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| In the Matter of the Arbitration<br><br>between<br><br>EUROCEANICA (UK) LTD.,<br>as Owners of the **CRYSTAL AMARANTO**<br><br>and<br><br>TRICON SHIPPING INC.,<br>as Charterers | Final Award |

Before: Paul E. O'Brien
David W. Martowski
Manfred W. Arnold

Appearances: Freehill Hogan & Mahar
for and on behalf of Euroceanica (UK) Ltd.
by Jan Petter Gisholt, Esq. and William J. Pallas, Esq.

DLA Piper LLP (US)
for and on behalf of Tricon Shipping Inc.
by Stanley McDermott III, Esq.

## INTRODUCTION

This arbitration arises out of a dispute between the Owners and Charterers of the M/T CRYSTAL AMARANTO over whether an owner can claim demurrage or a charterer can claim damages for deviation arising out of the reasonability of a master's decision to "clause" a Bill of Lading on account of apparent damage or discrepancy to the cargo.

## PROCEEDINGS

Owners demanded arbitration on February 4, 2011 and appointed Paul O'Brien as arbitrator. In response, Tricon nominated David Martowski. Manfred Arnold was selected as the third arbitrator and chairman for procedural matters. Thereafter, Owners and Tricon submitted main, reply, and sur-reply briefs which included as exhibits the voyage documents, certain survey reports, email correspondence, and technical data relating to the characteristics of caustic soda. The arbitrators convened, evaluated the evidence and arguments, and have made a unanimous decision regarding the claims and counterclaims.

## FACTS

Under a modified ASBATANKVOY form charter party dated October 23, 2009, Euroceanica (UK) Ltd. ("Euroceanica" or "Owners") chartered the CRYSTAL AMARANTO to Tricon Shipping Inc. ("Tricon" or "Charterers") for a single voyage from one safe berth Alexandria (Egypt) to one safe berth Huelva (Spain)[1] with a part cargo of min. 4,000 mt up to 4,200 mt one grade of caustic soda ("CSS") in Tricon's option.

The charter party obliged Tricon to load the caustic soda at 100 mt per hour and to discharge at 150 mt per hour, Sundays and Holidays included (SHINC) both ends

[1] The cargo was eventually discharged in Turkey as a consequence of the dispute underlying this arbitration.

with the laytime being reversible. Demurrage was payable at the rate of US$10,000 per day pro rata for any excess time beyond the agreed laytime.

The CRYSTAL AMARANTO arrived at the load port of Alexandria on October 26, 2009 and tendered her Notice of Readiness to load the cargo on October 27, 2009. Laytime commenced on that day at 0600 hours. Before loading began, the vessel's tanks were inspected and accepted by SGS on behalf of Charterers and a Certificate of Tank Cleanliness was issued on October 27, 2009 at 2100 hours. Loading commenced on October 28, 2009 at 0115 hours and was completed on October 30, 2009 at 0845 hours. The vessel's total allowed laytime expired on October 30 at 1000 hours.

During loading operations on October 28, 2009, the Master observed a film of foreign material floating on the surface of the cargo and detected a strong smell of urea in the area of certain cargo tanks. The Master reported these conditions, following which Owners arranged for a surveyor to attend. A Free Marine Limited surveyor, representing vessel's P&I Club, boarded the vessel on October 29, 2009 at 2115 hours and confirmed that he "observed a membrane of foreign materials floating on the cargo surface in addition to strong urea smell emitted from the cargo." The Free Marine surveyor advised the vessel's Master "to issue a Letter of Protest to reserve the Owner's rights." As for the suspected cause of the foreign matter on the surface of the cargo and the strong urea smell, the Free Marine surveyor commented:

> *In the light of cargo tanks acceptance by the SGS, we have to deny any possibility of contamination by previous cargos* [sic] *at the vessel's tanks . . .*

> *It is hard at the present stage to determine – by visual inspection – the nature of and the source of the foreign materials at the cargo surface which could be resulted of contaminated hoses and/or substandard cargo.* [sic][2]

The Free Marine surveyor returned to the vessel on October 31, 2009 at 1530 hours to conduct another survey together with Tricon's SGS surveyor.[3] The photographs incorporated in the Free Marine report (and provided to the panel) showed foreign matter floating on the cargo surface. The Free Marine surveyor again remarked that it was still not possible to determine the "nature and the source of the foreign materials at the cargo surface," and once more raised the possibility of contaminated hoses and/or substandard cargo as being the reason for the contamination.[4]

Based upon the presence of a foreign substance floating on the surface of the cargo in the vessel's tanks and the Free Marine surveyor's findings, the Master questioned the condition of the caustic soda cargo at the time of the joint survey on October 31. Acting on his concerns, the Master claused the Bill of Lading to reflect that "film observed on surface of cargo." [5] He also drew a line through the notation "clean on board" on the body of the Bill of Lading.

Tricon had sold the caustic soda aboard the CRYSTAL AMARANTO to their Spanish customer on letter of credit terms requiring Tricon to present a clean Bill of

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[2] Exhibit A to Owners' Reply Brief.

[3] Owner submitted the Free Marine survey reports as exhibits. The panel, however, has not been provided with a copy of any report by SGS although certain select photographs taken by the SGS surveyor were provided.

[4] Exhibit B to Owners' Reply Brief.

[5] While Tricon has confirmed that the cargo was ultimately determined to be in sound condition and sold without discount, the lab analysis performed by Intertek dated November 2, 2009 stated that "The tested sample was found to be contaminated with foreign matter which [sic] possibly organic matter."

Lading. Given that the document was no longer "clean," the sale failed. Tricon fulfilled their Spanish sales contract by shipping a replacement cargo on another ship from Izmit (Turkey) to Huelva. Tricon diverted the CRYSTAL AMARANTO cargo to Ismit. In making these arrangements, Tricon incurred additional costs.

The CRYSTAL AMARANTO arrived at the port of Izmit[6] on November 4, 2009 at 0915 hours. Discharge operations were completed on November 6, 2009 at 0655 and the vessel sailed at 0800 hours the same day.

## CLAIMS AND COUNTERCLAIMS

Owners, as a consequence of the delays encountered at the load port, claimed demurrage of $33,075.52. Owners have requested that this panel award that sum in demurrage, its legal fees of $10,541.00 in pursuing the demurrage claim, its legal fees of $18,888.50 in defending against Tricon's counterclaim, costs of $1,972.28, and the costs of this arbitration.

Tricon deny all of Owners' claims and seek recovery of their losses of $103,211.25 that were incurred because the CRYSTAL AMARANTO was diverted from her intended discharge port of Huelva to Izmit. This loss is mostly attributable to Tricon having to provide a replacement caustic soda cargo and ship to satisfy the Huelva receiver. Tricon also seek their legal fees of $18,422.85 and the costs of this arbitration.

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[6] The underlying documentation shows both Yenikoy (Exhibit C) and Izmit (Exhibit D) as the discharge port.

## DECISION

Counsel exerted considerable effort and advanced worthy arguments in support of their respective positions. A significant portion of these arguments have been devoted to the characteristics of caustic soda, to its propensity to form a surface film, to the question of whether such film is due to contamination or inherent vice, and to whether the Master had a legal obligation to clause the Bill of Lading. Instructive as these arguments may be, the critical issue to be decided is whether in this particular situation in October 2009 in Alexandria, the Master of the CRYSTAL AMARANTO, in deciding how and when to clause the Bill of Lading, used reasonable care in making that decision. The panel is of the opinion that he did.

Before addressing the Master's actions, the panel wishes to refer to the Dow Chemical publication[7] and the ensuing arguments about sodium carbonates (as an "impurity"). Charterers make the point that the effect of atmospheric carbon dioxide; *i.e.*, the creation of a film on the cargo surface; is a normal event in the transportation of caustic soda and does not represent a contaminant. Indeed, Tricon states that the cargo arrived after the transshipment in turkey in the same good order and condition in which it had been shipped. Charterers argue that these conditions are natural to the product, not exceptional and "much less evidence that the condition of the cargo is unsound and a clean B/L should not be issued."[8]

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[7] Charterers' Exhibit 8.

[8] Charterers' Reply Brief at p. 2.

If indeed the presence of a "surface film" and odor were such normal and accepted characteristics of caustic soda by everyone in the trade, why could Tricon not persuade the market to accept a "fish-smelly" and filmy parcel? It is not unknown that caustic soda cargoes have been rejected because of odor conditions. The burden to educate the industry about smell and appearance rests with charterers and/or shippers

The Master's responsibility in this situation was to assess reasonably the condition of the cargo, using the skill and ability expected of someone in his position. He is not expected to be an expert in the particular cargo, but instead is to act with deliberation and prudence in choosing the best course of action. The Master here did discharge that burden; he did not rely only on his own judgment but also called in outside assistance when the dispute over the condition of the cargo of the Bill of Lading first arose. This assistance - the Free Marine surveyor - conducted two separate cargo surveys on October 29 and October 31. Both of these surveys expressed reservations about possible contamination and supported the Master's assessment of the situation. Masters, in such situations, are under considerable and often conflicting pressure, as was the Master here. No evidence has been adduced that the Master was incompetent, overwrought or compromised. Rather, given the considerable evidence that something was amiss with the cargo, there is no reason to think that, in clausing the Bill of Lading in the way he did, the Master was doing anything other than acting in the way he thought best to protect the interests of both Owners and the third party cargo buyers.

The panel understands that the standard articulated here is not absolute or unqualified. A Master is not expected to be completely knowledgeable as to all the characteristics of the particular cargo in question - although it is certainly possible that a master who has, say, 20 years' experience of carrying inorganic chemicals would be regarded as more expert in that type of cargo than a master who had no such experience. Notwithstanding, what a master must do is to assess the situation reasonably and accurately, using best judgment and experience in any event.

In support of their arguments, Owners refer to a case covering a similar situation:[9]

> *Reviewing the contentions of the parties, it appears to me that the threshold question is whether the action of the Master was reasonable because the detention claim, the bunker consumption and the stevedoring charge all flow from the Master's refusal to sign clean Bills of Lading.*
>
> *. . . It is difficult to second-guess the perception of the person on the spot* [emphasis added]. *The assessment of whether or not the action of the Master was reasonable is not an easy question to answer, particularly since we are now dealing with the matter in hindsight. Had the Master issued a clean Bill of Lading and had there been a problem subsequently with the cargo quality, Charterers no doubt would have looked for recourse against the Owners. On the other hand, had the Master claused the Bills of Lading, Charterers and/or the suppliers could not have drawn under the letter of credit, which required clean Bills of Lading. . . .*
>
> *It is my opinion that although the Master's attitude may be considered over-cautious, his action must be viewed as prudent, especially when taking into account the circumstances and the location. Also, the Master's action was for the ultimate benefit of the Charterers and/or the cargo interest.*

Not quoted by counsel, but available in the public domain, is also the English case of the DAVID AGMASHENEBELI decided by Justice Coleman.[10]

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[9] HANS LEONHARDT, SMA #2820 (1991).

Despite the argument by Tricon that the cargo was in sound condition and was sold without discount, the observations by the Master, the Free Marine surveyor as well as the SGS surveyors persuaded us that the Master's actions were prudent. Therefore, we deny Tricon's claim and award Owners' demurrage claim as submitted.

**Interest**

The panel awards interest at the rate of 3.25%, representing the weighted average prime rate for the period from December 3, 2009 to the date of this award.

**Costs and Fees**

Clause 24 of the ASBATANKVOY form provides for the awarding of costs, including a reasonable allowance for attorneys' fees. The panel makes an allowance towards Owners' fees and costs of $28,000.

The arbitrators' fees and expenses, as set for in Appendix A, are the joint and several obligation of both parties and form an integral part of this award. Payment of the fees is to be made in accordance with the directions contained in the appendix.

**Award**

Tricon is directed to pay Owners the amount of $71,066.47, which we arrived at as follows:

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[10] QBD Admiralty Ct) May 31, 2002.

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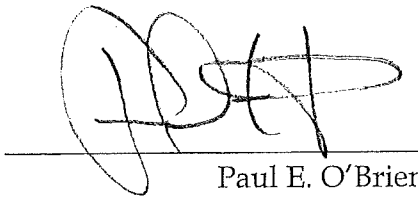
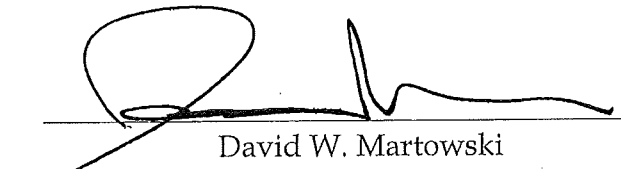
| • Demurrage | $33,075.52 |
| Interest thereon | 3,012.81 |
| • Allowance towards legal fees and costs | 28,000.00 |
| • Arbitrators' fees paid on Charterers' behalf | 6,978.14 |
| Total due Owners | $71,066.47 |

If payment has not been made within 15 days from the date of this award, interest at the rate of 3.25% p.a. is to accrue on the principal amount of $33,075.52 and run until settlement has been made or the award has been reduced to judgment.

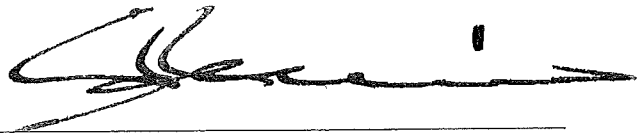
The Arbitration Clause provides that this award may be made a rule of the court.



Paul E. O'Brien



David W. Martowski



Manfred W. Arnold

New York, New York
September 21, 2012

APPENDIX A

**In the Matter of the Arbitration between EUROCEANICA (UK) LTD., as Owners of the CRYSTAL AMARANTO and TRICON SHIPPING INC., as Charterers under a Charter Party dated October 23, 2009**

The panel's fees and expenses for rendering this award total $14,480, which are assessed in full against Charterers.

The individual fees are as follows: Mr. O'Brien - $5,600, Mr. Martowski - $2,600 and Mr. Arnold - $6,280 are to be satisfied from the SMA escrow account. The account closing balances are $7,501.86 for Tricon and $7,509.53 for Euroceanica.

After full payment has been made to the arbitrators, Owners are entitled to a claimover of $6,978.14 against Charterers, which we have included in our award. Any remaining balance in the escrow account is to be returned to Owners' P&I Club or their counsel.

The fees and expenses are a joint and several obligation of the parties.

New York, New York
September 21, 2012