



AMERICA'S CUP ARBITRATION PANEL

ACAP36/07-03 (ACWS Cagliari)

IN THE MATTER

of the Protocol
governing the 36th America's Cup

IN THE MATTER

of an Application by
American Magic
New York Yacht Club ("NYYC")
(hereinafter altogether the "**Applicant**")

regarding ACWS Cagliari / Coronavirus (COVID-19) outbreak

19 May 2020

AMERICA'S CUP ARBITRATION PANEL

Case No. ACAP36/07-03 (ACWS Cagliari Entry Fees issue)

DECISION

BACKGROUND

1. The present Decision is the third decision issued by the Panel as part of Case ACAP36/07 (“**Decision ACAP36/07-03**”). It follows the Panel’s first decision issued on 18 March 2020 regarding the merits of the case (“**Decision ACAP36/07-01**”) and its second decision issued on 24 March 2020 regarding the costs related to Decision ACAP36/07-01 (“**Decision ACAP36/07-02**”).
2. As the Applicant (NYYC) had also requested “*the return of the Cagliari entry fee of 300.000 USD from the Challenger of Record to this Competitor*”, the Panel stated in the same Decision ACAP36/07-01 that

“A Panel determination about the entry fees and how they should be applied to costs of the Cagliari ACWS will be the subject matter of a separate decision. Such separate decision will also contain a decision on costs related to the Entry fees issue”.
3. To that effect, the Panel, in Decision ACAP36/07-01 (§29), requested COR36, as the Organizing Authority, to “*submit [...] a summary table of entry fees received as well as of all costs which have been incurred in relation to the organization of the Cagliari ACWS and which cannot be recovered. Such submission shall be substantiated by reasonable evidence*”.
4. On 1 April 2020, the Panel issued further Directions 06 in which it ordered that:

“COR36’s submission shall include relevant documents and any terms of the basis upon which the Parties paid Entry fees for the Cagliari ACWS Event. The submission shall also include particulars or a schedule of all documents it is relying on to support COR36’s claim. To the extent that confidentiality is not claimed the documents shall be included in the submission. If confidentiality is claimed COR36 shall include why the documents should remain confidential and email them directly to the Panel [...]. The Panel will then decide on a document-by-document basis whether they should be confidential or, where appropriate, making necessary arrangements to permit relevant evidential documents to be presented and any special arrangements put in place”.

COR36’S ENTRY FEES SUBMISSION

5. On 29 April 2020 at 8:24pm (Italian time), COR36 submitted on ECAF a “Response to the Panel Request of 18 March 2020 (paragraphs 28 and 29 of the ACAP 36/07 Decision) as amended by the 1 April 2020 Directions 06”, with enclosures (“**COR36’s Entry Fees Submission**”). On the same date at 8:26pm (Italian time), the Panel (only) received from COR36, by separate email (not on ECAF), the documents regarding which COR36 requested a confidentiality order (see below §36.a.).

6. Together with COR36's Entry Fees Submission, COR36 filed a table of entry fees received as well as a summary of the costs incurred. The summary of costs was sent (i) to the other Parties in a partly redacted version (together with the non-confidential related supporting evidence) and (ii) (only) to the Panel in an unredacted version (together with all related supporting evidence). COR36 also filed a Report prepared by a chartered accountant confirming the "*correctness of the expenses*" incurred by COR36 in relation to the organization of the Cagliari ACWS.
7. In its submission, COR36 requested
 - "a) A Decision that the Entry Fee paid by the Challengers for participation in the Cagliari ACWS is not be returned by COR to the Challengers; and*
 - b) an order as to the costs, fees and expenses associated with this proceeding".*
8. In the same submission, COR36 also
 - a. confirmed the request made in its submission dated 25 March 2020 "*that the detailed costs information that will be provided by COR36 will be kept confidential by the Panel and that only a redacted summary thereto (with the exclusion of any evidence) will be shared with the other parties to the proceedings. We submit that the evidence may include invoices, salaries, self-contractors/services fees, accounting documents and contracts/orders which might be confidential between COR 36 and third parties*". COR36 accordingly reserved its right, in case the Panel would reject its request for a confidentiality order, to elect – as provided for by Article 7.2 of the RoP – to withdraw the evidence it has filed (only) with the Panel or to proceed without confidentiality; and
 - b. submitted that "*COR is entitled to demand payment of the funding shortfall from the Cagliari ACWS from the other Challengers*" and that "*COR reserves the right to request payment of any overall funding shortfall in respect of the Preliminary Regattas and the CSS at the end of the CSS*".

OTHER PARTIES' REPLIES TO COR36'S ENTRY FEES SUBMISSION

9. On 14 May 2020, the Panel received, in reply to COR36's Entry Fees Submission, two submissions from NYYC and one from ETNZ.
10. ETNZ submitted that (i) "*entry fees paid in respect of the ACWS regattas are non-refundable*", (ii) "*the Protocol requires the Challenger of Record [...] to apply the Entry Fees paid by NYYC and the other competitors for the Cagliari ACWS to the costs of the Preliminary Regattas. This includes not only the Cagliari ACWS but also the Christmas Cup scheduled for December. Any review of whether COR36*

has complied with its obligations is premature, and can only be assessed at the conclusion of the Christmas Cup” and (iii) “ETNZ also paid an Entry Fee of US\$ 300,000 and accepts that this is non-refundable”.

11. NYYC submitted that (i) COR36’s confidentiality request is opposed, (ii) should the Panel need to determine the question of the applicable law, New Zealand law is applicable, (iii) NYYC is entitled to recover the Entry Fees pursuant to New Zealand law as well as pursuant to the Protocol. NYYC also made some (general and specific) submissions regarding ACWS Entry Fees deductions and, on that basis, submitted *“that the Panel, in light of the matters raised in these submissions, invite the Challenger of Record to redraft and resubmit it’s expenses claims for the Cagliari Regatta for further review”*. In respect to the Portsmouth ACWS, NYYC contended that *“the Protocol and fiduciary aspects of the Cagliari Regatta Entry Fees do not apply to the Portsmouth Regatta Entry Fees”*.
12. In its second Reply, NYYC further submitted that since the filing of its first Reply, *“it received the Defender’s accounting for the Portsmouth Regatta”* and such accounting shows that *“only 29% of the costs sought by the Challenger of Record have been sought by the Defender. No management costs have been charged in the manner set out in the Challenger of Record’s Attachment 3”*.
13. Ineos Team UK did not file a Reply.

FURTHER SUBMISSIONS

14. On 15 May 2020, COR36 filed a further submission in reaction to NYYC’s Reply of 14 May 2020 making, inter alia, some consideration in the merit.
15. Following this submission, on 18 May 2020, the Panel *“remind[ed] all that when a case has been opened, and subject to specific circumstances, the Parties are not to file submissions which are not permitted in the Rules of Procedure or in the procedural timetable as established by the Panel, unless leave to do so has been granted. In this particular case, no such leave has been granted. It does not appear to the Panel that it should. As a result, the comments made by COR36 in its submission of 15 May 2020 will not be considered as being on file”*.
16. On 19 May 2020, NYYC filed a further submission aiming at disclosing *“a document relevant to the determination of the costs of the Cagliari Regatta”* and attaching such document. In view of the reasons outlined hereunder, such submission and the attached document are deemed by the Panel to be irrelevant and therefore do not need further consideration.

ACAP JURISDICTION

17. Pursuant to art. 53.4.a) Protocol, the Arbitration Panel shall be empowered “to resolve all matters of interpretation of the Protocol and Rules [...]”. The issues at stake relate to the interpretation 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.
18. Words used in this Decision have the meaning as defined in the RoP.

DISCUSSION

Relevant applicable rules

19. The provisions of the Protocol which are relevant are the following:

“7. ENTRY FEES AND PERFORMANCE BOND.

7.1. In respect of an accepted notice of challenge, the challenging yacht club shall pay to the RNZYS the entry fees (“Entry Fees”) as follows: [...].

[...]

7.5. The Entry Fees shall be non-refundable [...].”

7.6. In addition to the fees referred to above, the following payments will be required and are deemed to be part of the Entry Fees:

*a) except for the Portsmouth ACWS in respect of which Article 7.6 c) shall apply, (See Protocol Amendment 07) no later than 3 months before an ACWS Event, each Competitor shall pay to COR the sum of USD 300,000. Such amounts shall be paid into an ad hoc separate bank account in the name of the COR (“**The Preliminary Regattas Account**”) and shall be applied to the payment of any costs associated with the Preliminary Regattas; in the event of a positive balance, the surplus shall be applied to the costs associated with the CSS;*

[...]

7.9. As well as the amounts referred to in Clauses 7.5 a) and 7.6 a) the Challengers shall share equally all further costs of the Preliminary Regattas, the CSS and other activities of the Challengers as a group associated with the challenge for the 36th America’s Cup. Such costs may be offset from money raised from commercial activities. Any calls on Challengers to contribute funds to assist with meeting such costs may be required at such time and in such amount as is determined by COR and approved by RNZYS (such approval not to be unreasonably withheld). [...].

[...]”

“29. FINANCIAL OBLIGATIONS OF COR AND THE DEFENDER.

29.1. The Preliminary Regattas and the CSS globally on one side and the Match on the other side, shall financially operate independently from each other, with separate financial accounting and each respective party shall be responsible for the costs and

the receipt of all revenues for each Event (including the Entry Fees payable under this Protocol), the payment of all expenses (including the funding of Regatta Director, Jury, Rules and Measurement Committees, Umpires and other race officials) for each Event. See Protocol Amendment 02.

29.2. Any final surplus resulting from the Preliminary Regattas and the CSS shall be equitably distributed according to the following criteria:

- a) *two thirds of the surplus, if any, amongst the Challengers based on their performance in the CSS;*
- b) *the balance to the three top scoring Competitors at the end of ACWS, based on the position achieved.*

29.3. Any funding shortfalls in each Event shall be met as follows:

- a) *in respect to the Preliminary Regattas by all the Challengers equally;*
- b) *in respect of the Challenger Selection Series by all the Challengers equally;*
- c) *in respect of the Match by RNZYS”.*

Request for refund of Cagliari ACWS Entry Fees

20. NYYC has requested that COR36 be ordered to return the Entry Fees of USD 300'000 which it had paid in respect of the Cagliari ACWS.
21. The sum of USD 300'000 the return of which is requested by NYYC is the sum referred to at Art. 7.6.a) of the Protocol. Art. 7.6 provides that this sum is “*deemed to be part of the Entry Fees*”, “Entry Fees” being a defined term pursuant to Art. 7.1 of the Protocol.
22. Art. 7.5 of the Protocol expressly provides that “*The Entry Fees shall be non-refundable*”. Accordingly, the Entry Fee of USD 300'000 paid by any competitor is non-refundable. COR36 is therefore not required to nor permitted under the terms of the Protocol to return such Entry Fees as requested. NYYC’s request for refund of the USD 300'000 Entry Fees is thus rejected.

Financial surplus or shortfall

23. Without prejudice to the fact that the Entry Fees are not refundable, the Protocol (Art. 7.6.a)) specifically makes provision as to how the USD 300'000 Entry Fees are to be dealt with: “*the sum of USD 300,000 [...] shall be applied to the payment of any costs associated with the Preliminary Regattas; in the event of a positive balance, the surplus shall be applied to the costs associated with the CSS*” (7.6.a)).
24. Art. 2.1 of the Protocol defines the “Preliminary Regattas” as “*The ACWS and the Christmas Race*”. The “ACWS”, which is the acronym for the “*America’s Cup World Series regattas*”, include the regattas taking place (or which were to take place) in Cagliari in April 2020, Portsmouth in June 2020 and Auckland on 17-20 December

2020 (“*incorporated within the same period of the Christmas Race*”, see Art. 2.1.a)iii) of the Protocol). The “Christmas Race” is the regatta “*to be held at the Match venue within the same period of the Auckland ACWS regatta during 17 – 20 December 2020*” (Art. 2.1.b) of the Protocol).

25. Art. 3.1 of the Protocol defines the “CSS”, i.e. the Challenger Selection Series, as being regattas to be organized and conducted by COR36 for all Challengers in “*January/February 2021*”, the winning yacht of which “*shall become the Challenger under the Deed of Gift for the Match*”.
26. Art. 7.9. of the Protocol provides that “*As well as the amounts referred to in Clauses 7.5 a) and 7.6 a) the Challengers shall share equally all further costs of the Preliminary Regattas, the CSS and other activities of the Challengers as a group associated with the challenge for the 36th America’s Cup. Such costs may be offset from money raised from commercial activities. [...]*”.
27. Art. 29.1 of the Protocol specifically makes provision that the Preliminary Regattas and the CSS “*shall financially operate*” “*globally*”.
28. As a consequence of the above-mentioned provisions of the Protocol, the accounting required to determine whether there is a surplus or a shortfall from the Preliminary Regattas and the CSS should be done as a whole. Whether or not there was funding surplus or shortfall can therefore be determined only after the Preliminary Regattas and the CSS have been completed. In the present case, the last regatta to be organized is the CSS, which is scheduled to take place in January/February 2021. It is only at that stage that it will be possible to know if there is a final surplus or funding shortfall. If it is a surplus, Art. 29.2 of the Protocol shall apply; if it is a shortfall, Art. 29.3 of the Protocol shall apply (see above for a quote of the Protocol provisions). It is further considered that the final accounting in respect of the Cagliari ACWS, including the making of payments of the actual costs incurred, is unlikely to be complete at this stage and a more accurate statement of accounts will be available when the final calculations are being made.
29. COR36 has submitted that “*the costs borne by COR for the organization of the Cagliari ACWS [i.e. EUR 3’358’568.98] by far exceed the total amount of the Entry Fees paid by the Challengers [i.e. USD 1’200’000]*” and that:

“COR is entitled to demand payment of the funding shortfall from the Cagliari ACWS from the other Challengers.

However, COR offers voluntarily to defer making a demand now, and to evaluate the financial position in respect of the Preliminary Regattas and of the CSS at the end of the CSS (as would be the case for a financial surplus). In the meantime, COR reserves the right to request payment of any overall funding shortfall in respect of the Preliminary Regattas and the CSS at the end of the CSS”.

30. As a result, it is premature and, for that matter, not yet needed nor possible for the Panel to make a determination in this respect and, accordingly, to go at this stage through the accounting/summary of costs submitted by COR36. The Panel may have to deal with this issue at a later point in time in case any Party files a submission to that effect.

Confidentiality order requested by COR36

31. As a consequence of the Panel's determination in §30 above, the confidentiality issue is, at this stage, moot. This is without prejudice to what is provided by Art. 7.1 of the Rules of Procedure.

Portsmouth ACWS

32. In its submission (§11) ETNZ has raised a point regarding the Portsmouth ACWS. The Panel reiterates (see Decision ACAP36/07-01, §27) that the Application only regarded the Cagliari ACWS. The Panel considers that the reasoning given in this case should be of assistance to the Parties in respect of the Portsmouth ACWS. The Portsmouth ACWS is however not the subject-matter of this case. Should a Party want to raise any issue regarding the Portsmouth ACWS, it is invited to file a separate Application.

Applicable law issue

33. In its submission (§9 *et seq*) NYYC has raised a point regarding the law applicable to the merits of Applications filed under the Protocol. Since this matter is decided on the basis of the substantive provisions contained in the Protocol, there is no need to address the issue of the law applicable to the merits.

COSTS

34. The Parties' submissions regarding cost allocation are the following:
- a. NYYC stated that it "*concur[s] with the Panel's views as set out in the Directions on its costs being apportioned equally amongst the competitors*";
 - b. ETNZ is of the view that it should not be required to meet any of the Panel's costs in relation to this part of the ACAP36/07 proceedings;
 - c. COR36 requested an "*order as to costs*";
 - d. Ineos Team UK have not expressed any views.

35. Having regard to the reasons for the Decision, and noting that NYYC's application has been unsuccessful, the Panel directs that the Panel's costs will be borne in their entirety by NYYC.

DECISION

36. As a result of the aforesaid, the Panel finds that:
- a. The Applicant's request that COR36 be ordered to return the Entry Fee of USD 300'000 which it paid in respect of the ACWS Cagliari is rejected;
 - b. COR36's request for a confidentiality order is moot;
 - c. The costs of the Panel amounting to **NZD 10'600** shall be borne by NYYC. Each Party shall bear its counsel costs. This costs award is required to be paid to the Panel's Bank Account within 7 days as of the date of this Decision.

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36th America's Cup Arbitration Panel