added it. Mr Walker presumed that it had all passed through the right chain of command. Mr Walker denied that he admitted to Mark Turner in July 2013 that he was involved with Mr Ruthenberg and denied being involved. Mr Walker agrees that Mr Ruthenberg would not have added the weight off his own bat, but would have done it under instruction which Mr Walker thought had gone through the correct channels. Mr Walker disputes that he bought lead in Newport.

Mr Jack Caldwell

72. Mr Caldwell gave his opinion that the Jury process was unfair as hearsay evidence was used as proof of matters. He stated that the Disciplinary Commission was created in haste to attempt to slip in English sports law as the applicable law.

Mr de Ridder

73. Mr de Ridder submitted that he is an exceptionally ambitious person but he did not consider himself a forceful person. The whole team was performance driven and he believed that you do not win world championships without a pressure to perform. However, he would never cheat to win. Mr de Ridder left school at 19, has sailed since then and is considered one of the most successful wingsail trimmers in the world. Since the Dutch MNA publicized that it would not impose any further sanction, he received a lucrative job offer to join the Volvo Race, Team Abu Dhabi.

74. Mr de Ridder stated that OTUSA started the Newport Regatta 5 points ahead of the rival team and so there was no motive to cheat. He said the team held open discussions about moving weight forward for the regattas in Venice and Naples well before Newport, but nothing illegal was ever discussed. He submits that the Jury failed to make the distinction between people who work on the platform and those who work on the wing, each of whom have very clearly defined roles. […] Mr de Ridder explained the concept behind moving weight forward in light air. Mr de Ridder accepted that if someone put weight in the forward kingpost it would be a breach of the rules.

75. Mr de Ridder stated that he arrived in Newport the morning of June 21 and arrived at the OTUSA base after lunch. He gave an interview about cleaning and using wings but there were no meetings. He recalls that Piet van Nieuwhuijzen arrived a day earlier and was working on the platform. Mr de Ridder was working on the wings. The next morning Mr de Ridder went down to the base and got the boat ready for measurement. He stated that he was never involved in a meeting as described by Mr Ruthenberg. He does not know why he did not bring up the question of timing before the Jury hearing. He stated that Sailor X got off because he could prove that the boat was already in the water when he arrived in Newport.

76. Mr de Ridder has never been accused of cheating in over 20 years. In relation to a chain of emails starting with one from Andy Walker dated 17 April 2012, Mr de Ridder stated that OTUSA is like a Formula 1 team and they do everything to go faster. He accepted that as Mr Ruthenberg no longer works in the industry, there is no reason for him to lie. Mr de Ridder pointed out that Mr Ruthenberg was very clear that he was getting pressure from Mr Walker, but Mr Ruthenberg could not remember what Mr de Ridder said, where he said it and who was present. Furthermore, Mr Ruthenberg never informed Mr de Ridder about putting weight forward.

77. Mr de Ridder stated that he found out about the weight in the forward kingpost 2-3 weeks before the Jury hearing in San Francisco. In relation to a comment in the McKenzie interview notes that he was 'aware of work done to the dolphin striker' Mr de Ridder stated that Mr McKenzie was pretty loose with evidence and what he himself meant was that he could physically see that work was done to the kingpost; lots of boats have problems with the kingpost and it can be serious if it breaks. In response to a suggestion that he gave a different answer to the Jury, Mr de Ridder drew a diagram to explain to the Panel how extra length was added to the kingpost and at the time of the McKenzie interview, he knew this work had been done as he could physically see it. By the time of the Jury hearing, more measurements had been made and one could see that extra length had been added.

78. In relation to sanction, Mr de Ridder stated that the penalty is enormous and destroys 20 years of hard work. He considers that he cannot prove he did not do something. He was hoping to do one more AC and then move into boat design. The AC teams have now hired their teams for the next cup. Mr de Ridder's penalty has not been made public so he still gets offers for day sailing. The entire episode was highly publicized in the media and Mr de Ridder had to explain to his children why the media were saying he was a cheat.

III. SUBMISSIONS OF THE PARTIES

A. The Appellant's submissions

79. The Appellant's submissions, in essence, may be summarized as follows:

1. *Evidence*: there is a lack of sufficient evidence against Mr de Ridder to justify a finding of guilt;

2. *Penalty*: the penalty imposed was disproportionate;

3. *Disciplinary Commission*: the Commission lacked jurisdiction to hear Mr de Ridder's case and the Rules of Procedure of the Commission were created illegitimately; and

4. *Due process*: there was a general lack of procedural fairness during the disciplinary hearings of ISAF.

a) Evidence

80. The Appellant submits that the case against Mr de Ridder is based entirely on the testimony of Bryce Ruthenberg who had only a 'vague recollection' of the conversation during which Mr de Ridder allegedly directed Mr Ruthenberg to place the weight in the forward kingpost. The Appellant submits that Mr Ruthenberg was uncertain about who was present at the meeting, who ordered him to place the lead and how he was instructed to place the lead. Moreover, Mr Ruthenberg acknowledges that he never told Mr de Ridder he had placed the lead.

81. In relation to the alleged meeting, the Appellant submits that Mr Ruthenberg was wrong about Sailor X and could have been wrong about Mr de Ridder. Andy Walker strongly denies such meeting ever took place and the meeting has never been confirmed by any of the attendees allegedly present. The alleged meeting took place on 19 or 20 June 2012, yet Mr de Ridder was not in Newport on those dates. ISAF did not dispute the evidence of Cathy Ryan that she travelled with Mr De Ridder on 21 June and ISAF did not dispute the timeline, which proves that Mr Ruthenberg was mistaken not only as to Sailor X but also Mr de Ridder. The Appellant submits that the best evidence is that of Mr de Ridder himself which the Panel should accept.

82. The Appellant submits that the available evidence does not make sense and there is no direct evidence of lead in the forward kingpost. It cannot be excluded that lead was put in after Newport as there is no chain of custody. Furthermore, there is no motive for Mr de Ridder to put his career on the line for a potential advantage, knowing it was illegal. Mr de Ridder was always an honest person.

83. The Appellant submits that the Lee Ann La France investigation was inconclusive and the La France Note contained views that were unfounded and unproven. ISAF's counsel failed to show that Mr de Ridder was a liar, whereas Ms La France found Mr de Ridder to be a credible witness.

84. In relation to the standard of proof, counsel for Mr de Ridder submits that the standard should be interpreted as close to reasonable doubt given that Mr de Ridder is facing the most serious charges. Counsel reminded the Panel that Mr Ruthenberg received a one-year period of ineligibility, which was suspended subject to certain conditions, for his role in the matter.

b) Penalty

85. The Appellant submits that the sanction is disproportionate and has destroyed Mr de Ridder's career, or at least seriously handicapped it. The Appellant compared this case to sentences handed down in other disciplinary cases before ISAF, and referred to CAS case law and English/EU law to demonstrate that the principle of proportionality must be observed and the *"exclusion of Mr De Ridder from the 34th edition of the America's Cup would have been a sufficient punishment in this view"*. Finally, Mr de Ridder is fighting for his honour and the damage is not just about the dollars.

c) Procedural Issues

86. In his written submissions, the Appellant pleaded that the Disciplinary Commission lacked jurisdiction; the Review Board made a fundamental error by accepting the Rules of Procedure of the Disciplinary Commission; there were irregularities concerning the adoption of the rules of Procedure of the Disciplinary Commission; and there was an absence of 'natural justice' because of an overlap in members between the various ISAF disciplinary bodies. In relation to the procedural issues, in his closing submissions, counsel for Mr de Ridder submitted that they could be cured by the *de novo* hearing, but that nonetheless there should be a ruling on the conduct of ISAF as the sport deserves this.

d) Costs

87. The Appellant requests a ruling on costs, should his appeal be successful

B. The Respondent's submissions

88. The Respondent's submissions, in essence, may be summarized as follows:

a) Evidence

89. Counsel for the Respondent submitted that ISAF completely rejects any allegation of conspiracy. ISAF did not cause this controversy. It was presented to it after confessions were made and an investigation occurred. The reason Mr de Ridder was found guilty was because he was the only sailor named by the two who confessed.

90. ISAF submits that there was a conversation between Andrew Walker, Bryce Ruthenberg and Mr de Ridder at which adding weight was discussed. Mr Ruthenberg was expected to add weight, and Mr Ruthenberg did add weight. Mr de Ridder knew it and also that it was in breach of the rules. He did not tell the truth to the Jury. ISAF's case does not depend on a direct order.

91. In relation to motive, counsel for ISAF submits that this is not a case where motive ought to trouble the Panel. It is obvious that those involved were very keen and very focused on moving weight forward and down on the boat. The emails disclose legal ways of doing so; the motive

is there and desire is there. Mr de Ridder was in a position of authority and respect to encourage, persuade, and direct Messrs Ruthenberg and Walker to carry out the illegal act. It is simply not remotely probable that Mr Ruthenberg or Mr Walker would add weight without direction to do so.

92. ISAF submits that the strongest evidence is Bryce Ruthenberg's confession. He had nothing to gain by confessing, which caused the proceedings to commence in the first place. If Mr Ruthenberg had said nothing, there was no evidence the lead was in the forward kingpost and the only way it was discovered was through his confession. Mr Ruthenberg has lost any chance of working in the industry and has suffered in that way to the same extent as Mr de Ridder. ISAF submits that Mr Ruthenberg is extremely credible, although his recollection of events – exactly which day and who was there – are not perfect. It was not important whether Sailor X was there, as Mr Ruthenberg did not say anything about him. Mr Ruthenberg understood the instruction came from Mr de Ridder, which is corroborated by Mr Walker in a number of ways. Mr Walker's present evidence is unreliable; it has obviously changed throughout proceedings. It started with him admitting much more in terms of his own involvement and also implicating Mr de Ridder. Mr Walker's contemporaneous corroborative evidence at pages 357 & 358 of the Transcript state there was a meeting where Mr Ruthenberg, Mr de Ridder and maybe Piet van Nieuwhuijzen were present.

93. ISAF submits that the timeline reconstructed by Mr de Ridder does not help. Mr Ruthenberg cannot recollect exact words said and does not remember exact dates. Mr Ruthenberg was pretty sure the boat was measured the day before the race, which would have been 26 June. ISAF submits it can only be assumed Mr Ruthenberg meant the day before the boat was put into the water to train, which would have been 21 June. The only thing the Panel can be sure is that weight appears to have been put in the boat before the races. No one can remember exactly when and it is certainly possible that Mr de Ridder could have been there for discussion. The evidence regarding Piet van Nieuwhuijzen only came out during the CAS hearing and is not an issue before this Panel.

94. In relation to the La France Note, counsel for ISAF submits that the note does not add much but it corroborates the evidence of Andy Walker and Bryce Ruthenberg. ISAF's counsel submits that Mr De Ridder's answers are not persuasive and that further, ISAF's counsel stated that Mr de Ridder was unable to explain why Mr Ruthenberg would have added weight without instruction.

95. Counsel for ISAF submits that the correct burden of proof is comfortable satisfaction, which comes from the rules and regulations in place and is also the test that CAS will apply for these types of cheating cases and match fixing cases where there is no other standard.

b) Procedure

96. Counsel submits that as this is a *de novo* hearing any procedural difficulties are cured. As the focus of the CAS hearing was on the factual issue of what had happened at Newport, ISAF had not developed full submissions in answer on the ISAF procedure.

c) Penalty

97. Counsel for ISAF accepts that the sanction must be proportionate and submits that the most helpful jurisprudence is the case law on match fixing. ISAF accepts that the regatta stage was not the America's Cup final, but it was part of the biggest international sailing event and at the highest level. ISAF submitted that a sanction of 3 years is not too long and is not one the Panel should interfere with.

98. At the conclusion of the hearing, the parties confirmed that their right to be heard had been respected.

IV. ADMISSIBILITY

99. The ISAF Review Board issued its decision on 23 May 2014. The Appellant filed his appeal on 12 June 2014, *i.e.*, within 21 days of receipt of the challenged decision. The Respondent has not raised any issue with the timeliness of this appeal. Pursuant to Article R49 of the CAS Code, the Panel is satisfied that the appeal was filed in due time and is admissible.

V. JURISDICTION

100. Article 82 of the ISAF Constitution provides:

> ***82. Appeal of a Review Board Decision***
>
> *Notwithstanding Article 81, there shall be a right of appeal by any of the parties from any decision of the Review Board:*
>
> *(a) In any case involving accredited Olympic Competitors, in which the Court of Arbitration for Sport has properly established its jurisdiction under the Olympic Code for Sports,*
>
> *(b) In any other case in which a competitor consents to the jurisdiction of the Court of Arbitration for Sport in respect of the appeal.*

101. The Appellant relies on Article 82(b) as granting him a right of appeal to CAS. In its answer brief, the Respondent agrees that the right of appeal to CAS is set out in Article 82(b). Moreover, both parties signed the Order of Procedure, by which the Respondent confirmed that it did not contest the jurisdiction of the CAS. Accordingly, pursuant to Article R55 of the CAS Code, the Panel is satisfied that it has jurisdiction to hear this case.

VI. APPLICABLE LAW

102. Article 2.2 of the ISAF Constitution, provides that:

Any disputes relating to the validity or construction of the Regulations or any other rules or regulations made there under (together, the "ISAF Regulations"), and any disputes relating to the application of the ISAF Regulations or the exercise of powers there under, shall be subject to the exclusive jurisdiction of the courts of England and Wales and their principles, and shall be governed by English law, excluding English choice of law principles.

103. Article 17 of the ISAF Regulations contains a clause that is substantively the same. As set out above, Article 82 of the ISAF Constitution provides for a CAS appeal against a decision of the Review Board, but does not specify what law will apply in the CAS proceedings.

104. The Appellant submits that American law should apply and that English law is only applicable where ISAF itself is being sued as an entity.

105. ISAF submits that American law applies to AC Jury proceedings, but pursuant to the ISAF Constitution, English law is applicable for the purposes of this appeal.

106. Article R58 of the CAS Code provides that:

The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.

107. The Panel shall decide this dispute according to the applicable ISAF regulations. The parties dispute which law should apply subsidiarily. The Panel notes that the challenged decision was issued by the ISAF Review Board. ISAF is a private company incorporated under the laws of the Isle of Man. Its daily administration is handled by ISAF (UK) Ltd., which is based in Southampton, England. In light of the fact that the legal system with which ISAF appears to have the closest connection is England, to the extent necessary the Panel shall apply English law subsidiarily.

VII. MERITS

108. In order to determine this appeal, the Panel must decide which of the evidence produced during these proceedings and outlined above it prefers bearing in mind always that the burden of proof lies upon the Respondent to make good the charges to the appropriate standard discussed below. Before turning to its consideration of the evidence, the Panel will deal first with the question of procedural fairness, which was pleaded by the parties in their written submissions. However, during the hearing both parties accepted that as this was a *de novo* hearing before CAS, procedural defects before the lower instances could be cured. As noted above, Counsel for Mr de Ridder nevertheless asked the Panel to make a ruling on ISAF's conduct and, as noted below, counsel for ISAF accepted that any observations made by the Panel on this issue would be carefully considered by ISAF.

A. Procedural Fairness

a) Procedures before ISAF disciplinary bodies

109. The virtue of a *de novo* hearing is that, in a hallowed phrase, issues about procedural irregularities in the bodies from whose decisions an appeal is brought "fade to the periphery" (CAS 98/208 para. 10) if indeed they do not disappear beyond it. However this does not mean that the CAS is uninterested in the disciplinary procedures of sports governing bodies – not least because the better those procedures, the fewer the cases in which the subject of an adverse decision may feel compelled to come to CAS. The way in which the Appellant's case was handled below has prompted the Panel, at the agitation of the Appellant and with the acquiescence of the Respondent, to set out certain non-exhaustive propositions, germane to this case, which underpin the essential requirements of fairness and ensure that justice is not only done but is seen to be done.

1. There should be a clear demarcation line between the roles of investigator, prosecutor and adjudicator – in short a legal separation of powers.

2. There should be a full disclosure of all material in the possession of the prosecution which maybe of assistance to the person charged with a disciplinary offence.

3. The material on which the adjudicator is invited to base its verdict should be clearly defined to the person charged, and, as far as possible, the adjudicator should be shielded from material potentially prejudicial to the person charged but on which the prosecution does not intend to rely.

4. There should be a clear demarcation between persons who sit at first instance and those who sit on any bodies to which first instance decisions may be appealed within the same disciplinary structure.

5. A person charged should be informed of and given access to the procedures to be applied in his or her case.

6. No change to a disciplinary procedure should be introduced with retrospective effect unless favourable to the person charged.

110. The twin planks of natural justice, *nemo judex in causa sua* and *audi alteram partem*, in so far as not embraced within those six requirements should always be observed. (Those requirements are also subject to well-established exceptions such as legal professional privilege, nor do they apply as such to field of play decisions.)

111. The fact that particular procedures have a long pedigree is not itself justification for their deployment if inconsistent with basic fairness, and indeed may be invalid as contrary to Swiss *ordre publique* or analogous principles of other applicable law.

112. The Panel does not consider it necessary or indeed desirable to comment on the extent to which the above principles may not have been observed in the present case, (though it is aware

of the Appellant's lively concerns in this context, some of which at least it presently shares) because the Respondent was not invited to explain its position other than by way of written statements which did not specifically or comprehensively engage with these points. It contents itself with noting that the Respondent gave an express (and welcome) undertaking that it would review its own procedures in the light of any observation of the Panel and draw them to the attention of other bodies which administer discipline within the historic sport of sailing.

B. Standard of Proof

113. The Appellant submits that the Panel should assess the evidence according to a standard close to reasonable doubt; ISAF submits that the correct standard of proof is comfortable satisfaction.

114. The Panel determines that the correct standard of proof to apply is the "comfortable satisfaction" standard widely applied by CAS panels in disciplinary proceedings. According to this standard of proof, the sanctioning authority must establish the disciplinary violation to the comfortable satisfaction of the judging body bearing in mind the seriousness of the allegation. It is a standard that is higher than the civil standard of "balance of probability" but lower than the criminal standard of "proof beyond a reasonable doubt" (cf. CAS 2010/A/2172, para. 53; CAS 2009/A/1920, para. 85). Disciplinary proceedings and criminal proceedings are distinct. Only if a disciplinary offence was also a criminal offence would there be any argument in favour of applying the criminal standard of proof to disciplinary proceedings. The charge against Mr de Ridder did not involve allegations of criminality so that any such argument does not require further consideration.

115. Moreover, the Panel considers that the standard of proof does not itself change depending on the seriousness of the (purely disciplinary) charges. Rather the more serious the charge, the more cogent the evidence must be in support. The question therefore to be determined in this case is whether the Panel is comfortably satisfied there was cheating here.

C. Assessment of Evidence

116. In assessing the evidence, the Panel will ask itself whether (1) there was weight added, and if so, (2) by whom and (3) on whose instructions? The Panel had the benefit of hearing oral evidence from the three main protagonists in this matter: Mr de Ridder, Bryce Ruthenberg and Andrew Walker. The Panel also had the benefit of having sight of written evidence produced before the lower instances, including the handwritten interview notes prepared by Mr McKenzie and the transcript of the hearing before the ISAF Jury.

117. One of the issues before the Panel is the admissibility of hearsay evidence. In so far as that issue is raised regarding the Transcript, the Panel believes it is now moot, as the Panel heard oral evidence from the relevant witnesses and the parties had the opportunity to test the witnesses on the statements they made to the Jury. In relation to the La France Note, the Panel understands the Appellant's concern that the Note constitutes 'triple hearsay' and should be disregarded. The Panel also notes Mr McKenzie's position that the allegations in

the Note were unfounded and not proven and that the sole purpose of sharing the Note with the Jury was to give them some direction in asking questions at the hearing. The Panel considers the issue to be one of weight rather than admissibility. That said, for the reasons already just mentioned, the Panel is not inclined to place any weight on the contents of the Note as evidence of their truth. However, the Panel will give some regard to the note as evidence of Mr Ruthenberg's consistency. Similarly, the Panel will give some regard to the Note as evidence of Mr Walker's inconsistency as going to his credibility as a witness.

118. The Panel understands the Appellant's concerns regarding Mr McKenzie's interview notes, particularly where the answers are noted but not the questions. The Panel has borne this fact in mind when considering the interview notes, particularly in relation to the responses noted in Mr de Ridder's interview. But in relation to the key issue of who said what (if anything) and to whom, the Panel has had the benefit of hearing live evidence from the witnesses and it is for the Panel to decide by reference to all the admissible evidence which version of events it deems more credible, bearing in mind, it repeats, the relevant burden and standard of proof.

119. The lynch pin of ISAF's case is the evidence of Mr Ruthenberg. It is he who points the finger at Mr de Ridder, but in so doing necessarily points the finger at himself. The Panel is unable to conceive of any reason why he should deliberately put his own career in jeopardy by giving false testimony or invent a case against Mr de Ridder nor was any reason suggested by Counsel for the Appellant. Mr de Ridder in his evidence accepted that as Mr Ruthenberg, on account of this episode, no longer works in the industry, there is no reason for him to lie. Moreover, there was no evidence of any bad blood between himself and Mr de Ridder. Counsel for Mr de Ridder chose to put his case against Mr Ruthenberg on the basis of deliberate invention rather than honest mistake but the Panel has nonetheless examined both possibilities. As to the second it notes that on the key rather than on marginal issues Mr Ruthenberg's testimony at all junctures has been remarkable for its consistency as it will proceed to demonstrate.

120. The Panel is comfortably satisfied after hearing the evidence orally at the hearing and reviewing the evidence available from the previous instances, that Mr Ruthenberg put lead in the forward kingpost of boat 4 prior to it being put in the water at the Newport Regatta. Mr Ruthenberg first confessed this fact to Mark Turner and has never wavered from that point. This fact is corroborated by Mr Turner's oral evidence to this Panel; by the McKenzie interview notes; the La France Note; Mr Ruthenberg's statements to the Jury and Mr Ruthenberg's oral evidence to this Panel. The Panel has considered the Appellant's argument that there is no 'forensic' evidence of this fact, as lead was never found in the forward king post of boat 4, but the Panel accepts that, as suggested by Mr McKenzie, the lead could either have fallen out or been removed before boat 4 was inspected. The discovery of lead would have been potentially inculpatory, but its absence is not conclusively exculpatory.

121. The Panel is also comfortably satisfied that given his position as a shore crew member, Mr Ruthenberg did not act 'off his own bat' but rather acted further to instructions from someone higher up in the team hierarchy, namely a sailor or sailors. Although Sir Russell questioned whether the shore team would need instruction from higher up to make decisions about the boat, Mr Turner, Mr Walker and Mr McKenzie are at one that Mr Ruthenberg would not have added weight to the forward kingpost of his own volition, without being directed to do so.

122. This leads to the key question: where did that direction come from? Mr Ruthenberg's evidence is that the direction came from Mr de Ridder arising out of a meeting or conversation preceding the Newport Regatta. This was initially corroborated by Mr Walker in his information first given to Mr Turner although his position changed from time to time – which the Panel is compelled to conclude arose out of a desire to save himself from sanction. Again no reason was ever provided as to why at any time Mr Walker should have pointed a finger at Mr de Ridder, although it is indisputable that at some time he certainly did.

123. The Appellant re-constructed a timeline of events before the Newport Regatta and submitted that Mr Ruthenberg must be mistaken in his recollection that Mr de Ridder was present during the meeting – as he was with Sailor X – as Mr de Ridder only arrived in Newport on 21 June. The Panel notes that Mr Ruthenberg, by his own admission, does not have a perfect recollection of words and dates. Indeed, in his oral evidence to this Panel he accepted the argument of counsel for ISAF that based on counsel's timeline, the conversation about adding weight must have taken place sometime between 22 and 24 June; in cross-examination, he agreed with counsel for Mr de Ridder's timeline that the conversation must have taken place between 17 and 20 June. (The Panel acknowledges that Mr Ruthenberg was being interviewed over the telephone without access to the Transcript, so it was difficult for him to be any more precise about dates than what was suggested to him by the counsels.) What is undisputed is that Mr de Ridder arrived in Newport on 21 June and boat 4 was measured and launched on 22 June. The question for the Panel is whether it was possible that between Mr de Ridder's arrival and the boat being launched, there was sufficient time for the conversation to take place and the weight to be added. The Panel is satisfied that there was sufficient, even if brief time, for this to happen. It does note that the point in time itself was only belatedly raised by Mr de Ridder which is not itself without significance when considering its force.

124. A central question is whether such conversation ever took place. Mr de Ridder denied at the CAS hearing that there was any meeting in Newport to discuss putting weight in the forward kingpost. Mr Walker also initially denied at the CAS hearing that there was any such hearing. However, in his evidence to the Jury, Mr Walker stated that there was a conversation in Newport about putting weight forward at which he, Mr Ruthenberg, Mr de Ridder and may be Mr van Nieuwhuijzen were present [Transcript pg. 357, lines 7-14]. The Transcript records that Mr Walker continued to say that *"it was discussions about putting weight in king posts"* and the word 'weight' meant lead. When this part of the Transcript was put to him in cross-examination, Mr Walker agreed with counsel for ISAF that, if it was in the Transcript, then Mr Ruthenberg was right when he said there was a conversation about putting weight forward and that Mr de Ridder was there. The Panel is satisfied that although there may not have been a formal meeting, at a minimum, there was a conversation in Newport involving at least Mr Ruthenberg, Mr de Ridder and Mr Walker at which the issue of adding weight to the forward kingpost was discussed.

125. The Panel notes that Mr Ruthenberg initially remembered Sailor X being present at the meeting but subsequently realized that he only arrived later in Newport, so he could not have been there. The Panel is not troubled by this clarification, as Sailor X is not alleged to have played a role in adding weight, so his presence or absence would not have been particularly memorable for Mr Ruthenberg.

126. One other point the Panel notes, but which was not raised as an issue by the Appellant, is that at the CAS hearing, Mr Ruthenberg gave evidence that […] was working on the boat when Mr Ruthenberg put the lead in the forward king post and he was talking to him as he put it in. In his evidence to the Jury however, Mr Ruthenberg said that he was alone in the boat building with Andy Walker when they weighed the kevlar sock and subsequently put it in the king post and nobody else saw him doing it [Transcript pg. 209, lines 15-25; pg. 210, line 1; pg. 211, lines 8-10; also pgs. 266 & 267]. The Panel considers that while this may be a discrepancy *vis à vis* […], it does not contradict Mr Ruthenberg's evidence *vis à vis* Mr de Ridder. Mr Ruthenberg was in the act of carrying out earlier instructions and whether […] was present at that time is irrelevant for the purposes of this case.

127. Turning to the final question of who gave the instruction to add the weight to the forward kingpost, the Panel notes Mr Turner's evidence that he believed the pressure must have come from a sailor or sailors, although he was never at that stage told a name. The only sailor who was ever named as giving that direction was Dirk de Ridder. He was identified by Mr Ruthenberg from the beginning and consistently throughout these proceedings. He was also identified by Mr Walker as being present during the conversation at which the idea to put weight in the forward king post was discussed. Although Mr Ruthenberg cannot remember the explicit wording of such direction, he was clearly under the impression that he was expected to carry out the job and add weight to the forward kingpost and that Mr de Ridder was 'driving it'. When asked at the CAS hearing what he meant by 'driving it', Mr Ruthenberg explained that meant that Mr de Ridder instigated the weight forward.

128. Mr de Ridder is entitled to exemplify his unblemished record, but the Panel cannot regard this as outweighing the other evidence against him. The emails referred to at para. 57 and 65 above show that the team (Mr de Ridder included) were keen to explore every possibility of enhancing their boat's performance in this important competition. At the summit of every sport, fractions can determine the difference between podium placers and runners-up, and sportsmen and women who are at the boundaries of what is legitimate and compatible with the rules of the game can, occasionally, in pursuit of their ambition, stray over them. This is what, in the Panel's view, happened here.

129. Based on its careful analysis and weighing of the evidence, the majority of the Panel is comfortably satisfied that Mr de Ridder gave instructions, express or implied, to add weight to the forward king post of boat 4 at the Newport Regatta.

D. Sanction

130. Turning then to sanction, the Panel notes that in the Reconsideration and Sanction Decision, the Disciplinary Commission ("DC") Panel pointed out that, having reviewed other cases involving gross misconduct under ISAF RRSAC 69, *"it has become apparent to the [DC] Panel that to date there has been little consolidated guidance available to those that have to make such decisions within the sport"* and that *"there is no discernable tariff for sanction"*. In order to provide some guidance, the DC Panel produced a table summarizing decisions where a sailor was suspended as a result of RRSAC 69.

131. In determining that the Appellant was open to sanction under RRSAC 69, the Review Board Panel examined the available case law and also took into account the fact that OTUSA considered that the incident was a serious violation of the RRSAC and withdrew all its boats from the World Series Regatta.

132. This Panel has considered the parties' submissions on sanction, including the cases cited, and notes that prior suspensions enforced on other sailors are somewhat wide ranging. While such prior cases are not binding on the Panel, they are useful in deciding the appropriate sanction based on Mr de Ridder's level of fault. In this regard, the Panel has decided to reduce the sanction to 18 months, beginning on 1 September 2013.

133. The majority of the Panel has arrived at this decision for the following reasons:

1. It believes that a period of ineligibility of 3 years is disproportionate in light of the circumstances of this case and compared to previous sanctions imposed by ISAF. As the parties acknowledge, none of the previous cases are exactly on point, and the Panel has to assess the degree of Mr de Ridder's culpability and the appropriate sanction based on the particularities of this case. The table produced by the DC Panel lists 18 cases. Although this Panel has access to only a summary of the cases, it appears that only 3 of them relate to cheating and, accordingly, are comparable to the present case. (The other cases relate to offences involving physical altercations, verbal abuse, falsification of qualifying documents, and misconduct on the water). The three potentially relevant cases appear to be the following:

    i. Sailor E: received a 16-month eligibility suspension for sailing with a significantly larger mainsail than permitted and refusing control measurement of sails.

    ii. Sailor M: received a five-year eligibility sanction for deliberately altering boat measurement conditions and refusing inspection.

    iii. Sailor P: received a one-year eligibility suspension on a classification matter for "systematic cheating".

   In this regard, the Panel finds particular comparison to the cases of Sailors E and P.

2. The Panel has also taken into account the DC's decision rendered in Mr Ruthenberg's case. The DC concluded that Mr Ruthenberg was acting under instruction and has also admitted his role in the wrongdoing, and accordingly considered that a one-year period of ineligibility, suspended on certain conditions, was the appropriate sanction.

3. The Panel notes that Mr de Ridder was not allowed to compete in the AC34 and that he has suffered financially from his sanction.

4. The Panel has taken into account the fact that this is Mr de Ridder's first offence in a distinguished and successful sailing career spanning 20 years and has taken note of the evidence of previous good character. The Panel has also taken into account the suffering

of Mr de Ridder's family caused by the extensive attention and media coverage this event received.

5. The Panel notes that Oracle's position as champion was confirmed and the outcome of the Newport Regatta would not change that standing.

6. Taking into account of all these factors, including the somewhat opaque precedents, the Panel considers that a proportionate sanction to impose on Mr de Ridder is a period of ISAF ineligibility of 18 months.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Dirk de Ridder on 12 June 2014 is partially upheld.

2. The ISAF Review Board's decision issued on 23 May 2014 is set aside and amended as follows:

   Dirk de Ridder's ISAF eligibility is revoked for a period of 18 months from 1 September 2013.

3. (…)

4. (…)

5. All other motions or prayers for relief are dismissed.