



36th
AMERICA'S CUP

AMERICA'S CUP ARBITRATION PANEL
Rules of Procedure
Published 6 December 2018
Version as at 11 February 2019

These Rules of Procedure of the America's Cup Arbitration Panel ("**Arbitration Panel**" or "**ACAP36**") for the 36th America's Cup are adopted pursuant to Article 53 of the Protocol governing the 36th America's Cup, as amended (the "**Protocol**"), for all matters within the Arbitration Panel jurisdiction under the Protocol.

1. DEFINITIONS

The definitions contained in the Protocol shall apply as also shall the following definitions apply:

- 1.1. **Applicant** means any Party filing an Application in accordance with these Rules of Procedure and entitled to do so pursuant to the Protocol.

- 1.2. **Application** means a written request for a decision by the Arbitration Panel in relation to a dispute, a request for interpretation, or any other submissions about a matter within the Arbitration Panel's jurisdiction under the Protocol.
- 1.3. **Bank Account** means the bank account as will be indicated from time to time by the Arbitration Panel.
- 1.4. **Documentation** means any written material or physical evidence filed in relation to any matter before the Arbitration Panel.
- 1.5. **ECAF** means the Arbitration Panel Electronic Case Facility made available by the Arbitration and Mediation Center of the World Intellectual Property Organization (WIPO Center).
- 1.6. **Arbitration Panel Chairman** means the Chairman of the Arbitration Panel as appointed in accordance with Article 53.1 of the Protocol.
- 1.7. **Arbitration Panel Secretary** means the person who may be appointed by the Arbitration Panel to handle administrative matters for the Arbitration Panel.
- 1.8. **Observer** means a person permitted by the Arbitration Panel to observe the conduct of a hearing, in accordance with these Rules of Procedure.
- 1.9. **Party** means any person or entity over whom the Arbitration Panel has jurisdiction under Article 53.4 of the Protocol, including each Competitor, RNZYS, Challenger of Record or any Official.
- 1.10. **Protocol** means the Protocol governing the 36th America's Cup, as amended from time to time.
- 1.11. **Reply** means an Applicant's answer to a Respondent's Response.
- 1.12. **Respondent** means any Party who files a Response to an Application.
- 1.13. **Response** means a submission in response to an Application.
- 1.14. **Racing Rules** mean the then current Racing Rules as agreed and adopted by COR/D in consultation with World Sailing referred to in Article 16.1(e) of the Protocol.
- 1.15. **AC36 Service Address List** means a list of the email addresses advised to the Arbitration Panel Chairman or if appointed, to the Arbitration Panel Secretary, by the Parties.
- 1.16. Unless defined in these Rules of Procedure, the words with capital letters refer to the terms defined in the Protocol.

2. JURISDICTION

- 2.1. The Arbitration Panel shall have the powers foreseen in Article 53.4 of the Protocol.

3. LEGAL SEAT – LAW GOVERNING 36th AMERICA’S CUP PROCEEDINGS – LANGUAGE

- 3.1. The legal seat of the Arbitration Panel is Auckland, New Zealand. However, the Arbitration Panel may carry out all the actions which fall within its jurisdiction at any Event or Venue of the America's Cup or its Preliminary Regattas or in any other place it deems appropriate, or by correspondence, e-mail or other means of communication at a distance, including but not limited to ECAF or other similar electronic devices.
- 3.2. The Arbitration Panel proceedings shall be governed by these Rules of Procedure, by the New Zealand Arbitration Act 1996 and by the New York Convention of 1958 on the Recognition and Enforcement of Arbitral Awards. Whenever acceptable under the New Zealand Arbitration Act 1996, these Rules of Procedure shall prevail. In all instances, the Arbitration Panel shall act fairly and impartially and shall provide equal treatment and a fair opportunity to be heard given the circumstances in which the decision must be made.
- 3.3. The Arbitration Panel proceedings shall be in the English language. Unless otherwise agreed by the Arbitration Panel, evidence in a language other than English shall be translated into English by an independent qualified translator or such other translator approved by the Arbitration Panel, the costs of such translator to be borne by the Party producing such evidence.

4. COMMUNICATIONS

- 4.1. Each Party shall advise the Arbitration Panel Chairman and each of the Panel members of one or more email addresses and physical addresses for service of documents. Each Party shall be responsible for keeping the Arbitration Panel Chairman and each of the Panel members as well as the Arbitration Panel Secretary (where appointed) advised of any additional addresses or changes to them.
- 4.2. Parties shall use ECAF for all filing and all Documentation under these Rules of Procedure, except:
 - 4.2.1. matters pertaining to confidentiality (see paragraph 7 herein),
 - 4.2.2. matters otherwise directed by the Arbitration Panel.

Should circumstances prevent a Party from using ECAF for making a filing or accessing, it shall seek directions from the Arbitration Panel Chairman.

All Arbitration Panel notices concerning pending matters will be posted on ECAF, unless the Arbitration Panel decides otherwise.

ACAP and all other participants of ECAF will use ECAF only for its above-described purpose. In particular, ECAF participants will not share access information with any unauthorized parties and will not obtain unauthorized access to non-ECAF data or systems.

4.3. The Arbitration Panel and the Parties on the AC36 Service Address List will receive an ECAF email notice of any filing made using ECAF.

4.4. Matters, such as physical items, which cannot be filed through ECAF, shall be delivered or couriered to the Arbitration Panel Chairman.

4.5. Communications to the Arbitration Panel, other than those required to be made through ECAF, shall unless otherwise advised by the Arbitration Panel Chairman be addressed:

4.5.1. By email to the Arbitration Panel Chairman (david.tillett@acap36.com) and to the two other members of ACAP36 (graham.mckenzie@acap36.com and henry.peter@acap36.com)

or, when sending by email is not possible,

4.5.2. By courier or hand delivery to the Arbitration Panel Chairman:

David Tillett AM
66 Wright Street
Adelaide SA 5000

or such other address as may be advised by the Arbitration Panel Chairman.

4.6. Time limits:

4.6.1. The time limits fixed under these Rules of Procedure shall begin from the day after that on which a notification or communication is received.

4.6.2. Upon application on justified grounds and after consultation with the other Party (or Parties), the Arbitration Panel Chairman may extend any time limit if the circumstances so warrant and provided that the initial time limit has not already expired.

- 4.6.3. The Arbitration Panel may, upon application on justified grounds, suspend an ongoing arbitration for a limited period of time.

5. INITIATION OF PROCEEDINGS / PROCEDURE FOR APPLICATION

- 5.1. Prior to filing an Application with the Arbitration Panel, the Applicant shall pay a nonrefundable application fee to the Bank Account in the sum of NZD 8'000 (eight thousand New Zealand Dollars) per Application.
- 5.2. Any Applicant may file a written Application, with attachments if appropriate. In doing so such Party shall be deemed to have affirmed the jurisdiction of the Arbitration Panel.
- 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;
 - 5.3.2. the Applicant's request for relief.
 - 5.3.3. proof of payment of the Application Fee referred to in §5.1.
- 5.4. In case of any dispute, an Application to the Arbitration Panel shall be filed within ten (10) days from when the Applicant was or could reasonably have been aware of the circumstances justifying the Application, unless:
 - 5.4.1. a shorter time limit is specified in the applicable Rules; or
 - 5.4.2. the Arbitration Panel is satisfied that there is good reason to extend the time limit, taking into account the desire to expedite disputes and to avoid parties from storing up potential applications.
- 5.5. Any Party may file a written Response, with attachments if appropriate. The Response to an Application shall set forth whether the Respondent supports or opposes the Application or the reasons for inclusion in the matter or any observations relevant to the outcome of the Application, with the grounds for the support, opposition, appearance or observations and with particulars to support those grounds, including the detailed evidence upon which the Respondent relies and including a reference to any rules considered applicable.

- 5.6. A Respondent is deemed to have waived the issue of lack of jurisdiction of the Arbitration Panel unless such Respondent raises the issue with its initial Response.
- 5.7. The Arbitration Panel will advise each Party of the time within which a Response may be filed, and issue such further directions as the Arbitration Panel considers appropriate.
- 5.8. If a Party filing an Application or Response represents a wider group of Party interests permitted under the Protocol, the Arbitration Panel may if it deems appropriate require confirmation as to the identity of which members of the group are represented and what their position is.
- 5.9. The Arbitration Panel will answer hypothetical questions only in exceptional circumstances and only when it decides that a decision on the question is essential to the furtherance of the purposes of the 36th America's Cup as stated in the Protocol and in the best interest of the Event.
- 5.10. The Arbitration Panel may decide to proceed on an expedited basis, if the circumstances so require, and may issue the directions therefor.
- 5.11. Upon filing with the Arbitration Panel an Response stating that the Respondent intends to cause a third party to participate in the arbitration, the Respondent shall simultaneously provide a copy of its Response to the third party. The Arbitration Panel shall fix a time limit for such person to state its position on its participation and file an Response pursuant to §5.5. The Arbitration Panel shall also fix a time limit for the Claimant to express its position on the participation of the third party.
- 5.12. If a third party wishes to participate as a party to the arbitration, it shall file an application to this effect with the Arbitration Panel, together with the reasons therefor within ten (10) days after the arbitration has become known to the intervenor, provided that such application is filed prior to the hearing, or prior to the closing of the evidentiary proceedings if no hearing is held. The Arbitration Panel shall communicate a copy of this application to the Parties and fix a time limit for them to express their position on the participation of the third party and to file, to the extent applicable, an answer pursuant to §5.5.
- 5.13. Joint provisions on joinder and intervention: A third party may only participate in the arbitration if it is bound by the Protocol or if it and the other Parties to the Application agree in writing. Upon expiration of the time limits set in §5.11 and 5.12, the Arbitration Panel shall determine the terms and conditions under which the third party shall participate in the proceedings.

6. PROCEEDINGS FOLLOWING APPLICATIONS AND RESPONSES

- 6.1. 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.
- 6.2. Following the filing of any Responses and Replies, the Arbitration Panel will give directions on the further course of the proceedings, including the production of additional written submissions and of additional detailed documentary evidence (when permitted by the Arbitration Panel), list of witnesses, witness statements, and any other procedural aspects.
- 6.3. Any Party to a proceeding may request an oral hearing and suggest the location thereof in its Application or in its Response or Reply. In such a case, it shall give the reasons for such request and for such location.
- 6.4. The Arbitration Panel will always have discretion to decide whether an Application will be determined by an oral hearing and, as the case may be, where and when such hearing shall take place, or on documents only.
- 6.5. In the event of an oral hearing, the Arbitration Panel Chairman will fix the date, time and place of the hearing and will advise the manner in which the hearing will be conducted. The Arbitration Panel may, from time to time, adjourn a hearing, on its own volition or at the request of a Party.
- 6.6. With the prior approval of the Arbitration Panel and subject to its directions, an Applicant or Respondent may withdraw or amend an Application, Response or Reply, or submit new evidence. When an amended Application, Response, Reply or new evidence is filed, any Party directly affected may file a Response or Reply, as appropriate.

7. CONFIDENTIALITY

- 7.1. As a matter of principle: (i) the proceedings before the Arbitration Panel will be transparent and not confidential between the Parties and (ii) all Arbitration Panel decisions will be published. The Arbitration Panel may however decide otherwise in its discretion if special circumstances so justify.
- 7.2. The Arbitration Panel may issue or withdraw an order for confidentiality as it considers just and equitable. The Arbitration Panel will only grant such an order in exceptional circumstances. If, following an Application for confidentiality, the Arbitration Panel decides that it will not grant such an order, the Arbitration Panel will advise the relevant Party, who may elect to withdraw any evidence or submission (in such a case, the withdrawal shall

occur within not more than 48 hours, unless the Arbitration Panel decides otherwise) or to proceed without confidentiality.

8. WRITTEN SUBMISSIONS

- 8.1. Subject to Paragraph 7.1 all Applications, Responses or Replies before the Arbitration Panel shall be available to each Party on ECAF or through any other communication mean as might be indicated by the Arbitration Panel.
- 8.2. Other than that which is permitted in Paragraph 16.1, the Parties shall not make public the Applications, Responses, Replies or any of the evidence.

9. ORAL HEARINGS

The Arbitration Panel may, from time to time, decide that a stenographic record of the hearing be organized, on its own volition or at the request of a Party. The costs of such a record will be shared by the Parties unless otherwise ordered by the Arbitration Panel.

10. OBSERVERS AT ORAL HEARINGS

- 10.1. Each and any Party as well as America's Cup Event Limited ("**ACE**") and Challenger of Record 36 S.r.l. ("**COR36**") may appoint up to two Observers who will be permitted to observe at oral hearings. The Arbitration Panel may alter the number of Observers at any time and may permit additional Observers.
- 10.2. As a matter of principle, media observers will not be permitted to attend any oral hearing, unless authorized by the Arbitration Panel.
- 10.3. The Arbitration Panel may order that a hearing, or any part thereof, shall be held in private and may impose other conditions with respect to each Party and Observers that it deems appropriate.
- 10.4. Unless otherwise directed by the Arbitration Panel, Observers shall not make public the Applications, Responses, Replies or any other submissions, or any of the evidence, documentary or otherwise prior to the publication of the Arbitration Panel decision.

11. ORAL EVIDENCE / PROCEDURE FOR APPLICATION

- 11.1. At an oral hearing, any Party or any Party whom the Arbitration Panel has invited to file submissions may, to the extent the Application touches on matters within their area of responsibility, present oral testimony through witnesses if so decided by the Arbitration Panel. Witnesses shall be subject to examination by any Party who has a direct interest in the outcome of the matter and by the Arbitration Panel.
- 11.2. The Arbitration Panel may order the appearance of witnesses and may compel such appearance through application of the New Zealand Arbitration Act 1996.
- 11.3. When permitted by the Arbitration Panel, witnesses may testify by remote video or such other means as the Arbitration Panel directs.
- 11.4. When the Arbitration Panel permits the use of written statements from a witness at an oral hearing, the Arbitration Panel may direct that the witness shall be made available for examination by any Party who has a direct interest in the outcome of the matter and by the Arbitration Panel.
- 11.5. Witnesses will not be required to give evidence under oath however, the Chairman shall invite such persons to tell the truth, subject to the sanctions of perjury or other disciplinary sanctions.
- 11.6. If a person who has given a written statement is not available for examination at the hearing or through authorized remote systems, the Arbitration Panel will not consider the statement unless exceptional circumstances command otherwise.
- 11.7. After the hearing, no further submission or argument may be made or evidence produced, unless requested or authorized by the Arbitration Panel.

12. PROCEDURAL DIRECTIONS

- 12.1. The Arbitration Panel will give such directions as it considers appropriate to facilitate the resolution of the Application.
- 12.2. Any directions issued by the Arbitration Panel will have the status as if they were Rules of Procedure.

13. PROVISIONAL REMEDIES

- 13.1. Upon the request of a Party in any proceeding pending before the Arbitration Panel, the latter may make an order for provisional or interim relief, including the stay of the effects of a decision under challenge. In agreeing to these

Rules of Procedure, in compliance with the Protocol, the Parties expressly waive their right to request such relief from other authorities.

- 13.2. Upon the filing of an Application for interim or preliminary relief, the Arbitration Panel Chairman shall advise each Party of the Application and invite each Party to express its position within a time limit to be fixed in consideration of the circumstances. In the case of utmost urgency, the interim or preliminary relief may be issued without first hearing any other Party, provided that each Party is offered the opportunity to be heard at the earliest possible time thereafter. An order for interim or preliminary relief will cease to be effective whenever the Arbitration Panel so decides, but at the latest upon issuance of the Arbitration Panel's final decision.
- 13.3. An order granting interim or preliminary relief may be conditional upon the provision of security.
- 13.4. 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.

14. COSTS AND PENALTIES

- 14.1. Referring to Article 53.3 of the Protocol, the fees and expenses of the members of the Arbitration Panel as well as any other proceedings related costs (as determined by the Arbitration Panel) shall be recovered on a user pay basis from the Parties involved, as ordered by the Arbitration Panel. Pursuant to Article 53.9 of the Protocol, the net operating costs of the Arbitration Panel (in excess of application fees and costs received or imposed) will be met by COR/D. Any positive balance on the Bank Account at the end of the competition will be split in equal shares and transferred to the respective bank accounts of COR36 and ACE.
- 14.2. In addition to the application fee provided for in Rule 5.1, if the Arbitration Panel shall consider it appropriate it may order costs to be paid in advance of any further step of the proceedings (e.g. oral hearing or the matter being determined).
- 14.3. Pursuant to Article 53.4(k) of the Protocol, the Arbitration Panel shall, whenever appropriate in its award, fix or determine the costs in respect of any Application payable by an Applicant or a Party directed to be served with an Application, including imposing costs as a penalty for frivolous claims or imposing the costs to the losing Party. The Arbitration Panel shall do so as it

considers just and equitable, having regard to all relevant matters which may include:

- a) the outcome of the Application;
- b) the reasons for the decision;
- c) whether the decision is of universal application or for the benefit of a significant number of competitors or the event and, if so, it would normally result in a minimal or no award of costs;
- d) the conduct of the Parties prior to and during the Application or any hearing, including procedural conduct which may include obstructive or delaying conduct;
- e) whether the application related solely to the Racing Rules and only required a relatively straightforward application of the Racing Rules, and if so it would normally result in no award of costs; and
- f) whether the decision has the effect of providing an interpretation or compliance with the documents referred to in Article 16.1 of the Protocol.

14.4. The Arbitration Panel may also impose such penalties as it considers appropriate, which may include penalties in accordance with Article 53.10 of the Protocol. Where no penalty is specifically provided for a breach of any of the provisions of this Protocol, the Conditions, the Deed of Gift or previous decisions of the Arbitration Panel, the Panel shall determine and impose such penalty as it considers appropriate having regard to the nature and manner of the particular breach. Pursuant to Article 53.4(l) of the Protocol, the Arbitration Panel may determine the penalty for failure to make any payment fixed or determined by it. The penalty may include the forfeiture of the Performance Bond.

14.5. The Arbitration Panel will whenever possible give the opportunity to relevant Parties to provide their views on any order or award for costs or any penalty that may be imposed.

14.6. Each party shall bear the costs of its own witnesses, experts and interpreters, unless otherwise determined by the Arbitration Panel pursuant to Rule 14.3.

14.7. Any amount to be paid by a Party, including an application fee (see Rule 5.1), an advance on costs (see Rule 14.2), a final costs determination (see Rule 14.3) or a penalty (see Rule 14.4), shall be paid on the Bank Account.

15. DECISIONS

- 15.1. The Arbitration Panel shall rule on each matter placed before it in accordance with the Deed of Gift and the Protocol, using the merits, general principles of law and the rules of law the application of which it deems appropriate. The Arbitration Panel will use its best endeavours to act in a time and cost-efficient manner on all such matters.
- 15.2. Decisions of the Arbitration Panel will be in writing and will contain reasons. Before the written decision is published, a summary of the decision may be given orally or in writing at the conclusion of an Application or a hearing. Decisions will be published without restriction unless the Arbitration Panel determines that, for reasons in terms of Paragraph 7 of these Rules of Procedure, publication of a decision should be restricted in such manner as the Arbitration Panel considers appropriate.
- 15.3. In the event that a decision is not unanimous, any dissenting member of the Arbitration Panel has the right to be identified and have such dissent published with the Arbitration Panel decision. The dissenting opinion will be appended to the Arbitration Panel decision.
- 15.4. On its own initiative, the Arbitration Panel may correct a clerical, computational or typographical error, or any errors of similar nature contained in the award, provided that such correction is done within thirty (30) days of the date of such award. Any application of a party for a correction of a clerical, computational or typographical error must be made within thirty (30) days of the receipt of the award by such party. The Arbitration Panel shall then grant the other party a short time limit to submit any comments thereon. The decision to correct the award shall take the form of an addendum and shall constitute part of the award.
- 15.5. All decisions and/or awards of the Arbitration Panel taken in good faith within their proper authority and/or jurisdiction as prescribed in and/or contemplated by the Rules shall be final and binding on all parties and shall not be subject to any review or appeal, unless the Arbitration Panel, in its sole discretion and based on new evidence, so decides.
- 15.6. The Arbitration Panel shall not be bound by decisions from any previous America's Cup but may take into account such decisions when making any determination.

16. DISSEMINATION OF INFORMATION

- 16.1. In addition to what is foreseen in Paragraphs 8.2 and 10.4 above, the Parties may only disseminate information issued by the Arbitration Panel or having a direct or indirect relation with the activities or proceedings conducted by the

Arbitration Panel in accordance with directions from the Arbitration Panel Chairman.

- 16.2. As a matter of principle, the Parties shall not disseminate information issued by the Arbitration Panel or having a direct or indirect relation with the activities or proceedings conducted by the Arbitration Panel, in particular to the media.

17. AMENDMENTS

These Rules of Procedure may be amended or revoked at any time by the Arbitration Panel following consultation with the COR/D.

18. SUBMISSION TO THE ARBITRATION PANEL

By filing an Application, Response or Reply with the Arbitration Panel, a Party agrees to be bound by these Rules of Procedure, as amended from time to time.

19. EFFECTIVE DATE

These Rules of Procedure have been drafted by the Arbitration Panel and approved by COR/D on 6 December 2018. Following consultation with the COR/D, these Rules have been amended on 11 February 2019. This amended version became effective on such latter date.

David Tillett, Chairman

Arbitration Panel members: Graham McKenzie, Henry Peter