



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

**AMERICA'S CUP ARBITRATION PANEL**

**ACAP36/08**

**IN THE MATTER**

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

**IN THE MATTER**

*of an Application by*  
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 "**Applicant**"*

*against*

Circolo della Vela Sicilia ("**CVS**")  
Luna Rossa Challenge Srl ("**Luna Rossa**")  
Challenger of Record 36 Srl ("**COR36**")

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

*regarding* obligations to meet costs connected to media production and the provision  
of race management systems for regattas under the Protocol

**2 July 2020**

**AMERICA'S CUP ARBITRATION PANEL**

**Case No. ACAP36/08**

**FINAL ORDER**

## PARTIES' SUBMISSIONS

1. On 15 June 2020, ETNZ and ACE filed an Application (the “**Applicant**”, respectively the “**Application**”). The background and scope thereof was the following:

*“4. This application relates to a dispute between COR/D concerning obligations to meet costs connected to media production and the provision of race management systems for regattas under the Protocol.*

*5. ACE and COR36 are parties to an agreement 11 October 2018 with a joint venture between Riedel Communications GmbH & Co and WEST4MEDIA Filmproduktions GmbH (together **Circle-O**) to provide media production and race management systems for the 36<sup>th</sup> America’s Cup (**Circle-O Agreement**).<sup>1</sup> The Circle-O Agreement reflects, among other things, the respective obligations of COR/D in Article 28 of the Protocol.*

2. The Applicant submitted the following requests for relief:

### *Orders sought*

23. ETNZ/ACE seek orders for the Panel:

- (a) Declaring the COR/COR36 is in breach of its obligations in Art 28.1 of the Protocol by failing to meet its obligations under the Circle-O Agreement;
- (b) Declaring that COR/COR36 is in breach of its obligations under the Dalton/Bertelli Agreement;
- (c) Ordering that COR comply with Article 28.1 of the Protocol and the Dalton/Bertelli Agreement by meeting its obligations under the Circle-O forthwith;
- (d) Reserving leave to ETNZ/ACE to prove and be awarded damages for any losses arising from the breach; and
- (e) Such other orders as the Panel sees fit (including to Sanction COR/COR36 for ongoing breaches).

And, “*in the event that such an order is not made (or is not complied with)*”:

### *Relief sought*

27. ETNZ/ACE request an order from the Panel declaring that if ETNZ/ACE were remedy the default of COR/COR36 under the Circle-O agreement, then ETNZ/ACE would be entitled to subrogate or otherwise avail themselves of COR’s rights under Articles 7.9 and 29.3 of the Protocol in relation to those amounts.

3. On 17 June 2020, the Panel issued Directions 02 ordering that
  2. The Respondent has stated that it accepts that this case should be mediated (without prejudice to a possible outcome). But it has added that "*before engaging with the mediation and present further submissions, the Parties shall focus their joint efforts in finalizing these negotiations and only mediate the differences between themselves which should emerge before the end of this process*" (§8 of COR36's Response). Notwithstanding this, the Panel will assume that COR accepts to start the mediation process and that their desire to negotiate with Circle-O will be part thereof, under the guidance of the Sole Mediator.
  3. The Sole Mediator will be the Panel's Chairman.
  4. Parties are invited not to file any further submission on ECAF with regard to this matter, unless leave to do so has been granted by the Panel.
  5. The mediation will only take place between the Applicant and the Respondent.
  6. Pursuant to Art. 7.2 of the RoP, the mediation will be confidential between the Parties thereto. As the case may be, the Parties are however entitled to report/consult with the other Competitors any matters relating to the mediation. However, should the Parties discuss with other Competitors any matter related to the mediation, such other Competitors shall be bound by the confidentiality obligation as stated above.
  7. Unless otherwise decided by the Panel, the other Challengers will be informed of the outcome of the mediation and will, on that occasion, have a chance to take possible steps based on the Protocol (or on any other basis pursuant to which the Panel has jurisdiction).
4. On 18 June 2020, CVS, Luna Rossa and COR36 (the "**Respondent**") (i) confirmed its agreement that the dispute be mediated and that only the Applicant and the Respondent be involved therein, (ii) submitted "*that it shall be requested to submit its reasoned position only once both the negotiation with Circle-O has been concluded (or has stalled) and as soon as it will be clear whether or not the Parties agree to the allocation of the TV Budget [on the basis of a first draft of an agreement that the Applicant had undertaken to provide at the end of May]*" and (iii) requested for an urgent confidentiality order.
5. On 19 June 2020, NYYC American Magic made the following comments:

*"It is acknowledged that a mediation is necessarily a private and confidential dispute resolution process between parties. NYYC-American Magic do not wish to become directly involved in the minutiae of the issue. NYYC-American Magic is however potentially affected if there are material changes to existing arrangements. It has entered into obligations with third parties in reliance of the present arrangements. A mediation can result in the parties making a new accommodation. In fairness, given this late juncture in the 36th America's Cup, NYYC-American Magic respectfully submits it needs to be consulted and to agree to any proposed changes that might materially affect it. This includes for example, any changes to the broadcast arrangements or anything that may adversely affect the financial rights and obligations of the challengers under the Protocol especially given the provisions of art 29.2 and art 29.3 as to surpluses and shortfalls".*

6. Later on the same day, the Applicant submitted a Memorandum in which it (i) requested *“that the Panel amend its directions at paragraph 10(a) and (b) of its directions of 17 June 2020 so that those documents are required to be filed on those dates regardless of any agreement to mediate”*, (ii) contended that a mediation shall occur after these documents (Response to the Application and Reply to the Response) have been exchanged, (iii) noted that *“ongoing efforts to renegotiate arrangements with Circle-O are irrelevant to this application”* and (iv) stated that *“ETNZ has no objection to the mediation being confidential in the usual way”* and challenged that fact that a *“broader confidentiality order suppressing public comment on the existence or nature of the dispute between the parties”* shall be issued by the Panel.
7. Also on 19 June 2020, Ineos Team UK commented that *“[...] ETNZ/ACE are making us an interested party in this mediation. We respectfully submit that any determination of such matters would not be appropriate without our involvement. Accordingly, we reserve the right to make submissions or argument with respect to any matter which relates to our interest or position as a Challenger”*.

## **MEDIATION**

8. Pursuant to Art. 53.4 of the Protocol, the Parties agreed that the dispute be mediated. The mediation took place only between the Applicant and the Respondent. The Panel's Chairman acted as Sole Mediator.
9. The mediation process has been successful. This case is thus settled. The other competitors, NYCY American Magic and Ineos Team UK, have been informed of the result of the mediation.

## **COSTS**

10. The costs of this case, including mediation, amount to **NZD 14'750**.
11. Parties to the mediation have agreed that each of them should bear half of the costs, namely NZD 7'375.
12. Accordingly:
  - a. COR36 shall transfer **NZD 7'375** on the Panel's Bank Account, and
  - b. As ETNZ has paid the application fee of NZD 8'000, the Panel will thereafter refund to ETNZ an amount of **NZD 625**.
13. Each Party shall bear its Counsel's costs.

**ORDER**

14. As a result of the aforesaid:

- a. This matter is settled and the case is therefore closed following successful mediation.
- b. COR36 shall pay, within 7 days as of the date of this Decision, to the Panel's Bank Account an amount of **NZD 7'375**. The Panel will thereafter refund to ETNZ an amount of NZD 625. Each Party shall bear its Counsel's costs.

David Tillett, Graham McKenzie, Henry Peter  
36<sup>th</sup> America's Cup Arbitration Panel