AMERICA'S CUP ARBITRATION PANEL

ACAP36/10

IN THE MATTER
of the Protocol
governing the 36th America's Cup

IN THE MATTER
of an Application by
Stars+Stripes USA
representing Long Beach Yacht Club

*hereinafter altogether the "**Applicant**"*

regarding Applicability of the Deed of Gift's and Protocol's Constructed-in-Country Requirements to Events other than the Match

4 August 2020

AMERICA'S CUP ARBITRATION PANEL

Case No. ACAP36/10

DECISION

STARS+STRIPES' APPLICATION

1. On 20 July 2020, Stars+Stripes USA, the representative team of Long Beach Yacht Club, filed an application (the "**Applicant**" or "**Stars+Stripes**", respectively the "**Application**").

2. The Applicant explained the general nature of the matter as follows: "*The Deed of Gift contains a "constructed in country" requirement that applies only to the Match between the "Club holding the Cup" and the "Challenging Club." The Deed of Gift permits the "Club holding the Cup" and the "Club challenging for the Cup" to agree on conditions of the Match, currently the Protocol. Article 9 of the Protocol specifies how the Deed of Gift's constructed-in-country requirement is to be satisfied for the Match but, in contrast to previous protocols, does not otherwise impose a constructed-in-country requirement for Events other than the Match. The Class Rule does not address constructed-in-country issues at all*".

3. Stars+Stripes submitted the following request for relief: "*The Applicant respectfully requests that the Arbitration Panel confirm that, for purposes of the 36th America's Cup Presented by Prada, the constructed-in-country requirements contained in the Deed of Gift and the Protocol apply only to the Match and not to any other Event*".

4. Also, Stars+Stripes pointed out that its Application was "*not a hypothetical question*" and said that "*The Arbitration Panel's decision in this matter will have direct and immediate implications and could determine the Applicant's continued participation in the remaining Events*".

OTHER PARTIES' RESPONSES

5. In accordance with the Panel's Directions 01 issued on 21 July 2020, COR36, Ineos team UK, ETNZ and American Magic have filed Responses on 27 July 2020.

6. The content of such Responses are referred to in this Decision as considered appropriate.

STARS+STRIPES' REPLY

7. In accordance with the Panel's Directions 01, Stars&Stripes replied on 30 July 2020, submitting that it was a valid and continuing Challenger under the Protocol and that it was entitled to apply to the Panel. Stars&Stripes further confirmed its position as outlined in the Application including the fact that its question was not hypothetical.

ACAP JURISDICTION

In general

8. Pursuant to art. 53.4(a) Protocol, the Arbitration Panel shall be empowered "*to resolve all matters of interpretation of the Protocol and Rules […]*". Art. 16.1 of the Protocol defines the "Rules" as being "*the Deed of Gift, and the decisions of the Arbitration Panel*", the Protocol, "*the AC75 Class Rule*", "*the relevant Race Conditions as agreed and adopted by COR/D which will include the applicable Sailing Instructions*" and "*the racing rules as agreed and adopted by COR/D in consultation with World Sailing and administered by a Jury and Umpires appointed by COR/D in consultation with World Sailing*".

9. In its Application, the Applicant has requested the Panel to interpret *inter alia* the Deed of Gift and Art. 9 of the Protocol. The Arbitration Panel therefore has jurisdiction over this matter and, accordingly, the ACAP Rules of procedure (version as at 11 February 2019) (the "**RoP**") apply to these proceedings.

10. Words used in this Decision have the meaning as defined in the RoP.

11. The submissions filed in this case raise two objections against ACAP answering the questions raised by Stars&Stripes:

    a) pursuant to Art. 7.7(a) of the Protocol, Stars&Striped has no "right" to apply to the Panel because it is in "*default*" in the payment of any of the Entry Fees and because it failed to enter into the Cagliari and Portsmouth ACWS, and

    b) Stars&Stripes is raising a "hypothetical" question within the meaning of Clause 5.9 of the Rules of procedure because "*The Applicant has provided no information as to what it actually proposes to do in the event of a favourable answer from the Panel, or how it would, in practical terms, make a difference*" (see COR36's Response).

Possibility for Stars&Stripes to apply to the Panel

12. Art. 7.7(a) of the Protocol provides that

> *"[…]*
>
> *If a Challenger is ineligible due to a default in the payment of any of the Entry Fees or the provision of a Performance Bond under this Article, then the following shall also apply:*
>
> *a) During the period the Challenger is in default, that Challenger may not exercise any of its Challenger rights granted under this Protocol and in particular, the*

AC75 Class Rule may be amended under Article 52.2 and AC75 Class Rule 33.1 (a) without the agreement of that Challenger;

[…]"

13. In its Decision regarding Case ACAP 36/04, the Panel found on 14 March 2019 (§ 40) that "*The three Late Entry Challengers have been validly accepted (...)*". Stars&Stripes (Long Beach Yacht Club) has accordingly been validly accepted (as defined in Art. 6.1 of the Protocol). As a consequence, there is no doubt that, as things currently stand, Stars&Stripes is not precluded from competing in the 36th edition of the America's Cup.

14. Several submissions have suggested that Stars&Stripes is not entitled to apply to the Panel in view of the fact that it is in "*default*" within the meaning of Art. 7.7(a) of the Protocol. It is unnecessary to decide whether Art. 7.7(a) of the Protocol applies here because, even if it does, the Panel does not consider that the possibility for an accepted Challenger to apply to the Panel and to get a request for relief answered is a "*right*" as referred to in Art. 7.7(a) of the Protocol. The reason therefore is because any Team that has been accepted (within the meaning of Art. 6.1 of the Protocol), and as long as it enjoys that status, cannot be deprived of access to the Panel, for instance to be able to challenge that it is in "*default*" or that it has been validly excluded. In other words, even if a team is in "*default*" within the meaning of Art. 7.7(a) of the Protocol, it is entitled to apply to and get its questions answered by the Panel.

Hypothetical question

15. Some Parties have submitted that the Applicant's question is hypothetical and should therefore not be answered by the Panel.

16. Pursuant to Clause 5.9 of the Rules of procedure, "*The Arbitration Panel will answer hypothetical questions only in exceptional circumstances and only when it decides that a decision on the question is essential to the furtherance of the purposes of the 36th America's Cup as stated in the Protocol and in the best interest of the Event*".

17. The Panel considers that the question raised by Stars&Stripes is clear and not hypothetical. It indeed has direct and immediate implications and Stars&Stripes has a legitimate interest for it to be clarified. The Panel will therefore answer that question.

DECISION

COR36's request for exclusion of the Applicant

18. At § 32 of its Response of 27 July 2020 COR36 "*requests the Panel to exclude the Applicant from further participation in AC36 as expressly provided for by Article 7.7b) of the Protocol, and to impose on the Applicant any other penalty it considers appropriate in furtherance of Article 53.10 of the Protocol*".

19. Art. 7.7(b) of the Protocol provides that

> *"[…]*
>
> *b) The Arbitration Panel is also given jurisdiction under Article 53.10 to impose such penalty it considers appropriate having regard to the nature and manner of the breach, including exclusion of the Challenger from further participation in AC36".*

20. As already mentioned above (§13), Stars&Stripes is currently an accepted Challenger (see ACAP's Decision in Case 36/04). The Panel considers that the request for exclusion made by COR36 in its Response is out of the scope of this Application and, as the case may be, should be the subject matter of a separate application. In fact, a request for exclusion of a Competitor is a serious matter and would require to give all Parties an opportunity to make full submissions.

Scope of applicability of the constructed in country requirement

21. The Applicant submits that, unlike previous Protocols (including the AC35 Protocol (Art. 35.15) which imposed a constructed in country requirement on "*each Competitor's AC Class Yacht*"), the constructed in country requirement contained in the current AC36 Protocol (Article 9) makes reference to "*the Deed of Gift requirement*", which applies only to the Match. Accordingly, the constructed in country requirement contained in the Protocol applies only to the Match and not to any other Event.

22. The third operative paragraph of the Deed of Gift provides as follows:

> *"Any organized Yacht Club of a foreign country, incorporated, patented, or licensed by the legislature, admiralty, or other executive department, having for its annual regatta an ocean water course on the sea, or on an arm of the sea, or one which combines both, shall always be entitled to the right of sailing a match of this Cup, with a yacht or vessel propelled by sails only* ***and constructed in the country to which the Challenging Club belongs****, against any one yacht or vessel constructed in the country of the Club holding the Cup"* [emphasis added].

23. The Deed of Gift makes reference only to the Match and not to other "*Events*" (as the Protocol does, see below). This is due to the fact that at the time of writing the Deed of Gift, challengers selection races are not referred to and do not appear to

have been envisaged. One cannot therefore interpret the provisions of the Deed of Gift as implying that they only apply to the Match. The same logic would suggest that the Class Rules only apply to the Match.

24. The term "*Events*" (referred to in Art. 5 of the Protocol) is a term defined in the Protocol and includes the America's Cup World Series, the Christmas Cup, the America's Cup Challenger Selection Series and the Match.

25. Art. 16.1 of the Protocol states that "*The conduct of the Event shall be governed by: a) the Deed of Gift, and the decisions of the Arbitration Panel; b) this Protocol; c) the AC75 Class Rule; d) the relevant Race Conditions as agreed and adopted by COR/D which will include the applicable Sailing Instructions; e) the racing rules as agreed and adopted by COR/D in consultation with World Sailing and administered by a Jury and Umpires appointed by COR/D in consultation with World Sailing, together the "**Rules**"*".

26. Art. 16.2 of the Protocol provides that "*[…] the documents referred to in this Article shall have precedence in the order the documents are listed*".

27. The Panel is of the view that any Team challenging for the 36th America's Cup challenges under the same rules with regard to all Events. "*Events*" is a defined term and includes the Preliminary Regattas, i.e. the ACWS and the Christmas Cup (Art. 2 of the Protocol), the Challengers Selection Series (Art. 3 of the Protocol) as well as the Match (Art. 4 of the Protocol). It is therefore implicit that a Challenger cannot sail a boat in the Challenger Selection Series, which are part of the Events and have the specific purpose of determining the final Challenger, if the yacht used to win such Series is ineligible in terms of the Protocol to sail in the Match.

28. This is reaffirmed in Attachment 1 to the Notice of Race and Conditions for the Challenger Selection Series ("Prada Cup Conditions") dated 30 June 2020, which provides that the winner of the final stage of the CSS will be the *"challenger for the Match*". Accordingly the challenging yacht is the one that would be sailed in the CSS.

29. Also, the rationale of the Deed of Gift as varied by mutual consent is that all requirements are applicable to all yachts used to participate in the America's Cup (Match or other races) in general, unless expressly provided for. In other words, it would not be acceptable for a Challenger to qualify in the CSS with a boat that would be ineligible to sail in the Match.

30. Accordingly, the only reasonable interpretation of the Deed of Gift and the Protocol is that eligibility to compete in any Event that has its *raison d'être* being a selection for the Match, is subject to complying with the "constructed in country" requirement of the Deed of Gift.

31. This reasoning is confirmed by other provisions of the Protocol.

32. Article 3.1 of the Protocol makes it clear that the winning yacht shall become the Challenger under the Deed of Gift for the Match. Accordingly, such yacht must fulfil the requirements imposed for participating in the Match, including the "constructed in country" requirement provided for by the Deed of Gift.

33. Also, Article 9.1 of the Protocol provides that "*The Deed of Gift requirement that the yacht of a challenging yacht club be constructed in the country of the challenging yacht club, and the yacht representing the yacht club holding the America's Cup be constructed in the country of such yacht club, shall be deemed to be satisfied by the lamination or another form of construction of the hull in such country. […]*". Such provision specifically makes reference to the "constructed in country" requirement contained in the Deed of Gift and does not limit such requirement to the Match. It refers to the "*yacht of a challenging yacht club*" in general, therefore not only the yacht competing for the Match but for all Events. This is in line with the fact that the "constructed in country" requirement contained in the Deed of Gift has to be satisfied not only during the Match but during all Events.

34. In light of all of the above, the Panel considers that the "constructed in country" requirement contained in the Deed of Gift and in the Protocol applies to all Events as defined by Art. 5 of the Protocol, and therefore not only to the Match.

Breach of confidentiality obligation

35. On 25 July 2020, it came to the attention of the Panel that there may have been a breach of the confidentiality obligation provided for in Clause 7 of the Rules of Procedure in respect of disclosures to outside persons concerning this Case. Indeed, the Panel noted that there had been recent comments in the media, and in particular on the Sailing Illustrated, giving quite specific details of the Application, and then in the New Zealand media.

36. The Panel directed each Yacht Club and Team to make enquiries with all their members who may have had access to – or knowledge of – the Application, and to ascertain whether any such member had communicated in any way with the media, and in particular to Sailing Illustrated, in relation to this Case subsequent to the filing of the Application.

37. All Teams advised the Panel that both their members and the relevant members of the Yacht Clubs they represent maintained confidentiality about the Application and its contents.

38. The Panel considers that it has investigated the matter to the extent reasonably possible without protracting matters and notes that all Teams, for themselves and their Yacht Clubs, have denied any involvement in the leak. The Panel considers

such issue as serious, and reminds that it has a broad discretion concerning penalties it can impose should any breach be established.

COSTS

All costs, save the costs relating to the confidentiality/leak issue

39. The Panel fees in respect of Case 36/10 (save the costs relating to the confidentiality/leak issue, see below) amount to **NZD 12'900**.

40. Having regard to the reasons for the Decision, and noting that Stars+Stripes' Application has been unsuccessful, the Panel directs that the Panel's costs will be borne in their entirety by Stars+Stripes.

Confidentiality/leak issue costs

41. The confidentiality/leak issue has incurred costs in an amount of **NZD 4'900**. The Panel considers that (i) it is unclear which Team or Yacht Club, if any, is at the origin of this leak and (ii) addressing the issue is in all Team's interest. As a result that amount will be borne by all five Teams equally, i.e. **NZD 980 each**.

Conclusion on costs

42. Stars+Stripes has paid an amount of NZD 7'975 (banking fees of NZD 25 had been deducted from the Application Fee received by the Panel).

43. Accordingly, the costs shall be paid by the Parties as follows:

    i. Stars+Stripes is hereby ordered to pay NZD 12'900 + NZD 980 - NZD 7'975 = **NZD 5'905** ;

    ii. Each of the four other Parties (COR36, Ineos team UK, ETNZ and American Magic) is hereby ordered to pay the sum of **NZD 980**.

44. Each Party shall bear in full the costs of its counsel, if any.

45. This costs award is required to be paid to the Panel's Bank Account within 7 days as of the date of this Decision.

DECISION

46. In summary the Panel finds that:

a. The answer to the Applicant's question as to whether "*the constructed-in-country requirements contained in the Deed of Gift and the Protocol apply only to the Match and not to any other Event*" is "no", it applies to all Events;

b. Any possible request for exclusion of a Team shall be the subject-matter of a separate Application;

c. The Panel's costs shall be borne as aforesaid. Each Party shall bear its counsel costs.

David Tillett, Graham McKenzie, Henry Peter
36th America's Cup Arbitration Panel