



AMERICA'S CUP ARBITRATION PANEL

ACAP36/04 (2019)

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

AND

IN THE MATTER
of an Application by
American Magic (representing New York Yacht Club)
(ACAP36/04)

14 March 2019

AMERICA'S CUP ARBITRATION PANEL Case 04

DECISION

APPLICATION

1. On 4/02/19 American Magic filed an Application with the Panel. They sought an interpretation and, where appropriate, orders with regard to three Late Entry Challengers being Royal Malta Yacht Club (Malta Altus Challenge or MAC), Long Beach Yacht Club (Stars & Stripes) and Royal Maas Yacht Club and Royal Netherlands Yacht Club (Dutch Challenge or now described as Steam Ocean BV).

2. The Application concerned the ability of the Defender and Trustee Royal New Zealand Yacht Squadron (RNZYS), (i) to accept conditional challenges and in particular where the conditions set to that acceptance include a requirement of future Protocol amendments and (ii) to accept a joint Dutch Challenge from two Yacht Clubs; with that regard, the Application in particular questioned the validity of accepting Challenges under the condition that future amendments of the Protocol be made in order to provide that Entry Fees be paid on a different deferred basis not then in the Protocol.

TWO OTHER APPLICATIONS

3. On 12/02/19 Applications were also filed by Emirates Team New Zealand (ETNZ) representing RNZYS being Case 36/02 and on 13/02/19 by Luna Rossa Challenge representing Circolo Della Vella Sicilia (COR36) being Case 36/03. Such Applications concerned disputes in respect of various matters arising from the three Late Entry Challengers referred to on paragraph 1 above.
4. In Directions issued by the Panel on 5/02/19 and 12/02/19, it was determined that the three Cases 02, 03 and 04 would be addressed together as the case issues were related.

SETTLEMENT OF CASES 02, 03

5. On 28/02/19 ETNZ and COR36 each separately advised they had settled the matters the subject of their respective Applications in Cases 02 and 03. On 1/03/19 the Panel, pursuant to Rule 6.6 of its Rules of Procedure (ROP), approved the withdrawal of such Applications.
6. Details of Cases 02 and 03 and their settlement terms are contained in the Panel's Costs Awards Decision issued on the same date as this Decision.

MAINTAIN ITS APPLICATION

7. In the Directions of 1/04/19 the Panel invited American Magic to advise whether it wished to continue with its Application in Case 04, or amend or withdraw it. On 2/03/19 American Magic advised that it wished to maintain its Application. American Magic submitted that it did not require any further documents and noted that its Application could be addressed on the papers as filed, without the need of an oral hearing.
8. On 3/03/19 American Magic filed a Reply which addressed the various Responses and the discovery of documents that had been filed up until 28/02/19 when Cases 02, 03 and this Case 04 were being addressed together. American Magic essentially maintained its position and concerns set out in its Application of 13/02/19, in particular regarding the validity, respectively, of conditional challenges and of a joint challenge made by two yacht clubs.

DISCUSSION

Documents Produced and Protocol Changes

9. The Responses and Replies filed in Cases 02, 03 and 04 have all been taken into account by the Panel in making its decision. A part of American Magic's Application (points 4 and 5) sought discovery of various challenge documents which are now understood by the Panel to have been satisfied. Protocol Amendment 03, which has in the meantime been published, made changes to Articles 7.1(c), 7.2 and 7.9 of the Protocol with regard to the new arrangements for payment of Entry Fees and providing Performance Bonds by the three Late Entry Challengers.
10. Article 52.1 of the Protocol provides that the Protocol can be amended by mutual agreement between the Trustee (RNZYS) and the Challenger of Record (Circolo Della Vella Sicilia). The settlement agreement made by them in respect of Cases 02, 03 provided for the implementation of certain amendments of the Protocol which are contained in Protocol Amendment 03. The Panel considers that this Protocol amendment was properly able to be made by agreement.
11. The Defender Yacht Club (RNZYS) is required by both the Deed of Gift and Article 6.1 of the Protocol to accept every bone fide notice of challenge, subject to the requirements of the Protocol and in particular as provided for in Article 6.2 of the Protocol. There is no evidence that RNZYS acted other than in good faith and in a reasonable manner with regard to its Trustee responsibilities in accepting the three Late Entry Challengers.

Entry Fees and Performance Bond

12. Entry Fees are received in terms of Article 7.5 of the Protocol. 73.75% goes to RNZYS and 23.75% to Circolo Della Vella Sicilia. Challengers are not a party to or have any Entry Fees entitlement. Any instalment or escrow arrangements are not decided or required to be approved by such Challengers.
13. Unlike in some previous Protocols, Entry Fees are not required to be provided with the Challenge documents. Entry Fees (including Late Entry Fee Payment), Performance Bonds and acceptance of a Challenge are separate processes under the Protocol. Article 7.1 of the Protocol provides for the payment of Entry Fees after acceptance of a Challenge, not upon lodgement of the Notice of Challenge and other required documents. This means that the 3 Late Entry Challengers complied with the requirements foreseen by the Protocol for a challenge to be valid.
14. Article 7.7 of the Protocol provides that "*A Competitor shall pay the Entry Fee and provide the Performance Bond in full as a condition precedent to its eligibility and racing....*" In the Panel's view, this means that payment of Entry Fees and provision of a Performance Bond is a condition precedent to being entitled to race in the America's Cup, not to be accepted as a Challenger. As a result, MAC, Stars & Stripes, and Steam Ocean BV will be eligible to race in the America's Cup if they comply with the Protocol, including with the provisions of Protocol Amendment 03 regarding in particular the amended dates of Late Entry Fee Payment and provision of the Performance Bond.
15. The Panel notes that the Applicant itself provided its Performance Bond after the due date foreseen in the Protocol. Protocol Amendment 02 included an amendment to article 7.2 of the Protocol extending the time for those that challenged early from 31 July 2018 to 30 September 2018 to

provide their Performance Bond. It has not been argued that any of this invalidated their respective Challenges.

Multiple Yacht Club Challenges

16. Steam Ocean BV represents an accepted Challenge from two long established Yacht Clubs, i.e. Royal Maas Yacht Club and Royal Netherlands Yacht Club. This dual challenge is unusual in the history of the America's Cup. It is understandable that it has been questioned.

a) Parties' positions

17. American Magic submit that the Deed of Gift, the Protocol and the Rules require for each challenge to be filed by a single yacht club and rely upon the "*plain words*" of the Deed of Gift, the Protocol and the Rules. They therefore submit that a joint challenge by two yacht clubs is null, void and against the plain words of the Deed of Gift and the Protocol.

18. RNZYS have accepted the joint Challenge by the multiple Dutch Yacht Clubs, being of the view that such challenges are valid under the Protocol.

19. RNZYS submit that all challenges after the initial challenge of COR36 are made under the jurisdiction of the Protocol which records items of mutual consent as authorised by the Deed of Gift, and not under the Deed of Gift itself. ETNZ therefore rely upon the terms of the Protocol and refer to Article 59 of the Protocol that provides: "*unless the context otherwise requires, words importing the singular include the plural and vice versa and words importing any gender include any gender*".

20. RNZYS submit that there is nothing in the context of Article 6.1 to suggest that the reference to Yacht Club "*does not also include the plural yacht clubs*" and that the parties to the Protocol have therefore by mutual consent agreed to joint challenges from multiple yacht clubs.

21. Steam Ocean BV submit that either or both Dutch Yacht Clubs meet the requirements of a Yacht Club under the Deed of Gift. This was not disputed. It is not the issue.

22. STEAM Ocean BV also rely on Article 59 of the Protocol, and submit that there is nothing in the context of Article 6.1 that precludes Article 59 having effect. They further submit that if it had been the intention of initial parties to the Protocol to be restrictive, they would have expected words like "single yacht club" or "one yacht club" or "an individual yacht club". They note that both the Clubs meet the requirements set out in the Deed of Gift for a yacht club (which is not in dispute). They submit that either or both could become the Trustee of the America's Cup. They submit the law of trusts places no restriction on trusteeships being limited to a single entity. They submit that should the Dutch Challenge become the eventual winner of the America's Cup, that both Clubs become the joint Trustees of the America's Cup. They note that while there is only one yacht club that can compete pursuant to the Deed of Gift, that "*Any organised Yacht Club*" can be read to include two yacht clubs that each meet the requirements placed on a yacht club by the Deed of Gift.

23. They further submit that their interpretation is supported by the Deed of Gift dissolution clause permitting the transfer from one club to another club of the same nationality in the event of dissolution of the club holding the Cup.

24. They also submit that, if the Arbitration Panel does not accept their submission and take the view that the Deed of Gift requires a single yacht club, the Protocol supersedes the Deed of Gift by mutual consent and Article 59 applies to allow the singular to be plural and vice versa. They further note that if the Arbitration Panel determines that the trusteeship of the America's Cup cannot be held by two yacht clubs, the Dutch Challenge would nominate the older yacht club, being the Royal Netherlands Yacht Club to assume the role. They indeed say that if the Panel "*determines that the Trusteeship of the America's Cup cannot be held by two Yacht Clubs, the Dutch Challenge would nominate the older Yacht Club, being the Royal Netherlands Yacht Club to assume the role*".

b) Panel's analysis and decision

25. As a preliminary comment, the Panel notes that, pursuant to Article 53.3 of the Protocol, it has jurisdiction to "*resolve all matters of interpretation of the Protocol and Rules [...]*", the Rules being defined at Article 16.1 of the Protocol and including (inter alia) the Deed of Gift, the AC75 Class Rule, the relevant Race Conditions and the racing rules.
26. Article 58 of the Protocol specifically defines the term 'Challenger' as follows: "*The term "Challenger", except where inconsistent with the context, names a Yacht Club whose challenge has been accepted by RNZYS and includes any syndicate or other entity which undertakes that Yacht Club's challenge as its representative.*"
27. This is a specific reference in Article 58 being the Interpretation section of the Protocol. The Defender and the Dutch Challenge also refer to Article 58 in referring to the Interpretation section of the Protocol as follows: "*unless the context otherwise requires, words importing the singular include the plural and vice versa and any words importing any gender include any gender*".
28. The Panel considers that the express wording of the term "Challenger" in this article demonstrates a context requiring a single yacht club. It would have been simple for the drafters of the Protocol, had they intended more than one yacht club to be capable of a challenge to provide for this in this definition.
29. It is further considered had the drafters of the Protocol intended such departure from being established practice, and the express wording of the Deed of Gift, they would have expressly provided for it rather than rely on the wording referred to above.
30. In any event, the Protocol cannot depart from the principles of the Deed of Gift which sets the corners of what can be agreed by mutual consent be the signatories of the Protocol.
31. The Deed of Gift systematically uses the singular, for instance when referring to "*Any organized Yacht Club [...] having for its annual regatta [...]*", "*the Challenging Club shall give 10 months [...]*", "*the Club challenging for the Cup and the Club holding the same [...]*", etc.
32. The Deed of Gift does not contain any clause similar to Article 59 of the Protocol. Without prejudice to the aforesaid Panel's views about the proper reading of the Protocol, the Panel considers that the Deed of Gift does not allow for a joint challenge, as it would not for a joint defence.
33. It is therefore the Panel's view that the current purported acceptance of the joint challenge cannot remain as it is presently and consideration of regularisation of the Challenge is required.

34. In considering the regularisation of the Challenge, it is appropriate to ask what prejudice would be suffered if the current purported acceptance by the Defender is regularised to enable the acceptance of the Dutch Challenge to proceed in accordance with the original Deed of Gift and Protocol as interpreted above.
35. It must be recognised that a fundamental principle of the Deed of Gift is that the “*Cup is donated upon the conditions that it shall be preserved as a perpetual Challenge Cup for friendly competition between foreign countries*”.
36. It is not enough for another competitor to say that it will suffer prejudice by having an additional competitor. The Deed of Gift envisages competition from countries around the world. Another competitor does not suffer a relevant prejudice simply because it has to compete against more yacht clubs.
37. It is to be noted that in respect of the joint Challenge, as found by the Defender, both Clubs comply in all respect with the eligibility requirements of the Protocol and the Deed of Gift.
38. The Dutch Challenge have prudently recognised the possibility of an interpretation that a challenger is required to be by a single Yacht Club, and have offered to “*nominate the older Yacht Club, being the Royal Netherlands Yacht Club to assume the role [of Challenger]*”. The change to the Challenge is simply the removal of one of the presently accepted yacht clubs.
39. Since the Panel found that there cannot be a joint challenge, the Panel considers that the Dutch Challenge should be permitted – in order to regularize their challenge – to nominate a single Yacht Club as offered by the latter. Subject thereto, the Dutch Challenge will be considered as a valid Challenger.

DECISION AND ORDERS

40. The three Late Entry Challengers have been validly accepted and are entitled to vote on any Class Rule changes while they continue as Challengers.
41. The arrangements for the Entry Fee, Late Entry Fee Payment and Performance Bond as agreed between RNZYS and COR36 and as set out in Protocol Amendment 03 are valid.
42. The joint Dutch Challenge can be regularized by nominating a single yacht club. The Dutch Challenge is therefore permitted to nominate the Royal Netherlands Yacht Club as their Challenger. Subject thereto, the Dutch Challenge will be considered as a valid Challenge.
43. Any other claim made by the Parties are dismissed.

COSTS

44. American Magic chose to maintain its Application after Cases 02 and 03 were settled. It was entitled to do so; no other Party advised the Panel they wished to further participate in this case after such settlement.

45. With regard to Rule 14.3 of the ROP, the Panel considers that it is fair and equitable that the Applicant meet all the costs of the Application in Case 04 as from 2/03/19. It is from such date that American Magic chose to continue. The costs incurred as from 2/03/19 are modest as most of the Panel's time in reading and considering the issues was incurred before 2/03/19.

COSTS AWARD

46. American Magic is ordered to pay costs of NZD 8,000 to the Panel, to be paid within 14 days of the date of this award. As American Magic have already paid the Application Fee of NZD 8,000 for this Case 04, which the Panel will apply to this Costs Award no further sums are required to be paid by them in this Case.

CONFIDENTIALITY

47. This Decision will be published. All Parties are reminded that all other documents including the Applications, Responses, Replies and documents discovered remain confidential.

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