



36TH AMERICA'S CUP

AMERICA'S CUP ARBITRATION PANEL

ACAP36/16-01

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**"

***In relation to the Conduct of Final Rehearsals of the Race Management Systems
for the PRADA Cup***

8 January 2021

AMERICA'S CUP ARBITRATION PANEL

Case No. ACAP36/16-01

DECISION

THE APPLICATION

1. On 4 January 2021, CVS, Luna Rossa and COR36 filed an application (the "**Applicant**", respectively the "**Application**").
2. At points 2-4 of the Application, the Applicant submitted the following "*Executive summary*":

"2. The Applicant seeks the urgent assistance of the Panel:

- (i) to conduct a Final Rehearsal of the Race Management System ("RMS") and TV Production, as already agreed and budgeted for between the Applicant, the Respondent and the TV and RMS producer Circle-O; and*
- (ii) to bring forward the Final Rehearsal from January 13-14, 2021, to January 11-12, 2021, so as to give more time to Circle-O to address the problems experienced during the ACWS Auckland.*

3. The Respondent:

- a. threatens, without any justification and so as to gain a competitive advantage, to cancel the Final Rehearsal, and replace it with Official Practice Racing despite the lack of agreement by and between COR/D as required by Article 15.1(b) of the Protocol; and*
- b. in an improper attempt to force the Applicant to concede to its demands, has given instructions to ACE's employed staff (some of whom are paid 50% by COR) to prevent the use of the fleet of Protectors during the Final Rehearsal of the RMS and TV Production.*

4. As a consequence of the Respondent's refusal to comply with its contractual obligations, and having regard to the importance of the Final Rehearsal, the Applicant is forced, in the interests of the AC36 and of all Competitors, to request, once again, the assistance of this Panel to stop the unreasonable and illegitimate behaviour of the Respondent".

3. At points 28-29 of the Application, the Applicant makes the following "*Request for urgent relief*":

"28. In light of the above, the Applicant seeks the following relief:

- (i) A declaration that the Applicant is entitled to use the Protectors and the assistant boats and other equipment from now until the end of the PRADA Cup Challenger Selection Series.*
- (ii) An order that the Respondent must withdraw any instructions which it has issued, and is forbidden to give any further instructions, to ACE employees in relation to the use of the Protectors and of the assistant boats and other equipment by or on behalf of the Applicant from now until the end of the PRADA Cup Challenger Selection Series.*
- (iii) An Order that for an appropriate penalty to reflect the fact that this is not the first time that the Respondent has been in blatant breach of its agreements with the Applicant and / or the Protocol.*
- (iv) An Order for the Respondent to pay the costs of this Application.*

29. Having regard to the limited time available (as set out in the Werner email of January 3, 2021), the Panel is asked

- (i) for an expedited decision on or before January 6, 2021 in respect of the relief sought in paragraphs 28(i) and (ii) above, pursuant to paragraph 5.10 of the Rules of Procedure; alternatively
- (ii) for provisional or interim relief on or before January 6, 2021 in respect of the relief sought in paragraphs 28(i) and (ii) above, pursuant to paragraph 13.1 of the Rules of Procedure
- (iii) to issue a summary of its decision as a matter of priority with reasons to follow pursuant to paragraph 15.2 of the Rules of Procedure”.

RESPONSES TO THE APPLICATION

4. On 4 and 6 January 2021, in accordance with the Panel's Directions 01, Ineos Team UK, NYYC-American Magic and the Defender submitted Responses to the Application.

5. In its Response Ineos Team UK submitted that:

“2. We consider that this dispute concerns only the Defender and the Challenger of Record and do not believe our involvement would be helpful or appropriate.

3. We have only two limited comments to make at this stage therefore:

- a. We will participate in the final Rehearsal for the Race Management Systems and can confirm that we are prepared to do so on 11 and 12 January 2021 as proposed by the Challenger of Record.*
- b. If there is Official Practice racing scheduled on these days, we can also confirm we will participate in such practice racing”.*

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

“The Race Management System is a complex electronic system supplied and provided by the organizers and it includes the Media System on board each AC75. For the crew to see the on-board instrument data while racing, such data must first pass through the Media System and from there to the displays and screens of the AC75.

Furthermore, all racecourse information and all umpire calls are managed and received by a competing AC75 by the Race Management System.

[...]

In short, with the failure of the Race Management System no fair racing is possible.

[...]

Leading to the ACWS and during the ACWS, all Competitors have experienced serious failures of the Race Management System and the Media System which fundamentally curtailed their ability to race and foil the boat safely.

New York Yacht Club American Magic have serious concerns that failures will occur again during racing and it supports the conduct of the “Final Rehearsals of the Race Management System” on January 11th and 12th with the expectation that racing in

the Prada Cup and the America's Cup will not be unfairly prejudiced by any electronic failures of the Race Management System or the Media System.

Preventing the means of doing so, will likely lead to further failures during official racing, reputational damage, further claims before the Panel, and possible disruptions to the Event.

On another topic, it is vitally important that all the data from Patriot USA-5 that the organizers receive during these rehearsals is treated with absolute confidentiality.

Since these Final Rehearsals of the Race Management System do not constitute official racing, we consider that Article 30.2 of the Protocol does not apply and that all data from Patriot USA-5 belongs to New York Yacht Club American Magic.

We reserve our right to request the organizers to ensure that the data remains confidential and to request the complete deletion of such data and any copies thereof after the rehearsals.

Finally, we request the Panel to remind COR/D to ensure that "adequate measures are put in place so that performance information of individual yachts is not available to any other Competitor" as required by Article 30.3".

7. In its Response ETNZ in substance submitted that:

"4. For effective testing of the Race Management System (including the electronic umpire system known as Ump Bot) and TV production, ideally two yachts need to be on the course together in a match race situation. This requires the yachts to be sailing in a "coordinated manner". These matters have been confirmed to ETNZ by both the Chief Umpire, Richard Slater and the COR/D head of TV, Stephen Nuttall. ETNZ submits that it is clear that it is in the best interests of the Event for coordinated sailing to occur as part of these tests, and that this is position under the Protocol.

5. The background facts offered by the Applicant conveniently ignore that the dispute between the Defender and the Challenger of Record is wider than just a disagreement over the supply of the fleet of Protector support boats. At the heart of the matter is the disagreement over whether the Final Rehearsal is an official practice permitting coordinated sailing under Article 15 of the Protocol. [...]

[...]

6. ETNZ therefore seeks a ruling from the Panel, based on the grounds outlined in this response, that coordinated sailing between Competitors is permitted at the Final Rehearsal activities planned for 11 and 12 of January on the grounds that the elements of Article 15.1(b) of the Protocol are satisfied.

7. On the basis that it is ruled that coordinated sailing is permitted at the Final Rehearsal under Article 15.1(b) of the Protocol, the ETNZ's position is as follows:

- (a) we agree to the change of date from that specified in the Services Agreement to 11-12 January or such other suitable date around that time (as it is our current understanding that 11-12 January may not be achievable due to problems with availability of personnel and it may yet have to be either 12-13 or 13-14 January); and*
- (b) we accept that the Final Rehearsal can be considered part of the "Auckland Events" under cl 8 of the 2019 Settlement Agreement, and ETNZ will make the fleet of Protectors available".*

8. ETNZ therefore made the following “Comments on remedies”:

“27. ETNZ submits that the relief sought by COR should be refused, and that instead a declaration made that coordinated sailing is permitted at the practice/rehearsal to be held in January 2020. If that declaration is made, ETNZ will allow the Protectors, the assistant boats and any relevant equipment to be used for that purpose.

28. There is no need for the declaration sought by COR that it is otherwise entitled to use the Protectors, the assistant boats, and “other equipment” “from now until the end of the PRADA Cup Challenger Selection Series” because:

(a) There is no dispute that COR is entitled to use that material for purposes of running Auckland Events it is managing; and

(b) The declaration sought by COR goes beyond its entitlements. COR is not entitled to generally use the Protector boats from now until the end of the PRADA Cup. Rather, it is only entitled to use those boats as needed to manage the PRADA Cup.

29. Similarly, there is no need for an order that ETNZ withdraw any instructions, and preventing ETNZ from giving any instructions, to ACE employees in respect of use the same equipment by COR from now until the America’s Cup. No such instructions have been given, nor will they be given if COR is using the equipment within the scope of its entitlements.

30. COR’s application asserts, without foundation, that ETNZ is adopting a position designed to “gain a competitive advantage”, that ETNZ wishes to “cancel the Final Rehearsal, and replace it with Official Practice Racing”, and that ETNZ has variously acted “improperly”, “unreasonably”, “illegitimately”, “opportunistically” and “petulantly”. COR’s use of such adjectives are inaccurate and unhelpful. ETNZ’s position is that the Protocol permits coordinated sailing at the practice to be held in January 2021, and that it is in the best interests of the Event that this occur. COR has taken a different view, and this has led to several further disputes between COR/D. The purpose of this Panel is to resolve disputes between the competitors, and it has helped the Competitors (including COR/D) to constructively resolve several disputes throughout this America’s Cup cycle. The position taken by COR in this application—that the Panel should order a penalty against ETNZ and order that ETNZ pay the costs of the application—is wholly without merit and should be rejected”.

COR’S REPLY TO THE RESPONSES

9. On 7 January 2021, the Applicant submitted a Reply to the Responses in which it in substance submitted as follows:

“7. ETNZ now seeks to argue that the Final Rehearsal is an “official practice” within the meaning of Article 15(1)(b). It is not. To be an “official practice” there has to be mutual agreement to that effect by COR/D. As ETNZ implicitly accepts, and as evidenced by the email from Mr Plazzi quoted in paragraph 12 of ETNZ’s Response, there is no such mutual agreement. Moreover, the Prada Cup Conditions do not contain official practices (previously official practice days have been expressly agreed in the Conditions, see ACWS Auckland Conditions). [...]

[...]

9. The “Rehearsal” (page 39 of Exhibit 2a), as its name suggests, is the final stage of the testing required to ensure that broadcast coverage of the Challenger Selection Series is fully functioning and satisfactory, which is in the interests of that Event (and the Match to follow). It is incorrect to characterize it as one of the agreed exceptional circumstances under the Protocol in which practice racing, or co-ordinated sailing with other Competitors can occur. The obligations undertaken by Circle-O to test its RMS in a Final Rehearsal are wholly unrelated to any ‘official practice’ within the meaning of Article 15.1(b).

10. It is also wrong to imply or suggest that the Final Rehearsal requires or will in any way involve sailing or testing yachts in a co-ordinated manner. The needs of the Final Rehearsal can be met by having successive Challengers sail the nominated course, using marks laid and at timings supplied by the Regatta Director, all within the terms of the Panel’s previous ruling on Article 15.1 in ACAP 36/15-01.

11. By taking part in the Final Rehearsal, Competitors will not be performing official practices (as per Article 15 of the Protocol), but carrying out and assisting with tests for the RMS and the TV production to be used in the Prada Cup.

[...]

14. Clause 8 of the 2019 Settlement Agreement provides:

“ETNZ will supply a fleet of 18 Protectors for the COR Race Management for use in Auckland events ...”

In the light of ETNZ’s argument it may be relevant to note that the obligation is for ‘Auckland events’, not ‘Auckland Events’ as suggested by ETNZ in paragraphs 23 and 24 of its Response.

[...]

16. The Applicant submits that it cannot seriously be suggested that ETNZ’s obligation to supply Protectors is restricted only to the Auckland Events, but not to the preparatory activities for those Events, such as testing the RMS. Moreover, ETNZ’s latest position is inconsistent with its previous conduct. Protectors were (correctly) supplied by ETNZ and were used several days in advance of the ACWS.

17. The threat by the Respondent not to supply the Protector fleet for the Final Rehearsal is a clear breach of the Settlement Agreement. As the Respondent knows, these tests are essential for the PRADA Cup, and for the credibility of the America’s Cup generally.

[...]

18. The Applicant agrees with American’s Magic’s submission that Article 30.2 of the Protocol does not apply to the Final Rehearsal, and makes no claim to or over any data and information from Patriot USA-5 produced during the Final Rehearsal”.

RESPONDENT’S FURTHER SUBMISSION

10. On 8 January 2021, Respondent submitted unsolicited comments regarding Applicant’s Reply, in particular that “Having read the Applicant’s Reply filed in this case, if the Panel requires ETNZ to formalise its request for a ruling regarding the interpretation of “official practice” by filing a separate application and paying a separate application fee, it is ready and willing to do so. However, we contend this should not prevent a pragmatic and constructive resolution of the linked issues in

dispute regarding the imminent Final Rehearsal which need to be resolved in the interests of the Event”.

11. The Panel considers that there is no need for a separate Application by Respondent as this issue is covered by the present decision.

ACAP JURISDICTION

12. 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.
13. Words used in this Decision have the meaning as defined in the RoP.

DECISION

14. In substance, the Panel is requested to answer the following questions which it will do hereunder, with reasons:

Applicant’s “Request for urgent relief” (point 28 of the Application):

Request 1: *“A declaration that the Applicant is entitled to use the Protectors and the assistant boats and other equipment from now until the end of the PRADA Cup Challenger Selection Series”.*

The Panel is of the view that the Final Rehearsal of the Race Management System and TV Production is part of the Auckland events as referred to in the Agreement entered into between COR/D on 27 February 2019 (Exhibit 1 submitted by COR), the Auckland events being an official Event in the sense of Art. 15.1.a) of the Protocol. As a result, pursuant to point 8 of the Agreement dated 27 February 2019, the Respondent must supply the Protectors fleet, assistant boats and other equipment for this Final Rehearsal. The Respondent has agreed in its submission to do so.

Such Final Rehearsal will take place under the direction and control of the Regatta Director.

The Competitors shall not be precluded from sailing “*in a coordinated manner*” in the sense of Art. 15.1.a) of the Protocol (because the Final Rehearsal is part of an official Event), but this will occur under the control of the Regatta Director.

Also, the Applicant and the Respondent being in agreement with that regard, the Panel accepts that the Final Rehearsal can take place on January 11-12, 2021 instead of January 13-14, 2021.

Request 2: *“An order that the Respondent must withdraw any instructions which it has issued, and is forbidden to give any further instructions, to ACE employees in relation to the use of the Protectors and of the assistant boats and other equipment by or on behalf of the Applicant from now until the end of the PRADA Cup Challenger Selection Series”.*

See the Panel’s decision regarding Request 1.

Request 3: *“An Order that for an appropriate penalty to reflect the fact that this is not the first time that the Respondent has been in blatant breach of its agreements with the Applicant and / or the Protocol”.*

The Panel considers that the Application was essentially aiming at clarifying points of disagreement between the Applicant and the Respondent which is done through this decision and that a penalty is not justified.

Request 4: *“An Order for the Respondent to pay the costs of this Application”.*

See below point 15.

NYYC-American Magic’s request:

Request 5: *“[...] we request the Panel to remind COR/D to ensure that “adequate measures are put in place so that performance information of individual yachts is not available to any other Competitor” as required by Article 30.3”.*

As far as confidentiality of each Competitor’s equipment and data is concerned, since the Event and any part thereof is conducted under the control of the Regatta Director, the latter will ensure compliance with the Protocol and, in particular, with Art. 30.3 thereof.

ETNZ’s request:

Request 6: *“ETNZ therefore seeks a ruling from the Panel, based on the grounds outlined in this response, that coordinated sailing between Competitors is permitted at the Final Rehearsal activities planned for 11 and 12 of January on the grounds that the elements of Article 15.1(b) of the Protocol are satisfied”.*

See the Panel’s decision regarding Request 1, reminding that Art. 15.1.b) of the Protocol applies only to the extent in which COR/D mutually agree.

COSTS

15. The Panel is mindful to decide that costs are to be shared equally between the Applicant and the Respondent, unless they submit otherwise, with reasons, **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