



IN THE MATTER
of the Protocol
Governing the 37th America's Cup

AND

IN THE MATTER
of an Application filed by the New York Yacht Club ("NYYC")
American Magic ("AM") seeking orders to be excused from
participation in the Second AC37 Preliminary Regatta – Jeddah,
and to exclude the application of Article 10.2 of the Protocol
and for no penalty to be imposed for such lack of participation

AMERICA'S CUP ARBITRATION PANEL CASE 004

ACAP37/004 – DECISION (28th May 2023 at 14:35 UTC)

EMAIL DISTRIBUTION

To: America's Cup Distribution List

Cc: David Tillett, Graham McKenzie, Bryan Willis, Sasha Lines

APPLICATION

1. On 3rd May 2023, an Application dated 3rd May 2023 was received by the Arbitration Panel ("Panel") from New York Yacht Club American Magic ("AM") ("the Applicant"), seeking orders to be excused from participation in the Second AC37 Preliminary Regatta – Jeddah, and to not impose any penalty for such lack of participation.
2. The Applicant has become aware of the announcement made by America's Cup Media (as defined in Article 60.1(c) of the Protocol) on 28th April 2023 stating that the Second Preliminary AC37 Regatta is to be held in Jeddah, Kingdom of Saudi Arabia from 30th November to 3rd December 2023.
3. The Applicant considers that it has reasonable and genuine safety concerns in participating in any of the AC37 Events (as defined in Schedule 1 of the Protocol) in Saudi Arabia including Jeddah and seeks orders from the Panel to excuse AM from participation in the Second AC37 Preliminary Regatta in Jeddah in application of the Protocol including Articles 10.1 and 10.2.
4. The Applicant further requests the Panel to exclude the application of Article 10.2 of the Protocol and therefore to not impose any financial or points penalty on AM for lack of participation in the Second AC37 Preliminary Regatta in Jeddah.

DIRECTIONS

5. On 6th May 2023 the Panel Secretary, on behalf of the Panel, emailed those recorded as representatives of each team, and the AC Event Authority (“ACE”):
 - (i) Setting a time and date by which AM must advise whether or not it had asked COR/D to excuse AM from participation in the Second AC37 Preliminary Regatta in Jeddah, by 17:00 (New Zealand time) on Tuesday 9th May 2023, with a copy to the other parties;
 - (ii) Setting a time and date by which COR/D may, should it wish to do so, file a submission in response to the submission by AM referred to in clause 5(i) above, by 17:00 hours (New Zealand time) on Saturday 13th April 2023, with a copy to the other parties;
 - (iii) Setting a time and date by which each of those parties wishing to make an Observation, should do so by 17:00 hours (New Zealand time) on Wednesday 17th May 2023, with a copy to the other parties; such Observations being limited to whether they considered the Panel to have jurisdiction to make the orders referred to in the Application;
 - (iv) Advising that the Panel would review any Submission, Response and Observations that had been filed and would decide if it wished to invite further observations from the Applicant and/or from COR/D and/or from any of the other parties;
 - (v) Advising that the World Intellectual Property Organization (“WIPO”) Electronic Case Facility (“ECAF”) was not yet set up and that therefore this case would be managed by email exchanges directly between the parties and the Panel; and
 - (vi) Noting that the Applicant had not requested the Panel to address the Application through the Fast Track Process provided for in Article 67.14(b) and noting that additional information and further submissions were required, and that the Application was not suitable for the Fast Track Process.

RESPONSES AND REPLIES

6. On 9th May 2023 AM sent an email to the Panel and to the Panel Secretary, with a copy to the other parties, stating that it had not at that date, asked COR/D to excuse AM from participation in the Second AC37 Preliminary Regatta in Jeddah as provided for in Article 10.2 of the Protocol.
7. On 10th May 2023 AM sent a letter by email to COR/D, copied to the Regatta Director, the Panel and the Panel Secretary, requesting COR/D to excuse AM from participation in the Second AC37 Preliminary Regatta in Jeddah as provided for in Article 10.2(a) of the Protocol; and further requesting COR/D not to apply to the Arbitration Panel for it to impose any financial or points penalty on AM for lack of participation in the Second AC37 Preliminary Regatta in Jeddah as provided for in Articles 10.2(a)(i)(B) and 10.2(b)(i) of the Protocol.
8. On 10th May 2023 AM sent an email to the Panel and the Panel Secretary, with a copy to the other parties, stating that it had on 10th May 2023 asked COR/D to excuse AM from participation in the Second AC37 Preliminary Regatta in Jeddah as provided for in Article 10.2 of the Protocol.

9. On 13th May 2023 COR/D submitted a Response confirming that D had received AM's request but that COR had not received AM's request directly and only became aware of such request when it received the email from AM dated 10th May 2023. COR/D further submitted that the Panel has no jurisdiction to grant the orders sought in the Application and that AM's request under Article 10.2 of the Protocol should not affect the Panel's decision on whether it has jurisdiction to determine the case.
10. In its Response dated 13th May 2023 COR/D further submitted that the Application should be dismissed and that AM should be directed to bear the Panel's costs and expenses under Article 67.13 of the Protocol.
11. In its Response dated 13th May 2023 COR/D further submitted that it would review AM's request to excuse non-participation in the Second AC37 Preliminary Regatta in Jeddah under Article 10.2 of the Protocol and would make a decision in due course in accordance with the Protocol.
12. No submissions were received from the other parties served.

CONFIDENTIALITY OF APPLICATIONS

13. On 16th May 2023 it came to the attention of the Panel that there may have been a breach of the confidentiality obligation provided for in Article 67.12(b) of the Protocol in respect of disclosures to outside persons (in this case the media) concerning this Case 004.

FURTHER DIRECTIONS

14. On 18th May 2023 the Panel Secretary, on behalf of the Panel, emailed those recorded as representatives of each team, and the AC Event Authority ("ACE"):
 - (i) Setting a time and date by which AM may, should it wish to do so, file a Reply in response to the Response submitted by COR/D referred to in clause 9 above, by 17:00 hours (New Zealand time) on Tuesday 23rd May 2023; and
 - (ii) Setting a time and date by which all parties who had been emailed the Further Directions shall use their best endeavours to make enquiries of all persons who may have had access to, or knowledge of, the Application, and to ascertain whether, and if so in what circumstances, any such person communicated in any way with an unauthorised third party, including the media, in relation to the Application, by 17:00 hours (New Zealand time) on Thursday 25th May 2023.

RESPONSES AND REPLIES

15. On 22nd May 2023 AM submitted a Reply to the Response submitted by COR/D dated 13th May 2023. In its Reply dated 22nd May 2023 AM submitted that it had informed COR/D and the Panel that it had decided not to participate in the Second AC37 Preliminary Regatta – Jeddah due to reasonable and genuine safety concerns of AM, and that it had also advised the COR, the Defender and the Regatta Director.
16. In its Reply dated 22nd May 2023 AM further submitted that it considered the Panel to have jurisdiction in respect of the Application because the Application is a matter of interpretation of several Articles of the Protocol. AM further submitted that the requirement to race under Article 10 of the Protocol and the mandatory participation in Special Events is secondary and subject to, matters of

security and safety and at the sole discretion of the Competitor to determine whether or not it is safe to test, train, sail and/or race on any given day.

17. In its Reply dated 22nd May 2023 AM further submitted that if the failure of a Competitor to comply with Article 10.1 of the Protocol is based on reasonable grounds, or circumstances beyond the reasonable control of the Competitor, or reasonable and genuine safety concerns of the Competitor, then COR/D must excuse such competitor from participation and may not apply to the Panel for it to impose such financial penalty as it considers appropriate having regard to the nature and manner of the breach; and the Panel shall not impose the points penalties set out in Article 10.2(b).
18. In its Reply dated 22nd May 2023 AM further submitted reasons as to why it considered the Panel to have jurisdiction to resolve disputes between the Defender and the Challenger of Record, between an individual Challenger and the Defender and between an individual Challenger and the Challenger of Record; and that the Panel has jurisdiction to impose penalties as it considers necessary, and that it has the power to instigate mediation on any dispute it considers appropriate for mediation. AM further submitted that the Application does not fall within any of the situations set out in Articles 47.2 and 67.5 of the Protocol in which the Panel has no jurisdiction.

ADDITIONAL FURTHER DIRECTIONS

19. On 24th May 2023 the Panel Secretary, on behalf of the Panel, emailed those recorded as representatives of each team, and the AC Event Authority (“ACE”):
 - (i) Setting a time and date by which COR/D may, should it wish to do so, file a Response in response to the Reply submitted by AM referred to in clause 15 above, such Response being limited only to paragraphs 6 to 14 inclusive of the Reply submitted by AM, by 17:00 hours (New Zealand time) on Friday 26th May 2023; and
 - (ii) Reminding all parties who had been emailed the Further Directions on 18th May 2023, to use their best endeavours to make enquiries of all persons who may have had access to, or knowledge of, the Application, and to ascertain whether, and if so in what circumstances, any such person communicated in any way with an unauthorised third party, including the media, in relation to the Application, by 17:00 hours (New Zealand time) on Thursday 25th May 2023.

ADDITIONAL RESPONSES AND REPLIES

20. On 24th May 2023 the Defender (“D”) submitted its Observations and Findings on the question of confidentiality and stated that the Application was originally received by the five recipients listed on the current Arbitration Panel Distribution List and was circulated internally to five others, including Directors and Legal Counsel. D stated that all recipients had confirmed that they did not further circulate the Application and did not communicate in any way with any unauthorised third party including the media, in relation to the Application. D further submitted that the Application itself was not at that time shared with the Royal New Zealand Yacht Squadron (“RNZYS”).
21. In its Observations and Findings dated 24th May 2023 D further submitted that on 16th May 2023 the Commodore of RNZYS received an unsolicited email from James Farmer KC, attaching a copy of the Application, and that the Commodore

had circulated it to the four members of an RNZYS Reset Committee. D submitted that the Commodore of the RNZYS and the members of the Reset Committee had all confirmed that they had not passed the Application on to any other third party. D submitted that James Farmer KC was not acting for RNZYS in a professional capacity and was no longer a member of the Club, and nor did he have any association with either the Defender nor with ACE. D submitted that it was not aware if James Farmer KC was acting for any other party on this matter, nor what association he had, if any, with any other Competitor.

22. On 24th May 2023 Alinghi Red Bull Racing (“ARBR”) submitted its Observations on the question of confidentiality and stated that it had made enquiries of all persons who may have had access to, or knowledge of, the Application, and that only a limited number of persons in addition to the four recipients listed on the current Arbitration Panel Distribution List had access to or knowledge of the Application, being the four members of the Board of Directors of ARBR and no more than three senior Team Members. ARBR confirmed that the outcome of its internal enquiries was that none of those persons had communicated in any way with an unauthorised third party, including the media, and had not contravened the confidentiality provisions of Article 67.12(b) of the Protocol.
23. On 24th May 2023 Luna Rossa Challenge Srl (“LR”) submitted its Observations on the question of confidentiality and stated that the Application had been received by the Rules Group of LR which comprised of eight persons, and that all members of the Rules Group had confirmed that they had not disclosed nor disseminated information relating to the Application to third parties, including the media.
24. On 24th May 2023 INEOS Britannia (“INEOS”) submitted its Observations on the question of confidentiality and stated that it restricted distribution of Panel cases to those within the organisation who had a strict need to know the information for the purposes of responding to directions given by the Panel. INEOS confirmed that all recipients were subject to confidentiality obligations either through their employment contracts, consultancy contracts or professional obligations. INEOS stated that it had reviewed its internal communications regarding the Application for Case 004 and had interviewed all those in receipt of the Application, and had found no evidence that any person from within either the Royal Yacht Squadron Limited or INEOS had communicated in any way with an unauthorised third party including the media, in relation to the Application.
25. On 24th May 2023 AM submitted its Observations on the question of confidentiality and stated that before the start of Case 004 its General Counsel, Luis Saenz Mariscal, had reminded all persons with access to or knowledge of the Application to maintain strict confidentiality of all documents relating to the proceedings. AM further stated that its General Counsel had carried out an internal investigation and had reviewed electronic correspondence and personal conversations and had found no evidence of any member of the New York Yacht Club (“NYYC”) or any member of AM as the source of the leak to the media.
26. On 25th May 2023, AM further confirmed that when referring to the media in its Observations dated 24th May 2023, it also implied and meant “any other third person” and that their General Counsel had made enquiries, reviewed email records from the AM servers and conducted personal interviews, and that he had nothing to indicate that anyone related to NYYC or AM had distributed a copy of the Application or made it otherwise available to any third person that did not belong to either NYYC or AM, including the media and by any indirect means. AM confirmed that only a few persons at NYYC and AM had access to the Application and that it was on a “need to know” basis.

27. On 25th May 2025 Orient Express Racing Team ("OERT") submitted its Observations on the question of confidentiality and stated that the Application had been received by eight persons within OERT comprising the internal rules distribution email group, and that OERT had conducted an enquiry into the recipients of the Application and that all recipients had confirmed that they had not disclosed nor circulated information relating to the Application to third parties, including the media.
28. On 26th May 2023 COR/D submitted a Response to the Reply submitted by AM on 22nd May 2023. In its Response dated 26th May 2023, COR/D submitted that it had observed that AM in its Reply dated 22nd May 2023, had raised various new matters, arguments and grounds which went beyond the relief and arguments raised in its Application dated 3rd May 2023.
29. COR/D further submitted that its position remained that the decision under Article 10 of the Protocol whether or not to excuse a competitor was one for COR/D to make in consultation with the Regatta Director, and not for the Panel to make. COR/D further submitted that no decision had yet been made by COR/D under Article 10 in respect of AM's request to be excused from participation in the Second AC37 Preliminary Regatta in Jeddah and that no dispute currently existed between COR/D and AM.
30. COR/D further submitted that the Panel does not have jurisdiction to pre-emptively determine a dispute that has not yet arisen, and further, does not have jurisdiction to determine the issues raised in the Application, nor to grant the relief sought in the Application. COR/D submitted that if AM wished to raise new matters of interpretation of various provisions of the Protocol, then these should be the subject of a new application.

DISCUSSION

31. The Application from AM dated 3rd May 2023 sought orders from the Panel for AM to be excused from participating in the Second AC37 Preliminary Regatta in Jeddah and for no penalty to be imposed in terms of Article 10.2 of the Protocol. At the time of such Application, AM had not sought the agreement of COR/D to be excused from such Regatta in terms of Articles 10.1 and 10.2 of the Protocol.
32. Following Directions issued by the Panel on 6th May 2023, AM sought the agreement of COR/D to be excused from the Second AC37 Preliminary Regatta in Jeddah. COR/D is currently considering such request with a decision still to be made.
33. The reply from AM dated 22nd May 2023 responding to the COR/D observations dated 13th May 2023 included a broad range of matters including why AM considered the Panel to have jurisdiction, which was a matter of interpretation. AM also included its views on the requirement to race and participate in AC37 Events under Article 10.1 of the Protocol and a "reasonable grounds" test. The Panel considers that much of what was contained in the AM Reply dated 22nd May 2023 was new and very different from what was contained in its Application dated 3rd May 2023. In many respects it was a smorgasbord of multiple arguments. The Panel does not think it appropriate or necessary to address such a range of arguments. The Panel considers Article 10.2 of the Protocol is clear as to its meaning.
34. The Panel notes that Article 10.1(b) of the Protocol provides that it is "subject to the discretion of COR/D to excuse any competitor pursuant to Article 10.2." Article 10.2(a) of the Protocol provides, "Unless COR/D (in consultation with the Regatta Director) is satisfied...". In the Panel's view, as currently drafted the Protocol is clear that it is only

COR/D which has the power to excuse a competitor from an AC37 Event. COR/D has not yet made a decision. COR/D is required to make such decision on "reasonable grounds" in accordance with the Protocol. The Panel is not entitled under the Protocol to make the orders sought in the Application.

COMMENTS ON CONFIDENTIALITY

35. The breach of Article 67.12(b) of the Protocol is a significant concern. An entire copy of the Application has been disclosed to the media whilst these proceedings were continuing. It appears to be a blatant breach of the Protocol, likely intended to cause effect to COR/D. All Competitors have denied any such breach.
36. If such a breach occurs in the future, the Panel gives notice that it intends to take more stringent steps including possible orders of discovery.
37. The Panel notes that significant penalties can be imposed by the Panel under Article 67.4 of the Protocol for breaches of confidentiality.

DECISION

38. The Application is dismissed.
39. When COR/D makes a decision on whether or not to excuse AM from participation in the Second AC37 Preliminary Regatta in Jeddah, if AM considers such decision to be not in accordance with the Protocol, AM may make a new application to the Panel. Such decision by COR/D must be "on reasonable grounds". Such test is subjective.
40. Equally, Article 10.2(a)(i)(B) of the Protocol entitles COR/D to apply to the Panel "to impose such financial penalty it considers appropriate" should COR/D not excuse AM from attending the Second AC37 Preliminary Regatta in Jeddah. What is "appropriate" is within the Panel's discretion.
41. If AM wishes to raise new matters of interpretation relating to the issues raised in Case 004 then AM may make a new application to the Panel. AM should note however, that if it makes an application to the Panel seeking to advance the matters raised in paragraphs 6 to 14 inclusive of its Reply dated 22nd May 2023, prior to COR/D making its decision, for the reasons set out above the Panel would need convincing to deviate from its current position.

COSTS

42. This case follows the normal position that the Applicant should pay the costs of an Application. AM is to pay costs of Euros 14,500. As AM has already paid Euros 10,000 in its Application fee, the further costs of Euros 4,500 is to be paid to the Panel account within 7 days.

28th May 2023

America's Cup Arbitration Panel
David Tillett AM (Chair)
Graham McKenzie
Bryan Willis