AMERICA'S CUP ARBITRATION PANEL

ACAP36/14

IN THE MATTER
of the Protocol
governing the 36th America's Cup

IN THE MATTER
of an Application by

Emirates Team New Zealand ("**ETNZ**")
Royal New Zealand Yacht Squadron ("**RNZYS**")
America's Cup Event Limited ("**ACE**")

*hereinafter altogether the "**Applicant**"*

***regarding* the Course Area issue**

3 November 2020

AMERICA'S CUP ARBITRATION PANEL

Case No. ACAP36/14

DECISION

THE APPLICATION

1. On 31 October 2020, Emirates Team New Zealand ("**ETNZ**") on behalf of itself and the Royal New Zealand Yacht Squadron ("**RNZYS**") as Defender and America's Cup Event Limited ("**ACE**") filed an application (the "**Applicant**", respectively the "**Application**").

2. At point 1 of the Application, the Applicant stated that "*It is a request for the Panel to resolve a dispute between the Defender and the Challenger of Record (**COR**) and other Challengers over a proposal to agree a solution to the Course Area issue, the potential for which was anticipated in the Panel's decision in ACAP36/12*".

3. At point 4 of the Application, the Applicant submitted that *"this dispute is appropriate for mediation, particularly given the position of the Auckland Mayor on behalf of the Host Authorities, clearly communicated to the teams in the past few days. Under Article 53.4 m) of the Protocol we therefore request the Panel undertake such a mediation".*

4. The Applicant concluded the Application as follows:

> *"**Conclusion***
>
> *22. The Panel's assistance is sought to facilitate an agreement amongst all teams on a solution which will balance the interests of the Competitors, the Hosts, the Auckland Events, the public of New Zealand, and the standing of the America's Cup. The issue is one of obvious significance for the Event, and one requiring the competitors to engage reasonably, responsibility and constructively towards a fair resolution. That has not happened since the Panel's decision, and that needs to change. Mr Dalton's email provides a proposal that we envisage answers any tangible concerns of the other competitors—if the other competitions have further tangible concerns then those need to be made clear and the competitors need to engage on those issues constructively and in good faith".*

OTHER PARTIES' FURTHER SUBMISSIONS

5. On 1st November 2020, the Panel issued Directions 01 in which it invited "*any Challenger to say […] if it agreed to take part in a mediation*". Pursuant thereto, American Magic, Ineos Team UK and COR filed the following submissions on 2 and 3 November 2020 respectively:

6. American Magic submitted that:

> *"NYYC - American Magic welcomed the award of the America's Cup Arbitration Panel upholding the commitment made in the Protocol that the courses for the Challenger Selection Series (Prada Cup) will be the same as for the Match. That award is full and final in accordance with art 51.1 of the Protocol and for the sake of clarity, NYYC - American Magic does not accept or consent to any re-litigation of the issue.*

Access to the Race Courses is a matter for the Defender and the relevant local authorities to resolve, not for the Challengers.

That said, NYYC-American Magic's door remains open to mutual consent discussions under the guidance of the Chairman of the Panel as envisaged by the Panel's award".

7. Ineos Team UK mainly submitted that:

"2. We do not agree that the issue of whether or not to include Race Courses B and C is appropriate for mediation".

"5. We have no desire to become involved in further litigation particularly at a time when we are focused on preparations ahead of the first set of races in December 2020".

*"**Relief***

7. We request that the Panel order that the request for meditation be refused.

8. If however the Panel concludes that mediation is in fact appropriate then we would ask that we be included in such meditation in order to ensure that our position is adequately represented".

8. COR mainly submitted that:

"29. In light of the aforesaid, the Challenger of Record fails to understand why the Applicant appears to be so reluctant to follow the suggestion of this Panel in paragraph 21.b) of the ACAP12/36 Decision and,

30. in a first instance, make further approaches with the Harbourmaster and with the Auckland Hosts to try to waive the current restrictions. This is, by far, the most obvious solution and would not only be in the interest of the Event and of the public of New Zealand but also ensure compliance with the terms of the Protocol.

31. This said, if all other Challengers agree, the Challenger of Record agrees to engage in a Mediation provided that its agreement shall not be deemed as a waiver of its rights to challenge the Application as being contrary to the general principle of "res judicata", Article 51.1 of the Protocol and 15.5 of the Rules of Procedure and, in any event, wrong.

32. The Challenger of Record seeks an order pursuant to paragraph 7.2 of the Rules of Procedure confirming that (i) the Mediation (and all documents and information filed or otherwise disclosed by the parties in that context, including the Application and this Submission) shall remain fully confidential between the Parties; and (ii) the outcome of this case ACAP14 and all of the Mediation shall be communicated to the general public with a press release agreed between all parties.

33. Finally, the Challenger of Record seeks an order for the costs, fees and expenses of and associated with this Application. As this is an application aimed at digging the Applicant out of a hole of its own making, those costs should be payable by the Applicant regardless of the outcome".

DECISION

9. On 21 October 2020, the Panel issued the following Decision in Case ACAP36/12 ("**ACAP36/12 Decision**"):

> *"21. In summary the Panel finds that:*
>
> *a) If any part of the course area of the CSS and the Match (e.g. Courses B and/or C) are not accessible with no restriction at any time in accordance with Art. 3.4 of the Protocol, then that part of the course area will be used neither for the CSS nor for the Match.*
>
> *b) This does in no way restrict COR/D from making further approaches to the Harbour Master and/or any other competent authority in order to attempt to change the current restrictions.*
>
> *c) The Competitors are free to agree on a solution different from what the Panel has decided in point a) above, in which case such solution will apply provided all Competitors unanimously agree thereon.*
>
> *d) The Regatta Director shall allocate the use of the permitted parts of the course area in accordance with the aforesaid and Art. 3.4 of the Protocol.*
>
> *e) ETNZ/ACE has not breached the Protocol and/or the VMA.*
>
> *f) The Panel will decide that costs are to be shared equally between all Competitors, unless one or more of them submit otherwise **within 5 days of this Decision**. A final decision on costs will be taken by the Panel once this time limit has passed".*

10. Pursuant to Clauses 51.1 of the Protocol and 15.5 of the Rules of procedure, the ACAP36/12 Decision is final and binding on the Parties.

11. At point c) of the ACAP36/12 Decision the Panel has found that "*The Competitors are free to agree on a solution different from what the Panel has decided in point a) above, in which case such solution will apply provided all Competitors unanimously agree thereon*". Mediation could have been a way for the Competitors to agree on a solution. Pursuant to Clause 53.4(m) of the Protocol, a mediation can be envisaged only if all Parties agree, which has not been the case here (as at least one Party – Ineos team UK – did not agree thereto).

12. The present case can therefore not be mediated and, as a result, the Application fails.

13. This Decision is without prejudice to the ACAP36/12 Decision, in particular points b) and c) of its dispositive part (see above).

COSTS

14. The Panels' fees relating to Case ACAP36/14, including the present decision and the activity of the Administrative Secretary, amount to **NZD 5'700**. No expenses have been incurred by the Panel.

15. As mentioned above, ETNZ's Application failed; the costs are thus to be borne in full by ETNZ. As ETNZ has paid the application fee of NZD 8'000, the Panel will refund to ETNZ an amount of **NZD 2'300**.

16. Each Party shall bear in full the costs of its counsel, if any.

DECISION

17. In summary the Panel finds that:

a) The present case cannot be mediated and, as a result, the Application fails;

b) This Decision is without prejudice to the ACAP36/12 Decision, in particular points b) and c) of its dispositive part (see above).

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