



36TH AMERICA'S CUP

AMERICA'S CUP ARBITRATION PANEL

ACAP36/09

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 payment of an overdue invoice concerning a quota of the Host Fees

18 August 2020

AMERICA'S CUP ARBITRATION PANEL

Case No. ACAP36/09

FINAL ORDER

PROCEDURAL HISTORY / PARTIES' SUBMISSIONS

1. On 30 June 2020, CVS, Luna Rossa and COR36 filed an application (the “**Applicant**” or “**COR36**”, respectively the “**Application**”).
2. The Applicant submitted the following requests for relief:
 21. In light of the above, the Applicant seeks an order that
 - a. the Respondent should immediately pay to COR36 the due, payable and outstanding amount of the COR36 Venue Consideration, i.e. the amount of NZD 875,000.00 + GST.
 - b. The Respondent should pay the costs of this application.
 22. 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 ACAP Rules of Procedure. As the claim is for funding to which COR36 is entitled to enable it to finance its obligations, it is important that those funds should be released.
 23. The differences between the Applicant and the Respondent arise under Articles in the Protocol and agreements that are a matter only between themselves and therefore - in line with the jurisprudence of this Panel (e.g. ACAP36/05/Med, Directions 02) - the Applicant requests that this proceeding shall remain confidential towards any other person or entity, including the other Challengers. Further the documents relate to commercial confidential matters. For these reasons, only the Application is filed on ECAF, while the Exhibits are directly sent to this Panel and to the Respondent to maintain confidentiality towards the Challengers.
3. On 1 July 2020, RNZYS, ETNZ and ACE (the “**Respondent**” or “**ETNZ**”) filed on ECAF a “Memorandum” in which it submitted that (i) the Applicant had not yet paid the application fee of NZD 8'000 (Art. 5.1 and 5.3.3 RoP) and (ii) pursuant to Clause 34 of a so-called VMA Agreement entered into on 10 May 2018 between COR36 and ACE (the “**VMA Agreement**”), the Parties were “*obliged to agree to request mediation under Art. 53.4 [of the Protocol]*”.
4. On the same day the Panel received confirmation that the Applicant had paid the application fee of NZD 8'000 pursuant to Art. 5.1 and 5.3.3 RoP.
5. Also on 1 July 2020, NYYC American Magic filed a letter on ECAF in which it stated that it did not seek to become directly involved in the mediation “*but as with AC36/08 [...] if there are to be any material changes to the existing arrangements for AC36, NYYC-American Magic requests it's prior approval to the changes given it has relied upon the existing arrangements in entering into obligations with third parties*”.
6. On 2 July 2020, COR36 confirmed to the Panel that it accepted to mediate the present dispute.

7. On 2 July 2020 the Panel issued Directions 01 in which, with regard to its jurisdiction, the Panel stated that:

“7. Pursuant to the Application:

20. The claim is made pursuant to:

- a. **clause 18 of the VMA, which expressly provides at clause 34 that "in compliance with Article 53.4 of the Protocol this Agreement is within the jurisdiction of the Arbitration Panel"; and**
- b. **clause 5, and Schedule 4 of the Settlement Agreement, which, as it settles matters provided for in the VMA, also comes within the jurisdiction of the Arbitration Panel.**

8. With regard to the meaning of the Settlement Agreement, see §10 of the Application.

9. The Panel therefore has jurisdiction both as a result of the Protocol and of an agreement entered into on 10 May 2018 between COR36 and ACE (the "VMA Agreement").

8. In accordance with Directions 01, the Applicant filed on the same day a "Memorandum of the Applicant Supplemental to its Application of June 30, 2020" (the "**Supplemental Application**").
9. On 3 July 2020 Respondent (ETNZ) filed a memorandum relating to the Supplemental Application (the "**ETNZ Memorandum**").
10. On 3 July 2020, following ETNZ's Supplemental Application and ETNZ Memorandum, the Panel issued Directions 02 in which it invited "*ETNZ and the other Challengers [...] to submit their position as to the following questions:*
- (i) should the points raised in the Supplemental Application filed yesterday by the Applicant be part of the currently ongoing mediation?*
 - (ii) if not, should the currently ongoing mediation go ahead and the subject matter of the Supplemental Application be dealt with as a separate case;*
 - (iii) if not, should the currently ongoing mediation be stopped, and all issues raised following the Applicant's initial application and Supplemental Application be dealt with without attempting to mediate whole or part thereof and as a single case?"*.
11. In the same Directions 02 the Panel provided that "*the Applicant will be entitled to respond about the views expressed by ETNZ and, as the case may be, by the other Challengers*" and that "*The currently ongoing Mediation is put on hold until further directions are issued by ACAP with that regard*".

12. On 3 July 2020 Respondent (ETNZ) filed a memorandum in which it submitted:

ETNZ's response to the questions in para 4 is as follows:

- (i) the issues raised by the Applicant's Supplemental Application are new and not within the subject matter of their original Application so cannot yet be part of the current ongoing mediation;
- (ii) see below
- (iii) the current ongoing mediation should be postponed to enable the Applicant to file a separate Application. We anticipate that the Application will also be suitable for mediation and given that one of the issues in this case involves a payment due back from COR 36 to Mayo and Calder Limited and in turn ACE, it may be appropriate to mediate both cases together. ETNZ will be able to have a position on this once the grounds of the new Application and the issues involved are more clearly identified.

13. On 6 July 2020, the Applicant filed a "Memorandum of the Applicant in response to the Respondent Memorandum of July 5, 2020" in which COR36 *"reiterate[d] that the issues raised in the Supplemental Memorandum of July 2, 2020 – for the reasons already outlined therein – are strictly linked with the original Application and should therefore be mediated together in the context of the ongoing mediation and of ACAP09. In particular, the failure of the Respondent to pay to the Applicant the COR36 Venue Consideration instalment due at the end of April 2020 may indeed be a direct consequence of the Investigations"*.

14. On 7 July 2020 ACAP issued Directions 03 dealing with procedural issues and giving directions as to how the mediation process should proceed.

MEDIATION

15. The mediation involved only the Applicant and the Respondent in view of the fact that they were the only parties to the VMA Agreement. Since the Panel Chairman was busy with other matters, he appointed Graham McKenzie (Panel member) to act as Sole Mediator. Both Parties agreed, however the Applicant made it clear that in their opinion this was a deviation to Art. 53.4.m) of the Protocol and that the Applicant's agreement with that regard was therefore limited to this mediation.

16. The mediation process has been successful and the dispute is resolved.

COSTS

17. The costs of this case amount to **NZD 13'800**.

18. The said total amount does not include the Sole Mediator's mediation fees which will be invoiced directly to the parties by the Sole Mediator, in equal shares.

19. Parties to the mediation have agreed that each of them would bear half of these costs, namely NZD 6'900. Accordingly:
 - a. As COR36 has paid the application fee of NZD 8'000, COR36 will be refunded NZD 1'100 and
 - b. ETNZ shall pay NZD 6'900 on the Panel's Bank Account
20. Each Party shall bear the costs of its Counsel.
21. This costs award is required to be paid to the Panel's Bank Account within 7 days as of the date of this Final Order.

ORDER

22. As a result of the aforesaid:
 - a. This matter is settled and the case is therefore closed following successful mediation.
 - b. The Panel's costs shall be borne as aforesaid. Each Party shall bear its Counsel costs.

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