



36TH AMERICA'S CUP

AMERICA'S CUP ARBITRATION PANEL

ACAP36/12

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

IN THE MATTER
of an Application by
Circolo della Vela Sicilia ("**CVS**")
Luna Rossa Challenge Srl ("**Luna Rossa**")
Challenger of Record 36 Srl ("**COR36**")

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

against

Royal New Zealand Yacht Squadron ("**RNZYS**")
Team New Zealand Limited trading as Emirates Team New Zealand ("**ETNZ**")
America's Cup Event Limited ("**ACE**")

*hereinafter altogether the "**Respondent**"*

regarding an alleged breach committed by the Defender in respect of Courses

21 October 2020

AMERICA'S CUP ARBITRATION PANEL

Case No. ACAP36/12

DECISION

THE APPLICATION

1. On 19 September 2020, CVS, Luna Rossa and COR36 filed an application (the "**Applicant**", respectively the "**Application**").
2. At points 1-3 of the Application, the Applicant explained the context/reasons for its Application:
 1. On September 11, 2020, the Applicant filed its Response to an Application submitted by ETNZ requesting the start of a Mediation in relation to the management of the ACWS Auckland, the Christmas Race, the Prada Cup and the Match of the 36th America's Cup (the "**Response**" Case ACAP36/11).
 2. In its Response (Section K., Additional Breach in respect of Courses, paragraphs 136 to 148) the Applicant raised a number of claims against the Respondent in relation to, *inter alia*, breaches of the Protocol to the 36th America's Cup (the "**Protocol**") and of the Venue Management Agreement dated May 10, 2018 (the "**VMA**", **Exhibit I**).
 3. This Application is filed in case it is found that these breaches are not suitable for Mediation in ACAP36/11, and also so that the other Challengers are involved.
3. The Applicant also submitted a letter issued by the Ports of Auckland on 29 January 2020 (Exhibit 7 to the Application), which provides:

Ports of Auckland Limited, following a discussion with Auckland Transport Harbourmaster, would like to put forward the following scenario for consideration in regards to race courses used during the Prada Cup and America's Cup race series.

[...]

We would like the following scenario to be tabled for consideration and adoption at the next 'On-Water' stakeholder meeting, currently scheduled for Thursday 30 January 2020.

1. All key dates – ie: Christmas Cup (17 – 20 December 2020), Prada Cup Finals only (potentially 2 weeks at the end of February 2021) and America's Cup races (6 – 14 March 2021) are guaranteed to have all race courses available on all designated race and reserve days (excluding Monday 8th March 2021)
2. The Prada Cup round robin races are restricted to race courses A, D or E. Race courses B & C cannot be used for these races.

4. At points 26 *et seq* of the Application, the Applicant made the following request for relief:

C. REQUEST FOR RELIEF

26. COR 36 seeks
- a. an order directing ACE to join and support COR36 in an approach to the Ports of Auckland Limited, the Harbourmaster and all other relevant Auckland Authorities in order to explore the possibility of allowing the use of Race Courses B & C during all races of the PRADA Cup.
 - b. in the event that the use of Race Courses B & C during all races of the PRADA Cup will not be possible, a fair solution or solutions which will balance, offset and/or remove any competitive advantage which ETNZ will obtain from that restriction, either by agreement between ACE and COR36 or, failing agreement, by a decision of this Panel. At this stage COR36 leaves open for discussion with ACE in consultation with the other Challengers what that fair solution should be, as it may depend on the decision of the Ports of Auckland Limited, the Harbourmaster and other relevant Auckland Authorities.
 - c. an appropriate order including a penalty for the above outlined breaches of the Respondent; *and*
 - d. an order for the costs, fees and expenses of and associated with this Application.
27. Proof of payment of the Application Fee is enclosed (**Exhibit 9**).
28. In the interest of the 36th America's Cup and of all involved Parties, the Applicant requests the Panel to proceed on an expedited basis under paragraph 5.10 of the Rules.
29. As the matter at hand is relevant for the other Challengers, the Applicant does not request confidentiality towards them. On the contrary, it would welcome – and understands the Respondent shares the same view – each of the Challengers to submit their position on the matter to this Panel as well as each of the Challengers receiving all documents that will be submitted by the Parties.

THE RESPONSES

5. In accordance with the Panel's Directions 01 dated 21 September 2020 and Directions 02 dated 29 September 2020, the following Parties have submitted Responses to COR36's Application:

- Ineos Team UK on 26 September 2020, in which it concluded as follows:

11. We would therefore consider it more appropriate for the Panel to simply set rules by which, in the event the Harbourmaster does not change its decision, any access to Racing Courses B and C is shared fairly and equally by all Challengers and the Defender. For example:
- a. If Courses B and C are not to be used for the purposes of the COR Auckland Events, then they likewise should not be used for training, racing or any other purpose for the entire duration of those events – ie as from the start of the first event until the conclusion of the last.
 - b. If a party is not permitted to access Courses B and C, then such exclusion should apply for the entire day of the scheduled races for the COR Auckland Events and that limited access be permitted for transit only through these Course Areas on those days.

- American Magic on 1st October 2020, in which it made the following requests:

31. NYYC-American Magic respectfully seeks the following orders of the Panel:

That unless it is unanimously agreed between all competitors then still competing in AC36:

- a. The course areas available for the Match must be the same course areas available for all parts of the CSS;
- b. Should in any period of the CSS, one or more of the course areas not be available for selection by the Regatta Director, such course areas cannot be used by the Defender for training or otherwise during the same periods;
- c. Should in any period of the CSS, one or more courses not be available for selection by the Regatta Director, such course areas cannot be later used for the Match;
- d. The Regatta Director is required ensure that the dimensions of all the actual courses in all the racing conform to the Course Configurations set out in Appendix 3 of the COR/D Notice to Competitors No. 7 dated 30 August 2018;
- e. That the word “approximately” used in the said Appendix 3 is interpreted to mean “Used to show that something *is almost, but not completely, accurate or exact; roughly*” and that, as a consequence the width and length of the course must have minimal variations and be as close as practicable to those specified.

- ETNZ on 1st October 2020, in which it submitted inter alia that (i) “*There is no breach of Protocol by the Defender as alleged by COR36 as a result of the Hosts not confirming the availability of the Courses B and C within Course Area I during the early rounds only of the Prada Cup*”, (ii) “*There is no breach of the VMA by ACE, in particular Clause 2*”, (iii) “*there is no competitive advantage for the Defender who in fact is at a competitive disadvantage*”.

REPLY TO THE RESPONSES

6. On 6 October 2020, the Applicant filed its Reply to the Responses, which included the following request for relief:

- a. An immediate order directing the Respondent to join and support the Applicant in an approach to the Ports of Auckland Limited, the Harbourmaster and all other relevant Auckland Authorities in order to explore the possibility of allowing the use of Race Courses B and C during all races of the Prada Cup.

Based on preliminary investigations, it appears unlikely that the Auckland Harbourmaster (and all other relevant Auckland Authorities) will change his / their mind(s) at this late stage and allow the use of Race Courses B and C during all races of the Prada Cup, but the Applicant believes that it is worthwhile making a further effort.

- b. In the event that it has become clear within 7 days of today (6 October 2020) that the use of Race Courses B and C during all races of the Prada Cup will not be possible, the only fair solution is to comply with the Protocol rule, and therefore Courses B and C should not be used at all as a course option for the Events (as proposed in AM's Response, paragraph 16. and INEOS's Response, paragraph 11.).
- c. an appropriate order including a penalty for the above outlined breaches of the Respondent, especially in light of its failure to disclose to or discuss with COR the restrictions which it knew had been agreed and/or were being imposed in respect of Courses B and C;
- d. COR requests the Panel to determine how the equal course sharing principle set out in Article 3.4 is to be managed by the Regatta Director. Such determination to be based on Regatta Director recommendation issued after he has consulted with the COR and the Defender.
- e. an order dismissing AM's request in relation to the Courses Configuration formulated in paragraphs 31.d. and 31.e. of the AM Response; *and*
- f. an order for the costs, fees and expenses of and associated with this Application.

REGATTA DIRECTOR'S RESPONSE

7. In Directions 03 dated 6 October 2020, the Panel considered it would be of assistance to have the Regatta Director express his views in respect of the submissions filed by the Parties in Case ACAP36/12. In such Directions, the Panel also granted the Regatta Director access to ECAF.

8. The Regatta Director (Mr. Iain Murray) expressed his views and provided his proposed course of action in a "Response" submitted by him on 12 October 2020 (the "**Regatta Director's Response**").

9. The Regatta Director's proposed course of action was the following:

Regatta Director proposed course of action:

1. For a race day of the CSS (and Match), I will determine the course area to be used the evening before racing based on the weather forecast and notified to the regulatory authority in conjunction with the priority list in COR/D Notice 27.
Priority 1 Course C
Priority 2 Course A
Priority 3 Course B
Priority 4 Course D
Priority 5 Course E.

All Competitors may use the nominated course area up until 45minutes prior to scheduled racing for that day. After that time only competitors racing will be permitted to be inside the restricted racing area.

2. While there is any Auckland Harbour Master prohibition on using course area B and C for racing in the Prada Cup round robin and semi-final stages, the Defender has no access to Course B or C between 1400 and 1700 on one scheduled race day in the Prada Cup round robin and semi-final stages. The Defender shall declare the day this will apply to by 31 December 2020.
3. There is no other limitation on access to any course other than detailed in points 1 and 2.

PARTIES' VIEWS REGARDING THE REGATTA DIRECTOR'S RESPONSE

10. Upon invitation to do so by the Panel in Directions 04, the following Competitors expressed their views in respect of the Regatta Director's Response:

a) Ineos Team UK, including the following request for relief:

"Relief

8. We request that one of the following orders be made, in order to maintain compliance with the terms of the Protocol:

Either:

Courses B and C should be removed from the list of courses available for selection by the Regatta Director in the Notice of Race for the CSS and the Match.

Or:

If the panel determines that Courses B and C are to be retained only as course options for the CSS Final and the Match then as an absolute minimum all Competitors should be prohibited from using Courses B and C during the period from the start of racing in the CSS to the end of the repechage".

b) COR, including the following request for relief:

22. The Applicant therefore respectfully submits that

- (i) The Panel should direct that race courses B&C are not to be used at all for any of the Events; and
- (ii) the Regatta Director should, as a consequence, be requested to issue a new proposed course of action pursuant to Article 3.4 of the Protocol which takes into account:
 - the unavailability of the race courses B&C for all the Events.
 - that the racing hours of the PRADA Cup are to be excluded from the calculation of the time each team is allowed access to the race courses as expressly stated in Article 3.4 of the Protocol ("*...*) except during the CSS racing hours (*...*").

c) American Magic, which *inter alia* submitted that "*These Defender designated courses are now not compliant with the Protocol due to the Harbour Master's actions, and their designation of Regatta courses must now be removed to comply with both the Protocol and the Harbour Master's requirements*".

d) ETNZ, which mainly submitted that:

- 3. Article 3.4 of the Protocol is not easy to interpret, we reiterate our comments in para 23 of the ETNZ Response in this case that the Protocol drafting does not reflect the practicality of how the course area will need to be managed during racing in the Prada Cup. Given the circumstances, we generally support the Regatta Director's effort to balance the interests of all Competitors but make the following comments:
 - (a) In relation to para 1 of the section headed "**Regatta Director proposed course of action**", we consider that all Competitors should be entitled to use the nominated course area up until say 10 minutes prior to scheduled racing for that day, or in the event of racing being postponed, to a later time nominated by the Regatta Director. There should be requirements that Competitors not interfere with mark laying duties of the on-water operations team during this period and that both the yachts and support boats of the non-racing Competitors be clear of the course prior to the designated time;
 - (b) We also propose that these periods prior to any official racing be designated as official practice to avoid any potential conflict with Article 15.1 of the Protocol but recognise that this provision will require the agreement of the Challenger of Record.

ACAP JURISDICTION

11. The Arbitration Panel has jurisdiction over this matter pursuant to art. 53.4(a) of the Protocol and, accordingly, the ACAP Rules of procedure (version as at 11 February 2019) (the "**RoP**") apply to these proceedings.

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

MAJORITY DECISION (of David Tillett and Henry Peter)

13. Article 3.1 of the Protocol provides that

"In January / February 2021, COR shall organise and conduct a Challenger Selection Series for all Challengers ("CSS"), at the venue of the Match and within the course areas of the Match, to be governed under the CSS Conditions. [...]".

14. Article 3.4. of the Protocol provides that

“Except during the racing hours in the Christmas Race, there shall be no restriction on access to the course area of the CSS and the Match. As from the first scheduled day of racing in the CSS - but except during the CSS racing hours - at the time of day when racing in the Match is scheduled the course area of the CSS and the Match shall be shared equally between the Challengers (50%) and the Defender (50%) as managed by the Regatta Director”.

15. Articles 4.2 and 4.3 of the Protocol provide that

“4.2. The selected venue and precise dates for the Match shall be announced by RNZYS by the 30th of August 2018.

4.3. The Racing Areas, Course Area and the intended course configurations for the Match shall be announced by COR/D by the 30th of August 2018”.

16. Pursuant to Art. 4.2 and 4.3 of the Protocol, COR/D issued the following Notices to Competitors:

- a) on 30 August 2018, Notice to Competitors No. 7 announcing, *inter alia*, the following two Course Areas, including a total of 5 potential course locations (Appendix 2): (i) Course Area I which includes 4 potential course locations and (ii) Course Area II which includes one potential course location (“**Notice 7**”);
- b) on 6 February 2020, Notice to Competitors No. 27 confirming that the Course Areas “*will apply to the Prada Cup, the ACWS Auckland and the Christmas Race*” and issuing (as an attachment) Guidelines outlining the principles governing the selection of course locations during the Match, the preceding Prada Cup and the other Auckland events (“**Notice 27**”). Notice 27 states that “*These guidelines constitute recommendations only for the Regatta Director who under the Protocol is solely responsible for the conduct of all racing in AC 36*”. Such Guidelines give details regarding the potential course locations, which shall be “*publicly identified*” as A, B, C, D and E.

17. In the light of the aforesaid provisions, the Protocol sets three principles:

- a) The CSS and the Match shall take place at the same venue and within the same course areas (Art. 3.1 of the Protocol);
- b) Access to the course area of the CSS and the Match (save and except as provided for in Art. 3.4 of the Protocol) shall be unrestricted at any time;
- c) The course area of the CSS and the Match shall be shared equally (as managed by the Regatta Director) between the Challengers and the Defender (Art. 3.4 of the Protocol).

18. The decisions issued by the Harbourmaster have the effect of restricting the usage of part of the course area announced in Notices 7 and 27. In particular, the course

locations B and/or C cannot be used during the round Robin and semi-final stages of the Prada Cup/CSS. This therefore constitutes a “restriction on access” to the course area, and accordingly any course area which is the subject of such restriction cannot be used in either the Prada Cup/CSS or the Match.

19. American Magic sought an order regarding the meaning of the word “*approximately*” used in Appendix 3 of Notice 7. The Panel is of the view that approximately should be defined in its normal meaning, having regard to the circumstances, and notes that American Magic has quoted the definition in the Oxford dictionary; it is therefore not necessary to further define this as submitted. More generally, the Parties are free to deal with the Regatta Director concerning any enquiries relating to his responsibilities under the Protocol, and if necessary to make an application if they have concerns.

COSTS

20. The Panel is mindful to decide that costs are to be shared equally between all Competitors, unless one or more of them submit otherwise within 5 days of this Decision. A final decision on costs will be taken by the Panel once this time limit has passed.

DECISION

21. In summary the Panel finds that:
 - a) If any part of the course area of the CSS and the Match (e.g. Courses B and/or C) are not accessible with no restriction at any time in accordance with Art. 3.4 of the Protocol, then that part of the course area will be used neither for the CSS nor for the Match.
 - b) This does in no way restrict COR/D from making further approaches to the Harbour Master and/or any other competent authority in order to attempt to change the current restrictions.
 - c) The Competitors are free to agree on a solution different from what the Panel has decided in point a) above, in which case such solution will apply provided all Competitors unanimously agree thereon.
 - d) The Regatta Director shall allocate the use of the permitted parts of the course area in accordance with the aforesaid and Art. 3.4 of the Protocol.
 - e) ETNZ/ACE has not breached the Protocol and/or the VMA.
 - f) The Panel will decide that costs are to be shared equally between all Competitors, unless one or more of them submit otherwise **within 5 days of this Decision**. A final decision on costs will be taken by the Panel once this time limit has passed.

MINORITY VIEW (of Graham Mckenzie)

22. This decision has been taken by a majority of 2 to 1 of the Panel members (majority: David Tillett and Henry Peter; minority: Graham Mc Kenzie). Graham Mc Kenzie's minority view is the following:

There is a valid basis for interpreting the Course Areas are the two areas bordered in black in Appendix 1 attached to Notice 7 provided on 30 August 2018. I recognise the different points of view.

In my view the outcome of the Panels majority decision to rule out entirely the possible use of courses B and C is not correct. The commercial consequences (Article 20.2 of the Protocol identifies them) so close to the Events will not be insignificant. The dispute relates to availability during 12 possible racing days during the CSS round robins and semi-final. The use of such courses is weather dependent and up to the Regatta Director as to selection or not at all.

My preferred interpretation is to largely accept point 8 of the Ineos Team UK Response (of 16 October) to the Regatta Director Response. They submit as an OR alternative interpretation the Panel could rule that courses B and C may be retained for possible use for the CSS Final and Match by banning the use of those areas by Competitors during the CSS round robins and semi-final. I prefer this interpretation whereby any Competitors not racing during the period courses B and C are not available due to the Harbour Master local law compliance permit conditions, they would be prohibited from using courses B and C. This would include the Defender for such applicable period. The Regatta Director would still be expected to allocate to such Competitors the use of other courses including those being raced upon.

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