In the Matter of the Arbitration between STANDARD COMMODITIES AUSTRALIA PTY LTD., as Charterers and EITZEN CHEMICALS (SINGAPORE) PTE LTD., as Owners of the **SICHEM EVA**	:	Final Award

Before: Manfred W. Arnold
Sole Arbitrator

Appearances: Macpherson & Kelley Lawyers (Sydney) Pty Ltd.
for Standard Commodities Australia Pty Ltd.
by Geoff Farnsworth, Esq. and Janice Lim, Esq.

Freehill Hogan & Mahar LLP
for Eitzen Chemicals (Singapore) Pte Ltd.
by William J. Pallas, Esq. and Jan P. Gisholt, Esq.

INTRODUCTION

This dispute arose under a charter party (on the ASBATANKVOY form) dated February 26, 2009 between Eitzen Chemicals (Singapore) Pte Ltd. (hereinafter Eitzen or Owners) and Standard Commodities Australia Pty Ltd. (hereinafter Standard or Charterers). The fixture covered the shipment of a part cargo of 7,000 mt, 2% more or less in Charterers' option, of multiple grades of tallow within vessel's natural

segregations. The vessel loaded eight parcels at Vancouver (Canada) for discharge at Karachi (Pakistan) which Standard had sold and delivered to Unilever Pakistan Pty Ltd. (Unilever), Aftab Soap Factory (Aftab), Kohinoor Soap and Detergents (Pvt) Ltd. (Kohinoor) and Mukhtar Chemicals (Mukhtar).

Based upon information submitted, it appears that all four receivers notified Charterers at different dates[1] about damage to their respective parcels. Ultimately, this led to claims against Charterers in the total amount of $163,733.01, for which Standard are seeking an award together with interest, legal fees and costs of this arbitration.

The fixture provided for New York arbitration and the application of US law. On June 29, 2010, Charterers appointed me as arbitrator with the suggestion to Owners that the matter be presented to a sole arbitrator. On July 29, 2010, Eitzen concurred and confirmed my appointment as sole arbitrator.

The parties agreed that the case would be submitted on documents.[2] The proceedings were closed on November 18, 2011.

BACKGROUND

The fixture was based upon the ASBATANKVOY and included the agreement that,

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[1] Unilever on May 15, 2009 without quantifying the damages; Mukhtar on May 22, 2009 without stating the amount of damages; Aftab on July 25, 2009 complained about the quality of the tallow and requested compensation of $10,000; Kohinoor complained about the tallow quality and requested compensation of $77,550.

[2] Charterers' Points of Claim dated September 30, 2010; Owners' Brief dated November 30, 2010; Charterers' Reply Brief dated May 17, 2011 (which included a claim amendment); Owners' Sur-Reply Brief dated September 30, 2011; Charterers' Points of Reply dated November 15, 2011; Owners' Final Closing Submission dated November 15, 2011.

> *Part II of Asbatankvoy be included with the additions as per Stancom rider clauses 1-36 (amended as agreed in Sichem Pearl / Standard Commodities charter party dated February 22, 2008) by title and detailed in full (in original unamended form) on attached document titled "Stancom rider clauses for Asbatankvoy charter pary.*[sic] *doc". Where in conflict the rider terms override Part II (printed form) of Asbatankvoy.*

It also included rider clauses for voyage parties as previously accepted by the parties.[3] Charterers' heating instructions were referenced in the recap and attached to the document.

The cargo was stored in shore tanks 11, 17 and 23, which were sampled by Intertek on March 5, 2009[4] and loaded into the SICHEM EVA on March 9 and 10. Discharge was completed on April 29, 2009.

ARGUMENTS

The parties' positions can be summarized as follows:

Charterers have argued that,

> *It was a condition of the carriage that the cargo was to be carried at a particular temperature and our client gave the Master of the vessel heating and handling instructions in relation to cargo. By reason of the fact that heating and handling instructions were not followed, the cargo was delivered in a damaged condition.*[5]

Owners contend that Charterers have failed to present a *prima facie* case entitling them to the recovery of damages.

These arguments have been repeated in various forms and detail during the course of this proceeding, including Owners' request for summary judgment.

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[3] In the SICHEM PEARL fixture with Standard dated February 22, 2008.
[4] The specific sampling periods were 0915-0935 for tank 11, 0945-1020 for tank 17 and 1050-1125 for tank 23.
[5] Macpherson + Kelly's (M+K) letter of December 22, 2009.

DISCUSSION AND DECISION

I have carefully reviewed the record and arguments by the parties and arrive at the following conclusions:

Owners' Request for Summary Judgment – This has been defined as a procedural device available for the prompt and expeditious disposition of claims or counterclaims when there is a belief that there is no genuine issue of material facts and that the party, asserting this motion, will prevail as a matter of law.[6] Traditionally, commercial arbitrators have been reluctant to grant summary dismissal of claims.[7] A more detailed discussion on this issue is contained in the CLARA ANN award.[8]

> *The Maritime Arbitration Rules of the Society of Maritime Arbitrators, Inc. do not specifically address the panel's authority to hear and decide a summary judgment motion, however, maritime arbitrators have recognized that the Rules and maritime arbitration practice do not preclude arbitrators from addressing such motions.*
>
> *Summary judgment in the federal courts is only granted if the pleadings, depositions, admissions, affidavits, etc. show there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. In determining whether the moving party has met its burden, courts resolve all ambiguities and draw all reasonable inferences in favor of the nonmoving party. Courts may not decide disputed issues of fact on a motion for summary judgment, nor should arbitrators.*

After having taken into account the circumstances of this case and the arbitral precedent, I deny Owners' request for summary judgment.

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[6] Black's Law Dictionary 6th ed. 1990.
[7] MOUNTAIN BLOSSOM, SMA Award 3910 (2005).
[8] SMA Award 3985 (2007); also Seacor Offshore v. U.S. Bancorp, SMA Award 3734 (2002).

Standard's Claim Currency Conversion Claim – Charterers' original claim was quantified as US$163,733.01, however, on May 17, 2011, the amended their claim, asking that the reimbursement for the damages claimed should be awarded in Australian dollars – AU$251,896.94. Charterers have argued that although they traded in US dollars, they account for their transactions in AU dollars and, therefore, an award in US dollars would be insufficient and not fully compensate them for losses created by Eitzen.

From these records before me, it is clear that the transactions directly related to the February 26, 2009 charter party were all conducted in US dollars, including the claims by the receivers. It is a fact of life that currencies fluctuate, leading to possible losses or gains, for that matter. Therefore, unless the parties negotiated a currency parity, hedged or made other similar provisions, the obligations between Owners and Charterers are calculated in the currency stipulated in the charter party. Corbin on Contracts states that "where breach of contract for dollars occurs, judgment is for that amount in dollars; where a foreign currency is involved, conversion to dollars is required."[9] The latter part of the Corbin quote does take into account the point Standard's counsel is trying to make by referring to the Bloomberg AU dollar spot chart for March 2009,[10] but same is not applicable for this particular case; this was a contract for US dollars and the award will be in US dollars.

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[9] 11-55 § 1005 (2004); see also Austrian Airlines v. UT Finance [04 Civ. 3854 (RCC) (AJP) S.D.N.Y. 2005, Lexis 7283].

[10] Attachment 1 to the M+K letter of May 17, 2011 (the time of the tallow discharge at Karachi).

Standard's Claim for Damages – In their Points of Claim,[11] Charterers seek an award of US$163,733.01 representing "the total claim/losses by Unilever, Aftab, Kohinoor and Mukhtar, following settlement discussions with Standard Commodities."[12] Table 4 details the payments as follows: Unilever – $69,939.17; Aftab – $5,000; Kohinoor – $70,000; and Mukhtar – $18,750.

Before I address the particulars of Standard's claims, it is fitting to comment on the parameters under which this claim must be viewed.

Private Contract of Carriage – The parties agree that there is a private carriage of contract, however, they do not concur on the consequences of this conclusion. In a recent arbitration,[13] I addressed this issue under reference to the SEAFORD arbitration,[14] as that unanimous decision succinctly set forth what I perceive to be the correct approach concerning the application of COGSA in private carriage contracts as well as addressing the significance of bills of lading being receipts for cargo and not independent documents dictating the rights and obligations of the parties.

> *The threshold question is whether the Carriage of Goods by Sea Act applies. Prior to the enactment of COGSA, it was well established that where carriage is pursuant to a charter and a bill of lading is issued to the charterer and remains in the hands of the charterer, the bill of lading is a mere receipt as between the carrier and the charterer and the charter, and not the bill of lading, determines the rights and obligations of the parties. See G. Gilmore & C. Black, The Law of Admiralty §4-10 at 218-19 (2d ed. 1975); The Iona, 80 F. 933 (5th Cir. 1897); Carr v. Austin & N.W.R. Co., 14 F. 419 (E.D. Tex. 1882); The Chadwicke, 29 F. 521 (S.D.N.Y. 1887).*

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[11] Supra.
[12] Par. 19.
[13] PRINCE OF TIDES, SMA Award 4146 (2011).
[14] SMA Award 951 (1975).

> *This principle has been reaffirmed in a number of cases after the enactment of COGSA. See, for example, Ministry of Commerce v. Marine Tankers Corporation, 194 F. Supp. 161 (S.D.N.Y. 1960); Albert E. Reed & Co., Ltd. v. M/S Thackeray, 232 F. Supp. 748 (N.D. Fla. 1964); North American Steel Products Corp. v. Andros Mentor, 1969 A.M.C. 1482 (S.D.N.Y.); Jefferson Chemical Company, Inc. v. M/T GRENA, 292 F. Supp. 500 (S.D. Tex. 1968); In re Marine Sulphur Queen, 460 F. 2d 89 (2d Cir. 1972).*
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> *We hold therefore that the rights and obligations of the parties are determined by the terms of the Charter and not by COGSA. The circumstances under which Owner may be held liable to Charterer are set forth in . . . the Charter . . . .*
>
> *In order to recover, the Charterer, as Plaintiff, must bring itself within one of those situations referred to in* [the charter party] *which alone can give rise to liability by Owner. In other words, unlike carriage which is subject to COGSA, Charterer from inception has the burden of proof. The authorities which Charterer cites to the effect that a private carrier's prima face liability is established by proof of receipt of cargo and its non-delivery may be true where the contract does not provide otherwise. Even in Commercial Molasses Corp. v. New York Tank Barge Corp., 314 U.S. 104 (1941) to which Charterer refers, the Supreme Court was careful to point out at page 100 that in the case of private carriage the parties are free to stipulate for such obligations as they may see fit "in which case the bailor cannot recover without proof of its breach."*

In the discussion of COGSA and the effects upon common and private carriage, Professor Thomas J. Schoenbaum writes that "At common law, distinctly different legal consequences attach to common and private carriage"[15] This confirms that indeed a different standard must be applied when dealing with these concepts because otherwise what would be the purpose of exculpatory clauses in charter parties? The SEAFORD decision predates those arbitrations in which I expressed similar views in dissenting opinions.[16]

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[15] Thomas J. Schoenbaum, Admiralty and Maritime Law (St. Paul, Minn." West Publishing Co., 1987), p. 293.

[16] F.D. CLIPPER, SMA Award 3118 (1994); DAN FRIGG, SMA Award 3325 (1996); Maersk Sealand/CSX Lines, SMA 3992 (2008). In the JO ELM, SMA Award 3617 (2000), the majority stated that under a

Charterers argue that they have met the burden of proof under general maritime law and that the burden in a contract for private carriage is upon the shipper/consignee to prove Owners' breach of duty or obligation. They contend that they carried this burden by showing Owners breached the charter party causing the deterioration of the cargo.[17]

Arguendo, if Charterers proved the breach of a charter party term, they also would have to prove that the breach indeed was the cause for the damages claimed. The panel in the GUADALUPE arbitration unanimously concluded that the Charterers had to prove that the cargo was delivered to the vessel in good condition. The arbitrators stated that,

> *[A] clean bill of lading, such as was issued by the vessel, is ordinarily prima facie evidence of delivery in good condition. However, courts have long recognized that the bill of lading does not have this probative force where, as here, the carrier was prevented from observing the damaged condition had it existed when the goods were loaded.*[18]

In Caemint Food,[19] the Second Circuit stated:

> *. . . The shipper must "prove by a preponderance of the credible evidence that the [goods] were delivered to the vessel in good order and condition'. Vana Trading Co., Inc. v. S.S. Mette Skou, 415 F. Supp. 884, 887 (S.D.N.Y. 1976), rev'd on other grounds, 556 F.2d 100 (2 Cir.), cert. denied, 434 U.S. 892, 98 S.Ct. 267, 54 L.Ed.2d 177 (1977). It is fair to impose on the plaintiff the burden of showing the condition of packaged goods on delivery because the shipper "has superior access to information as to the condition of goods when delivered to the carrier," Commodity Service Corp. v. Hamburg-American Line, 354 F.2d 234; The*

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contract of private carriage, particularly when the cargo was an in-house product and an intra-company transfer, the burden of proof was upon the claimants, particularly where the bills of lading were mere receipts and not documents of title.

[17] Standard's Reply Brief (xii and xiii) under reliance on the GUADALUPE, SMA Award 2656 (1989).

[18] The NIEL MAERSK, 91 F.2d 932 (2d Cir. 1937), cert. denied, 302 U.S. 753 (1937); Caemint Foods, Inc. v. Lloyd Brasileiro, 647 F.2d 347 (2d Cir. 1981).

[19] Ibid at 354.

Katingo Hadjipateras, 81 F.Supp. at 447; Elia Salzman Tobacco Co. v. S.S. Mormacwind, 371 F.2d at 539, just as the carrier has superior access to information as to what happened thereafter.

Notices – Owners have argued that Charterers failed to provide prompt and proper notice of the claims for those damages asserted in this arbitration. Even though the vessel completed discharge on April 29, 2009, detailed claims documentation was received only in late December 2009. It is Charterers' position that prompt notices were sent; i.e., on April 30, 2009 (via the brokers), Owners were notified about the breach of the heating and handling instructions as well as on May 26, 2009 (via the brokers), that significant claims had been received from the consignee for degradation of the cargo condition. Standard confirms that they did not formally finalize and settle the damage claims until December 22, 2009 because of the efforts to mitigate damages by verifying and negotiating the various claims.

In their reply brief of May 17, 2011, at page 17, Charterers state, "The claim is primarily based on the application of the COGSA, as incorporated by the Clause Paramount." In the foregoing, I have commented on the extent the COGSA provisions can apply to this particular case; i.e., it applies as a term of the charter party and with the force of an independent statute. COGSA provides in (6), "Notice of loss or damage; limitation of actions" in pertinent parts:

> *Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading. If the loss or damage is not apparent, the notice must be given within three days of the delivery. . . .*

> *The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.*
>
> *In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.*[20]

This provision is not in conflict with any of the terms of the charter party and when applied to the facts of this particular case it is apparent that:

- no written notice of damage or description of damage was given to the Owners prior to the removal of the goods into the custody of the buyers at Karachi;
- no notice was given within three days of the delivery;
- no action was commenced by Charterers within the one-year period after the goods had been delivered.[21]

The release and removal of the cargo to the various receivers and Charterers' failure to comply with these COGSA requirements create *prima facie* evidence of delivery of the goods in sound condition as described in the bills of lading.

The fact that Owners (a) did not have timely notice of the alleged damages, (b) were not given the opportunity to inspect the cargo upon delivery, (c) were not represented at the receivers' facility during the lab tests and (d) were not privy

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[20] Title 46, Chapter 28, § 1303.

[21] Where the contract contains an arbitration clause or the parties agree to arbitrate their disputes, "suit" includes "arbitration." It has been stated that ". . . the timeliness of an arbitration demand under a charter would be for the arbitrators to decide. The same would be true of the timeliness of claims for cargo damage or loss. . . ." See e.g. Conticommodity Services v. Philipp & Lion 613 F.2d 1222 (2d Cir. 1980); Office of Supply v. N.Y. Navigation Co. 469 F.2d 377; Thomas J. Schoenbaum (supra) states at p. 329 that ". . . arbitration is the functional equivalent of a law suit."

to Charterers' settlement negotiation, in my view, severely prejudiced Owners' ability to defend against the claims alleged in this arbitration.

Furthermore, since the cargo was delivered on April 29, 2009 and arbitration was only demanded on June 29, 2012, the time-bar provision could also be argued.

Contracts of Sale / Bills of Lading – The underlying Contracts of Sale between Standard and the various Buyers[22] state the unit price in US dollars per m/t CFR[23] Karachi (Incoterms 2000). The definition of CFR under those terms is that the seller bears the costs and freight necessary to bring the goods to Karachi, however, the risk of loss of and/or damage to the goods, as well as any cost increases, was transferred from the seller to the buyers when the goods passed the ship's rail at Vancouver. The Incoterms also specify that the buyers assumed all risks of the goods from the time when the cargo passed the vessel's rail at the discharging port.

The bills of lading covering the various SICHEM EVA parcels state that, "The quantity, measurement, weight, gauge, quality, nature and value and actual condition of the cargo unknown to the Vessel and the Master, to be delivered at the port of discharge. . . ."

Cargo – In the Points of Claim, Charterers' Tables 1-3 set forth the comparison of contracts specification to lading and discharging port determination (composite samples upon arrival Karachi).

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[22] SCS 2506 Unilever; SCS 2514 Kohinoor; SCS 2515 Kohinoor; SCS 2516 Aftab; SCS 2518 Ali Traders (Mukhtar); SCS 2519 Kohinoor.
[23] Cost and Freight.

- Table 1 – This table covers the Aftab and Kohinoor cargo loaded in tank 3C. The contractual FAC color[24] characteristics called for 11 A-B max for both contracts; the Karachi arrival specs were stated as 11 B, thus in compliance. The free fatty acids contractual values were stated at 3% for Aftab and Kohinoor; the Vancouver loading percentage was shown as 2.94% and the Karachi discharge number was 3.75%. Similarly, the R&B[25] contract specifications were 1.0 Red max for both buyers and the Karachi arrival numbers were 1.8 Red.

  The loading port characteristics for the free fatty acids and the R&B were already at or very close to the stated contract specs.

  One of the expert reports[26] submitted offers a range of general statements on factors affecting the quality of tallow, including free fatty acid increase and color deterioration (FAC and R&B). The report does not make specific reference to the cargo carried on board the SICHEM EVA or her heating log. It is noteworthy that this document was authored nearly 17 months after the heating logs had been turned over to Charterers, based upon which, they claim that Owners' breached the heating instructions.

  Charterers had posed the question of the likely effects on the bleachability of tallow as a result of excessive or prolonged heating during shipping. Mr. Conoulty's answer was "that excessive and prolonged heating of tallow during

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[24] Raw Color Test.
[25] Refined and Bleached.
[26] Annexure 14 (Commodity Inspection Services letter of September 28, 2010 authored by David Conoulty) introduced in Charterers' Points of Claim, item 17.

shipping can cause an increase in fatty acid content and a variation in the bleached colour of tallow." This statement only confirms the obvious, namely that the tallow **can** be affected by exposure to excessive and prolonged heat. The report by Charterers' consultant[27] dated May 12, 2011 states that, "Even under the best conditions with a 42-day ocean voyage, a slight decrease in quality can be expected." Even without placing a specific value on the "slight decrease" qualification, it must be obvious that if a cargo is loaded with tallow at 2.94% free fatty acids (under a contract spec of 3.0%) and with an R&B of 1.0 Red max (compared to 1.0 Red max contract spec), it will not arrive at the discharge port with the same specifications. Taking into account some of the points made by Mr. Conoulty, it is certainly possible that the cargo quality and condition can be affected by inherent vice of the tallow.

I am also disturbed by the unilateral test procedures in general and two specific examples in Tables 2 and 3. The R&B results in Table 2 for the tanks 1P and 1S show a contract spec of 1.0 Red max, a composite sample at Karachi of 1.3 Red and then a 2.6 Red established by the buyers. In Table 3, the Unilever $&B results was 2.0-2.5 Red; a spread of .5 within the buyers' own lab appears to be "too flexible." This particular characteristic also shows R&B values of yellow; i.e., 11 at Vancouver and 12 as Unilever's result. The Contract of Sale for this lot shows quite a few details, but does not specify a "yellow" criteria.

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[27] R.H. Okenfuss, Exhibit 3 to Charterers' Reply Brief.

- Table 2 - The cargo loaded in tanks 1P, 1C, 1S and 6C, for Kohinoor and Mukhtar, meets the contract specs on delivery at Karachi for free fatty acids and for FAC color. Charterers claim that R&B color for the Kohinoor lot is off-spec. I do not find that the sales provided for R&B color specification. Also, the Vancouver loading specs do not provide a value which, in itself, prevents a prior loading-to-discharge comparison.
- Table 3 - This refers to the Unilever cargo loaded in tanks 3S and 5C. The free fatty acids value is within specification. For the FAC color characteristic, the contract provided for "9-11 max," the Vancouver value was stated as "not darker than 7," however, no data was stated for the Karachi arrival condition; thus, Charterers failed to prove a non-compliance on this category. For R&B color, this contract provided for ".5 Red max." The cargo was loaded with "1.1 Red/11 Yellow" and delivered with a reading of "2.0-2.5 Red/12 Yellow." It is obvious that the cargo was off-spec on this characteristic at the port of loading. It could be argued that under normal circumstances, the Vallescura Rule[28] should be applicable, however, under the circumstances of this particular case, non-compliance with contractual terms as well as the disregard of customary industry practices concerning the determination of cargo damages, it is my view that the party which breached its obligations should not benefit from its wrong-doing or be given the benefit of the doubt.

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[28] Schnell & Co. v. *Vallescura*, 293 U.S. 296; 1934 AMC 1573.

Heating Logs – The main argument advanced by Charterers is Owners' failure to follow the heating and handling instructions. The record shows that on April 29, 2009, after the completion of discharge, Charterers requested the production of vessel's heating logs. The vessel complied with Charterers' demand on April 30. Charterers state that on the same day, they placed Owners on notice (via the brokers).[29]

It appears that certain parts of the heating log were missing from the initial production, but were subsequently made available to Standard. On April 30, 2009, David Partridge[30] advised the brokers as follows:

> *Have analysed the vessel's "official" heating logs received overnight.*
> *Await your reply to my earlier email, however, please place the Owners for the Sichem Eva on notice for breaching our Heating Instructions as attached to this fixture.*
> *You will have to excuse my skepticism, but it appears to me, that these official heating logs have been produced with haste, especially after the 15th April recordings. You will see some errors highlighted below, which Owners now cannot change given they have published this report, but expect they have been hastily prepared after receiving your request to have them produced. The hand-writing and reporting data changed from the 15th April, wherein only whole numbers have been subsequently recorded, whereas previously, the temperatures were reported to one decimal place.*[31]

This was followed on May 26, 2009 with another message to the brokers:

> *Pls advise status re mine below, as have not seen a reply*
> *Pls ask Owners for their final heating logs after discharge*
> *Also ask them to answer my questions below*
> *We have received significant claims from Buyers for quality degradation, opposed to the surveyed sampling and analysis undertaken by SGS and Intertek at loadport*
> *I trust you have confirmed that "our" heating instructions have been issued to the vessel for the Sichem Anne loading today in Quebec?*

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[29] See Standard's Reply Brief, par. 1, items (b) i-iii.
[30] Standard's Commercial Manager.
[31] Exhibit 1 to Charterers' Reply Brief.

It has not been explained why Charterers, on April 30, stated that they had analyzed the vessel's "official"[32] heating logs. The May 26 email also refers to a Partridge message as being quoted below and to which he had not seen a reply. I note that this message in question does not appear to be a part of the exhibits.[33] I also noticed that the additional logs, received on June 2, 2009[34] from the brokers were not accompanied by a transmittal letter showing date and origin/sender.

If indeed Charterers were suspicious and felt this strongly about vessel's breach of the heating instructions leading to the request of the heating logs, why then did they not take affirmative action by lodging a protest with the Master, engaging Owners in a dialogue, notifying them about impending lab tests of presumable sealed samples,[35] keeping Owners informed about the settlement discussion or even tendering to Owners the defense of the cargo claims?

Reports - The parties have submitted a total of four expert/ consultant reports; (a) the David Conoulty report by Charterers; (b) David R. Jones' declaration of November 30, 2010 by Owners; (c) the consultant report by Richard H. Okenfuss of May 12, 2011 by Standard and (d) the Jones declaration of September 30, 2011 submitted by Eitzen in response to Standard's Reply Brief and the affidavit of Michael Betar dated May 5, 2011.

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[32] Part of Exhibit 1 to Charterers' Reply Brief.
[33] The two-page Partridge/broker exchanges are also part of the Betar affidavit (Michael Betar, principal of Standard Commodities) marked 6H. (Note: A number of the same exhibits were submitted with different covering documents, but not using consistent identifications. The Betar affidavit uses letters for the supports as well as numbers.)
[34] Par. 29 of the Betar affidavit, Exhibit O.
[35] There is no indication that the vessel was supplied by Intertek with composite samples at the loading port.

I have already commented on the Conoulty report. With respect to the Okenfuss and Jones statements, I carefully considered their opinions and arguments in my decision.

The Michael Betar affidavit dated May 5, 2011 was prepared more than two years after the SICHEM EVA's call at Karachi and covers issues which should have been initiated in April 2009 with the involvement of Owners' or their insurers to establish a protocol for the joint testing of the alleged cargo damages. The 30 photos which accompany the affidavit, are submitted in support of the cargo claims, however, in the absence of proof concerning the claim of possession, I find them lacking probative value. It appears that the tallow was discharged from the SICHEM EVA, composite samples were taken by SGS Pakistan and then the cargo was released to the various receivers. There is no evidence to indicate where the cargo was stored after discharge from the vessel or how it was transported to the individual buyers' facilities. The failure to provide such vital information throws into question the entitlement and basis for receivers' claims.

Paragraph 41 of the affidavit states, "They [Kohinoor] also took us in the small Lab, where their chemist showed us how he had worked through the various samples . . ." The affiant at no time claims that he had first-hand knowledge of the facts which are claimed by the tallow buyers and only states what was shown to him and what he was told by the ultimate claimants.

Paragraph 27 of the affidavit states that, "While it is not uncommon from time to time for Pakistani customers to complain about the product and seek discounts or other

concessions, this case is different. . . ." The second Jones declaration includes the following direct response, ". . . that Pakistani receivers are prone to making, often unmeritorious, claims against their shipments. CWA see this across the board in case-work involving chemical commodities as well as edible oils and petroleum products." This type of response does not come unexpectedly in an adversary system, but it serves little purpose as it is conjecture at best and does not advance the resolution of this matter, unless it can be proven.

The Intertek report dated April 2, 2009[36] covers inedible bleachable tallow .05$ stored in shore tanks No. 11 and No. 23 at Vancouver. The shore tank sampling took place on March 5, 2009. The cargo, for the account of Unilever, was loaded into vessel's tanks 3S and 5C on March 10, 2009 and showed no result for R&B. On April 15, 2009, SGS Canada issued a revised report[37] which "cancels and supersedes the original report issued on March 18, 2009." The March 18 report is not in evidence. The revised certificate of analysis contains an R&B reading of 5.0 Red / 70 Yellow.

Item 23 of the affidavit states,

> *On 15 May 2010, I received an email from Unilever complaining about the condition of the Tallow and requesting compensation for additional costs incurred in additional bleaching the Tallow. This email is annexed and marked "I".*

The cover sheet to Exhibit I, as submitted to me, shows that the document consists of nine pages and spans email exchanges between Standard and Unilever for the period from April 27, 2009 through August 21, 2009.

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[36] Marked Annexture 6 (within Exhibit E) in the Betar affidavit.
[37] Exhibit F in the Betar affidavit.

The discussions/exchanges address matters of applicable test procedure ending with an undated email (in the sequence of messages later than August 21, 2009) from Unilever to Standard stating, i.a., ". . . We hereby accept your original offer and give below our account details where US$40,000 needs to be remitted. . . . Regarding balance of $15/mt we will get this adjusted in next shipment from you in future."[38]

Following are quotes from some of the messages leading up to the settlement:

- May 5, Unilever (UL) to Standard (SC) – "I suggest you engage the services of your local agent to bleach the tallow as per our standard . . . the cost of bleaching will be paid by you to your agent. . . ."
- May 15, UL to SC – "If we follow AOCS method 55 the color after bleach improves for 2.5R to 2.0R which is still much lighter than agreed specs. . . . For remaining quantity of 1500 mt approximately we request Magicom uses Reems[39] . . . to bleach the tallow as per our standard and then move it to our factory. Reems is their agent and needs to be paid off for this extra service by Magicom itself."
- May 16, SC to UL – "There is still uncertainty regarding the testing as your results show. In any case sealed samples . . . will be despatched by the surveyor, SGS for re-testing bleach to another SGS lab outside Pakistan. We have reason to

[38] The Betar affidavit, in paragraph 47, states that on August 25, 2009, Unilever requested that $40,000 be remitted to Unilever.

[39] A broker with whom Standard had entered into an agreement (Exhibit B in the affidavit), pursuant to which Reems was paid a 1% commission on the purchase price of the tallow.

do this based on obtaining in the last week or so, more news that may be reason why we have conflicting results."

- May 26, UL to SC – "Any progress and result from SGS Singapore on the tallow samples submitted. . . ."
- June 2, SC to UL – "Samples were despatched to Singapore and regrettably SGS are incapable of conducting the analysis. . . . Samples are being despatched June 3rd to SGS either Geneva or North America. . . ."

  Standard visited with Unilever in Karachi June 19-21, 2009.
- June 27, SC to UL – "The final position and settlement is as follows: We pay forthwith, USD 30/mt for goods as cash deposit; we pay USD 15/mt as discount allowance on next business. The results as analyzed by SGS (no PCSIR) both shipment and arrival reveal results that fall outside the AFOA allowance by a marginal level of .1 and .3 Red respectively. We believe the cargo to have also suffered damage in transit through disregard of owner on heating instructions. Normally this is an obligation to claim under your insurance but it appears you are not willing to do that leaving ourselves responsible for added damages we did not create."
- July 7, UL to SC – "We have discussed the proposal with higher management. . . . We are ready to settle this claim @ UDS 35/mt . . . in one go instead of giving discount in future deal."

- August 21, SC to UL – "We are willing to stand by our original offer. . . . Alternatively, given the situation is at the moment under review by owners and P&I Club for damages done to goods while in transit, then we suggest you wait. . . ."

There is no explanation for the difference between what Standard settled for with Unilever ($40,000), as stated in Mr. Betar's affidavit,[40] compared with the sum claimed against Owners ($69,939.17).

Summary – After I reached the conclusion that summary judgment was not warranted, it obviously became necessary to review and weigh the evidence, arguments and the underlying contractual terms in great detail and with care.

When taking into account the collective submissions by the parties, I cannot but ultimately come to the conclusion that Owners prevail. The result may be harsh[41] as far as Standard are concerned, but they in fact put themselves into this position. In their email of June 26, 2009 to Unilever,[42] Charterers stated, "Normally, this is an obligation to claim under your insurance . . .;" this position should have been expressed to the other buyers as well since all shipments were made on a CFR basis. Similarly, under the

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[40] Paragraph 47.

[41] *Where possible, a reasonable and equitable construction will be given a contract; however, hard terms may not be ignored, contrary to the clear meaning of the language used and the parties' intention.*
The words of the contract will be given reasonable construction, where possible, rather than an unreasonable one. A contract should be interpreted so as to give reasonable meaning to all of its provisions and should be read in the sense in which a prudent and reasonable person in the parties' position would understand it. A court thus should adopt a construction that accords with common sense, and a fair or just construction should be made over one that is unreasonable, inequitable, harsh or oppressive. However, it is not within the province of a court to change the terms of a contract, even though it may be harsh and unreasonable, and the application of equitable principles in the construction of contracts does not override the terms of lawful contracts. A party is bound by the unambiguous terms of its contract, even though the terms or result may be harsh. Also, a court may not impose equitable duties not stated in the contract. (17A C.J.S. Contracts (2011) Sect. 421)

[42] Supra.

bills of lading, subject to certain rights and obligation, the buyers were entitled to proceed against the vessel, however, which they failed to do. On the other hand, Standard put themselves "in the middle" and acted as a volunteer when settling the claims asserted by the buyers, which, in my opinion, were unsubstantiated and unproven. Based upon the submissions, it is apparent that Charterers' motives to settle the claims with receivers and then proceed against the Owners were to serve their buyers. The email exchanges with Unilever were an indication that Standard expected a continued relationship since part of the settlement was a discount on a future transaction. In paragraph 48 of the Betar affidavit, it is stated that Standard ". . . has not entered into any future contracts with any of the Consignees. . . . Even our long term client Unilever has not passed us a single inquiry since this shipment." Applying this statement to the final settlement of the Unilever dispute which called for a payment of $40,000 and an adjustment of $15/mt on the next shipment, but according to the record was satisfied with the cash settlement only, how was the $15/mt discount ultimately dealt with, if at all, in light of Mr. Betar's statement? This glaring factual and unexplained discrepancy in the Unilever claim gives rise to question whether the settlements agreed to by Standard were *bona fide* and arm's length transactions.

Any arguments raised by counsel but not specifically addressed in this award were carefully considered but summarily dismissed *sub silentio.*

Charterers have argued that their proof does not need to be "beyond a reasonable doubt"[43], with which I agree, but the standard required is that of "a preponderance of credible evidence." It is my decision that Charterers have failed to carry this burden and, therefore, I deny their claims in full.

COSTS AND FEES

Both parties have requested an award of fees and costs for this arbitration.[44] In view of my decision on the merits, I deny Charterers' claim, but award the sum of $20,000 as an allowance towards Owners' legal fees and costs.[45]

The arbitrator's fees and expenses are set forth in Appendix A, which forms an integral part of this award. Payment of the fees is to be made from the SMA escrow account in accordance with the instructions contained in the appendix. The fees are a joint and several obligation of both parties.

AWARD

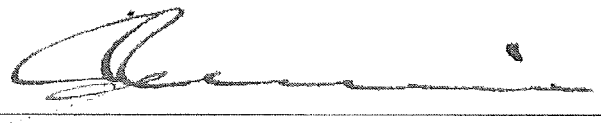
Charterers are directed to pay Owners the sum of $22,034.52, representing:

• Allowance towards Owners' legal fees and costs	$20,000.00
• Reimbursement for arbitrator's fees and expenses paid on Standard's behalf	2,034.52
Due Eitzen	$22,034.52

[43] Points of Reply, item 9 (c)
[44] No specific amounts had been requested by either side.
[45] Clause 24 of the ASBATANKVOY form: "Awards made in pursuance of this clause may include costs, including a reasonable allowance for attorney's fees . . . ."

If payment has not been made within 30 days from the date of this award, interest at 3.25% shall accrue from the date of this award until payment has been made or the award has been reduced to judgment, whichever first occurs.

Pursuant to the arbitration clause, this award may be reduced and entered as judgment in a court of competent jurisdiction.



Manfred W. Arnold

New York, New York
March 7, 2012

APPENDIX A

In the Matter of the Arbitration between Standard Commodities Australia Pty Ltd., as Charterers, and Eitzen Chemicals (Singapore) Pte Ltd., as Owners of the SICHEM EVA

My fee and expenses for rendering this award are $9,380, which are to be borne 75% by Charterers ($7,035) and 25% by Owners ($2,345).

The parties had established an escrow account with the SMA, contributing $5,000 each. According to the SMA's records, the closing balances show $5,000.48 for Standard and $5,000.07 for Eitzen.

In the first instance, full payment of my fee and expenses is to be made from the escrow account, after which, Owners have the right of claimover against Charterers for the payment ($2,034.52) made on behalf of Standard. The balance of $620.55 is to be returned to Owners' counsel.

New York, New York
March 7, 2012