



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

**AMERICA'S CUP ARBITRATION PANEL**

**ACAP36/17-01**

**IN THE MATTER**

of the Protocol  
governing the 36<sup>th</sup> 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**"

***In relation to Event Branding Requirements***

**11 January 2021**

**AMERICA'S CUP ARBITRATION PANEL**

**Case No. ACAP36/17**

**PRELIMINARY DECISION**

## THE APPLICATION

1. On 5 January 2021, CVS, Luna Rossa and COR36 filed an application (the "**Applicant**", respectively the "**Application**").
2. At point 1 of the Application, the Applicant submitted the following "*Executive summary*":

*"1. This Application is filed to request the Arbitration Panel of the 36th America's Cup (the "**Panel**") to:*

*a. direct the Rules Committee to apply Article 31 of the Protocol and the COR/D Notices Nos. 16 and 19 section relating to the yacht branding, published on 30 June 2019 and 25 July 2019 respectively ("**Event Branding Requirements**") and/or amend AC75 Class Rule 30.1 by incorporating the "Event Branding Requirements" specified under AC75 Class Rule 34.1; and*

*b. declare that implementation by any competitor of AC75 Class Rule Interpretation 066 in such a way as to preclude strict adherence to the specified Event Branding Requirements shall not:*

- i. excuse any Competitor's non-compliance with its Event Branding Requirements; nor*
- ii. provide any justification under AC75 Class Rule 33.1 (b) for the Rules Committee not to amend Rule 30.1 as required."*

3. At points 29-30 of the Application, the Applicant makes the following "**REQUEST FOR RELIEF and INTERIM MEASURES**":

*"29. In light of the above, the Applicant seeks declarations and / or an order that:*

*a. directs the Rules Committee to apply the Event Branding Requirements and specifically COR/D Notice 16 as per article 34 of the AC 75 Class Rules and/or amend AC75 Class Rule 30.1 by incorporating the Event Branding Requirement (being COR/D Notices No 16, published on 30 June 2019 under AC75 Class Rule 34.1); and*

*b. declares that implementation by any competitor of AC75 Class Rule Interpretation 066 in such a way as to preclude strict adherence to the specified Event branding requirements shall not:*

- i. provide any justification under AC75 Class Rule 33.1 (b) for the Rules Committee not to amend Rule 30.1 as required; nor*
- ii. excuse any Competitor's non-compliance with its Event branding obligations.*

*30. Having regard to the limited time available before the start of the Prada Cup, the Panel is asked:*

*a. for an expedited decision on or before 13 January 2021 - (noting that the first race day of the Prada Cup is 15 Jan) - pursuant to paragraph 5.10 of the Rules of Procedure; alternatively,*

*b. for immediate provisional or interim relief in respect of the relief sought in paragraphs 29.b above, pursuant to paragraph 13.1 of the Rules of*

- Procedure; and to order Competitors not to use any sails that do not comply with the Event Branding Requirements until this case is finally decided; and*
- c. *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."*

## **RULES COMMITTEE'S INITIAL RESPONSE TO ACAP CASE 17 APPLICATION**

4. On 7 January 2021, in accordance with the Panel's Directions 01 dated 5 January 2021, the Rules Committee submitted an "Initial response", which includes the following:

### **Jurisdiction**

The Rules Committee recognizes the jurisdiction of the Arbitration Panel under Protocol Article 53.4 to resolve ACAP Case 17 within the following limitations:

- a) The limitations detailed in Protocol Article 21.1, 53.4 a) and 53.5.
- b) The fact that the Rules Committee is the sole responsible for the interpretation of the AC75 Class Rule as stated in Protocol Article 21.2 and AC75 Class Rule 32.1 and 35.96.

[...]

1. We believe that the wording of Article 14 of the PRADA Naming and sponsorship agreement is consistent with the AC75 Class Rule. It is possible for a Competitor to place logo's specified by PRADA on any part of the top 25% of the mainsail.
2. The Class Rule has no minimum mainsail area. If COR/D Notice 16 had created a minimum mainsail area, then such an amendment would not have been a valid 'event branding' amendment applied via Class Rule 33.1(b) as it introduces a new limit on the design of the mainsail.
3. The Rules Committee continue to offer to work with COR/D, and in particular COR and CVS to find an alternate solution which satisfies the contract without affecting the competition.
4. A possible solution:
  - Competitors, if necessary, shall either:
    - i) fold the adhesive vinyl around the leech or
    - ii) cut such small areas of adhesive and fix them to the sail skin at the same height either under the Official Event Logo or in the inside surface of each sail skin.In that way the weight of the Official Event Logo will remain the same and at the same location.
  - If COR/D chooses, new sail stickers, where the sticker is the same size and weight but where the printed logo is smaller may be provided to Competitors. If these stickers are supplied, Competitors shall use them.  
This gives COR/D the option to print slightly smaller logos that would be clear of the areas that would be folded or cut. Because the overall sticker is the same size and weight there would be no performance impact.

## **RESPONSES TO THE APPLICATION**

5. On 8 and 9 January 2021, in accordance with the Panel's Directions 01, Ineos Team UK, NYYC-American Magic and the Defender submitted Responses to the Application.

6. In its Response Ineos Team UK “*urge[d] the Panel to reject the Application*” and in substance submitted as follows:

3. We are disappointed to find that, at this late stage, the Challenger of Record is seeking what is effectively a change to the sail design requirements and permissions of the Class Rule – simply because of their desire to accommodate a specific size of logo.
4. All Competitors and all interpretations of the Class Rule by the Rules Committee have relied on the specific requirements of the Class Rule.
5. The Challenger of Record submits that the change is needed because of the requirements of the Brand Manual. However, it is clear from Article 16 of the Protocol that the Class Rules takes precedence over anything set out in the Brand Manual. There is no reference to the Brand Manual in the hierarchy of rules which govern the Event as laid out in Article 16.1 and Article 31 of the Protocol requires only that Competitors “*respect the Brand Manual*”.
6. This situation could have been avoided had the Challenger of Record issued the Brand Manual by its required publication date of 31 March 2019. It did not, and it also then failed to work with the Rules Committee to seek amendment to the Class Rules following publication of the Brand Manual via COR/D Notices 16 and 19 which were published on 30 June 2019 and 25 July 2019.

7. In its Response NYYC-American Magic “*request[ed] to the Arbitration Panel to dismiss the application by the Challenger of Record with imposition of the full costs of these proceedings upon the Challenger of Record*”. NYYC-American Magic in particular submitted the following:

This application by the Challenger of Record is an abuse of procedure to seek a competitive advantage for its team, Luna Rossa Challenge through prejudicing New York Yacht Club American Magic by negating the right to use its mainsails that comply with all the Rules, including the Protocol and the AC75 Class Rule.

The size and dimensions of a mainsail are governed by the AC75 Class Rule and not by the size of the provided sticker with the event branding.

[...]

## **2.-Breach of the Protocol by the Challenger of Record.**

On the issue of branding the Challenger of Record breached its own Protocol as Article 31 required the Challenger of Record to publish the "Brand Manual" no later than the 31<sup>st</sup> of March 2019.

The Challenger of Record did not do so.

In fact, the "Brand Manual", has never been published by COR/D.

Notice to Competitors 16 (published three months after the deadline) refers to the "Event Branding according to the AC75 Class Rule – Article 30". Such Notice to Competitors does not mention the "Brand Manual", nor relate to, in any way, Article 31 of the Protocol.

Notice to Competitors 19 refers to "Team Brand Guidelines". Again, there is no reference in any of these documents to the "Brand Manual" or Article 31 of the Protocol.

Additionally, the "Guidelines" and a "Manual" are clearly different things.

Despite what the Challenger of Record says in paragraph 18 of its submission which reads:

**"18.-COR considers that the position presently adopted by the Rules Committee in relation to incorporation of the "Event branding" issued as COR/D Notice 16, which is also part of the Brand Manual published under Protocol Article 31, is misconceived."**

The reality is that Notice 16 does not include the "Brand Manual" of Article 31 of the Protocol. Instead, Notice 16 refers to "Event Branding" in relation to Article 30 of the AC75 Class Rule.

[...]

## **4.-Negligence of the Challenger of Record.**

On the issue of branding the Challenger of Record failed to understand that the Class Rule does not impose any obligation of minimum area to mainsails.

There is no such a thing as a "Minimum Sail Size" referred to the mainsail as mentioned in Notice 16.

Should the Challenger of Record have consulted with the Rules Committee, or with this Competitor, before publishing such document, the Challenger of Record would have avoided such a fundamental misunderstanding and these proceedings.

There has been no minimum area requirement for any mainsail since the publication of the Class Rule.

Interpretation 66 does not change the Class Rule, it just interprets it.

The Challenger of Record in its applications continues to sustain (in error) that there is a minimum size of the mainsail!

[...]

**6.-Allegations of the Challenger of Record that New York Yacht Club American Magic has infringed the Protocol.**

Paragraphs 10, 14, 24 and 26 of the application of the Challenger of Record are directed to New York Yacht Club American Magic so we are forced to reply to those paragraphs.

**COR Application parr. 10:**

"10.-COR's concerns proved to be justified as shown by an example of non-compliance by a Competitor with branding obligations imposed on all Competitors by Article 31 of the Protocol (photograph attached as **Exhibit 5**). A main sail produced by American Magic has insufficient actual area to accommodate the Event Logo sticker required by the Event Branding Requirements. Essentially, American Magic has affixed a "cut down" version of the Event Logo sticker to the available remaining area of main sail."

Article 31 of the Protocol requires Competitors to display the "branding and advertising" ... "For the whole or any part or part of any Event, **including the preparation thereof**."

*Patriot* is sailing in New Zealand in preparation of the Event, therefore Article 31 of the Protocol applies.

The remedy for this alleged non-compliance was for the Challenger of Record to initiate proceedings before the Arbitration Panel as per the Rules within ten (10) days of the alleged breach. Such process would have allowed New York Yacht Club American Magic the right to be heard, allow due procedure, and allowed the consideration of eventual remedies well before the start of the Challenger Selection Series.

Having waived the right to initiate proceedings then, now the Challenger of Record has no grounds to claim that this Competitor is in breach of the Protocol. This is precisely the purpose of the timing requirements and deadlines for claims established in the Rules.

[...]

**7.-Any Amendment to the Event Branding is now forbidden unless it has the unanimous consent of Competitors.**

AC75 Class Rule article 34.1 clearly establishes that the Event branding specifications may be amended provided they are published at least 180 days prior to the first day of racing of the Event in which these specifications apply.

The deadline has well passed.

In less than one week we will start the Challenger Selection Series and in less than sixty (60) days the 36<sup>th</sup> America's Cup Match will be under way.

Any amendment of the Event Branding without the unanimous consent of Competitors per AC75 Class Rule 33.1 (a) is in breach of the Rules.

The AC75 Class Rule has already been modified by unanimous agreement of Competitors more than twenty (20) times.

8. In its Response ETNZ submitted that:

9. The Defender fully supports the Rules Committee position set out in its Response and considers their offer to continue to work with COR/D "to find an alternate solution which satisfies the contract without affecting the competition" is the appropriate way to resolve this dispute. We do not agree with new smaller stickers being issued (given the harangue and expense for the Competitors who are already fully compliant) but would agree with an arrangement such as the first alternative in paragraph 4 of the Rules Committee Response.
10. It is imperative that any adjustment ensures that the displayed Event branding in the upper portion of a Competitor's mainsail remains identical in weight to that carried on all other Competitors mainsails.

## COR'S REPLY TO THE RESPONSES

9. On 10 January 2021, the Applicant submitted a Reply to the Responses in which it in substance submitted as follows:

### C. SUMMARY

#### COR POSITION

13. There are now two sets of rules: the branding requirements provided by the Title Sponsor Agreement and guaranteed by the Protocol and the AC 75 Class rule Interpretation 66 concerning the dimensions and structure of the mainsail. Unless clarity is achieved in a way which properly respects the contractual rights and expectations of the Title Sponsor, there is a potential risk for a dispute with the Title Sponsor.
14. COR sought to resolve this problem through the Rules Committee, but without success, which is why it is now necessary to seek the assistance of the Panel.
15. COR submits that:
- Protocol Article 31 and COR/D Notice No.19 which has been issued pursuant that Article, has precedence over the AC75 Class Rules. Protocol Article 16.2 states that any conflict between the provisions of such documents shall be resolved in favour of the document first listed, being in this case the Protocol; and
  - The Event branding specification issued as COR/D Notice 016 is, in any event, part of the Class Rule, incorporated by reference pursuant to Rules 30.1 and 34.1.
16. As a consequence, any Competitor when building their sail was always required to strictly adhere to the specified Event branding requirements and display the stickers in the requested dimensions and position as set out in the Event Branding Requirements.
17. We disagree with the Defender's argument (paragraph 6 of its Response) that
- "the Class Rule takes precedence over anything contained in the Brand Manual which is not in itself a rule of the Protocol, Article 31 merely requires Competitors to respect the Brand Manual, a separate document"*.
18. Protocol Article 31 states expressly that
- ... branding and advertising, including, without limitation, on Competitors and their Team Members, Regatta Officials, AC75 Class Yachts, support boats, official boats, bases, clothing, etc. shall **always** respect the brand manual (the "Brand Manual").*
19. It is not clear what the Defender means when it says Article 31 "merely" requires Competitors to respect the Brand Manual. As is clear from Article 31 this is a mandatory requirement. A class rule which purports to contradict what has been agreed with the Title Sponsor in the Brand Manual is a clear breach of Article 31, which takes precedence over that purported rule.
20. Further, the Event branding specification issued as COR/D Notice 16 was already identified in AC75 Class Rule 34.1 and the table in that rule.

#### PRACTICAL SOLUTIONS

21. The Rules Committee has said that it is willing to work for practical solutions.

While the Applicant maintains its position as to the pre-eminence of Article 31 of the Protocol and the related Event Branding Requirements over the AC75 Class Rule, it is also willing to constructively work with Rules Committee and the Title Sponsor for a practical solution to resolve the impasse.

In the interim, COR respectfully seeks the Arbitration Panel to order Competitors not to use any sails which do not comply with the Event Branding requirements.

## ACAP JURISDICTION

10. 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.
11. Words used in this Decision have the meaning as defined in the RoP.

## PRELIMINARY DECISION

12. The Applicant has asked the Panel “*for immediate or interim relief in respect of the relief sought in paragraph 29.b [of the Application], pursuant to paragraph 13.1 of the Rules of Procedure*”. The Panel does not consider that the conditions to grant an interim relief as foreseen in Art. 13.4 of the RoP are met. In particular, based on its careful analysis of the case and of all submissions and documents filed, the Panel does not consider that, *prima facie*, “*the Applicant is likely to succeed on the merits*”. As a result, the Panel declines to grant the Applicant’s request for interim relief.
13. The Panel is however mindful of the urgency and importance of the matter as well as of the legitimate interests of the Title Sponsor. As proposed by the Rules Committee, COR and ETNZ, the Panel invites the Competitors to endeavour to agree on a practical solution to the present dispute. To that effect, the Panel grants the Competitors until **6pm (New Zealand time) on 13 January 2021** to find an agreed solution, working together with the Rules Committee. Should no agreed solution be found by that time limit, the Panel will issue a final decision.
14. This preliminary decision shall remain confidential until an agreement is found and the terms of any such agreement conveyed to the Panel by the Applicant, or a final decision is issued by the Panel.

## COSTS

15. A decision on costs will be taken by the Panel in due time.

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