
In the Matter of the Arbitration *

between *

DEIULEMAR COMPAGNIA DI NAVIGAZIONE, S.P.A., *
as Owner and Claimant *

and *

INDUSTRIAL TRADING AND SERVICES, S.A., *
As Charterer and Respondent *

Under a Contract of Affreightment *
dated November 29, 2003 *

FINAL AWARD

Before: John F. Ring, Jr., David W. Martowski and Thomas F. Fox, Chairman

For: Deiulemar Compagnia di Navigazione, S.P.A.
Fowler Rodriguez & Chalos, LLP by George M. Chalos, Esq.

For: Industrial Trading and Services, S.A.
No Appearance

INTRODUCTION

This matter arises out of a Contract of Affreightment ("COA") dated November 29, 2003 between Deiulemar Compagnia di Navigazione, S.P.A. ("Deiulemar" or "Owner"), as Owner and Industrial Trading and Services, S.A., ("ITAS" or "Charterer"), as Charterer.

BACKGROUND

The contract called for the carriage of four (4) cargoes of coal in bulk from Qinhuangdao, China to Vado Ligure, Italy during the period of April 1, 2004 to June 30, 2004. Each lifting was to be 60,000 metric tons, 10 percent more or less in Owner's option, with an expected intake of about 64,000 metric tons. Although Clause 31 of the contract specified only three liftings, the fixture recap dated November 25, 2003, (Owner's Exhibit "B") indicated that the COA indeed

covered four liftings. Moreover, correspondence between the parties and subsequent court documents confirmed the agreement to four liftings. The applicable freight rate was \$26.75 per metric ton. The first of the four voyages took place without apparent incident. On April 4, 2004, the contract was amended to provide that the fourth lifting would be performed in July 2004 instead of June (as originally scheduled) and an addendum to the contract (Owner's Exhibit "C") was issued accordingly. Also, the freight rate for this fourth voyage was increased to \$31.00.

After ITAS failed to provide cargo for the remaining three liftings, Owner submitted a claim against ITAS for \$1,704,480.00 in damages for breach of contract. Clause 27 of the COA provided that proved damages was the penalty for non-performance of the contract; not exceeding the estimated amount of freight. Owner also seeks interest, costs and attorney's fees.

PROCEEDINGS

Owner submitted its claim to ITAS on October 6, 2004. On October 7, 2004, Owner's local Italian counsel wrote to ITAS, demanding settlement of the claimed amount and threatening to bring the matter to arbitration, if ITAS did not give prompt confirmation of payment. Having been otherwise unable to enforce its contractual rights, Owner demanded arbitration under Clause 5 of the contract on March 17, 2005 and named Mr. Martowski as Owner's party-appointed arbitrator. Despite subsequent correspondence between the parties, ITAS failed to appoint an arbitrator.

On April 5, 2005, Deiulemar petitioned the U.S. District Court for the Southern District of New York to enforce the arbitration agreement. As no response was received from ITAS, Judge Marrero of the District Court granted Owner's Motion for Default Judgment on July 29, 2005 and confirmed Mr. Ring's appointment as ITAS's party-appointed arbitrator. Subsequent

to the District Court's order of July 29, 2005, Mr. Fox was appointed by Mr. Ring and Mr. Martowski as third arbitrator and chairman on August 4, 2005.

However, ITAS wrote to Judge Marrero on September 16, 2005, challenging the jurisdiction of the District Court. On September 26, 2005, Judge Marrero directed Deiulemar to respond to ITAS's jurisdictional contentions. Deiulemar complied with his request on October 19th and on October 24, 2005, Judge Marrero issued a Final Order confirming his prior Default Judgment and directing the arbitration to proceed.

The panel completed its disclosures on October 31, 2005 and Deiulemar submitted its preliminary claim with supporting documents on November 23, 2005.

On March 13, 2006, the panel requested Owner to provide further clarification of its claims within 15 days. ITAS advised on March 27, 2006 that it again rejected the jurisdiction of the U.S. District Court and enclosed a copy of its letter of November 15, 2005 to Judge Marrero. In that letter to Judge Marrero, ITAS claimed that it "never signed, executed or implicitly accepted the document named Contract of Affreightment (COA)".

Deiulemar noted ITAS's advice of March 27, 2006 and also submitted the clarification of its damages, as earlier requested by the panel. That clarification consisted of an unsworn statement by its in-house broker with additional details of Owner's claim for loss of earnings and supporting documents, which were derived from the relevant Baltic Freight Index for Panamax vessels, and which listed the average daily time charter trips rates from the Far East to Europe via the U.S./Canadian North Pacific Coast for May, June and July 2004.

The panel advised ITAS on April 7, 2006 that, unless it responded substantively to Owner's evidentiary submissions by April 21, 2006, the proceedings would be closed on that date without further notice and the panel would render its award on the basis of the evidence

presented. ITAS replied on April 21, 2006 and again advised that, as it had not executed the COA, it would not be subject to the panel's jurisdiction. ITAS did not participate further in these proceedings, which were closed on May 1, 2006. However, in response to a subsequent request to the parties for additional security for the panel's fees, ITAS again rejected the panel's jurisdiction for the reasons previously stated.

OWNER'S ARGUMENTS

I Deiulemar Submits That It Is Entitled To An Award Of US\$1,704,480.00, Plus Interest, Costs And Attorney's Fees, As A Matter Of Law For ITAS's Breach And/Or Failure To Honor Its Obligations Under The COA.

Deiulemar claims that a breach of contract has occurred when it is established that there was a contract, performance by the plaintiff, breach of contract by the defendant and damages.

Owner claims that there is no dispute that the COA was a valid and binding contract between the parties. It also notes the partial performance by ITAS under the COA. However, Owner contends that, despite its own performance of its obligations, ITAS has failed to complete its binding obligations, causing Owner to be damaged by the amount claimed, exclusive of interest, costs and attorney's fees.

Owner submits that the matter is a very simple and "clear-cut" case. Deiulemar maintains that the parties executed the COA for the lifting of four cargoes of coal in bulk during the period of March through June 2004; that Deiulemar provided one vessel and was ready, willing and able to provide three additional vessels, as required by the COA; that ITAS failed to nominate the three final cargoes and/or make payments due and owing under the COA; and that Deiulemar has suffered the damages claimed as a result of ITAS's breach. Therefore, it is contended, Owner should be made "whole" by a decision rendered in its favor.

II No Duty to Mitigate Under a COA.

Owner claims that it is axiomatic that a shipowner need not prove that it has mitigated its damages under a COA. Owner cites 2003 SMA Award (3814), *Scandinavian OBO Carriers, Inc. v. AMCI Export Corporation* in support of its position. In that matter, after having provided cargoes for the first two liftings of a COA, the charterer failed to provide a cargo for the third and final lifting. The issue in that arbitration was not liability, but, rather, the quantum and proper calculation of the damages due the owner for charterer's non-performance of the final lifting. In paraphrasing the panel's finding in that matter, Owner claims that it is entitled to the same monetary result that it would have achieved had Charterer provided cargoes for the final three liftings under this COA. Moreover, Owner further contends that, based on that ruling, mitigation of damages is irrelevant in the case of a COA providing for TBN vessels, where no vessel was nominated. Therefore, Owner submits, the only issue here is the proper quantum and calculation of damages to be awarded to Owner.

III The Proper Measure of Damages is Deulemar's Expected Profit Based upon the Prevailing Market Conditions.

Owner maintains that its damages should be measured by the profit it would have made (at the prevailing market conditions), had ITAS performed under the COA. Deulemar again relies on the finding in the Award cited above in claiming that the cost of execution should be based on the market rate for the period when each of the three remaining cargoes was to have been lifted – in May, June and July 2004. The basis for Owner's claim is as specified in Owner's Exhibit "D". Therefore, Owner contends that, as a matter of law, it is entitled to an award amounting to \$1,704,480.00 for all lost profits and expenses currently outstanding, excluding interest, costs, and attorney's fees.

IV This Panel is Authorized and Requested to Award Deiulemar Costs and Attorney's Fees Incurred.

Owner cites both SMA Rule 30 and two SMA Awards in support of its application for costs and attorney's fees. Moreover, Owner claims that it is "just and equitable" for the panel to award it the costs and attorney's fees incurred in these proceedings, as well as those of the earlier proceedings in the U.S. District Court to enforce the arbitration agreement. Deiulemar also reserves the right to make a supplemental submission of the exact quantum of its costs and attorney's fees, if requested.

Finally, Deiulemar submits that, as a matter of law, it is entitled to a decision awarding it \$1,704,480.00, plus interest, costs, and attorney's fees to recover the full amount outstanding. (Counsel for Claimant later submitted affirmations in support of attorney's fees and costs, which total \$16,200.51).

PRE-ARBITRATION CORRESPONDENCE WITH ITAS

Although ITAS has not participated in these proceedings, there is a record of prior correspondence with ITAS by Owner's New York and Italian counsel concerning Owner's demand for payment of its claim. On October 6, 2004, Mr. Chalos sent an email to ITAS (Exhibit "D"), which set out the basis of Owner's claim for damages. Italian counsel's letter to ITAS of October 7, 2004 repeated the basis of Owner's claim and sought confirmation of settlement from ITAS. On March 17, 2005, Owner served a demand for arbitration on ITAS, who replied on March 21, 2005 (Exhibit "H").

ITAS recounted its contract of November 26, 2003 covering its purchase of four Panamax cargoes of coal from its Chinese Seller ("Seller"), which were sold immediately to ITAS's Italian Buyer ("Buyer"). While the first lifting was completed without apparent incident

in April 2004, ITAS alleges that the Seller subsequently interrupted the supply of coal and demanded continuous price increases, which ITAS was unable to accept. Moreover, ITAS claims that it "had ceased all types of trading" because of the cutoff of supplies. ITAS also claimed that it had been trying for almost a year to reach agreement with its Seller with a view to "finding an operational transaction" with Deiuemar. In the same letter, ITAS related that it had virtually ceased operating because of a lack of coal and that in any arbitration award favorable to Deiuemar, Owner would need to prove that it had taken three vessels on a time charter basis to perform the ITAS COA alone. Moreover, ITAS claimed that it had no assets and that it would be financially unable to pay any damages whatsoever. Finally, ITAS asserted that, while it did not believe that arbitration would settle the matter, a settlement could be finally made if it managed to "achieve a transaction" with its Seller.

Owner's counsel replied to ITAS's letter of March 21, 2005 and noted that ITAS had not made any offer of settlement. Moreover, Owner advised that if no settlement offer or nomination of its arbitrator had been received from ITAS by April 1, 2005, Owner would apply to the U.S. District Court to seek to compel ITAS to arbitrate the matter. ITAS replied, without prejudice, on the same date that its deadline to the Seller for a settlement proposal was about to expire. ITAS maintained that, without an agreement, it would commence arbitration proceedings in China, thereby consuming the balance of its funds. On that basis, ITAS contended, it would not appoint an arbitrator in this matter, as it was unable to afford the legal cost. In conclusion, ITAS advised that it would keep Owner advised of all developments and that it would discuss an amicable solution, should it receive a favorable award in China.

DISCUSSION AND DECISION

In claiming that it did not execute the COA, Charterer has challenged the existence of the COA and, by extension, the panel's jurisdiction in this matter. We reject those assertions. A review of Charterer's conduct is instructive in reaching our conclusion. There is no dispute that the first of the four contracted liftings was performed by Charterer in April 2004. Moreover, Owner has not submitted a claim for damages arising from the April 2004 voyage and we must therefore assume that the cargo was carried without dispute. Furthermore, the COA was amended on April 4, 2004 to provide for the June 2004 cargo to be loaded in July 2004. In addition, and notwithstanding its subsequent disavowals, ITAS has previously admitted its failure to complete the balance of the contracted liftings. ITAS's belated attempt to avoid liability under the contract by virtue of its not having signed the document is belied by its previous conduct. Moreover, the U.S. District Court had already found that ITAS was subject to the jurisdiction of an arbitration panel.

Therefore, the only issue for decision is the quantum of Owner's damages arising from ITAS's breach. Owner has argued that the matter is a simple "clear cut" case and that it should be made "whole" by a decision in its favor.

The panel unanimously agrees that Owner had no duty to mitigate under the COA and that the proper measure of Owner's damages is its expected profit based upon prevailing market conditions. In support of its claim for damages, Owners relied principally on Exhibits "D" and "E" and provided a copy of SMA Award 3814 in support of its position. Although Exhibit "E" is partly, albeit inadvertently, redacted, Exhibit "D" recounts the same information in support of the claim for damages. Owner has asserted in Exhibit "D" that for the May, June and July cargoes, which were not lifted, its loss of \$1,700,000 was calculated on the basis of the

equivalent time charter on a standard Panamax on the contractual rate compared to the average of the BIFFEX for a similar trip.

Specifically, Owner's Exhibit "D" supports its claim of \$1,704,480 as follows:

The modern standard Panamax calculated on the contractual rate of \$26.75 gives a time charter rate of \$34,807 daily, while on the additional cargo to be performed in July the result would be \$41,287.

The average rate on the BIFFEX for the similar trip in May is \$21,535, in June - \$16,568 and in July is \$27,330.

The duration of the trip is estimated at 37.5 days. Therefore, the contractual rate of \$34,807 less \$21,535 (the average BIFFEX rate for May) equals \$13,272 multiplied by 37.5 equals \$497,000.

For June - \$34,807 less \$16,568 equals \$18,239 multiplied by 37.5 equals \$683,396.

For July - \$41,287 less \$27,330 equals \$13,957 multiplied by 37.5 equals \$523,387.

As ITAS failed to respond substantively to Owner's submissions, we found ourselves having to assess Owner's claims in isolation; without the benefit of the perspective that Charterer's absent countervailing evidence and arguments might have provided. However, upon our review of Owner's initial submission, we found a substantial claim supported only by the above brief references to a scale of notional values, without any underlying explanation or description of its meaning, prompting this panel to call for Owner's further clarification of its preliminary statement of damages.

The clarification provided by Owner's broker included the deadweight tonnage, speed and fuel consumption of a Standard Baltic Freight Index Panamax as the basis for three voyage estimates, which utilized the respective average time charter trip values (as referenced above) to determine the prospective profits for each of the three unfulfilled liftings. We have found that those average time charter trip values accurately reflect the Baltic Exchange Panamax Index

Route P4-03 values for the period from May 4, 2004 to July 30, 2004. Furthermore, based on our commercial experience, we have also found the methodology for calculating the estimated duration of the voyages and the resultant cost estimates for fuel consumption, port charges and Suez Canal transit fees, albeit not supported by commercial documentation, to be reasonable.

Notwithstanding that finding, we do take issue with the lack of completeness of Owner's presentation – both in the first instance and in response to the panel's request for clarification of damages. Specifically, when initially contemplating the viability of the prospective COA, Owner undoubtedly made preliminary voyage estimates based on its view of market conditions over the time from before entering the contract on November 29, 2003 through its intended period of execution from April through June (later July) 2004. Moreover, voyage estimates made in contemplation of executing the first lifting would have provided crucial insights into the evaluation of market tonnage presented for a timecharter trip (or any other timecharter basis) for the performance of that lifting. Furthermore, in preparing its claim for damages, Owner had the benefit of the completed first voyage, the presumably substantially supportive financial results of which could have served as strong evidence of what the subsequent unfulfilled voyages (adjusted for the time charter rates current for those periods) may have resembled. Apart from its additional submission of March 26, 2006, Owner provided none of that information. While Owner cited SMA Award 3814 in support of its preliminary claim, it did not follow the format of the more detailed presentation of that claim, prompting this panel to require additional clarification.

Our analysis of the values of the Panamax P4-03 for the period from May 4, 2004 to July 30, 2004 has disclosed that the average daily valuation for each of the three months has been derived from a wide range of valuations for the respective months.

	<u>May 2004</u>	<u>June 2004</u>	<u>July 2004</u>
Days	19	22	22
Average	\$21,535	\$16,568	\$27,330
Maximum - 05/10/04	\$25,960	06/30/04 \$18,850	07/13/04 \$33,909
Minimum - 05/28/04	<u>\$17,900</u>	05/25/04 <u>\$15,597</u>	07/01/04 <u>\$19,803</u>
Difference	\$8,060	\$3,253	\$14,106

Rider Clause 31 of the COA (in part) specifies the shipment period from April 1, 2004 to June 30, 2004 (later amended to July 2004 with an increased freight rate of \$31.00 per metric ton, for that lifting). However, that clause does not provide for the declaration of the laydays for each lifting, but merely specifies that the final performing vessel is to be nominated latest 10 days prior to the first layday. Moreover, the last paragraph of that clause states:

“Notwithstanding the above, due to tight delivery schedule, Owners will keep Charterers advised about potential vessels in position to load in consideration of which Charterers will make endeavour (*sic*) to load the Owner’s vessel.”

As the above table indicates, there were differences in the maximum and minimum daily values for the respective months – May - \$8,060, June \$3,253 and July \$14,106. A clearer understanding between the parties concerning potential performing vessels and a tighter clause covering the narrowing of laydays might have provided us with a more refined basis for our assessment of Owner’s damages.

Nonetheless, due to the imperfect language of Clause 31 with respect to the nomination of performing vessels, as well as to the lack of any substantive input from Charterer that discovery may have produced, we must accept as reasonable the respective monthly average rates upon which Owner has calculated its damages for the three unfulfilled liftings. However,

we must also note that Owner's failure to more adequately support its preliminary submissions has unreasonably prolonged these proceedings.

Although the COA does not provide for legal fees and does not incorporate by reference the SMA Rules, arbitrators have the power to award attorneys' fees. See *Bybyk v. Paine Webber, Inc.*, 81 F.3d 1193 (2nd Cir. 1996) and *Stone & Webster, Inc. v. Triplefine International Corp.*, 2004 WL 2940799 (2d Cir. 2004). ITAS was offered every opportunity to participate in these proceedings and failed to do so, which forced Deulemar to incur substantial expense in seeking its remedies. Accordingly, Owner is awarded a reasonable allowance towards its legal fees and costs of \$12,500.00.

AWARD

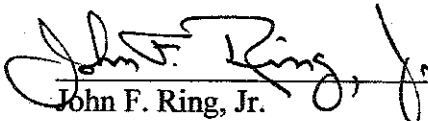
For the reasons cited above, Charterer is directed to pay Owner \$1,929,822.44 as follows:

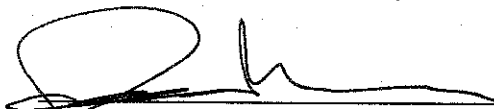
Claim amount	\$1,704,480.00
Interest thereon at 6.25% per annum from	
July 31, 2004 to June 14, 2006	199,342.44
Allowance for attorney's fees	12,500.00
Arbitrators' fees	<u>13,500.00</u>
Total	\$1,929,822.44

If the above amount is not paid within 30 days from the date of this award, interest on the principal amount due shall resume at the rate of 8.00% from July 14, 2006 and continue until payment in full has been made or the award is reduced to judgment, whichever occurs first.

The arbitrators' fees, which are assessed entirely against ITAS, are the joint and several obligations of the parties. The manner of settlement of those fees is set forth in Appendix "A", which forms an integral part of this award.

Pursuant to the arbitration clause, a court of competent jurisdiction may confirm this award.


John F. Ring, Jr.


David W. Martowski


Thomas F. Fox, Chairman

New York, NY
June 14, 2006

In the Matter of the Arbitration

between

DEIULEMAR COMPAGNIA DI NAVIGAZIONE, S.P.A.,
as Owner and Claimant

and

INDUSTRIAL TRADING AND SERVICES, S.A.,
As Charterer and Respondent

Under a Contract of Affreightment
dated November 29, 2003

APPENDIX A

The panel's fees and expenses in this matter total \$13,500.00 and are payable as follows:

John F. Ring, Jr.	\$4,000.00
David W. Martowski	\$2,950.00
Thomas F. Fox	\$6,550.00

As Owner has deposited \$17,000.00 with the Society of Maritime Arbitrators, Inc., the above fees are to be distributed by the SMA. The remaining balance, with accrued interest, is to be returned to Owner.

Owner has a claim-over against Charterer for the amount of \$13,500.00, as reimbursement for arbitrators' fees paid by Owner on Charterer's behalf. Interest on that amount at 8.00% per annum will run until it has been paid.

The panel's fees and expenses are a joint and several obligations of both parties.

New York, NY
June 14, 2006