In the Matter of the Consolidated Arbitration

-between-

PARTIAL FINAL AWARD

August 14, 2018

Koyo Kaiun Co. Ltd., as
Claimant-Owner of the
MT Clarice, MT Amelia, MT Xena

-and-

Liquistream Americas Inc. as
Respondent – Charterer

Under Amended ASBATANKVOY Form of Charter Parties
dated March 13, 2015, April 3, 2015
and June 25, 2015, respectively

Before: David W. Martowski, Esq.
Richard M. Ziccardi, Esq.
A.J. Siciliano, Chairman

For Claimant Owner: Freehill, Hogan & Mahar, LLP
by: Don P. Murnane, Esq., Jan P. Gisholt, Esq.
and Manuel A. Molina, Esq.

For Respondent Charterer: Haugen Consulting LLC
by: Mr. Brenden H. Hoffman and Mr. Ethan E. Fitzgerald
Demurrage Specialists

INTRODUCTION

Koyo Kaiun Co. Ltd. (hereinafter "Koyo" or "Owner") initiated this arbitration with its May 16, 2016 appointment of Richard M. Ziccardi. Liquistream Americas, Inc. (hereinafter "Liquistream" or "Charterer") responded with the appointment of David W. Martowski on or about October 25, 2016. The thus chosen party appointed arbitrators then appointed A.J. Siciliano to serve as third arbitrator and panel chairman for procedural matters.

This dispute involves three separate claims for demurrage which the parties have specially agreed to consolidate into a single proceeding before this panel of arbitrators. Notwithstanding the contrary provisions shown in each of the three charter party fixtures, the parties also agreed that both New York law and SMA Rules are to apply to this proceeding. The three demurrage claims in issue amount to $261,076.84 as follows:

MT Clarice c/p March 13, 2015	-	$ 66,181.41
MT Amelia c/p Apr 3, 2015	-	$ 106,698.48
MT Xena c/p June 25, 2015	-	$ 88,196.95
		$ 261,076.84

Charterer has characterized Owner's demurrage calculations as "vastly overstated" and as per its "Annex A", "Annex B" and "Annex C"[1] offers detailed reasons why the maximum demurrage amounts due for the CLARICE, AMELIA and XENA do not exceed $707.89, $52,719.79, and $49,538.97 respectively. However, the proper amounts of demurrage due Owner is not yet before the panel. Rather, as more fully discussed hereinafter, the core and threshold issue that drives this dispute is whether Owner did or did not comply with the documentary

[1] See Liquistream's Opposition to Koyo Kaiun Co .Claims Submission.

requirements of Liquistream's "Special Provisions October 2014" Clauses 20 and 21 or whether those three demurrage claims are now contractually time barred.

Rather than formal hearings, the parties opted to proceed on written submissions and documents. Post submission main and reply briefs were exchanged following which each party was permitted to file an additional sur-reply and a further and final sur-reply. The proceeding was declared closed to further submissions on May 3, 2018 but affidavits detailing the consulting fees of Haugen Consulting LLC and the legal fees of Freehill, Hogan & Mahar for this proceeding were not received until July 6, 2018 and July 9, 2018 respectively.

The Arguments

The dispute is primarily focused upon the following (modestly modified by Owner) Liquistream Americas, Inc. "Special Provisions October 2014" added clauses found in each of the three charter fixtures. There is no indication that actual charter parties were ever prepared, issued or signed.

20. STATEMENT OF FACTS / DOCUMENTATION CLAUSE

For Charterer's consideration, all Statements of Fact must be signed by either supplier or receiver if obtainable. If they shall refuse to sign, the Master shall issue a protest stating same. Owner is to fax or email signed copies if obtainable of the following statements within thirty (30 days after completion of each load operation and within thirty (30) days after completion of each discharge operation, to Charterer and/or Charterer's appointed representative (to be named): Notice of Readiness, Vessel's Port Log, Statement of Facts, Letters of Protest, and Pump Logs. Failure to submit these documents within the specified period will invalidate any

subsequent demurrage claim filed by Owner and said claim, if any, will be considered null and void.

21. DEMURRAGE CLAIMS

Demurrage and/or detention claims shall be supported by the following documents for each port/berth if obtainable:

(i) Notice of Readiness

(ii) Master's Port Log with Pumping Record

(iii) Statements of Facts (SOF) signed by shipper/receiver

(iv) Agent's Port Log

(v) ~~Terminal Log~~

(vi) Letters of Protest

If any of the aforementioned documents are not obtainable, Master is to issue a Letter of Protest duly signed by the Terminal and/or shipper/receiver. All claims with all supporting documents shall include a cover invoice referencing the following details only: the Payor (charterer), amount being claimed, vessel name, voyage number, and banking instructions, which is to be received by Charterer within sixty (60) days of the completion of discharge of the cargo from the Vessel, otherwise all such claims shall be deemed waived and absolutely barred. In the event of any circumstances, which might result in a claim for detention, Charterer shall in no case be liable for an amount in excess of that which would be calculated at the charter party demurrage rate. Charterers will endeavor to process all valid claims in a prompt manner. Owners and Charterers further agree that with respect to any claim or dispute arising out of this Charter Party, unless arbitration is commenced within three hundred sixty (360) days after completion of discharge, such claim or other dispute is waived and all liability with respect thereto is discharged.

Note: *Owner's modifications to both Clauses include the insertion of "if obtainable" and the strikethrough deletion of the "~~Terminal Log~~".*

Charterer argues that not only did Owner accept both Clauses but it added the "*if obtainable*" language and the strike through (deletion) of the Terminal log. It is Charterer's contention that despite the negotiated language of both Clauses, Koyo nevertheless failed to comply with the documentary requirements of Clause 20 within the stipulated 30 days. Consequently, each of Owner's subsequently submitted demurrage claims are contractually deemed "null and void". Neither, according to Charterer, did Owner comply with the 60 day document submission requirements of Clause 21 and so Charterer contends those claims are also contractually *"...waived and absolutely barred."*

It is Charterer's contention that similar "time bar" clauses are now the industry standard and the need to comply with the stated documentation within the stipulated time frame is well understood. That said, Charterer insists Owner didn't just forget to provide one document, but failed to provide dozens of documents for each voyage.[2] The panel attempted but was unable to verify the accuracy of Charterer's count of 102 missing documents. We do note, however, that Charterer's objections to the calculation of Owner's demurrage claims refer to and/or cite excerpts from the following NORs and SOFs:

MT Clarice - Loading at Houston – Stolthaven and Odjfell Terminals
Disch at Xiaohudao
Disch at Port Klang

MT Amelia - Loading at Houston – Odjfell and Stolthaven Terminals

[2] Liquistream's undated Opposition to Koyo Kaiun Co. Ltd.'s Claims Submission

Disch at Jiangyin

Disch at Taichung

Disch at Bangkok

MT Xena - Loading Houston – Odjfell Terminal

Disch at Xiaohudao

According to Liquistream. "... *Koyo's counsel remains fixated on the port logs despite numerous other documents not being provided in accordance with clauses 20 and 21 and despite there being a remedy should Master be unable to create a port log; i.e. the filing of a letter of protest which none of the masters ever did. First, Koyo agreed to create and provide Port Logs. If they did not know what Port Logs were, they should have asked or they shouldn't have agreed to create and provide them. Secondly, Koyo's counsel seems fixated on the notion that the title of a document defines what that document is rather than its content. Putting the title, "Statement of Facts" on the top of a pump log does not cause that pump log to be a statement of facts. Rather, it's the substance of the document which determines what the document is. To analyze a chemical tanker demurrage claim wherein the proration and suspension of time exists within the fixture as they do within these 3 fixtures, it's critical to understand the whereabouts of the vessel in port at any particular time and the quantities of cargo being worked and when they were worked.*" [3]

Finally, Charterer disparagingly dismisses the negotiating cargo broker's advice that he examined and found Owner's demurrage claim for the MT Amelia

[3] Liquistream's Sur Reply to Koyo's Counsel's 30 March 2018 Remarks.

to be properly supported in accordance with the charter fixture. Charterer likewise ignores that same broker's calculation of the demurrage earned by the MT Clarice[4].

In sharp contrast, Owner insists that the Clauses 20 and 21 are so imperfectly crafted that it is difficult if not impossible to discern their meaning. The confusion caused by such imprecise language render both Clauses "null and void" and unenforceable. Owner also argues Clause 20 is superseded by Clause 21, and that a careful reading of Clause 21 discloses that the only document required to be submitted within sixty (60) days of the completion of discharge was a "cover invoice". Owner contends that the Clause 20 documents it timely submitted more than adequately addressed any legitimate need the Charterer may have had concerning each vessel's port activities. Finally, Owner insists that Charterer's failure to timely respond to Owner's demurrage claims was intentional and orchestrated to implement the bad faith "gotcha" time bar defense advanced here. In this connection, Owner cites the following excerpt from this Chairman's dissent in the LPG/ Desert Orchid decision (SMA 2015 #4253).

"I consider that the Charterer was obliged to speak-up sooner than it did. Not to have done so is, in my view, a violation of the Charterer's overarching duty of good faith and fair dealing owed to its contract partner. It cannot be correct to allow a charterer to orchestrate a time bar defense simply by remaining silent. That is especially true in cases where that silence is either designed or causes an unsuspecting owner into believing that no documentary fault or other remedial deficiency was found in its otherwise timely claims submissions. In such

[4] Exhibit M to Murnane March 29, 2018 Declaration

circumstances, the charterer should be estopped from unfairly advancing the near-absolute contractual time bar in the form of a 'gotcha' defense".[5]

Liquistream's Trade Contracts

Although denying that the time bar provisions of Clauses 20 and 21 apply, Owner called for Liquistream to produce the "downline" contracts with its trade partners. Owner did so to determine whether Charterer had suffered a loss, disadvantage or prejudice linked to its contention that Owner failed to supply all of the documents listed in Clauses 20 and 21. Charterer declined explaining that those downline contracts were not only proprietary but irrelevant to the parties' disagreement regarding Clauses 20 and 21. Liquistream maintained that its opposition to Owner's demurrage claims was not predicated on itself having suffered a loss or financial prejudice linked to Owner's less than complete contractual compliance. Rather, Charterer insisted that its opposition was based solely on Owner's independent failure to comply with the agreed documentary requirements of Clauses 20 and 21.

Discussion

We begin by noting that this contentious proceeding has been punctuated by the many criticisms each party's advocate has leveled against the other. Suffice it to say, that the parties shared little, if any, "common ground". Indeed, so numerous were their differences that, even if not expressly addressed within the four corners of this partial final award, the panel confirms that it has considered all that the parties have said on each of their several disagreements.

[5] Given the nature of this quarrel, it is not surprising that Owner favored as much as Charterer criticized that dissent.

We accept that contractual time bar clauses, particularly those involving demurrage have become commonplace. On those occasions where such clauses are contested, the triers of fact invariably apply a strict interpretation to their stated terms. However, unlike Charterer's assertions, we do not consider the language of Liquistream's Clauses 20 and 21 to be representative of an industry standard. Quite the contrary, none of Charterer's cited examples of other time bar clauses contain the level of ambiguities and confusion as do Liquistream's added Clauses 20 and 21. We have seen correspondence wherein Charterer and/or its advocate struggled to explain and failed to provide a sample "Master's port log". On the other hand, each of the three demurrage claims presented were supported by a detailed "Time Sheet" on Koyo Kaiun letterhead for each port/berth of loading and discharge. These contemporaneously prepared "Time Sheets" were signed by or on behalf of the "Shipper/Consignee", the port agent, the vessel's Master or Chief Officer. More often than not, they were supplemented with Notices of Readiness (NOR), similarly signed Statement of Facts (SOF), and (where appropriate) pumping logs and operational letters of protest. Confronted with the old saw of "*Is a document what it says it is, or is it what it says*", Charterer has embraced the latter, with which we readily agree. That said, we noted but dismissed Charterer's complaint that none of the three masters filed a Note of Protest explaining his inability to obtain a contractually required signature. In our view, the need to obtain a required signature did not arise, or was excused by the "if obtainable" insert or was found to be factually irrelevant.

Our examination of the submissions persuades us that Owner did furnish sufficient Clause 20 documentation within the 30 days set out in Clause 20. More specifically, we consider the aforementioned "TIME SHEETS" to be more than adequate to satisfy Charterer's need for information regarding each vessel's in-port

movements and activities. As such they are the equal or the "substantial" equal of a "Vessel's Port Log", "Agent's Port Log" and/or "Statement of Facts".

Charterer's insistence that each and every of the contractually listed documents be presented is to elevate form over substance in a manner that strains commercial logic. Charterer has itself argued that "*Putting the title, 'Statement of Facts' on the top of a pump log does not cause that pump log to be a statement of facts. Rather, it's the substance of the document which determines what the document is.*" We not only agree with that position but consider it likewise applies to documents (however labeled) that contain the same essential information. It bears repeating that Charterer has confirmed it suffered no "downline" loss or financial prejudice due to Owner's failure to submit all of the contractually listed documentation.

Initially, Charterer argued that Clauses 20 and 21 are to be read as imposing separate and distinct documentary obligations but later argued the Clauses are to be read in harmony. In our view, neither position is especially helpful to Charterer. We have difficulty accepting Charterer's position that the documentation essential to Clause 20 is required to be submitted a second time in order to comply with Clause 21. In our view, the Charterer is obliged to account for all Clause 20 documentation already in hand when evaluating an Owner's Clause 21 submission.

Owner has argued that the Clause 21 reference to "All claims" includes those arguably barred by the 30 days submission requirement of Clause 20. We do not read the "*All claims*" language of Clause 21 to reactivate a justly barred Clause 20 claim. But here the question is moot because we have concluded that the Clause 20 time bar does not apply. Liquistream's Clause 21 goes on to call

for *"All claims"* to *"include a cover invoice ... which **IS** to be received by Charterer within (60) days of the completion of discharge ..."* Charterer's use of the singular *"IS"* rather than the plural *"are"* lends weight to Owner's argument that only the *"cover invoice"*, not the several documents listed in the preceding paragraph, is required to be *"received"* within the sixty (60) days. Thus, apart from the confusion posed by the listed documents, Clause 21 includes an added ambiguity which, pursuant to the *Contra Proferentem* rule of contract interpretation, this panel is obliged to resolve against Liquistream.

That Charterer chose not to question or otherwise object to Owner's documentary submissions until the 60 day time bar had or was about to take effect is troubling. Despite Owner's timely submission of Clause 20 and Clause 21 supports and repeated requests for payment, Charterer remained largely unresponsive until after both the thirty (30) and sixty (60) days had expired. That certainly was the case for the MT Clarice and MT Amelia submissions, but somewhat less so for the MT Xena submissions.

In the case of the MT Xena, the Clause 20, thirty (30) day submissions were made timely on July 20, 2015 (for documents due August 18, 2015), September 7, 2015 (for documents due October 15, 2015), September 22, 2015 (for Documents due October 21, 2015) and September 25, 2015 (for documents due October 25, 2015. The Clause 21, sixty (60) submissions were made September 22 and 25, 2015 for documents respectively due October 21 and 25, 2015. On September 29, 2015, Liquistream replied to Owner's request for *"remittance schedule"* saying the MT Xena was not *"a complete demurrage claim"* and requesting that Owner provide *"all relevant documents ... for all ports"*. Curiously, among the documents then sought by Liquistream were the *"Ullage documents"* at each port

which are not among the documents listed in either Clause 20 or Clause 21. That and the correspondence that followed only underscored the ongoing confusion of both parties as to the precise documents required by Clauses 20 and 21.

On October 6, 2015, the broker reported that Charterer was now "*requesting the port logs for each port*" adding "*not to be confused with the Statement of Facts*". Later that day, the broker offered the following "*for clarification purposes, Liquistream is asking for the "Master's port logs*" to which Owner replied "*have sent all supporting documents together with demurrage claims. Please kindly advise which port logs are you referring ?*". Liquistream's response, via the broker, read "*the port logs that the Master keeps (not the agent)*". That exchange was followed with yet another message quoting the Clause 21 listed documents but with "*Master's Port Log with Pumping Record*" highlighted in yellow. Still confused, on October 7, 2015, Owner telephoned the broker to request further clarification. Charterer responded the following day saying:

> "*The SOF is specific to charterer, product, and berth. The port log covers the vessel's time in port. The Agent's SOF is just that, the Agent's SOF (albeit granted the agents SOF is oftentimes copied verbatim from the master's SOF). Attached is an example of an Agent's port log. Note that it covers the Vessel's entire time in the port*".

But rather than the stated sample of an "*Agent's port log*", the attachment was actually an agent's "Statement of Facts"[6], The attachment made no mention of nor did it purport to be either a "*Master's port log*" or a "*Master's Port Log with*

[6] Owner's Exhibit I to Murnane 12/08/2017 Declaration

Pumping Record". Thus, it appears that Owner's ongoing confusion as to the documentary requirements of Clause 21 was likewise shared by the Charterer, thereby underscoring the fatal ambiguity of the Clause.

Decision and Award

In view of the parties' shared confusion regarding the documentary requirements together with ambiguous language of Liquistream's added Clauses 20 and 21, the panel is unanimous in finding that Owner's documentary and demurrage submissions were both adequate and timely made. Rather than allow those submissions to languish, we find that Charterer was required to explain its objections and/or accurately identify the documentary deficiencies far sooner than it did. Not to have done so until after or on the eve of a claim becoming contractually time-barred, smacks of bad faith and constituted a breach of the implied covenant of good faith and fair dealing that Liquistream owed Owner. Notably, the parties have specially agreed that New York law apply to this proceeding and pursuant to New York law that implied covenant includes "*a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other to receive the fruits of the contract*". [7]

Liquistream's motion to dismiss the three demurrage claims on grounds that each is contractually time barred by added Clauses 20 and 21 as well as its application for the consulting fees of Haugen Consulting LLC are denied.

As the prevailing party and against its application for the legal fees of Freehill, Hogan & Mahar, Owner is hereby awarded the sum of $100,000.00. Additionally, pursuant to the attached Appendix A, Owner is to be paid $14,800.00

[7] 511 W 232nd Owners Co. v. Jennifer Realty Co., 98 N.Y. 2d 144,153 (2002).

as reimbursement for its payment of Liquistream's unsecured balance of the panel's fees. Accordingly, within 30 days of the date of this Partial Final Award, Charterer is to pay $14,800.00 to Owner, failing which interest shall retroactively accrue at the prevailing prime rate from this date until the amount awarded Owner has been fully paid, or this award is reduced to a judgment, whichever first occurs.

The panel remains constituted to hear and decide the parties' disputes as to the amounts of demurrage, if any, properly due Owner under each of the separate charter fixtures for the MT Clarice, MT Amelia and MT Xena.

The amount and allocation of the individual arbitrator's fees are set forth in the attached Appendix A, which forms an integral part of this Partial Final Award that may be reduced to judgment in any court of competent jurisdiction.

David W. Martowski, Esq.

Richard M. Ziccardi, Esq.

A. J. Siciliano, Chairman

New York, NY
August 14, 2018