Headline, late June 2008:

"Billionaires battle for America's Cup in giant high tech cats."

Imagine this:

> *It is now late June 2008. The Spanish challenge was ruled invalid. Alinghi was forced to accept Oracle's challenge. Negotiations on a new protocol failed. Both teams have designed giant multihulls for the 40 mile windward leeward and 39 mile triangle courses specified in the Deed of Trust. The first race will be in a few days, on the 4th of July…*

Not a replay of 1988's lopsided "Mismatch" of Big Boat vs Cat, but high stakes racing in the fastest, all out high tech designs that money and big egos can buy.

It's more likely than you think. And, while it would be hell for the other challengers and their sponsors, it sure would be entertaining for the media and public, not to mention the designers and sailors. You can download a detailed analysis of the current legal situation, with links to the relevant documents, including the NY Court of Appeals ruling on the catamaran defense from the 27th AC.

Understanding the legal issues around the 33rd AC.

Are you a little confused about what's happening with the 33rd America's Cup? You're not alone. Here is our attempt to explain what is happening and how it may play out. We will try to stick to the facts and be clear when we offer our opinion. And, by the way, your author is not a lawyer.

First, we need to separate the legal issues from the sporting and commercial issues. To do this we have read the documents that set out the rules, and analyse the published comments from the main players in this drama.

One thing to remember – from a legal point of view, the match for America's Cup is between yacht clubs. So in this article we will talk about the Sociètè Nautique de Genève (***SNG***) the defending club, the Club Náutico Español de Vela (***CNEV***), whose challenge has been accepted by SNG, and the Golden Gate Yacht Club (***GGYC***), who claims that the CNEV challenge is invalid.

You might want to "Read the Deed" as the T-shirts said in San Diego in 1988. (Ironically, the people wearing those shirts seem not to have read it.)
http://www.a3.org/ac2000_DeedofGift.html or
http://www.americascup.com/multimedia/docs/2004/08/1092062211_deed_of_gift.pdf

What's going on?

A few facts about recent events…

- On 3 July, Alinghi won the 32nd Match; SNG continues to hold the Cup.
- On 3 July, SNG announced the acceptance of a challenge for the 33rd America's Cup from CNEV.
- On 5 July, SNG and CNEV issued the Protocol Governing the Thirty Third America's Cup. You can find the protocol at http://multimedia.americascup.com/multimedia/docs/2007/07/33ac_protocol.pdf
- On 11 July GGYC presented a challenge to SNG, claiming that the CNEV challenge was invalid. http://www.ggyc.com/GGYCChallenge.pdf
- On 19 July SNG announced that it had accepted Royal Cape Yacht Club (Shosholoza) as a challenger, under the new Protocol.
- On 20 July, GGYC filed a complaint with the New York Supreme Court asking, among other things, that the court declare the CNEV challenge invalid. http://www.ggyc.com/Verified_Complaint.PDF
- On 25 July, SNG, through ACM, announced the selection of Valencia for the 33rd America's Cup, to be sailed in July 2009.
- On 3 August, Vincenzo Onorato of Mascalzone Latino (Reale Yacht Club Canottieri Savoia) published a proposal for changes to the new Protocol. http://www.mascalzonelatino.it/home/dettaglio_news.jsp?ID=886 On the same day Russell Coutts, new CEO of BMW Oracle Racing (GGYC) was quoted as saying GGYC would withdraw their lawsuit if SNG would accept Onorato's changes.
- On 6 August, Michel Hodara, COO of ACM was quoted in an interview, saying that "We have no intention of going back" and that ACM (SNG) would not accept Onorato's suggestions. http://www.france24.com/france24Public/en/administration/afp-news.html?id=070806194935.f7bcwl29&cat=null

Who's in charge here?

The defender and challenger, if they work together. If they can't agree, then certain provisions of the Deed of Gift apply, and the New York courts rule on the legal issues.

The Deed of Gift gives the Defender and Challenger a lot of flexibility on how to run the event, if they can agree with each other:
"The club challenging for the Cup and the club holding the same may, by mutual consent, make any arrangements satisfactory to both as to the dates, courses, number of trials, rules, and sailing regulations and all other conditions of the match…"
But…
"In case the parties cannot mutually agree upon the terms of a match, then three races shall be sailed and the winner of two such races shall be entitled to the Cup."
The Deed goes on to specify that the defending club can select the location, and that the first and third races must be 20 miles to windward and return, and that the second race must be an equilateral triangle with 13 mile legs and with the first leg to windward.

Lessons from the 27th America's Cup – Big Boat vs Catamaran

In 1987, Michael Fay of New Zealand and the Mercury Bay Boating Club went to the New York courts when Dennis Conner and San Diego Yacht Club did not want to accept Mercury Bay's challenge. The court ruled that SDYC was obliged by the Deed of Gift to accept the challenge. The court also ruled that the issue of whether the "catamaran defense" was allowed by the deed would be decided after the match. Negotiations between the two clubs failed to achieve mutual consent, and the match was sailed on the courses specified in the Deed of Gift. The catamaran won two races, on 7 and 9 September 1988. Mercury Bay then went to the New York Supreme Court, asking that that catamaran be disqualified as an ineligible yacht under the Deed of Gift. On 26 April 1990, the New York Court of Appeals finally decided that the catamaran defense was allowed by the Deed of Gift and that SDYC was entitled to the Cup. You can find the court ruling at:
http://www.nycourts.gov/history/cases/mercury_sandiego.htm

Some interesting facts from the ruling:

- The ruling stated that the language in the deed is unambiguous on the questions being decided, so the judges could not consider any other evidence outside the language of the deed (in deciding that case).
- The ruling stated that the court may only judge on issues of law, not on issues of sportsmanship or fairness. (Author's opinion: Thank goodness!)
- The ruling stated that the deed allowed the defender to meet the challenger in "any one yacht or vessel" within the specified load waterline length and did not require the defender to sail in a yacht of the same type or evenly matched with the challenger.
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But, what's the problem now? CNEV challenged, SNG accepted the challenge and together they published a protocol. Even if CNEV was not a very tough negotiator, they consented to the protocol.

GGYC and others think the protocol is unfair. SNG has said through ACM that they won't renegotiate the protocol. So GGYC appears to feel forced to resort to filing a legal complaint. GGYC claims that the CNEV challenge is invalid, and that GGYC should be named the challenger of record.

The Deed of Gift says:
"Any organized yacht club of a foreign country, incorporated, patented, or licensed by the legislature, admiralty, or other executive deparment, having for its annual regatta an ocean water-course on the sea, or an arm of the sea, or on which combines both shall always be entitled to the right of sailing a match for this Cup…"
GGYC's complaint claims that SNG has breached their fiduciary duty by "self dealing" instead of negotiating with a valid challenger. GGYC also claims that CNEV does not meet the requirements for a Challenger under the Deed of Trust, because CNEV was formed just days before making their challenge, has not held annual regattas, and appears to have simply accepted the protocol without negotiation. If GGYC's complaint is decided by the courts, a key question will be whether the court will treat CNEV as "having" an "annual regatta" when the regatta was merely planned but had not yet been held when the challenge was filed. (Author's opinion: It's hard to see how planning to hold a regatta could be interpreted as "having" a regatta. But, note that at least one authority on English usage says that "first annual" is perfectly valid. http://www.wsu.edu/~brians/errors/firstannual.html)

Wait a minute! As Challenger of Record for the 32nd AC, GGYC accepted the Spanish challenge that was from the national association, not a yacht club. Doesn't that shoot a big hole in their argument?

(Author's opinion:) Not if this goes to court. The 1990 ruling on the catamaran defense of 1988 made it clear the court will not consider "extrinsic evidence" but will rely on what they find inside the "four corners of the deed". What happened in the 32nd AC is extrinsic. Read the deed.

What does the GGYC challenge say?

GGYC's challenge says:

- The GGYC and their challenge meet the requirements of the Deed of Gift for a challenge.
- GGYC is open to negotiating a protocol similar to the 32nd AC protocol.
- If SNG will not participate in negotiations, then the match should proceed as described in the Deed of Gift.
- To meet the requirements of the Deed of Gift, GGYC gives 10 months notice and names the dates for the match in case mutual consent is not achieved. The dates given are 4, 6 and 8 July 2008.
- Also to meet the requirements of the Deed of Gift, GGYC submitted a certificate with the name (USA), owner (Oracle Racing Inc), rig (single masted, sloop rig), maximum dimensions for load waterline (90 feet), beam at load waterline (90 feet), extreme beam (90 feet), draught of water (hull draft) (3 feet) and draught of water (boards down) (20 feet).

Note that these are maximum dimensions.

Why did GGYC challenge with dimensions for a multihull?

(Author's opinion:) It looks like GGYC is trying to avoid the trap that caught Michael Fay and Mercury Bay Boat Club in 1988: the defender is not obligated to sail the same type of yacht as the challenger, so the challenger better build the fastest boat they can within the limits set out in the Deed of Trust. The dimensions given by GGYC allow them to sail in a multihull.

Can SNG name another challenger, say Shosholoza's Royal Cape YC, as the challenger?

(Author's opinion:) No. The Deed of Trust would obligate SNG to accept GGYC's challenge. If the CNEV challenge is ruled invalid or withdrawn, then SNG will be obligated to accept GGYC's challenge, filed before any other challenges.
"And when a challenge from a club fulfilling all the conditions required by this instrument has been received, no other challenge can be considered until the pending event has been decided."

Does GGYC want to eliminate the challenger selection series and race Alinghi in catamarans?

They say they do not want this. But it appears that neither do they want to fall into the trap that caught Michael Fay in the Big Boat vs Catamaran 27th AC.

GGYC says they would like to see the 33rd AC in Valencia, in 2009, using a protocol similar to the one for the 32nd AC, including a challenger selection series. They have said they were not opposed to sailing in a new class of yacht.

So why this talk of catamarans and no challenger selection series?

If SNG will not negotiate and IF GGYC wins the court case, then the next AC Match must follow the format given in the Deed of Gift.

(Author's opinion:) Both teams will be free to build the fastest sail-propelled boat they can. GGYC's boat would need to respect the declared rig and maximum dimensions in their challenge. It is not clear to this author that SNG would be limited to a single masted, maximum 90 foot boat, or if they also have the option of a boat with more than one mast, between 80 and 115 feet long, as this seems to be allowed by the Deed of Gift.

What next?

Good question. Will SNG / Alinghi negotiate? Will this go to court? How will the court rule? If GGYC wins, will SNG / Alinghi then negotiate? Or will we see…

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