



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

**AMERICA'S CUP ARBITRATION PANEL**

**ACAP36/11**

**IN THE MATTER**

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

**IN THE MATTER**

*of an Application by*

Team New Zealand Limited ("**ETNZ**") and  
America's Cup Event Limited ("**ACE**") (together the "**Defender**")

*hereinafter the "**Applicant**"*

*against*

The Challenger of Record and its  
event management company, Challenger of Record Srl ("**COR36**") (together "**COR**")

*hereinafter the "**Respondent**"*

***regarding the management of the Events / various matters to be mediated***

**6 November 2020**

**AMERICA'S CUP ARBITRATION PANEL**

**Case No. ACAP36/11**

**FINAL ORDER**

## PROCEDURAL HISTORY / PARTIES' SUBMISSIONS

1. On 4 September 2020, the Defender filed an application (the "**Applicant**", respectively the "**Application**") pursuant to which the Applicant sought orders from the Arbitration Panel regarding various matters *inter alia* relating to the management of the Events and listed a series of issues to be mediated. At point 5 of the Application, the Applicant stated:

*"The issues raised in the application concern areas of operational disfunction and disagreement which, unless resolved, have the potential to detrimentally impact the Events in Auckland. In many cases these issues have been caused or compounded by the COVID-19 pandemic. It is also clear that many of the issues raised cannot be resolved by negotiation. The Defender considers that the prompt intervention of the Panel is needed, in the interests of the Event, to assist the parties to reset the elements of their relationship that are not presently working. For that reason, the Defender has requested that the various disputes raised here are mediated under Article 53.4 b) of the Protocol and in accordance with a mandatory mediation provision contained in the VMA. Should that mediation fail, the Defender's position is that the issues will need to be determined by the Panel."*

2. The Application thereafter mentioned a series of issues to be addressed in the context of the requested mediation. In view thereof, the Application stated at §59:

*"59. Under Article 53.4 m) of the Protocol the Defender requests that the Panel mediates the issues identified in this application as we submit all the issues are appropriate for mediation. In addition, under Clause 34 of the VMA, the Parties are obliged to agree to request mediation under Article 53.4."*

3. Later, on the same day, the Panel issued Directions 01 in which it ordered that:

*"6. COR and each other Challenger shall, by not later than 6 September 2020 close of business New Zealand time submit their position as to whether the requested mediation should take place, whether they wish to participate therein and if they have any immediate preliminary issue".*

4. On 5 September 2020, COR filed a "Memorandum in response to the ACAP Directions 01 of 4 September 2020" ("**COR's Response**") in which, *inter alia*, (i) it challenged some points of the Application and (ii) it "*re-confirm[ed] its availability to discuss all matters covered by the VMA with ACE in a COR/D Executive Committee*" and "*suggest[ed] that a meeting should be convened at the earliest opportunity*".

## MEDIATION

5. Although most of the issues of the present dispute related to the Venue Management Agreement dated 10 May 2018 entered into between ACE and COR 36 Srl ("**VMA**") and to which ETNZ is not a party, it appeared to the Panel that the nature of many of them related to the way the Events should be managed, which also involved the Protocol and that it would have been much preferable to involve in that regard not only ACE and COR, but also ETNZ (see the Panel's Directions 02 of 8 September 2020). The Panel therefore directed that the dispute was to be the subject matter of a mediation as per Article 34 of the VMA and Article 53.4 m) of the Protocol. Such mediation occurred between the Applicant and the Respondent (namely ETNZ, ACE and COR).

6. The Panel Chairman not being available to conduct this mediation process and in view of the successful outcome of Case 36/09 which, in part, regarded related issues, he designated Graham McKenzie (Panel member) to act as Sole Mediator with the consent of the Parties.
7. On 5 November 2020, a settlement was reached on all ACAP36/11 issues and dispute is therefore resolved. The content of such settlement is confidential to those Parties involved.

#### **COSTS**

8. The costs of this case amount to **NZD 11'100**.
9. Pursuant to the settlement agreement, the costs shall be shared equally between the Applicant and the Respondent, i.e. **NZD 5'550 each**. Accordingly, the costs shall be paid as follows:
  - a. As ETNZ/ACE has paid the application fee of NZD 8'000, ETNZ/ACE will be refunded NZD 2'450 and
  - b. COR shall pay NZD 5'550 on the Panel's Bank Account.
10. Pursuant to the settlement agreement, the said 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.
11. Each Party shall bear the costs of its Counsel.
12. 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**

13. 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  
36<sup>th</sup> America's Cup Arbitration Panel