



## AMERICA'S CUP ARBITRATION PANEL

**ACAP36/19**

**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**"  
or the "**Challenger**"

*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:* Presence of the Challenger representative on the On Water  
Operation Center yacht and access to TV production control room**

**11 March 2021**

**AMERICA'S CUP ARBITRATION PANEL**

**Case No. ACAP36/19**

**DECISION**

## PROCEEDINGS

### The Application

1. On 10 March 2021, CVS, Luna Rossa and COR36 filed an application (the "**Applicant**" or the "**Challenger**", respectively the "**Application**").
2. At point 16 of the Application, the Applicant submitted the following "REQUEST FOR RELIEF AND INTERIM MEASURES":

*" 16. The Challenger seeks:*

- a. Immediate interim measures to have the Challenger's representative (identified by the Challenger as Matteo Plazzi) permitted to be on board the OWOC boat throughout pre-race operations and throughout racing on the first day of the Match, Wednesday 10 March 2021;*
- b. An Order that the Challenger's identified representative be carried on board the OWOC boat during all other pre-race operations and racing on all other days during the Match; and*
- c. An Order that the production, editing and delivery of broadcasting be carried out for proper editorial purpose, be consistent and equalized as between the two Competitors.*

*In consideration of the imminent start of the Match today , the Applicant requests the Panel to proceed on an expedited basis under paragraph 5.10 of the Rules, specifically with respect to the relief under a) above."*

### Panel's Directions 01

3. On 10 March 2021, the Panel's Chairman issued - by email in view of the urgency of the matter (and posted on ECAF subsequently) - Directions 01 which provided as follows:

*"Dear all*

*No interim orders will be made today in view of the late time frame, and availability at such short notice of all members of the Panel*

*Further orders*

*1 D to file by midday tomorrow NZ time any response to the application*

*2 LR to file by 4 pm tomorrow any reply to the Response*

*Regards*

*David Tillett"*

### Response to the Application

4. On 11 March 2021, in accordance with the Panel's Directions 01, the Respondent filed a Response to the Application in which it in substance submitted that:

- (i) the Panel had no jurisdiction to deal with the issues which were the subject matter of the Application; and
- (ii) the Application should be rejected in full.

### **Reply to the Response**

5. On the same day, the Applicant submitted a Reply to the Response in which it in substance reaffirmed its position adding a reference to the Venue Management Agreement (VMA).

### **Respondent's request to file a further Submission**

6. On 11 March 2021 Respondent submitted to the Panel that the Applicant's reply contained significant new matters not raised in the Application and requested leave to file a further Response to address these matters and, as the Panel had initially set at 7.30 p.m. deadline, more time to do so. The Panel hereby decides not to grant that possibility to Defender in view of the fact that the Panel considers that this is not necessary in the light of the outcome of this decision.

### **DECISION**

7. The Panel will address, in turn, the two issues raised in the Application, namely, first, the presence of Challenger representative on OWOC (On Water Operation Center) yacht and, second, the access to the TV production control room at the IBC (the "**Control Room**").

### **FIRST ISSUE: PRESENCE OF CHALLENGER REPRESENTATIVE ON OWOC**

#### **The Parties Submissions**

8. In its Application, COR states that:

#### ***"B. PRESENCE OF THE CHALLENGER REPRESENTATIVE ON OWOC YACHT***

*2. The Challenger has requested the attendance of its representative on the boat of the On Water Operations Centre.*

*In first instance, Martin Paget of ACE Ltd as OA verbally advised that the presence on board the OWOC's boat Resolution III was no longer possible due to Covid Alert 2 restrictions.*

*Subsequently, the Defender through its legal advisor (who represents both ACE and ETNZ) questioned whether any rule required the presence of the Challenger's representative on board the OWOC boat.*

*The Challenger views this as a clear attempt to exclude the Challenger's representative from an Official boat during the Match.*

*See all recent correspondence attached as **Exhibits 1 and 2**.*

*3. The Challenger challenged this exclusion, but it has been met with a continuing refusal to allow this level of co-ordination, and is left with no choice but to invoke the assistance of the Arbitration Panel.*

4. On board of OWOC there are representatives from all the agencies and authorities involved with the Event (in this context, the Match itself), together with representatives of ACE. Their role is to ensure that all the safety requirements are satisfied before handing the control of the restricted water space over to the Regatta Director. This generally happens 15 minutes before racing can start and it is at this stage that Martin Paget as the On Water Operation Manager sends a message to the Regatta Director to proceed.

5. According to HVA 9.3 a) iv), HVA:

9.3 iv) ACE, in coordination with the Challenger of Record and the Regatta Director, is responsible for all aspects of the on-water delivery of the Events, including for management of the Race Courses, the On-Water Spectator Areas and the Race Access Corridors, i.e., spectator management, including the adoption of a preventative approach to spectator safety and event management, and escorts in and out of the harbour; ... This wording clearly contemplates the involvement of the Challenger of Record in these processes.

6. Furthermore, the presence of a representative of the Challenger on board OWOC is self-evidently a means of ensuring impartiality and transparency of the processes which impact so directly the decision-making and actions of the Regatta Director in and about the conduct of the Match, and ultimately its proper outcome.

7. The presence as observer of the Challenger's representative helps guarantee that the process is equitable, run with independence, and in all respects in compliance with Article 16.2 of the Protocol."

9. And based thereof it requests:

"a. Immediate interim measures to have the Challenger's representative (identified by the Challenger as Matteo Plazzi) permitted to be on board the OWOC boat throughout pre-race operations and throughout racing on the first day of the Match, Wednesday 10 March 2021;

b. An Order that the Challenger's identified representative be carried on board the OWOC boat during all other pre-race operations and racing on all other days during the Match; and"

10. In its Answer the Defender submits that:

**"PRESENCE OF THE CHALLENGER REPRESENTATIVE ON OWOC  
No jurisdiction**

1. The Challenger purports to seek to enforce an obligation it says arises under the Host Venue Agreement (HVA), a contract between ACE, ETNZ and the Hosts (Auckland Council and the Sovereign in right of New Zealand). The Challenger is not a party to the HVA.

2. The jurisdiction of the Panel is as set out in Article 53.4 of the Protocol. The Challenger purports to rely on Article 53.4(e) which provides:

to resolve any disagreement between RNZYS and the Challenger of Record and in particular in respect to the Race Conditions or Rules.

3. "RNZYS" is defined to mean "the Royal New Zealand Yacht Squadron and its representative team, Emirates Team New Zealand". This does not include ACE, the organising authority for the Event. ACE is not a party to the Protocol and the Panel has no jurisdiction over it<sup>1</sup>. Even if the Challenger is correct that ACE is in breach of some obligation in the HVA (which is denied), the Panel has no jurisdiction to order ACE to take, or refrain from taking, any step.

4. In any event, the Defender does not accept that Article 53.4(e) was intended to, or has the effect of, granting the Panel jurisdiction over disputes connected to private and independent contractual agreements between only ETNZ, ACE and third parties. Again, the Challenger is not a party to the HVA. This interpretation is demonstrated by the express reference in Article 53.4(e) to Race Conditions or Rules, both matters that are squarely within the ambit of the Protocol and which do not include the HVA.

### **No Contractual Entitlement**

5. To support its application the Challenger points to cl 9.3(a)(iv) of the HVA. The Challenger is not a party to the HVA and it does not create any contractual entitlements for the Challenger. The Defendant submits that this is a complete answer.

6. In any event, cl 9.3 of the HVA sets out a detailed structure for the management of Race Courses, and it is necessary to situate cl 9.3(a)(iv) in the context of that provision.

a) Clause 9.3(a)(i) provides that the Regatta Director, in compliance with the law and the directions of relevant government authorities, is responsible for selecting the Race Course to be used each day.

b) Clause 9.3(a)(ii) provides that ACE and ETNZ (and not COR) are responsible for consulting the Inter-Agency Steering Group (which includes the Hosts, the Harbourmaster, and a New Zealand Police representative) "in relation to access to and use of, the Race Courses, the Race Access Corridors and the On-water Spectator Areas".

c) Clause 9.3(a)(iii) provides that the HVA does not limit the powers of the Harbourmaster and New Zealand police.

d) Clause 9.3(a)(iv) provides that ACE is responsible for all aspects of the on-water delivery of the events, and that it is to coordinate with COR and the Regatta Director in doing so. That is, ACE bears sole contractual responsibility for these matters, and COR bears no responsibility. These matters include "management of the Race Courses, the On-Water Spectator Areas and the Race Access Corridors i.e. spectator management, including the adoption of a preventative approach to spectator safety and event management, and escorts in and out of the harbour".

e) Clause 9.3(a)(v) then provides that ACE and the Hosts will work in conjunction and co-operation with the Harbourmaster and the New Zealand process to obtain unrestricted access to the Race Courses.

f) Finally, cl 9.4(b) provides that "all costs associated with ACE obtaining access to the Race Course will be met by ACE".

7. It is clear that ACE, and not the Challenger, is responsible for the management of the Race Courses and associated areas, and that ACE is solely responsible for on-water delivery. Other official government agencies, like the Harbourmaster and the New Zealand Police also, of course, have important roles to play (it is the Harbourmaster, for example, not ACE, who has the power to declare that the course is clear and that racing may start). As cl 9.3(a)(iii) of the HVA clearly records, its provisions are always subject to the directions and authority of the Harbourmaster and the New Zealand Police.

8. If the parties intended for the Challenger to have a role, then they would have provided for one in the HVA (and they would have made the Challenger a party). Instead, cl 9.4(a)(iv) simply provides for ACE to "coordinate" with COR when fulfilling its responsibilities. This was intended to reflect the fact that COR was the organising authority for the Prada Cup, and does not create some general role for the Challenger in the on-water delivery of the Match2. That "coordination" in cl 9.4(a)(iv) is connected only to COR's role in organising the Preliminary Regattas (including the Christmas Race and the Prada Cup) is clear from COR's own correspondence which is recorded in recital D to the HVA:

9. Contrary to the Challenger's submissions, there is no contractual right in the HVA for it to have a representative on the OWOC boat. All the HVA provides is that ACE's on-water management will be "coordinated" with COR and the Regatta Director (and, as noted, this "coordination" does not extend to the Match). There is no role for any Challenger representative on the OWOC boat, and any unlikely "coordination"

*needed with the Challenger on the day can be achieved through a telephone or radio. A Challenger representative may only be on the OWOC boat if ACE, in its discretion, decides to invite such a representative on board.*

*10. The veracity of this interpretation is demonstrated by a simple counterfactual in which COR's sailing team had lost the Prada Cup, meaning some other challenger participated in the Match:*

*a. It could not be the case that that other Challenger had some right under the HVA to have a representative on the OWOC boat, because that other Challenger would not be a party to the HVA; and*

*b. Had COR's sailing team lost the Prada Cup there would be no conceivable reason for COR to nevertheless have a representative on the OWOC for a Match in which COR was not participating and was not the organising authority.*

*11. The Challenger submits (at [6] of its application) that it is necessary for it to have a Challenger representative on the as "a means of ensuring impartiality and transparency of the processes which impact so directly the decision-making and actions of the Regatta Director in and about the conduct of the Match, and ultimately its proper outcome". This might explain why the Challenger wants a representative on the OWOC boat, but the Challenger's wish does not, and cannot, create a contractual obligation where none exists. The Challenger appears to suggest that its "observer" is needed to help "guarantee that the process is equitable, run with independence and in all respects in compliance [sic] with Article 16.2 of the Protocol". However, there is nothing in the Protocol that entitles the Challenger to an "observer" on the OWOC boat (and that is certainly not the effect of Article 16.2 of the Protocol).*

*12. There is no reason to believe that the ACE representatives, officials and public authority representatives on the OWOC boat will behave partially, inequitably, or contrary to the Rules. The Challenger has presented no such evidence supporting any suggestion of potential misconduct by those on the OWOC boat, and any such suggestion is rejected by ACE in the strongest possible terms. Significantly, it is an independent public authority official, the Harbour Master, who makes the determination whether the Race Course is clear for racing, not ACE which only communicates that decision to the Regatta Director.*

*13. The Challenger, having failed to demonstrate any legal or factual basis on which this Panel could require its "observer" to be included on the OWOC boat, should have its application rejected and costs awarded against it.*

**No Practical Ability**

*14. We are fortunate, in New Zealand, to be able to hold an international event of this scale and significance. However, those circumstances are not the product of luck. Rather, New Zealand is in a position where the America's Cup Events have been able to go ahead because the Government has adopted effective regulatory measures to contain and eliminate COVID-19, and because New Zealanders have supported those measures by adhering to them. This is a matter that the Defender and ACE take extremely seriously.*

*15. Auckland is currently operating under Alert Level 2 COVID-19 restrictions. These are prescribed under the COVID-19 Public Health Response (Alert Level Requirements) Order (No 4) 2021. Clause 29 of that Order requires workplaces to have systems in place to:*

*a. enable compliance so far as is reasonably practicable with the 1-metre physical distancing rule;*

*b. “maintain compliance so far as is reasonably practicable with the 2-metre physical distancing rule for any other persons entering a workplace, or using the services, of the business or service”; and*

*c. to mitigate so far as is reasonably practicable the risks that arise to the extent that physical distancing is not fully maintained.*

16. Accordingly, it is incumbent on ACE, and a requirement of New Zealand law, to take proper precautions to enable social distancing on the OWOC boat for both its staff and others who are on that boat. To do so, it is necessary for ACE to limit the number of people on the OWOC boat as much as possible, and to have on the OWOC boat only those people strictly needed to enable on-water delivery.

17. ACE has determined the number of people who can safely be on the boat in order to enable these requirements to be fulfilled. The persons who are included on the OWOC boat are key ACE operational personnel<sup>3</sup>, technical support for the race management system, the Harbourmaster, and representatives from the New Zealand Police, New Zealand Coastguard, and St John's (medical support).

18. The people ACE has chosen to be on the OWOC boat are those who are required to fulfil ACE's contractual responsibility to deliver safe and effective on-water management under the Host Venue Agreement. This does not include a "observer" from the Challenger. It is not appropriate for the Panel to second guess or overrule ACE's decisions as to how it provides for the operation of the OWOC boat in the circumstances of a global pandemic; how it complies with New Zealand law; and how it best utilises the limited capacity of the OWOC boat to enable it to fulfil its responsibilities for on-water management under the HVA. The Defender respectfully submits that it would be extremely concerning if ACE were directed to include a COR representative on the OWOC boat in circumstances where ACE believes that it would make the operation of the OWOC boat unsafe, or where to accommodate that COR representative it would be necessary to exclude some other member of OWOC crew who ACE has deemed necessary to ensure a safe and well managed event on the water.

19. The Defender also records that when Level 2 restrictions were imposed during the Prada Cup, ACE's chairperson volunteered to remove herself from the OWOC to enable the vessel to operate safely and to allow a COR representative to be present on the OWOC boat on the basis that COR was the organising authority for that Event (in that case she considered that she was able to continue to fulfil her role from another vessel). Needless to say, the Challenger is not the organising authority for the Match. (See the Challenger's Exhibit 1).

20. Accordingly, even if the Challenger were correct that the Panel and jurisdiction, and that the Defender had breached an obligation, (both of which are denied) in the Defender's submission it would be highly inappropriate for the Panel to order the relief the Challenger seeks. Moreover, the relief is unnecessary as in the unlikely event that any "coordination" is needed with the Challenger, this can be done using a telephone or radio, and without any representative needing to be physically present on the OWOC boat. The Challenger's unfounded suggestions of potential misconduct are insufficient reason for this Panel to grant the disruptive mandatory relief the Challenger seeks.

#### **No Basis for Interim Measures**

21. Rule 13.4 of the Rules of Procedure provides:

*When deciding whether to award interim or preliminary relief, the Arbitration Panel shall consider whether the relief is necessary to protect the Applicant from irreparable harm, whether the Applicant is likely to succeed on the merits, and whether the interests of the Applicant outweigh those of any other Party, or of others who participate in any capacity in the America's Cup, or of the sport of sailing.*

22. *The Defender submits that the Challenger has manifestly failed to satisfy any of the mandatory elements that might justify interim measures:*

a. *The Challenger has identified no irreparable harm, other than vague and unfounded speculation that those onboard the OWOC boat might act partially or inequitably or might otherwise misconduct themselves. The Challenger's unfounded and unsupported speculation or suspicion does not provide sufficient basis for interim measures.*

b. *The Challenger has a weak case on the merits: as to jurisdiction; as to the meaning and effect of cl 9.3(a)(iv) of the HVA; and as to the practical ability of this Panel to order the relief it seeks.*

c. *The Challenger's interests do not outweigh those of any others. It is not even clear what interests of the Challenger are at stake (beyond its thinly veiled allegations of possible misconduct described earlier). In any event, the interests of ACE, and the wider sailing community (including the many spectators who have gone out to watch the Match), favour ACE being able to properly fulfil its contractual responsibilities to deliver on-water management are crucial to a safe and effectively conducted Match. The orders the Challenger seeks put that at risk. The interests of those onboard the OWOC boat, in the circumstances of a global pandemic, to work in a safe environment also outweigh the any interests of the Challenger.*

23. *The Challenger has failed to establish the jurisdiction of the Panel, a legal basis for its claim, and a factual basis to support the granting of interim measures. Its application should be rejected and costs awarded."*

11. Defender however states as follows:

***"ACE remains willing to accommodate a Challenger representative when that is possible***

24. *Despite its position that there is no jurisdiction and no legal entitlement for the Challenger to have a representative on the OWOC boat, the Defender records that ACE remains open to issuing an invitation to the Challenger to have a representative on the OWOC boat in the future. This will be explored when COVID-19 regulatory alert levels are reduced by the New Zealand Government, and when ACE considers that such a representative.*

25. *ACE has no desire to further damage an already difficult working relationship between it and the Challenger. The decision ACE has made reflects only its primary concern to ensure that it is able to perform its responsibilities effectively and to provide a safe event at all levels. It is disappointing that the Challenger has taken the aggressive approach of elevating this matter to the Panel premised on unfounded speculation about the potential for impartiality and or a lack of transparency from those exercising functions onboard the OWOC boat. However, ACE remains committed, as a matter of good faith and respect, to accommodate the Challenger's wish to have a representative on the OWOC boat, by invitation and its discretion, and when it is safely able to do so."*

12. Following which, in its Reply, COR submitted that:

**"A. PRESENCE OF THE CHALLENGER REPRESENTATIVE ON OWOC YACHT  
A 1 – Jurisdiction**

1. *This is a dispute between the Applicant and the Respondent and their associated Event entities in respect of the conduct of the Match, and therefore falls within the scope of the Protocol.*

2. *The relief sought by the Applicant is an order that the Challenger's identified representative be carried on board the OWOC boat during all pre-race operations and during racing on all days during the Match.*

3. *This request is addressed to the Respondent in its capacity as organizer of the Match under the terms of the Protocol. On the basis of the Protocol, the Defender has passed to ACE as its appointee to carry out the duties of organizing the Match. As part of that role, ACE and COR have also entered into the Venue Management Agreement.*

4. *On May 10, 2018, COR36 and ACE agreed to manage the Auckland Events in a coordinated manner and entered into an agreement related to the management of the Auckland Events (the "VMA") (Exhibit 5). This path was taken in reliance upon ACE's statement that "due to local administrative/public reasons/legislation the Hosts have required to deal only with ACE in relation to the Host City Appointment Agreement, the Host Venue Agreement and all related to the Auckland Venue including the payment of the Venue Consideration (Article 5 of the VMA).*

5. *COR 36 agreed with the Defender that the Auckland Events "will be organized in Auckland in coordination with ACE on the basis that ACE has now agreed to meet the cost of those events in addition to the Match with the assistance of the NZ Government funding)".*

6. *The VMA further provides that ACE shall "ensure that in its dealings with the Hosts withing the Host Venue Agreement or otherwise, it adequately considers the rights and prerogatives of Prada and of COR36 as provided for by the Protocol, by the Naming and Sponsorship Agreement and by this Agreement (...)" (Section 4 of the VMA ).*

7. *It was on this basis that ACE included in the HVA the clear wording of Section 9.3 a) iv) (set out in para 5 of our Application) which provides for the involvement of the Challenger of Record "for all aspects of the on-water delivery of the Events".*

8. *Accordingly, the authority of the Respondent to enter into the Host Venue Agreement itself and on behalf of the Applicant derives from the Protocol, giving the Applicant the right to raise this matter with the Panel.*

9. *It is self-evident that the duties and responsibilities of the Hosts have direct and practical impact on the Applicant. It is clear that they have always been intended to: the HVA itself records numerous associated duties and responsibilities on the COR 36's side. For example, all the commercial benefits to the Event, and the Cup Village set up that that the Host expected from COR 36 during the Preliminary regattas and Prada Cup are referred to in the HVA.*

10. *Moreover, The HVA is expressly subject to NZ law. NZ law includes the Contract and Commercial Law Act 2017, section 12 of which provides:*

*12. Deed or contract for benefit of person who is not party to deed or contract  
(1) This section applies to a promise contained in a deed or contract that confers, or purports to confer, a benefit on a person, designated by name, description, or reference to a class, who is not a party to the deed or contract.*

(2) *The promisor is under an obligation, enforceable by the beneficiary, to perform the promise.*

(3) *This section applies whether or not the person referred to in subsection (1) is in existence when the deed or contract is made.*

11. *As the other Competitor in the Match, CVS and Luna Rossa and their associated entity COR are parties for whose benefit the HVA (and other Event-related contracts) have been entered into. It is difficult to imagine “non-parties” more obviously, significantly and directly affected by the various obligations assumed by the named parties to the HVA.*

12. *As a matter of NZ law, they are therefore entitled to seek the enforcement of promises for their benefit and in their interest recorded in the HVA, albeit within the framework of this Panel procedure.*

13. *Because the relief sought ultimately derives from the Protocol, and VMA entered into to give effect to Protocol obligations, the Panel has full jurisdiction.*

14. *Additionally, and more specifically under Article 53.4 of the Protocol, the VMA agreement expressly provides for the jurisdiction of this Panel (Section 34.).*

15. *The Panel therefore has jurisdiction to resolve this Application. Denial of jurisdiction, based on that fact that ACE is not a named party to the Protocol (see sections 1-4 of the Respondent response) is untenable. It would have the absurd consequence that the Panel has no jurisdiction on any matter related to the duties of the Defender as organizer of the Event.*

16. *Ultimately transparency and equal access serve impartiality and fairness which is the underlining principle of sporting competition.*

#### **A2- MERIT OF THE REQUEST**

17. *We seek that the Panel order that the Applicant has a representative on board of the OWOC also on the basis of the following general principles:*

a. *The Deed of Gift provides that “[t]his Cup is donated upon the condition that it shall be preserved as a perpetual Challenge Cup for friendly competition between foreign countries”.*

b. *As stated by the Court of Appeals of New York in its decision 76 NY2d256 “the phrase ‘friendly competition between foreign countries’ more aptly refers to the spirit of cooperation underlying the competitions contemplated by the deed”.*

c. *This fundamental principle is confirmed in the Protocol, e.g. in Article 16.3 “[a]ll Officials including the Regatta Director, the Rules and Measurement Committees, the Umpires and the Jury shall comply with the Rules and always discharge their duties with honour, independence, impartiality and in good faith” and in Article 53.15 “[i]n all instances, the Arbitration Panel shall act fairly and impartially and shall provide equal treatment (...).”*

d. *It was on this basis that ACE included in the HVA the clear wording of Section 9.3 a) iv) (N 5. of our Application) which provides for the involvement of the Challenger of Record “for all aspects of the on-water delivery of the Events”. This is in line with the procedure followed in the Preliminary Regattas and in the PRADA Cup in which a representative of ACE was on board OWOC.*

18. *The presence of both the Defender and the Challenger of Record on board OWOC ensures that all on-water operations are performed with independence, impartiality, good faith and guaranteeing equal treatment as required by the Protocol, VMA and in line with the spirit of cooperation underlying the competitions contemplated by the Deed of Gift.*

19. *During the Prada Cup final COVID Alert 2 was in force, and there was no issue with Matteo Plazzi being on board the OWOC boat. There is no good reason why the same situation cannot continue to apply now, even while still at COVID Alert level 2. The Applicant considers that this is another example of the Defender resorting to specious "safety" arguments to obstruct the Challenger.*

20. *We appreciate the offer by the Defender to accommodate the Challenger's representative on the OWOC on invitation basis. But we believe that this should not be left at the discretion of ACE, but should be viewed as a reasonable and legitimate right of the Challenger.*

### **A3 – OTHER ISSUES RAISED BY THE RESPONDENT**

21. *By way of additional responses on specific submissions advanced by the Respondent, the Applicant says:*

**Para 6 d):** *The Applicant is not challenging ACE's sole contractual responsibility for on-water race management, but rather seeks to have it exercised with due regard to COR's legitimate interests.*

**Para 6 f):** *It should be noted that part of ACE's funding includes allocations from the Host Investment to COR.*

**Para 10:** *The "counterfactual" advanced by the Respondent is irrelevant and unhelpful: the Challenger of Record is now the Challenger for the Match.*

**Paras 11, 12 and 13:** *The Protocol (Article 16.3) imposes obligations of impartiality. The Applicant's reliance on that Rule in support of its position is not dependent upon evidence of its breach by the Respondent.*

**Paras 14 to 20:** *The Respondent's reliance on COVID Alert Level 2 as a basis of "No Practical Ability" is misleading. The person identified to go on board the OWOC boat, Matteo Plazzi, is not an outsider. He is an employee of COR who has, throughout Level 2, been operating in the same environment as ACE personnel.*

**Paras 21 and 22:** *The Match is already under way. Unless the relief sought by the Applicant is granted on an urgent interim basis, the issue will be rendered moot."*

### **Panel's decision about the presence of Challenger Representative on OWOC**

13. The Panel considers that it has jurisdiction to deal with this issue. This derives from the fact that the Applicant bases its request on the VMA Agreement which it entered into on May 10, 2018 with ACE and which contains an arbitration clause (Art. 34) pursuant to which "*In compliance with the Article 53.4 of the Protocol this Agreement is within the jurisdiction of the Arbitration Panel (...)*".
14. The merit of the Application request is in substance based on section 9.3 a) iv) of another agreement, namely the Host Venue Agreement (HVA) to which the Applicant is not a party but from which it purports to derive rights. The Panel does not consider it necessary to decide whether Applicant's third party beneficial theory approach is well founded, because in any event, even if it were, the Applicant would not succeed.

15. In fact, the Applicant's approach consists in alleging that it is entitled to have a representative on board OWOC in order to ensure that all on-water operations are performed properly. It mainly bases its contention to that effect on the fact that the VMA provides that ACE has to act in a coordinated manner with COR when fulfilling its responsibilities.
16. OWOC is a vessel the purpose of which is to provide a safe stadium for the Regatta Director to discharge his Race Management duties. OWOC's primary responsibility relates to safety and spectators' control. It is not the Regatta Director's vessel, the Regatta Director being the sole person in charge of conducting the Racing. The following people are on board OWOC: the Harbor Master, the New Zealand Police as well as the Hosts (being representatives of the Auckland Council and of the MBIE), as well as members of the ACE staff. In order to perform OWOC's function as aforesaid, there is no reason to consider that the persons on board OWOC have to be "controlled" by any of the Competitors, neither COR, nor, for that matter, the Defender.
17. As a result, the Panel decides that:
  - COR is not entitled to request that one of its representatives be on board OWOC during the Match regattas;
  - the Panel however has noted the Defender's statement pursuant to which ACE is willing to accommodate a COR representative on board OWOC when that is possible and expects ACE to fulfil that offer in good faith;
  - unless a COR representative is on board OWOC, no Defender representative will be entitled to be on board that vessel.

## **SECOND ISSUE: ACCESS TO THE CONTROL ROOM**

### **The Parties Submissions**

18. In its Application, COR states that:

*"8. The Challenger has requested in its role as contracting party for the TV production of the AC36 events, and as a Competitor, to attend at the International Broadcasting Center, and in particular to have a presence in the Control Room which houses all of the screens used by the broadcast Production Director.*

*9. The Challenger has a contractual entitlement to, and a legitimate interest in the broadcasting being undertaken in compliance with the production agreement, and with objectivity and impartiality towards both Competitors and their yachts. (see **Exhibit 3**).*

*10. The Challenger's position is that both the Challenger and Defender are entitled to attend the IBC every day. The Challenger understands and respects that COR & D attendance should not interfere with broadcast operations, but that has never previously been an issue.*

11. *The Challenger has also asked to make sure that when a representative of either the Defender or the Challenger accesses the IBC and especially the Control Room, the other Competitor's representative is informed, and given the opportunity to also attend.*

12. *From the correspondence it appears that the Defender was not interested to attend, and took the view supported by the Production Director, that if one party is not attending the other should not attend either.*

13. *While the Challenger is of a different view and does not agree with the Defender's approach that the decision of the Defender should in any case prevail, it accepts the de facto situation that neither the Challenger nor the Defender should attend in the IBC or Control Room during racing unless both decide to attend at the same time.*

14. *However more broadly, we request that the Panel records that the IBC and broadcasting should as far as possible at all times be delivered with equal exposure of both yachts and teams, and must be balanced, consistent and equalized for both Competitors."*

19. And, based thereon, it requests:

*"c. An Order that the production, editing and delivery of broadcasting be carried out for proper editorial purpose, be consistent and equalized as between the two Competitors."*

20. In its Answer, Defender submits that:

*"Access to IBC*

26. *The Defender doubts there is any jurisdiction for the Panel to make such an order but does not object to the Panel making a determination given the importance of the principle involved.*

27. *The Challenger's request to attend the TV Production Control Room at the IBC is in its capacity as contracting party for the TV Production and as a Competitor. For the reasons already outlined in the email correspondence with the Challenger the Defender disagrees with their position and considers it totally inappropriate for representatives of either Competitor to be present during racing.*

28. *Under clause 4.3 of the contract for the TV production referred to by the Challenger (known as the Circle O Agreement), if COR36 and ACE (the contracting parties) are unable to reach a joint position, COR36's position takes precedence for the for the COR 36's Events and ACE's position shall take precedence for the ACE Event (being the Match).*

29. *There were no such representatives of any Competitor present during racing any of the COR36 Events, representatives of the Challenger and Defender did visit the Control Room at the same time during a test day prior to the commencement of the Auckland ACWS on one occasion only.*

30. *It is an established precedent in America's Cup competition that due to the amount of confidential design and performance information generated by the yachts much of which does not become public, that it would be inappropriate for any*

Competitor representatives to be present in such a TV production room during racing.

31. Article 53.4 of the Protocol requires adequate measures are put in place so that performance information of individual yachts is not available to any other Competitor, other than such information is available to the public. By allowing representatives in the Control Room during the race production would put COR/D in breach of this provision, it is incumbent on COR/D not allow such an attendance.

**The Defender of a sequence of events involving the Challenger which led to this request:**

a. During the Prada Cup Final the Challenger declined a request from the Measurement Committee for both competing yachts to carry a Go Pro so it could be satisfied on the legality of the genoa winch operation of each (Ineos Team UK had agreed to the request);

b. The Measurement Committee subsequently requested footage from ACTV on this issue (a CNC lodged by Ineos Team UK against the Challenger was also dismissed due to there being available evidence of any illegality);

c. after the conclusion of the Match the Challenger lobbied officials and met with the COR/D Head of TV, Stephen Nuttall, claiming the coverage did not involve equal coverage of both yachts, evidently as the winning yacht there was more on board footage generated from on board the Challenger's yacht which would be usual from the winning yacht.

32. The Challenger is now seeking the Panel "records that the IBC and broadcasting should as far as possible at all times be delivered with equal exposure of both yachts and teams and must be balanced, consistent and equalized for both Competitors".

33. This is clearly an attempt to interfere with the editorial independence of the ACTV production which is wholly unacceptable and not in compliance with the principles of sportsmanship and fair play governing our sport."

21. Following which, in its reply, COR submitted that:

**"C. ACCESS TO IBC**

22. The request for an Order that the production, editing and delivery of broadcasting be carried out for proper editorial purpose, be consistent and equalized as between the two Competitors falls within the same wider dispute as to the management and delivery of the Event.

23. Access to the television broadcast and images are governed by the Protocol (including article 30). The issues of coordination, equivalence and impartiality apply as have already been stated in the Application in respect of attendance on the OWOC boat and are therefore also within the jurisdiction of the Panel.

24. The Applicant's position remains that the access to the control room by both the Challenger and Defender is justified to ensure, by direct observation, and taking into account the sensitivity of the data, that production is performed with independence, impartiality, good faith and guaranteeing equal treatment between Competitors as per rules and in compliance with the production agreement.

25. As said in the Application, the Applicant accepts that COR and Defender would attend at the same time.

26. The Applicant rejects the accusation (in para 31 c. of the Respondent's reply) of having "lobbied" Head of TV after the Prada Cup Finals. The group of ACTV personnel spoken to are people engaged and paid by COR 36, and COR 36 is fully entitled to discuss and give directions on the editorial content (see Exhibit 3 of the application – email from Alessandra Pandarese dated 9 March 2021 that reported the article 8.5 of the tv production agreement1).

27. The scope of the discussion was to express the view of COR 36 that the television production should be journalistic reporting in nature, focused on coverage of the sporting action, and not determined by any other agenda of any Competition.

28. We reiterate our request for the relief and remedies sought before the next race scheduled tomorrow Friday 12 March 2021."

### **Panel's decision about the access to the Control Room issue**

22. The issue raised by COR in its Application with regard to the "access to the Control Room" is twofolds:
23. Fair exposure allocation: the Applicant's claim pursuant to which it requests that the production, editing and delivering of broadcasting be carried out for proper editorial purpose be consistent and equalized between the two Competitors is based on a contract for TV production known as the "Circle O Agreement". To the Panel's knowledge, such agreement does not contain a provision pursuant to which it has jurisdiction to deal with issues deriving from such agreement. The Protocol does not either. As a result, the Panel considers that it has no jurisdiction to decide with regard to that first part of the issue;
24. Access to TV production control room at the IBC (the "Control Room"): pursuant to clause 30.3 of the Protocol:

*"30.3. COR/D shall ensure that adequate measures are put in place so that performance information of individual yachts is not available to any other Competitor, other than such information that is available to the public."*

By having access to the Control Room, any Competitor could have access to performance information of individual yacht which is not available to the public. As a result thereof:

- the Panel has jurisdiction with that regard; and
- it considers that none of the parties should have access to the Control Room at any time until the Match is over;
- the Panel does note that performance information of individual yachts which is not available to the public must not be made available to any Competitor.

## **COSTS**

25. A final decision on costs will be taken by the Panel in due time. In view of the fact that the Application was not successful, the Panel is however minded to decide that the costs should be borne by Applicant. The Parties are however hereby given five days to submit otherwise.

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