



36<sup>th</sup>  
AMERICA'S CUP

## **AMERICA'S CUP ARBITRATION PANEL**

**ACAP36/02,03,04 (2019)**

**IN THE MATTER**

of the Protocol  
governing the 36<sup>th</sup> America's Cup

**AND**

**IN THE MATTER**

of Applications by  
Emirates Team New Zealand  
(representing Royal New Zealand Yacht Squadron)  
(ACAP36/02)

*and*

COR 36 (Representing Luna Rossa Challenge and  
Circolo Della Vella Sicilia) (ACAP36/03)

*and*

American Magic (representing New York Yacht Club)  
(ACAP36/04)

14 March 2019

**AMERICA'S CUP ARBITRATION PANEL Cases 02 and 03**

**and AMERICA'S CUP ARBITRATION PANEL Case 04 (up to 02/03/19)**

**COSTS AWARD DECISION**

### **THREE APPLICATIONS**

1. Applications were filed by Emirates Team New Zealand (ETNZ) with ACAP on 1/02/19 (Case 36/02), by Luna Rossa Challenge (COR 36) (Case 36/03) and by American Magic (Case 36/04) both on 04/02/19.
2. The respective Applications concerned (i) whether COR36 was required to agree with certain amendments with regard to a Challenger and Late Entry payments (Case 36/02); (ii) whether three Late Entry Challengers had fully complied with the provisions of the Protocol in order for their Challenge to remain valid (Case 36/03) and (iii) whether the Late Entry Challengers (identified in paragraph 3 below) had fully complied with the Protocol and Deed of Gift.
3. The three Late Entry Challengers were Royal Malta Yacht Club (Malta Altus Challenge or MAC), Long Beach Yacht Club (Stars & Stripes Team USA or S&S) and, jointly, Royal Maas Yacht Club and Royal Netherlands Yacht Club (Dutch Sail).

### **INITIAL DIRECTIONS / DISCOVERY PROCESS**

4. The Panel issued procedural Directions on 5/02/19. Following Responses received by all Challengers the Panel issued further Directions on 12/02/19 determining that all three cases would be addressed together. The Panel also made orders for discovery of documents and that the three Applications would be heard at an oral hearing in Auckland in mid-March 2019. Such oral hearing was mutually agreed by the Parties.
5. Various requests and objections to the discovery of documents were filed by the Parties (ETNZ, COR36 and all the Challengers). Along with discovery of documents, Responses were also filed to the respective Applications.

### **SETTLEMENT**

6. On 28/02/19 ETNZ and COR36 each separately requested the Panel to accept the withdrawal of their Applications in Cases 36/02 and 36/03 respectively, as they had reached a settlement agreement in accordance with Article 52.1 of the Protocol. The settlement included agreeing to amend Articles 7.1(c), 7.2 and 7.9 concerning Entry fees and performance bonds. The Protocol changes have now been published. COR36 agreed it would raise no further dispute as to the validity of acceptance of the Notice of Challenge of any of the presently accepted Challengers.
7. On 1/03/19 the Panel provided further Directions 05 approving, pursuant to Rule 6.6 of the Rules of Procedure, the withdrawal of the two respective Applications in Cases 36/02 and 36/03 as at that date, with an award on costs to follow. In the same Directions American Magic were invited to advise the Panel whether it wished to maintain its Application in Case 36/04, or amend or withdraw it.
8. On 2/03/19 American Magic advised that they wished to maintain their Application in Case 36/04. They however agreed that there should not be an oral hearing and that Case 36/04 would be determined on the papers as already filed. Case 36/04 is the subject of a separate decision on the merits and award for Panel fees and expenses incurred by the Panel after 2/03/19.

## COSTS DISCUSSION

9. Following on from such Directions from the Panel, submissions on costs were filed by all the Parties on 4/03/19. ETNZ and COR36 submitted that costs should be borne equally by all parties who filed a submission. Ineos Team UK submitted that the costs should be shared between the Applicants only. American Magic and the three Late Entry Challengers submitted that they should not pay any costs.
10. Pursuant to Article 53.3 of the Protocol the fees and expenses of the Panel are to be "*recovered on a user pay basis from the Parties involved*".
11. Pursuant to Article 53.4(k) of the Protocol and Rule 14.3 of its Rules of Procedure the Panel is empowered to fix and determine costs of an Application "*as it considers just and equitable*."
12. The outcome of the Application in Cases 36/02 and 36/03 was that they were settled. While it is relevant that settlement occurred, it does not follow automatically that the Applicants should bear all costs.
13. Submissions were filed by all Challengers on various aspects of the three cases. The three existing accepted Challengers were very active in their respective views. The Late Entry Challengers were also active in defending their position as accepted Challengers. While it is recognised that the Applications and the process that followed may have caused at least delay and potentially harm to the Late Entry Challengers they have benefited from both the certainty of a settlement and from a deferral of payment of the Late Entry fee otherwise payable under the Protocol.
14. As a general starting point an Applicant should expect to pay reasonable costs. The dispute arose out of ETNZ and COR36 carrying out their responsibilities under the Protocol. The issues raised between them which were the subject-matters of the cases would have best been resolved by them without the need for an Application. Because of the settlement the Panel considers just and equitable not to award different costs levels between them on what may have been the merits of their respective Applications.
15. The Panel however considers that all Parties should bear some costs. All Parties were in fact actively involved in this matter, which lead to address significant issues relating to eligibility that needed to be resolved in the best interests of the Event.
16. Up until 1/03/19 nearly 60 documents (many of which were detailed and extensive) have been filed by the Parties, which required review by the Panel. The attendances by the Panel have been significant. Airfares and accommodation had been booked as had hearing and sound recording arrangements been made. In most cases full refunds have been obtained, but in other break fees have been incurred. The Panels costs including fees and expenses total **NZD 75,000**.
17. Application fees of NZD 8,000 for all three Applications have been paid. Ineos Team UK and American Magic have each paid the further fee of NZD 15,000 per Party which was directed to be paid in anticipation of the oral hearing. Stars & Stripes paid an amount of NZD 15,000 but a bank fee of NZD 15 was deducted so that ACAP's bank account was credited with only NZD 14,985. As a part of this award, in determining the sum to be paid by each Party any sums already paid by individual Parties will be taken into account. In a few cases a credit and/or a refund will be made. All of these aspects are provided for in the award below.

## AWARD OF COSTS

18. Total fees and expenses awarded in respect of Cases 36/02, 36/03 and 36/04 (up to 2/03/19) are **NZD 75,000**. The proportion of such costs award is payable by the Parties as follows.
19. **ETNZ** are ordered to pay the sum of **NZD 18,750**. After allowing for payment of the Application fee of NZD 8,000, the sum payable by ETNZ is NZD 10,750.
20. **COR36** are ordered to pay the sum of **NZD 18,750**. After allowing for payment of the Application fee of NZD 8,000, the sum payable by COR36 is NZD 10,750.
21. **American Magic** are ordered to pay the sum of **NZD 7,500**. After allowing for their payment of NZD 15,000 the sum of NZD 7,500 will be refunded to American Magic. The Application Fee of NZD 8,000 which American Magic paid with regard to ACAP36 Case 04 will be dealt with in the Panel's separate decision regarding such Case.
22. **Ineos Team UK** are ordered to pay the sum of **NZD 7,500**. After allowing for their Payment of NZD 15,000 the sum of NZD 7,500 will be refunded to Ineos Team UK.
23. **Stars & Stripes** are ordered to pay the sum of **NZD 7,500**. After allowing for their Payment of NZD 14,985 the sum of NZD 7,485 will be refunded to Stars & Stripes.
24. **Dutch Sail** are ordered to pay the sum of NZD 7,500.
25. **MAC** are ordered to pay the sum of NZD 7,500.

## PAYMENTS DUE DATE

26. All costs awards as ordered above are required to be paid to the Panel's account within 14 days of the date of this award.
27. The Panel has noted that in a number of cases some Parties did not make payment of the sum of NZD 15,000 directed by the Panel to be made in its Directions of 12/02/19 and reaffirmed in its Directions of 1/03/19. The Panel recognises that there may have been some doubts about the requirement to make the payment as a result of settlement of cases 02/36 and 03/36 and the oral hearing not proceeding. On this occasion the Panel will give the benefit of doubt. However, Parties are advised that any non-compliance of the Panel's Directions will be treated seriously.

## PUBLICATION

28. This decision will be publicly notified. The Applications and all other documents filed on ECAF or otherwise and provided in discovery in respect of these cases are not to be published and remain confidential between the Parties.

David Tillett, Graham McKenzie, Henry Peter

36<sup>th</sup> America's Cup Arbitration Panel