



36TH AMERICA'S CUP

AMERICA'S CUP ARBITRATION PANEL

ACAP36/15

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

IN THE MATTER
of an Application by

Emirates Team New Zealand ("**ETNZ**")
New Zealand Yacht Squadron ("**RNZYS**")

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

regarding the interpretation of Article 15.1 of the Protocol

24 November 2020

AMERICA'S CUP ARBITRATION PANEL

Case No. ACAP36/15

DECISION

THE APPLICATION

1. On 13 November 2020, Emirates Team New Zealand (“**ETNZ**”) as the representative team of the Royal New Zealand Yacht Squadron (“**RNZYS**”), the Defender, filed an application (the “**Applicant**”, respectively the “**Application**”).
2. At points 2 and 3 of the Application, the Applicant submitted the background of the dispute as follows:

“2. The Panel is requested to provide an interpretation of Article 15.1 of the Protocol and provide guidelines on what activities constitute “sailing or testing AC 75 yachts in a coordinated manner”. We would also welcome the involvement of the Regatta Director to assist the Panel on the issue.

3. There is currently a difference of opinion amongst the Competitors on what is permitted under the rule which clearly needs to be clarified to provide the teams with certainty for their ongoing training activities. We request that within the interpretation there be a set of practical guidelines which could be formulated in consultation with the Regatta Director after receiving the input of Competitors making submissions in this case”.

3. At point 63 of the Application, the Applicant makes the following request for relief:

15. We request the following from the Panel:
 - (a) An answer on which, if any, of the factual examples given (based on the information provided) would constitute “sailing in a coordinated manner” and the principles which apply;
 - (b) Guidelines as requested in para 3;
 - (c) Answers to the questions raised by Kevin Sheobridge in his email of 9 November:
 - (i) Can the teams use the same marks when training to ease congestion in a particular course area?
 - (ii) Is crossing tacks or gybes in close proximity permitted?
 - (iii) How long can you be sailing in close proximity on the same tack or gybe without breaking the rule?
 - (c) Any other interpretive guidance which the Panel is able to provide.
16. As the interpretation will have an effect on the current daily team activities on the water, it is requested that the Panel resolve the request on an expeditious basis.

4. Following the Application, the Panel issued Directions 01 on 13 November 2020 (followed by Amended Directions 01 on 14 November 2020 and Further Amended Directions 01 on 17 November 2020) through which it invited (i) the Regatta Director to submit its views/comments regarding the Application, (ii) any Competitor to file a Response about the Application and the Regatta Director’s comments, and (iii) the Applicant to file a Reply about the Responses and the Regatta Director’s comments.

REGATTA DIRECTOR'S VIEWS/COMMENTS

5. On 17 November 2020, the Regatta Director Iain Murray submitted his views/comments regarding the Application. In its submission, he *inter alia* stated:

“As the Regatta Director, I am instructed by article 15.1 to monitor the sailing of Competitors in official practice and/or regattas. I note that article 15.1 does not provide the ability for me to manage or monitor the sailing at other times.

If I was to have the authority to set practical guidelines I would likely implement rules such as:

- 1. Yachts must not sail within 100m of each other on the same approximate heading for more than 30 seconds;*
- 2. Yachts will not sail a measurable course at approximately the same time;*
- 3. Yachts may share practice marks subject to point 2 and where they do not round or pass the marks within 30 seconds or each other”.*

RESPONSES TO THE APPLICATION

6. On 19 November 2020, in accordance with the Panel's Directions 01 (as amended), NYYC-American Magic, Ineos Team UK and COR submitted Responses to the Application.

7. In its Response NYYC-American Magic in substance submitted that:

“4. Sailing or testing coordination between Competitors requires communication between them. Without communication, there cannot be, as a matter of logic, “a combined order for the production of a particular result” (emphasis added). The mere act of sailing in the same waters in a unilateral manner, regardless of proximity, is not “sailing or testing AC75 Yachts in a coordinated manner with other Competitors”.

[...]

9. To be clear, NYYC - American Magic has not at any time during the 36th America's Cup:

(a) sailed in in a coordinated manner with any other Competitor;

(b) communicated its sailing intentions, made any common sailing arrangements, or made any arrangement to share any information, equipment or marks with any Competitor or their intermediary;

(c) discussed any design and performance information with any other Competitor prior to, or after of, any sailing day;

(d) shared any telemetry or navigation data any other Competitor prior to, during or after sailing.

10. All on-water encounters with other Competitors (including those initiated by the Defender) have been impromptu, casual, brief in nature and never “coordinated”.

[...]

13. With the utmost respect, art 15.1 cannot be rewritten by the Panel by way of an interpretation. The words used are to be applied, not added to or reworded. The

Panel recognised and adopted this approach in its recent award in AC36/13: “The Panel’s task is to decide based on the clear wording of the Protocol, not to engage in what one may consider more fair and equitable,” (paragraph 36). What is not prohibited ought not be now prohibited by interpretation.

14. It is submitted that an appropriate interpretation would be: 3 “Coordinated” means “to act in combined order for the production of a particular result.” For two Competitors to act in a combined order, there must have been communication between those Competitors”.

8. In its Response Ineos Team UK in substance submitted that:

“3. We believe that the intention of Article 15.1 is to prevent Competitors from gaining an unfair advantage through coordinated training with other Competitors. Self-evidently Article 15.1 of the Protocol does not prohibit Competitors practising on the same courses at the same times, nor does it prohibit Competitors from observing the performance of each other’s boats.

4. To achieve coordinated training, then, by reference to the definition laid out by ETNZ in its Application: “To place or arrange (things) in proper position... To act in combined order for the production of a particular result...”, we believe that there needs to be an element of structured and planned organisation.

5. In other words, to put this into context, we believe Competitors would need to pre-agree various aspects of a mock race such as the start time and the racing co-ordinates and debrief afterwards to review the data. Without such pre-agreement or debrief arrangements, Competitors would simply be sailing alongside each other at proximity and trying to follow each other’s moves – this is not planned, this is not organised, and it is therefore not something the Protocol seeks to prevent.

[...]

7. [...] we do not consider it reasonable to draw a conclusion that there has been any breach of Article 15.1 by the Competitors cited in these examples.

[...]

9. The Regatta Director has suggested a different interpretation of Article 15.1 which goes further than our own, stating that the Article is “a limit on activities that result in obtaining the relative performance of yachts... [with the] intent to limit the collection of relative performance data”. 10 We do not agree that the Article is “a limit on activities that result in obtaining the relative performance of yachts... [with the] intent to limit the collection of relative performance data”. It does not say that. It simply says “There shall be no sailing or testing of AC75 Class Yachts in a coordinated manner”. The Race Director’s detailed extrapolation of the purpose and intent is simply not supported by the wording on the paper.

[...]”

9. In its Response COR in substance submitted that:

“7. Luna Rossa also agrees that the OED definitions of the verb “to coordinate” invoked by ETNZ provide some assistance. Coordination as the term is used in Article 15.1 requires some pro-active pre- determination of a shared course of action towards a common end, rather than merely contemporaneous or simultaneous activity in exercise of common rights of access to a course area. Expressed another

way, two or more yachts in proximity, even close proximity, and on the same heading, is not in and of itself “coordination“.

8. Article 15.1 is directed at Competitors who have reached an agreement between themselves to carry out particular sailing or testing evolutions at pre-arranged times, in pre-arranged locations, or in a pre-arranged manner or sequence. Mere similarity of activity in the same course area does not amount to coordination of this kind.

9. Competitors are not only entitled to access the same course area at any time, but should be free to conduct their sailing and testing activity as the situation in that course area allows or dictates. [...]

10. Given the inevitability of proximity, Luna Rossa’s view is that Article 15.1 should therefore not be interpreted in a restrictive way.

[...]

11. The Regatta Director’s expertise is welcomed, but Luna Rossa respectfully notes that interpretation of Protocol provisions, or their use in determining the compliance or otherwise of a particular course of conduct, are matters solely within the jurisdiction of the Panel.

[...]

24. Luna Rossa requests the Panel not, by any ruling on ETNZ’s application, to add further restrictions on sailing or testing activity to the existing terms of Article 15.1 of the Protocol as currently expressed.

25. It further asks the Panel to rule that yachts sailing or testing within 100 metres of each other on the same approximate heading AND more than 30 seconds (i.e. both conditions co-existing) is in breach of Article 15.1. Therefore, if two yachts are sailing or testing with more the 100 metres of each other on the same approximate heading are in compliance, regardless of the duration.

26. It further asks the Panel to rule that yachts sharing practise marks within a course area are compliant with Article 15.1 so long as they do not round or pass the same mark with more than 30 seconds from each other. Luna Rossa also asks the Panel to rule that Article 15.1 is not breached, if each yacht rounds a different mark of the same gate, even if within 30 seconds of each other.

27. Based on the above, Luna Rossa’s position on ETNZ’s questions are as follows:

- (i) Can the teams use the same marks when training to ease congestion in a particular course area? **Yes, as per paragraph 26 above**
- (ii) Is crossing tacks or gybes in close proximity permitted? **Yes when unavoidable due to congestion on the same course area and as per criteria expressed in paragraphs 5 to 10 above.**
- (iii) How long can you be sailing in close proximity on the same tack or gybe without breaking the rule? **See paragraph 25 above**
- (iv) Any other interpretive guidance which the Panel is able to provide. **See paragraph 24 above”.**

ETNZ'S REPLY TO THE RESPONSES

10. On 21 November 2020, the Applicant submitted a Reply to the Responses in which it in substance submitted as follows:

“3. In their submissions the Challengers variously argue that sailing or testing is only “coordinated” for the purposes of Article 15.1 if it occurs in accordance with the prior and express agreement of two or more competitors. However, “coordination” necessarily encompasses implied or “tacit” coordination or agreement. This is a concept well-known to competition/antitrust lawyers. The mischief which is intended to be addressed by Article 15.1 – teams in some way acting in unison in sailing or testing to obtain performance information or some other advantage – is only resolved if “coordination” under Article 15.1 embraces tacit as well as express coordination. Article 15.1 is intended to require competitors to test independently of each other and is intended to prevent competitors acting in concert. Express agreement is not the core concern of Article 15.1, rather it is the act of acting together in some way in circumstances where the competitors ought to be acting independently.

[...]

5. Sailing or testing is “coordinated” where two teams accommodate the actions of another, or act in concert (whether on the basis of an express agreement or not), in a way that enables each to obtain some benefit by doing so. It does not matter whether the coordinated actions result from prior agreement or happenstance, what is significant is that two or several competitors base their actions off the actions of the other(s) to each obtain some benefit or advantage. [...]

[...]

8. In Directions 01 the Panel invited the Regatta Director to submit his views/comments regarding the Application which were submitted on 17 November, the Challengers have questioned his authority in relation to the interpretation.

9. The Defender is of the view that having been invited by the Panel to submit his views/comments, he now has the status of an “appropriate technical expert” under Article 53.5 of the Protocol and the Panel is bound by his advice when delivering their decision.

[...]

Conclusion

20. In making the Application in this case it was our intention to have the Panel provide an interpretation of the rule which would provide clarification and certainty for all teams in their current and future training in Auckland. With the assistance of the Regatta Director and the input of the teams we submit the Panel now has sufficient information to provide such clarification”.

NYYC-AMERICAN MAGIC'S REQUEST FOR "AN OPPORTUNITY TO REPLY TO THE ETNZ'S REPLY"

11. On 23 November 2020, following ETNZ's Reply, NYYC-American Magic has "[sought] leave to register a concern that the ETNZ Reply contains new evidence including the applicability of anti-trust laws that ought to have been included in its originating application rather than introduced into its Reply (Paragraphs 4-7)". As a result, NYYC-American Magic has submitted that the Challengers should be given "an opportunity to reply to the ETNZ's Reply in the manner permitted by Rule 6.1 of the Panel's Rules of Procedure".
12. On the same day, ETNZ submitted that it was "only responding given the need for an urgent decision by the Panel as all four teams are now on the water in Auckland sailing and testing ahead of the upcoming ACWS/Christmas Race from 17-20 December" and commented NYYC-American Magic's submission of 23 November 2020 as follows: "(a) There was no "new evidence" contained in the ETNZ reply; (b) We did not submit that the anti-trust laws referred to were "applicable", the reference to them was by way of an analogy only; (c) The submissions made in our Reply were all in response to the Submissions made by the Challengers".
13. In Directions 02 dated 23 November 2020, the Panel stated that it "considers that ETNZ's Reply of 21 November 2020 does not contain any new matter of evidence which justifies the filing of further submissions. The Panel is mindful of the necessity to decide this Case as a matter of urgency". The Panel thus directed that "In view of Art. 6.1 and 6.2 of the Rules of procedure, the Panel does not consider it necessary or appropriate in this case to seek a further round of submissions in the circumstances. The Panel will now issue its Decision".
14. Art. 5.3.1 of the Rules of procedure provides that:
 - "5.3. The Application shall include:
 - 5.3.1. a statement of the facts and legal arguments on which the application is based, including a brief statement setting forth the basis for the Arbitration Panel's jurisdiction and shall set out the general nature of the matter with sufficient particulars to support the grounds thereof, including the detailed evidence upon which the Applicant relies as well as a reference to any rules considered applicable".
15. Art. 6.1 of the Rules of procedure provides that:

"Unless the Arbitration Panel directs otherwise, following the filing of Responses the Applicant may file a Reply to the Responses. The Arbitration Panel will advise of the time limit within which to file a Reply. Such Reply shall not contain new matters or new evidence unless leave of the Arbitration Panel to do so is obtained".
16. Pursuant to these two provisions, the Panel has discretion to determine and only consider what evidence complies with the Rules of procedure without necessarily requiring further submissions. In particular, the Panel is mindful that the Applicant has mentioned competition law analogies in its Reply. The Panel considers that

this is not a new matter nor new evidence within the meaning of Art. 6.1 of the Rules of procedure, and that in any event a competition law analogy is not directly relevant here.

ACAP JURISDICTION

17. The Arbitration Panel has jurisdiction over this matter pursuant to art. 53.4(a) of the Protocol 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.

DECISION

19. Art. 15.1 of the Protocol provides that:

“There shall be no sailing or testing of AC75 Class Yachts in a coordinated manner with other Competitors except:

 - a) *when participating in official Events; or*
 - b) *when participating in official practice and/or regattas organised during specific periods at nominated venues as mutually agreed by COR/D, and monitored by the Regatta Director”.*
20. In substance, the Panel is here requested to give an interpretation of this provision and in particular of the key issue which is what “*sailing or testing [...] in a coordinated manner*” means.
21. In order to do so, the Panel makes the following preliminary considerations:
 - a) Some of the course areas where the Competitors will be sailing or testing are limited particularly while sailing or testing at high speed. As a result, some course areas are relatively confined and the Competitors will inevitably be often in relatively close proximity;
 - b) Also, there is at times a significant number of recreational and/or commercial marine traffic in the course areas which may further limit the ability of Competitors to sail at a distance;
 - c) Art. 15.1 of the Protocol only applies when Competitors are not participating in official Events or in official practice and/or regattas organized during specific periods at nominated venues as mutually agreed by COR / D and monitored by the Regatta Director;
 - d) The Regatta Director has no authority outside of the Regattas and official practice;
 - e) The request to obtain the opinion of the Regatta Director came from ETNZ not the Panel. While the Panel was happy to receive the Regatta

Director's views, these were not to be treated as those of a "Technical Expert" in terms of Art. 53.5 of the Protocol which provides that such views are binding.

The meaning of "coordinated"

22. As seen above, Art. 15.1 of the Protocol prohibits sailing or testing "*in a coordinated manner*".
23. For a manner to be coordinated it requires both parties to act in concert, i.e. for both of them to have the intention to do so. In other words, it is not a unilateral behaviour; it requires more (unilateral gleaning of information is not covered by 15.1 of the Protocol, but by Art. 55.2 (prohibited activities)). In other words it does not suffice to have two boats sailing on the same course for the coordination condition to be met, a subjective element has to be found on both sides.
24. What is relevant is that coordination happens at any point in time; the fact that it has been pre-arranged is not necessary in order for coordination to exist. In fact, pre-arrangement of coordination is not a condition provided by Art. 15.1 of the Protocol. As a result, even without any pre-arrangement two boats could act in a coordinated manner, for example just giving each other a signal while sailing/training, without having agreed that in advance. Also, coordination can occur without any explicit agreement; a tacit agreement suffices for a coordination to exist, provided there is a reciprocal intention to do so.
25. Art. 15.1 of the Protocol does not provide either for a "benefit" criteria as submitted by one of the Parties. The question is not whether there is a benefit for any Competitor; it is only whether behaviours are coordinated.

What is not prohibited, thus permitted

26. Pursuant to Art. 3.4 of the Protocol "*... there shall be no restriction and access to the course area of the CSS and the Match*". As a result, the Protocol does not prohibit competitors being on the same courses and in the same area, or observing the performance of each other's boats, so long as it is not done in a "coordinated manner". Proximity does not in itself mean coordination.
27. It can however be said that the longer the boats sail close to each other, the greater the likelihood it could be found that they act in a coordinated manner. Although the Regatta Director has no authority with regard to the interpretation of the Protocol, the Panel has considered his suggestion to set that 30 seconds may be an appropriate time limit. The Panel appreciates that the suggestions of the Regatta Director were aimed at providing some helpful parameters to the application of Art. 15.1 of the Protocol, the Panel is of the view that to do so would be adding words and parameters into the said provision it does not contain. Art. 15.1 of the Protocol does not make reference to any given period of time so that the Panel does not consider that it is proper to set any authorised maximum time period with that regard. The same applies to distances: the Panel is not in favour of

setting rigid parameters such as not sailing closer than 100 meters from each other, or using, or not, the same practice marks at any point in time. However if two boats sail within 100 metres of each other for more than 30 seconds, it would become more likely that a breach of Article 15.1 could be alleged.

28. Should there be evidence that any Competitors have sailed or tested in a coordinated manner and that therefore the Panel would find that these Competitors have breached Art. 15.1 of the Protocol, penalties – which could be substantial – would be decided by the Panel.

Panel's answers to the Applicant's specific questions

29. In its Application ETNZ has requested the Panel to answer “*the questions raised by Kevin Sheobridge in his email of 9 November*” as follows:

- (i) Can the teams use the same marks when training to ease congestion in a particular course area?

Panel's answer: Yes, Teams can use the same marks when training, so long as they are not doing that in a coordinated manner; in other words, the simple act of using the same marks is not of itself a breach of Art. 15.1 of the protocol.

- (ii) Is crossing tacks or gybes in close proximity permitted?

Panel's answer: Yes, for the reasons mentioned in (i) above.

- (iii) How long can you be sailing in close proximity on the same tack or gybe without breaking the rule?

Panel's answer: one cannot define a set distance or time, as the article deals with the issue of coordination rather than length of time or distance. But the longer one so sailed, the more likelihood the Competitors would be considered to have sailed or tested in a coordinated manner.

- (iv) Any other interpretative guidance which the Panel is able to provide: The Panel's role is not to provide guidelines, but it can provide an interpretation. In rendering this Decision, the Panel has however been mindful that, in this particular instance, its interpretation needed to be sufficiently detailed so that Competitors are not regularly back before the Panel arguing about whether particular sailing conduct constitutes a breach of the Protocol.

COSTS

30. The Panel is mindful to 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.

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