



AMERICA'S CUP ARBITRATION PANEL

ACAP36/07

IN THE MATTER

of the Protocol
governing the 36th America's Cup

IN THE MATTER

of an Application by
American Magic
New York Yacht Club ("**NYYC**")
(hereinafter altogether the "**Applicant**")

regarding ACWS Cagliari / Coronavirus (COVID-19) outbreak

18 March 2020

AMERICA'S CUP ARBITRATION PANEL

Case No. ACAP36/07

DECISION

THE APPLICATION

1. On 5 March 2020 at 22:16 hours (Swiss Time Zone), an application was received by the America's Cup Arbitration Panel ("**ACAP36**" or the "**Arbitration Panel**" or the "**Panel**") on behalf of American Magic, the representative team of the Challenge by NYYC for the 36th America's Cup (the "**Application**").

2. In its Application, the Applicant described the background and scope of its Application as follows: *“The global Coronavirus outbreak and the particularly serious health situation in Italy, along with the legal measures approved by the Italian government, must be examined in the context of the next ACWS scheduled by Protocol 2.1 a) to be raced in Cagliari, Italy during 23-26 April 2020”*.
3. The Applicant submitted the following request for relief:

The New York Yacht Club American Magic respectfully requests to the America’s Cup Arbitration Panel to determine that:

- a) The above facts around the COVID-19 in Italy and the current legal situation constitute a case of *“force majeure”*, *“act of God”* or *“vis major”* that excuses our participation in the ACWS in Cagliari, Italy next month which would otherwise be required by Article 2.2. of the Protocol.
- b) That due to the said legal excuse of force majeure, the consequence contained in the second sentence of Article 2.2. of the Protocol which reads:

“Any Challenger that does not meet this requirement will no longer be eligible to participate in either the Christmas Race or the Challenger Selection Series.”

does not apply to NYYC American Magic for lack of participation in the ACWS in Cagliari, Italy.

- c) The return of the Cagliari entry fee of 30.000 USD from the Challenger of Record to this Competitor.

THE RESPONSES

4. On 6 March 2020, INEOS Team UK filed a Response to the Application in which it submitted as follows:
 3. We would prefer an outcome in which COR announces within the coming days that the event has been cancelled, and for all Competitors to confirm that this is acceptable despite the requirements of Article 2.1 b) to hold three separate ACWS events in 2020. And we would encourage the Arbitration Panel to engage in discussions with the parties to that end.
 4. However, if COR fails to do so then we would request that the Arbitration Panel exercise its powers, within the expedited timetable referred to in the Directions, to declare that:
 - a. Article 2.2 shall be interpreted so as to imply an exception in the event of force majeure;
 - b. the current situation would be considered to amount to a force majeure event for such purpose; and
 - c. as a result, a failure by a Challenger to participate in the forthcoming ACWS, or indeed in any ACWS event that follows due to such force majeure event continuing in the coming weeks, would not render a Challenger ineligible to participate in either the Christmas Race or the Challenger Selection Series.
5. On 8 March 2020, COR36 filed a Response to the Application in which it submitted *“that the requirements for the COVID-19 event to be treated as a force majeure event, or justifying the application of the principles of frustration, are not satisfied. As the organizer of the ACWS Cagliari, the Respondent has no choice other than*

to oppose the request for relief submitted by the Applicant, including any interim measures. As a consequence, Article 2.2 shall continue to apply in full to all parties to the Protocol'. COR36 also submitted the following:

G. FURTHER CONSEQUENCES IF RELIEF IS GRANTED

25. In the event that COVID-19 is determined to be a force majeure event, or an event which operates so as to frustrate participation in the ACWS Cagliari, the Panel will need to consider what other consequences should follow.
 26. The Respondent suggests:
 - a. that the Respondent should be relieved from its obligation to organize the ACWS Sardegna regattas as provided for by Article 2.1b) of the Protocol.
 - b. that any decision in respect of the ACWS Cagliari should apply with equal force and effect to the forthcoming ACWS in Portsmouth:
 - i. As at midday on 8 March 2020 there have been 211 reported cases of COVID-19 in the UK and 2 deaths;
 - ii. Portsmouth is part of the UK mainland; it is not a separate island;
 - iii. The UK's chief medical officer has said that it is "*highly likely that the infection will spread in a significant way*";
 - iv. the UK Government is reported to be preparing for a potential COVID-19 death toll of 100,000.
 27. Further, in the event that relief is granted in respect of the consequences under Article 2.2 of non-participation in the ACWS Cagliari, any financial losses must lie where they fall, i.e. the wasted costs of organizing the ACWS Cagliari will have to be borne by the Respondent, and the entry fee paid by the Applicant shall not be refundable. On the same basis the effects on the technical program or schedule changes must lie where they fall (i.e. each team shall bear the respective consequences). In support of this position it is submitted that the Applicant does not justify, by reference to any principle of law, the basis for seeking the return of the entry fee for an event when it is seeking to be excused from participating in that event. Moreover, the spread of COVID-19 is not something for which the Respondent can be blamed and where that has financial consequences for all involved parties the general rule is that the loss lies where it falls. The Respondent also suggests that the question of any financial consequences does not have to be determined as a matter of urgency, and if the Applicant wishes to pursue that part of its claim it should be required to set out a properly reasoned basis for the claim to which the Respondent can then reply.
 28. Finally, the Respondent is closely monitoring the situation in Italy and in Sardinia in relation to COVID-19 and will immediately inform the Defender and the other Challengers in the event that it is no longer possible to organize the ACWS Cagliari as a consequence of any new more restrictive Decree of the Italian Government.
 29. The Respondent is willing to discuss all possible measures (including an amendment of the Protocol) under the leadership of this Panel not only with regard to the ACWS Cagliari but also to the ACWS Portsmouth.
6. On 9 March 2020, ETNZ filed a Response to the Application in which it submitted as follows:
- (a) There is no applicable principle of *force majeure* and the applicable legal principles that might allow performance of contractual obligations to be excused are not engaged here;
 - (b) The obligations in the Protocol can only be amended according to its terms governing amendment; and
 - (c) Although as a matter of law the application must be rejected, if it becomes prudent for COR to cancel the event then COR/D can, with the assistance of the Arbitration Panel, reach an agreed position on consequential amendments that are equitable to all.

THE REPLY

7. On 9 March 2020, NYYC filed a Reply in which it “*reject[ed] all the legal arguments of the COR and the Defender*” and “*maintain[ed] all its requests to the America’s Cup Arbitration Panel*”.

NYYC’S REQUEST FOR SUSPENSION AND MEDIATION

8. On 12 March 2020, NYYC filed an application in which it (i) requested “*a delay in the Panel issuing a final decision on America’s Magic’s application, while negotiations to resolve the issues are underway between the competitors and yourself, which are fully supported by American Magic*”, (ii) communicated that NYYC “*managed to negotiate and pay at considerable cost, a later departure of the ship scheduled to carry its yacht and equipment from Florida to Sardinia, so that an additional week from today is now available*”, (iii) requested “*formal mediation under art. 53.4(m) of the Protocol*” and (iv) submitted that “*American Magic would also support the Panel being given any additional powers required to enable it to make any appropriate interim orders and a final and binding determination of all the issues caused by the COVID-19 pandemic*”.
9. Following NYYC’s request, the Panel issued Directions on 13 March 2020, in which it “*determined that the Chairman will conduct a mediation pursuant to Article 53.4(m) regarding Case 7, and more broadly issues arising out of the COVID-19 pandemic and the scheduled America’s Cup World Series regattas of Cagliari, Italy during 23rd to 26th April 2020 and Portsmouth, United Kingdom during 4th to 7th June 2020*”. This mediation was to be held via teleconference on Sunday, 15 March 2020 at 9.30am (New Zealand time).
10. Although the mediation process did not formally start, in order to speed up matters the ACAP Chairman conducted informal mediation with the Parties in view of trying to establish common ground.

COR36’S SUPPLEMENTAL RESPONSE

11. On 13 March 2020, COR36 submitted a supplemental response stating that, in light of the new developments relating to the COVID-19 situation which was worsening, “*The Applicant now accepts and avers that it has become impossible to hold the ACWS Cagliari on the currently agreed dates*”. COR36 therefore submitted the following request for relief:

“a. First, as explained above, ACWS Cagliari cannot go ahead; that is not a matter which can be mediated. The only question, therefore, is whether it is cancelled or postponed.

b. Second, any request by the Defender for blackout periods will not be accepted.

c. Third, the Respondent suggests that the only fair outcome, having regard to the significant investment already made by the Respondent, the Regione Sardegna and by other local authorities, is to allow the Respondent, as the organizer of the ACWS

Cagliari to postpone the ACWS Cagliari until after the ACWS Portsmouth to a date reasonably feasible for all competitors.

d. Fourth, the Respondent suggests that the need for an urgent decision regarding ACWS Cagliari is such that arguments concerning the financial consequences of a postponement or cancellation of the ACWS Cagliari can and should be left over to a later date”.

NYYC’S WITHDRAWAL OF ITS REQUEST FOR MEDIATION

12. On 14 March 2020, by letter to David Tillett (which was thereafter posted in ECAF), NYYC withdrew its request for mediation and submitted that *“As regards NYYC- American- Magic’s original application, much of it has now become moot, except the question of the entry fees paid, for which there is no immediate urgency and the Panel will likely need further information and submissions to properly and fairly assess, possibly after the Challenger of Record’s application has first been determined”.*

PARTIES’ SUBMISSIONS IN RESPONSE TO COR36’S SUPPLEMENTAL RESPONSE

13. By email sent by David Tillett on 14 March 2020 (and posted on ECAF on the same day), the Panel agreed to the withdrawal of the request for mediation that had been made by NYYC, and directed the Parties to file further submissions in response to COR36’s Supplemental Response (as the latter provided updated information and raised new issues). As a result, the following submissions have been filed on 16 and 17 March 2020:
14. Ineos Team UK submitted that (i) as regards the holding of the ACWS Cagliari and ASWS Portsmouth events, *“The Competitors should now accept that neither ACWS Cagliari nor ACWS Portsmouth will be able to go ahead as planned”* and that *“it is simply not practicable to postpone and reschedule either event”*; (ii) as regards consequential issues arising with respect to the terms of the Protocol, *“the parties should formally agree to waive (i) the requirement under Article 2.1(a) of the Protocol for COR to organise and conduct the previously announced ACWS Cagliari and ACWS Portsmouth; (ii) the requirement under Article 2.2 of the Protocol for each Competitor to participate in the ACWS regattas”*; (iii) regarding the return of the entry fees, *“in the current situation of a cancellation, the COR should [...] produce an account of costs that it has incurred and cannot recover, and return any net balance to each participant. The Arbitration Panel should oversee and determine such calculations”*; and (iv) as far as the blackout periods issue is concerned, *“for each team there should be a blackout period during which it “should be prohibited from sailing its yacht”, which should “be determined separately in respect of each team, by replicating the position that it would have been in had the two events had gone ahead”.*

15. NYYC submitted that:

“9. The ACWS Cagliari regatta has been cancelled for good reasons. As the Challenger of Record has publicly announced, it is now “impossible” to hold to regatta and it has been frustrated under contract law”.

10. There is no power in the Protocol, or otherwise by operation of the applicable law, to now belatedly postpone the ACWS Cagliari regatta beyond the specified dates or create an entirely new ACWS regatta.

11. To help facilitate a solution, NYYC-American Magic would welcome the addition of a further ACWS regatta in Auckland to replace the now cancelled regatta, but its view is that this can only now be by way of a collective agreement of all competitors. There is no power in the Protocol, or otherwise by operation of the applicable law, to now belatedly postpone the ACWS Cagliari regatta beyond the specified dates or create an entirely new ACWS regatta”.

16. Regarding the three requests for relief contained in its original application, NYYC submitted as follows:

“a) To be excused from participation in the ACWS-Cagliari due to force-majeure, act of God or Vis major: This has now been resolved with the cancellation of the regatta;

b) Art 2.2 relief: This has also been resolved by the cancellation of the regatta.

c) The return of the USD300,000.00 entry fee: This remains to be resolved by the Arbitration Panel. NYYC-American Magic is entitled to seek a refund under s.61 of the New Zealand Contract and Commercial Law Act 2017 quoted above and from the resulting absence of consideration and unjust enrichment. These may well need further submissions on the applicable law. This issue will return should the ACWS Portsmouth regatta be similarly cancelled so that it makes sense to fully establish the applicable law and principles at this juncture. NYYC-American Magic respectfully requests the Panel either;

i) order the return of the entry fee paid; or

ii) direct further submissions both as to and the application of the applicable law as regards the return of the entry fee paid”.

17. ETNZ (i) submitted that a postponement of the Cagliari ACWS “would require an amendment to the Protocol to be agreed by the Defender and COR” but that, in ETNZ’s opinion, such a postponement is not feasible; (ii) reiterated their willingness “to agree to a Protocol Amendment on the terms set out in paras 19 and 20 of our submissions dated the 9th of March 2020”; (iii) submitted, regarding the issue of whether the Portsmouth ACWS will proceed although this issue is not included in the Application, that Defender (as Organizing Authority) expects to be able to provide more information soon and envisages “making a decision before the six week period prior to the event”; and (iv) submitted that, in respect of NYYC’s request for a refund of the Cagliari Entry Fee which remains outstanding, it considers “that it is in the best interests of all parties to have the issue of the Entry Fee refund in respect of ACWS Cagliari resolved immediately, not at a later date, either via mediation or by a determination of the Panel if agreement cannot be reached via mediation”.

COR36'S FURTHER REPLY

18. On 17 March 2020, COR36 filed a reply to the responses submitted by ETNZ, NYCC and Ineos Team UK in which it submitted that
- (i) *“The Respondent confirms that, for the reasons already explained in its Response of March 13, 2020, the ACWS Cagliari cannot go ahead. The current situation fulfils the requirements for both force majeure and frustration, whichever test is said to apply”;*
 - (ii) *“The Respondent urges ETNZ to take any decision regarding cancellation at the earliest opportunity so as to allow each competitor to avoid incurring unnecessary and wasted costs and expenses”;*
 - (iii) it renounces to its request that Cagliari ACWS be postponed as none of the other competitors support such a postponement;
 - (iv) it *“agrees with the Applicant that the Panel does not have power to order blackout periods”;*
 - (v) *“the financial consequences of the cancellation of the ACWS Cagliari do not need to be resolved as a matter of urgency and the parties should be given a period of time to consider and respond to the legal submissions of the Applicant. The Respondent suggests that this should be done after any final decision in respect of the ACWS Portsmouth has been taken”;*
 - (vi) it *“does not accept that the meaning and effect of Articles 53.12 and 53.13 is that the Protocol is governed by New Zealand law. Article 53.12 identifies only the seat of the arbitration, not the governing law. Article 53.13 deals only with the procedure of the arbitration. The substantive law which is to be applied to disputes arising under the Protocol is to be determined according to Article 53.14”.*

ACAP JURISDICTION

19. As indicated in Directions 01, pursuant to art. 53.4.a) Protocol, the Arbitration Panel shall be empowered *“to resolve all matters of interpretation of the Protocol and Rules [...]”*. In its Application, the Applicant has requested the Panel to interpret Art. 2.1 and 2.2 of the Protocol. The Arbitration Panel therefore has jurisdiction over this matter and, accordingly, the ACAP Rules of procedure (version as at 11 February 2019) (the **“RoP”**) apply to these proceedings.
20. Words used in these Directions have the meaning as defined in the RoP.

EXPEDITED BASIS

21. As indicated in Directions 01, to the extent deemed necessary by the Panel, this matter is treated on an expedited basis pursuant to Art. 5.10 RoP.

RELEVANT FACTS

22. Pursuant to Art. 2.1.a) of the Protocol, the Cagliari ACWS was scheduled to be raced in Cagliari, Italy from 23 to 26 April 2020.

23. As of the date hereof:

(i) the World Health Organization has characterized COVID-19 as a pandemic on March 11, 2020 (<https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen>);

(ii) the Italian government has issued several decrees which substantially prevent any activity (save for limited exceptions, e.g. pharmacies and food markets) in the Italian territory;

(iii) governments worldwide have issued restrictions in movements, (for a summary of the current applicable travel bans <https://www.independent.co.uk/travel/news-and-advice/coronavirus-travel-ban-uk-us-europe-trump-australia-japan-foreign-office-advice-a9399161.html>) (see COR36's Supplemental Response).

DISCUSSION

Cagliari ACWS cancelled

24. In its Supplemental Response, COR36, as the Organizing Authority charged with the responsibility of conducting the event, accepted that it "*has become impossible to hold the ACWS Cagliari on the currently agreed date*" (see COR's Supplemental Response, §6). None of the Parties are in disagreement therewith. As a consequence, the Panel deems that the Cagliari ACWS event scheduled to be raced from 23 to 26 April 2020 has been cancelled by COR36 as Organizing Authority. The Cagliari event will therefore not take place.

25. The Panel considers that such cancellation of the Cagliari ACWS event occurs "for cause", the cause being the objective impossibility as a result of the orders of the local authorities (Italian and Sardinia Governments, respectively). This impossibility resulted in the frustration of the agreement, limitedly regarding the Cagliari ACWS event and not the entire Protocol.

No Panel's power to amend the Protocol

26. Generally the Panel has no power to amend the Protocol (unless expressly given that power, which has not occurred). As a result, the Panel cannot decide that:

- a) the Cagliari ACWS be postponed;
- b) additional ACWS be organized;
- c) any sailing blackouts not provided for in the Protocol should occur.

Portsmouth ACWS

27. The Application only regards the Cagliari ACWS. The Portsmouth ACWS is not the subject-matter of this case.

Entry fees

28. A Panel determination about the entry fees and how they should be applied to costs of the Cagliari ACWS will be the subject matter of a separate decision. Such separate decision will also contain a decision on costs related to the Entry fees issue.
29. In this respect, COR36, as the Organizing Authority, shall submit through ECAF, within **10 days as from the date of this Decision**, a summary table of entry fees received as well as of all costs which have been incurred in relation to the organization of the Cagliari ACWS and which cannot be recovered. Such submission shall be substantiated by reasonable evidence.

DECISION

30. As a result of the aforesaid, the Panel finds that:
- a. The Cagliari ACWS scheduled to be raced from 23 to 26 April 2020 is cancelled; and
 - b. Accordingly, COR36 is relieved from its obligation to organise and conduct the Cagliari ACWS as referred to in Art. 2.1.a) of the Protocol;
 - c. the Parties are relieved from their obligation to enter and participate thereto pursuant to Art. 2.2 of the Protocol.
31. COR36 shall provide the information as foreseen in §29 hereof. Further Directions will be issued thereafter.

COSTS

32. The issue of costs will be the subject matter of a separate decision. As things currently stand, it is the Panel's intention to order that the Application Fee paid by NYYC (amounting to NZD 8'000) shall be born by NYYC and that all Panel's costs exceeding the Application Fee shall be born in equal shares by the four Parties involved in this case. Should any Party have different views regarding the allocation of costs, such Party may file through ECAF a short submission in that respect **by no later than Friday 20 March 2020 midnight (New Zealand time)**.