
In the Matter of the Arbitration

between

Soreidom S.A.,

Claimant,

Final Award
March 14, 2024

and

Hansen-Mueller Co.,

Respondent,

arising under various NAEGA No. 2 Contracts.

Before: David W. Martowski, Sole Arbitrator

Appearances:

Freehill Hogan & Mahar LLP
On behalf of Soreidom S.A.
by: William H. Yost, Esq.

Hill Rivkins LLP
On behalf of Hansen-Mueller Co.
by: James A. Saville, Jr., Esq.

Introduction

This dispute between Soreidom S.A. ("Sor"), as Buyer, and Hansen-Mueller Co. ("HM"), as Seller, arises under a series of North American Export Grain Association, Inc. ("NAEGA 2") contracts. Sor seeks to recover outstanding demurrage in the total amount of $776,202.94 arising in connection with the loading of the (I) M/V GANT FLAIR and (II) M/V CENTURY EMERALD, plus interest, attorneys' fees and costs. HM denies liability for demurrage claimed with respect to the GANT FLAIR and contends that Sor's demurrage claim is limited to $2,820.14 with respect to the CENTURY

EMERALD. HM also contends that Sor is not entitled to recover any attorneys' fees and/or costs.

The Parties

Sor is headquartered in Paris, France and engaged in the international trading of bulk commodities including yellow corn, soybean meal and spring wheat. HM is an international grain and feed commodity trading and logistics company headquartered in Omaha, Nebraska with offices throughout the United States. It operates the Houston Port Elevator No. 1 in Houston, Texas and owns and operates two import and export. grain facilities on Lake Superior, a feed grain processing plant in Toledo, Ohio, and five grain terminals throughout the interior of the United States. The parties' trading relationship began in 2019 and is summarized in their Joint Timeline below.

Proceedings

The parties appointed me as sole arbitrator on June 1, 2023 and agreed to proceed on documents alone in accordance with the Society of Maritime Arbitration Rules ("SMA Rules"). I submitted my disclosure and was accepted by the parties who on July 5, 2023 agreed to a submission schedule for main and reply briefs. The parties exchanged submissions supported by legal and arbitral authorities on July 26, 2023 [1], and Reply Briefs on September 13, 2023. Counsel thereafter submitted Supplemental Briefs supported by authorities on December 22, 2023 in response to my request for a Joint Timeline of relevant trading milestones from inception in 2019 and the applicability, if any, of UCC Sec. 1-303 *Course of Performance, Course of Dealing, and Usage of Trade* to the GANT FLAIR dispute. The parties funded the SMA

[1] Sor's Application for a Final Award, Claim Statement, the Declarations of Erwan Abiven (Sor's Chartering Manager with personal knowledge of the facts but not involved in negotiating credit or payment terms) with Exs. 1-25; HM's Preliminary Brief and Supporting Documentation; Affirmations of Chief Financial Officer Kary Knapp; VP of Risk, Ryan Sherwood; and Export Logistics Settlement Manager, Megan Boehm; supported by Exhibits A-S.

escrow account, Sor submitted its claim for attorneys' fees and expenses, and these proceedings were formally closed on March 4, 2024.

Contracts

The parties' Sale Contracts and Confirmations provided in pertinent part: "NGFA trade rules and arbitration rules to govern", "Payment: Cash against mate's receipt" and "Governing Contract: NAEGA 2 Revised March 30, 2018 including Addendum 1 Revised and Arbitration Agreement." The NAEGA 2 Contracts provided in pertinent part: Clause 11 Payment (b) Net cash in U.S. Dollars, by telegraphic transfer to the bank designated by seller, against presentation of and in exchange for shipping documents per Clause 12 ("against bills of lading or mate's receipts (at seller's option) and weight and inspection certificates. ***"); Clause 27(a)-(c) (International Convention) that the United Nations Conventions on Contracts for the International Sale of Goods of 1980 "shall not apply to this contract"; Clause 28 (Governing Law) that "The parties agree that this contract shall be governed by the laws of the State of New York, notwithstanding any choice of law provision to the contrary", and Clause 30 which provided for arbitration in New York City before the AAA in accordance with the International Arbitration Rules of the American Arbitration Association.

Joint Timeline of the Parties' Relevant Exchanges and Course of Dealings

The parties' trading history began in 2019 and their course of dealings continued through 2022, involving multiple NAEGA 2 Contracts, Confirmations, and the loading of at least five vessels. An analysis of the minutely detailed 8-page Joint Timeline read against the parties' Witness Declarations, reflects:

- HM's credit terms evolved for Spring Wheat purchases from Cash Against Documents to 50% payment CAD (paid via wire transfer); 6% interest (annualized) on balance for 14 days; Remaining balance plus the premium charge paid via wire transfer on the 15th day;
- The credit line of 50% expanded beyond Spring Wheat to include Yellow Corn and Soybean Meal;

- Proposals as to whether credit terms would apply if Sor had 2 vessels on payment terms at any one time and validity of vessels' NORs if there was an outstanding unpaid cargo balance on the previous vessel;
- Increasing deterioration of the parties' trading relationship due to disagreement over the timeliness of their reciprocal payments for cargoes purchased and vessel demurrage incurred;
- HM's frustration over Sor's habitual late payments; [2]
- Dispute over the HINASE;
- HM's November, 2022 demand for AAA arbitration to recover Sor's failure to pay $973,881.77, execution of a Term Sheet memorializing the negotiated settlement of certain disputes with the reservation as to others to be determined by me, as sole arbitrator; [3]
- December, 2022 dispute over payment terms on the SALAMINA I's cargo, HM's refusal to release original bills of lading at her discharge ports of Trinidad and Guyana until 50% of the invoice balance was paid, and Sor's instructions to the Master to discharge her cargo without presentation of original bills of lading in exchange for LOIs; [4]
- HM's May, 2023 arrest of the SALAMINA I at Charleston, alleging Sor had previously converted her cargo, and settlement of that dispute; [5] and
- Commencement of these proceedings.

The November, 2022 Arbitration and Demurrage Disputes

During the course of the parties' relationship, a number of demurrage disputes arose over the interplay of payment/credit terms and demurrage. HM contended that Sor "repeatedly, erroneously and unilaterally deducted demurrage amounts it claimed HM owed from its payments to HM". By November, 2022, HM claimed that these

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[2] Declaration of HM's CFO, Kary Knapp; para. 18: "Soreidom's consistent failure to pay on time continued to be a major issue during the course of the business relationship. I had regular conversations with Xavier [de Moussac, Sor's CEO] regarding Soreidom's lack of timely payment and despite his promises to pay on time, they were rarely, if ever, fulfilled. Hansen-Mueller is not a bank and not in the business of loaning unsecured funds to its trading partners, which is essentially what Soreidom was doing; using Hansen-Mueller to extend unsecured credit to Soreidom while Soreidom chased down money to pay its long overdue bills."

[3] Discussed below.

[4] Declaration of HM's VP of Risk, Ryan Sherwood, paras 11-12.

[5] *Id.* at paras. 13-14.

amounts totaled $973,881.77 and on November 16, 2022, demanded arbitration before the American Arbitration Association International Center for Dispute Resolution ("AAA/ICDR") seeking (a) an emergency interim award that HM was not required to load certain arriving vessels as a result of Soreidom's payment breaches and (b) recovery of the principal amount of $973,881.77. [6]

The parties began negotiations and shortly thereafter on November 21, 2022, executed a Term Sheet Agreement resolving certain disputes, agreeing to submit others to arbitration, and Sor agreeing not to deduct any amounts from invoices issued on or after the date of the Term Sheet. [7]

One of the resolved demurrage disputes involved the M/V HINASE which loaded in July, 2022 . Specifically, the dispute regarding her laytime calculation centered on the interplay between the parties' payment/credit terms, the validity of her NOR and the commencement of laytime pursuant to the parties' contracts. HM argued that laytime commenced on July 12, 2022, peculiarly, the day on which the final payment for the cargo loaded on the GANT FLAIR was made. HM states that in resolving the HINASE dispute, Sor admitted that it was wrong and explicitly agreed with HM's position and calculation stating that, "Sor agrees that demurrage of $64,843.75 payable by HM was properly calculated by HM." [8]

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[6] HM's Preliminary Brief and Supporting Documentation, p. 5, Ex. J.
[7] Ex. J.
[8] *Id.*

The Term Sheet executed by HM's Tyle Kester and Sor's Xavier de Moussac on November 21 and 22, 2022, respectively, provided in pertinent part:

Terms
***
*3. **Notwithstanding the Settlement Payment, both HM and Sor reserve their respective rights to challenge the amounts of demurrage owed or dispatch earned in connection with the GF Demurrage issue and the CE Demurrage issues (collectively the "Demurrage issues").** In order to resolve these Demurrage issues, HM and Sor agree, notwithstanding the directives contained in Clause 30 of the NAEGA No. 2 Revised as of March 30, 2018, to submit these disputes to arbitration, with Mr. David Martowski serving as sole arbitrator, pursuant to the Society of Maritime Arbitrators (SMA) Rules. The parties' agreement to waive NAEGA Arbitration is limited and solely intended to resolve the Demurrage issues and shall not be considered a waiver of any rights the parties may have to NAEGA Arbitration under any other contract or agreement.*

a. The Parties agree that the decision of the arbitrator will be final and binding and each Party agrees to waive any right that each may have to appeal the Award to any Court.
[9] [Emphasis added]

Sor's arbitration demand and this proceeding followed.

Prologue

My decisions with respect to Sor's demurrage claims are based on the parties' contractual undertakings, burdens of proof, course of dealings, factual narratives, witness declarations, exhibits, legal and arbitral precedent, and a measure of discretionary commercial good sense. All arguments advanced by highly-skilled counsel but not specifically addressed, were carefully and respectfully considered but dismissed *sub silentio.*

[9] Term Sheet, Exs. J and K.

I GANT FLAIR Demurrage $596,690.25

Facts

The GANT FLAIR – In March, 2022 Sor, as Buyer, and HM, as Seller, entered into a series of NAEGA 2 FOB contracts (revised March 30, 2018) including Addendum 1 (loading rate guaranty) for the purchase of yellow corn, soybean meal and spring wheat cargoes totaling 17,212.66 MT which were ultimately transported on the GANT FLAIR. Each contract specified a guaranteed loading rate of 5,000 MT per WWDSSHEX at a charter party demurrage rate of $32,500/day. The payment terms of the majority of the contracts provided "50% of vessel invoice is Cash against mate's receipt, balance net 15 days." On May 4, 2022 Sor nominated the GANT FLAIR and provided HM with a listing of the quantities of cargoes it intended to load. The Vessel's ETA for her load port of Houston was May 15, 2022 and her discharge ports were stated as Trinidad and Guyana with demurrage/despatch rates at $32,500/$16,250. The Vessel tendered her NOR at Houston at 1800hrs on May 15 following NCB and USDA inspection and approval without HM's objection. [10]

On May 16 HM's Kyle German emailed Sor stating:

"Hansen-Mueller extended the following payment terms to Soreidom:

> 50% of invoice CAD
>
> Balance of invoice 15 days after B/L date at 6%
>
> Soreidom will not have 2 vsl on payments terms at any one time.
>
> Soreidom is out of contract terms and has been for the past several months. The 50% CAD payment is taking 5-10 days and paying off the balance of invoice is taking up to 30+ day from B/L date. Going forward, NOR for Soreidom vsl will not be valid if there is an outstanding unpaid cargo balance on previous vessel. We value Soreidom business but in today high priced

[10] Abiven Declaration, Ex.5.

environment we need to take measure enforce our agreed upon payment terms." [11]

On June 9, 2022, HM issued its final invoices for the Yellow Corn, Soybean Meal, and Spring Wheat cargoes. Each invoice stated that half of the invoice total is due upon receipt, with the balance due on June 23, 2023. [12]

In July Sor sent its Laytime Statement reflecting that laytime commenced on May 17 at 0700hrs and based on the guaranteed load rate, laytime permitted for loading the entire Vessel was 3 days, 10 hours, 37 minutes (17,212.66MT at 5,000MT per weather working day). Laytime ended at 1737hrs on May 20 and the Vessel went on demurrage. Loading was not completed until June 8 at 0215hrs due to berth congestion and Sor calculated demurrage as 18 days, 08 hrs, 38 mins at $32,500/day. [13]

On July 21, 2022, Sor emailed HM to inquire about whether its laytime statement had been reviewed.

On July 25 Mr. German responded, stating:

"We have had a chance to review the demurrage invoices and Hansen-Mueller is not responsible for demurrage on the MV Gant Flair (finished loading 06/08/22). We had an unpaid balance on the MV Jan Van Gent (final installment received 06/17/22). Per the attached Payment Terms, the NOR was not considered valid given this unpaid balance on the prior vessel. [14]

Subsequent email exchanges reflect in pertinent part the parties' fundamental disagreements over Sor's payment/credit for cargoes purchased and HM's payment of demurrage incurred.

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[11] *Id.* Ex. 6.
[12] *Id. Ex. 7.*
[13] *Supra* at paras.10-12.
[14] *Supra, Ex. 8.*

On July 29th HM's Mr. German stated:

"Our terms state that no two vessels will be on payment terms at any one point in time and that the NOR will not be valid for a current vessel if there is an unpaid balance on a prior cargo. At that time, Soreidom was out of payment terms on the MV Jan Van Gent; the vessel completed loading on May 22 2022 and with final installment due on June 07 2022. Final payment for the MV Jan Van Gent cargo was not received until June 17 2022. In this situation, the NOR for the MV Gant Flair became invalid at the completion of loading: June 8 2022. At that point, there were two vessels with unpaid balances: MV Jan Van Gent and MV Gant Flair. With the NOR becoming invalid for the MV Gant Flair, Hansen-Mueller is therefore not responsible for the vessel demurrage incurred. Soreidom had ample time to pay for the cargo on the MV Jan Van Gent, but chose to violate our agreed upon payment terms. These terms were agreed upon between Xavier de Moussac, Soreidom CEO and Kary Knapp, Hansen-Mueller Co. CFO. " [15]

Sor's Mr. Abiven responded, stating:

"As you said very well yourself the MV Jan van gent completed loading on May 22nd and the Gant Flair arrived on May 14th and tendered a perfectly valid NOR on the 15th, Soreidom could not possibly pay Hansen Mueller for the MV Jan Van Gent prior her loading completion since the payment is against mates receipt.

Soreidom did not chose to violate the agreed payment terms, the non-payment was simply due to the delay at the loading ports. Forgive my ignorance, I cannot understand how you expected Soreidom to pay an invoice against mates' receipt for a ship that had not yet loaded .... ."

It is Soreidom's understanding that HM never responded to this email and it subsequently issued HM a demurrage invoice for the M/V GANT FLAIR in the amount of $596,690.25, no part of which has been paid despite due demand. [16]

On September 14, 2022, Sor's Mr. Abiven sent the following additional, detailed message to HM

"We discussed the merits of your arguments to refuse to pay the demurrage for mv GANT FLAIR (and now the mv HINASE) with the lawyers of our Legal Defence insurance and with our insurance brokers.

In their opinion, the inclusion in the latest contracts of the words "Buyer cannot have two vessels on credit at any one time" implies that Hansen-Mueller is entitled to

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[15] *Supra,* Ex. 10.
[16] *Id.,* Ex. 11.

demand the full payment of the invoice issued for the 2nd vessel if there is another vessel still on credit. They can also decide to grant credit for both vessels but have no obligation to do so. Whether they agree or not agree to grant credit for another vessel, we believe that the discussed provision with respect to credit solely concerns the terms of payment for the cargo. This provision has no effect on other terms of the contract, including the contractual provision relating to the validity of the issued NOR for the 2nd vessel.

They noted that on 16 May 2022 Mr. German sent a message declaring that "Going forward, NOR for Soreidom vsl will not be valid if there is an outstanding unpaid cargo balance on previous vessel". It should be noted that the contract cannot be amended by one of the parties unilaterally. It requires the explicit agreement of the other party. Unless Soreidom responded to Mr. German confirming their agreement to amend the terms of the sale contract as per Mr. German's request (quod non), this statement/request does not have any legal effect and does not change anything on the legal terms agreed between the parties.

After due consideration of all relevant elements, they believe that the issuance of NOR should be governed only by the contractual term: "NOR: To be presented within regular office hours between 0700h to 1600h Monday to Friday along with NCB and USDA passes. Time to commence 07h00 next working day after NOR has been tendered and accepted". The fact that the NOR was issued whilst the previous cargo was not yet fully paid, does not impact on the validity of the NOR.

The NOR, laytime and demurrage clauses in the contract of sale operate independently from the clause governing the credit agreement. This is not an issue about which clause trumps which other clause. They are all equally valid for the contract both are included into but do not extend beyond their natural scopes, i.e. laytime and demurrage on the one hand and credit on the other hand.

We, therefore, invite you, and as far as necessary, put you on notice, to acknowledge without further delay that:

1. Subtracting the demurrage due by you for mv GANT FLAIR (invoice & laytime attached) from our payment of the cargo to be loaded on the mv Hinase fully settles that shipment; and

2. You will pay our demurrage invoice for mv Hinase (as attached)."[17]

HM apparently did not respond to this message.

The New York Uniform Commercial Code

§ 1-303. Course of Performance, Course of Dealing, and Usage of Trade.

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[17] *Supra.*

(a) A "course of performance" is a sequence of conduct between the parties to a particular transaction that exists if: (1) the agreement of the parties with respect to the transaction involves repeated occasions for performance by a party; and (2) the other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection.

(b) A "course of dealing" is a sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

(c) A "usage of trade" is any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage must be proved as facts. If it is established that such a usage is embodied in a trade code or similar record, the interpretation of the record is a question of law.

(d) A course of performance or course of dealing between the parties or usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware is relevant in ascertaining the meaning of the parties' agreement, may give particular meaning to specific terms of the agreement, and may supplement or qualify the terms of the agreement. A usage of trade applicable in the place in which part of the performance under the agreement is to occur may be so utilized as to that part of the performance.

(e) Except as otherwise provided in subsection (f), the express terms of an agreement and any applicable course of performance, course of dealing, or usage of trade must be construed whenever reasonable as consistent with each other. If such a construction is unreasonable: (1) express terms prevail over course of performance, course of dealing, and usage of trade; (2) course of performance prevails over course of dealing and usage of trade; and (3) course of dealing prevails over usage of trade.

(f) Subject to Section 2-209, a course of performance is relevant to show a waiver or modification of any term inconsistent with the course of performance.

(g) Evidence of a relevant usage of trade offered by one party is not admissible unless that party has given the other party notice that the court finds sufficient to prevent unfair surprise to the other party.

The Parties' Contentions

Hansen-Mueller denies Sor's claim, contending

1) A course of dealing is relevant in the interpretation of the parties' contracts and its terms, and may be used to supplement the agreement itself; [18]
2) When a course of dealing cannot be reasonably construed as consistent with the express terms of the parties' agreement, the express terms prevail;[19]
3) The express terms of the parties' agreements for loading cargo on the GANT FLAIR and course of dealing, mandate that Sor may have only one vessel on credit;
4) HM primarily relies on the emails of its Mr. Knapp of December 17, 2020 and Mr. German of January 14, 2021, respectively, to establish that at least two years prior to the loading of the GANT FLAIR, the parties expressly agreed that (a) no two vessels would be on credit at the same time; and (b) payment was 50% CAD with the balance plus interest to be paid within 15 days;
5) A course of dealing is a "sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to

[18] *N.Y.U.C.C.* Sec. 1-303(d) and *CCT Energy N.V. v. Bulk Oil (U.S.A.), Inc.,* 1986 U.S. Dist. LEXIS 15766 (S.D.N.Y. 1986).

[19] *N.Y.U.C.C.* Secs. 1-303(e) and 2-208(2); *Tian Long Fashion Co. v. Fashion Av. Sweater Knits, LLC,* 2016 U.S. Dist. LEXIS 96734, *14 (S.D.N.Y. 2016).

be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct;"[20]

6) There is no requirement that an agreement be ambiguous before evidence of a course of dealing can be shown, nor is it required that a course of dealing be consistent. [21] "A course of dealing analysis does require an indication of the common knowledge and understanding of the parties;" [22]
7) Sor had actual knowledge of the express credit and payment terms between April 2020 and March 2022 - almost two years prior to the GANT FLAIR loading - and never once stated that they did not reflect the parties' agreement;
8) The parties intended, agreed and acted on the basis that (a) no two vessels would be on credit at the same time; and (b) payment was 50% CAD with the balance plus interest to be paid within 15 days; and
9) Resolution of the HINASE demurrage dispute reflected Sor's admission in the Term Sheet that demurrage of $64,843.75 was properly calculated by HM and supports Mr. German's May 16, 2022 email that the GANT FLAIR's NOR would not be valid until all outstanding cargo balances on prior shipments had been paid. [23]

Concluding that whether by express terms of the parties' agreement or their course of dealing, the evidence establishes that the parties expressly agreed that (a) no two vessels would be on credit at the same time; (b) payment was 50% CAD with the balance plus interest to be paid within 15 days; and (c) the GANT FLAIR's NOR would not be valid if there was an outstanding unpaid cargo balance on a prior vessel.

Soreidom responds

10) The Parol Evidence Rule bars course of dealing evidence where, as here, the plain meaning of payment/credit terms set forth in the GANT FLAIR contracts is unambiguous; [24]
11) HM is not empowered to unilaterally modify the terms of the GANT FLAIR contracts retroactively;

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[20] *N.Y.U.C.C.* Sec.1-303(b).
[21] *New Moon Shipping Co., Ltd. v. MAN B&W Diesel* AG, 121 F.3d 24, 31 (2d Cir. 1997).
[22] *Id.*
[23] *T.L.C.W. LLC v. Fashion Outlets of Niagra*, LLC, 60 A.D.3d 1422, 1424 (4th Dept. 2009)."[t]he best evidence of the intent of the parties to a contract is their conduct after the contract is formed."
[24] *The Chesapeake 1000,* SMA No. 3877 (2005); *World Ambulette Transp. Inc. v. Lee, 161 A.D.3d 102 (N.Y. App. Div. 2d Dep't 2018); Intershoe, Inc. v. Bankers Trust Co.,* 77 N.Y.2d 517, 519, 522 (N.Y. 1991); *UCC* Sec 2-202 *Final Written Expression: Parol or Extrinsic Evidence.*

12) HM has the burden of establishing that a course of dealing existed and reflects Sor's agreement to a provision providing that a NOR would be invalidated if two vessels were on credit; [25]
13) HM proposed to Sor on only two occasions, December 17, 2020 and January 14, 2021 - thirteen months apart – that credit would not be extended to more than one vessel at a time;
14) The GANT FLAIR contracts do not expressly mandate that only one vessel may be on credit or that a NOR will be invalid if two vessels were on credit – unlike HM's proposed modification of the CENTURY EMERALD contract;
15) HM never indicated that breach of the "one vessel on credit rule" would render a NOR invalid until May 16, 2022, subsequent to the GANT FLAIR's tender of her NOR on May 15, 2022;
16) Laytime commenced on May 17, 2022 since HM accepted the Vessel's NOR by failing to object and proceeded to load her;
17) It is undisputed that the root cause of the delays was berth congestion which is for HM's account; [26]
18) HM cannot establish a course of dealing based on two isolated communications sent by HM approximately seventeen months before the transaction, since neither reference NOR validity in any context; [27]
19) No vessels were on credit when the GANT FLAIR tendered her NOR on May 16, 2022 as the JAN VAN GENT had not finished loading until May 22, 2022; [28]
20) The parties' course of dealing included HM's repeated issuance of invoices extending credit which confirms Sor's interpretation of the credit terms in the GANT FLAIR contracts; and
21) Resolution of the demurrage dispute regarding the HINASE is not evidence that Sor agreed that the GANT FLAIR's NOR would not be valid if there were an outstanding unpaid cargo balance on a prior vessel.

Concluding that Sor is entitled to recover demurrage in the amount of $596,690.25, plus attorneys' fees and costs.

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[25] *Fleet Capital Corp. v. Yamaha Motor Corp., U.S.A.*, 2002 U.S. Dist. LEXIS 18115, at *69-70, n. 25 (S.D.N.Y. Sep. 25, 2002*); J.B.I. Indus. V. Suchde*, 99 Civ, 12435 (AGS), 2000 U.S. Dist. LEXIS 11885 at *21 n.9 (S.DNY. Aug. 16, 2000).["... the party asserting a course of dealing, evidence is limited to objective facts, as distinguished from subjective intent."] and *Kunststoffwerk Alfred Huber v. R.J. Dick, Inc., 621 F.2d 560, 564 * n.7 (3rd Cir. 1980).*

[26] *The Phillipine Admiral,* SMA No. 708 (1972); *The SN Federica,* SMA No. 4289 (2016); and *The Ypatianna,* SMA No. 2044 (1984).

[27] *APL Co. Pte. Ltd. v. Kemira Water Solutions, Inc.*, 890 F.Supp. 2d 360 (S.D.N.Y. *2012); Nat'l Liab. & Fire Ins. Co. v. Mediterranean Shipping Co.* ,S.A., 2011 U.S. Dist. LEXIS 4756 (S.D.N.Y. 2011); and New *Moon Shipping Co. v. Man B&W Diesel*, 121 F.3d 24,31 (2d Cir. 1997).

[28] Abiven Declaration, Ex. *9.*

Discussion and Decision

Sor is awarded demurrage in the amount of $596,690.25 – The parties' reciprocal obligations under their NAEGA 2 FOB Contracts were for Sor to pay for the cargoes it purchased and for HM to pay for vessel demurrage incurred [29] While these contractual undertakings appear on their face to be completely separate and distinct, they became blurred and the issues for determination are 1) Whether the parties' 2019-2022 course of dealings linked, modified or superceded their express reciprocal obligations and reflect their contractual intentions?; and 2) Was HM entitled to reject the GANT FLAIR's NOR issued on May 15, 2022 in accordance with the terms of its email of May 16, 2022?

1) *An analysis of the parties' course of dealings is relevant to the interpretation of their agreements and may be used to supplement their NAEGA 2 contracts* - While parol evidence may not be used to contradict terms of the parties' contract as written, a case-specific course of dealing analysis may be used to supplement the agreement itself. [30] The analysis requires an indication of the common knowledge and understanding of the parties and when a course of dealing cannot be reasonably construed as consistent with the express terms of the parties' agreement, the express terms prevail. [31]

2) *While HM and Sor were free to modify their contracts, they could not do so unilaterally on a retroactive basis* – I agree with HM that parties are free to modify or alter the terms of their contract as they see fit to address their particular relationship and concerns, and that Clause 11 of the baseline NAEGA 2 contract leaves the terms

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[29] Chapter 16 (A), Louis Epstein, *Navigating Maritime Arbitration: The Experts Speak* (2019). "Laytime and demurrage provisions frequently appear in commodity sale contracts. FOB buyers who charter the vessels loading their goods normally wish to pass on to FOB sellers any liability they may incur under the charterparty for loadport demurrage."

[30] N.Y.U.C.C. Sec. 1-303(d) and *CCT Energy N.V. v. Bulk Oil (U.S.A.), Inc., Supra.*

[31] *New Moon Shipping Co., Ltd. v. Man B&W Diesel, Supra.*

of payment to the parties. However, a party cannot unilaterally modify contractual terms without the consent of its counter party [32] and this issue is further addressed below.

3*) The GANT FLAIR NAEGA 2 contracts did not on their written terms invalidate her NOR on May 15, 2022 if two vessels were on credit* - HM clearly demonstrated that it was capable of linking payment under the NAEGA 2 purchase agreement to the Vessel's NOR as it later proposed with respect to the CENTURY EMERALD's contracts by expressly stating "50% of vessel invoice is cash against mate's receipt and invoice, balance net 15 days. **Buyer cannot have two vessels on credit at any one time. NOR is not accepted until previous balance is completely paid."** [33] [Emphasis added] However, it did not do so in the case of the GANT FLAIR.

4) *HM has not carried its burden of establishing that the parties' course of dealings reflect their intention that the Vessel's NOR would be invalid if two vessels were on credit* - HM primarily relies on two of over twenty emails listed in the Joint Timeline to support its contention that the parties' course of dealings under UCC Sec 1-303 reflect their agreement that tender of the Vessel's NOR would be invalid if two vessels were on credit. Specifically, on December 17, 2020, HM's Chief Financial Officer, Kary Knapp proposed:

"As we move into 2021, we will continue with payment terms but it will only apply to one vessel. To say another way, we won't extend 50% credit on more than one vessel at a time." [34]

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[32] *Family Fashions, Inc. v. Sterling Jewelers, Inc.*, 2022 U.S. Dist. LEXIS 162453 (S.D.N.Y. 2022) and *Asoma Corp. v. SK Shipping Co.*, 467 F.3d 817 (2d Cir. 2006).
[33] Abiven, paras. 31-33; Exs. 14 and 18.
[34] Joint Timeline.

And on January 14, 2021, Mr. German, HM's Controller, emailed Sor's Claire Golec, "... *just a reminder on the credit terms to not have unpaid balances on multiple vessels at one time".* [35]

UCC Sec. 1-303(b) defines a "course of dealing" as:

> "* * * a sequence of conduct concerning previous transactions between the parties to a particular transaction that is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct."

Mr. Knapp expressly characterized his email of December 17, 2020 as a "proposal" [36] and nothing more. Mr. German's email of January 14, 2021 over a year later, sent a "reminder" apparently of Mr. Knapp's proposal. There is no evidence that Sor ever responded, let alone manifested assent, to Mr. Knapp's proposal and/or Mr. German's reminder.

Sor, citing *APL Co. Pte. Ltd. v. Kemira Water Solutions, Inc.* [37] and *Nat'l Liab. & Fire Ins. Co. v. Mediterranean Shipping Co., S.A.* [38] contends that two isolated emails over one year apart and seventeen months before the GANT FLAIR NOR was tendered, do not satisfy a "course of dealing" within the meaning of the UCC. I agree and am persuaded that the parties never tied the contractual knot on this key issue.

5) *HM's email of May 16, 2022 did not provide it with the retroactive right to reject the GANT FLAIR's NOR tendered on the previous day, May 15 2022 -*

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[35] *Id.*

[36] Knapp Declaration, Para. 12

[37] *Supra.* "There is therefore little past dealing from which this Court could infer that Kemira's silence as to the two sea waybills at issue was equivalent to acceptance of the Terms and Conditions - on these facts, this Court declines to find that one prior interaction could constiitute a 'course of dealing' sufficient to this task."

[38] *Supra.* "While the bills of lading for both (prior) shipments provided for "Port-to-"Port Carriage", two prior engagements are insufficient to establish a course of dealing." The court also citing *New Moon Shipping Co. v. Man B&W Diesel,* stated, "A prior course of dealing for contract purposes exists only when the parties have a "well-established custom" practiced in "numerous purchases over a period of time".

On May 16 May 2022 HM's Mr. German emailed Sor, stating:

"Hansen-Mueller extended the following payment terms to Soreidom:

- *50% of invoice CAD*
- *Balance of invoice 15 days after B/L date at 6%*
- *Soreidom will not have 2 vsl on payments terms at any one time.*

Soreidom is out of contract terms and has been for the past several months. The 50% CAD payment is taking 5-10 days and paying off the balance of invoice is taking up to 30+ day from B/L date. ***Going forward****, NOR for Soreidom vsl will not be valid if there is an outstanding unpaid cargo balance on previous vessel. We value Soreidom business but in today high priced environment we need to take measure enforce our agreed upon payment terms."* [39] [Emphasis added]

HM expressly conditioned its email on a "Going forward" basis which seems to me capable of only one interpretation - that the terms stated therein referred to future vessels and shipments. [40] HM was not entitled to unilaterally modify the parties' contracts retroactively.

6) *Resolution of the HINASE demurrage dispute is not evidence that Sor agreed that the GANT FLAIR's NOR would not be valid if there were outstanding unpaid cargo balances on a prior vessel* – The HINASE arbitration was commenced on November 16, 2022 and settled in short order on November 21, 2022. Parties settle disputes for a variety of reasons beyond their merits – preserving an amicable or repairing a deteriorating commercial relationship, nuisance value, reducing the disruption and expense of dispute resolution, and so forth. In this instance, notwithstanding a settlement

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[39] Abiven, para. 13 and Ex. 6.
[40] The *Cambridge Dictionary* defines "going forward" as "used, especially in business, to mean 'in the future.'"

payment, the parties specifically reserved their rights to challenge the amounts of demurrage earned in connection with the "GF" (GANT FLAIR) and the "CE" (CENTURY EMERALD) by name and I find HM's reliance on Sor's alleged admission against interest in this proceeding to be mis-placed.

II CENTURY EMERALD *Demurrage claim $179,512.69*

Facts

In July, 2022 the parties entered into a series of contracts for the purchase of yellow corn and soybean meal cargoes totaling 10,301.015 MT similarly governed by NAEGA 2 contracts (revised March 30, 2018) including Addendum 1 (loading rate guaranty). Each contract specified a guaranteed loading rate of 5,000 MT (or in some cases 4,300 MT) per WWDSSHEX with a charter party demurrage rate of $15,500/day. The payment terms of the majority of the contracts provided "50% of vessel invoice is Cash against mate's receipt, balance net 15 days." On September 1 Sor nominated the CENTURY EMERALD and provided HM with a listing of the quantities of cargoes it intended to load. The Vessel's ETA for her load port of Houston was September 8 and her discharge ports were identified as Trinidad and Guyana. The Vessel tendered her NOR at Houston on September 8 which HM accepted on September 9 without objection. [41]Laytime commenced on September 9 but loading did not commence until September 20 due to berth congestion and was not completed until September 23. HM did not present the CENTURY EMERALD contracts until September 21 which contained a modification to the payment terms – "Buyer cannot have two vessels on credit at any one time. NOR is not accepted until previous vessel is completely paid." Sor never accepted these terms and expressly rejected them. [42] Based on the guaranteed load rate, laytime permitted for loading the entire Vessel was 3 days, 10

[41] Abiven, Exs. 15-16. "Notice of Readiness Accepted. Received on September 9, 2022. Hansen-Mueller Received."
[42] *Id*, paras. 31-33; Exs. 14 and 18.

hours, 37 minutes (17,212.66MT at 5,000MT) per weather working day). Sor calculated demurrage based on a rate of $15,500 per day as $179,512.69. [43]

HM apparently unilaterally decided to bring another vessel, the SARONIC SPIRIT, to the berth ahead of the CENTURY EMERALD as reflected in the following email exchanges between the agent, HOST, and Sor:

- September 8, 2022 "... Berthing to be confirmed in due course as M/V Vokaria is currently alongside. Currently estimate 5-6 days remaining for cargo operations ..."
- September 9, 2022: "... Berthing to be confirmed in due course as M/V Vokaria is currently alongside. Currently estimate 5-6 days remaining for cargo operations. Hansen Muller is advising that decision is not been made to bring either the M/V Century Emerald & M/V Saronic Spirit in first..."
- September 12, 2022: "Berthing to be confirmed in due course as M/V Vokaria is currently alongside. Hansen Muller is advising that decision is not been made to bring either the M/V Century Emerald & M/V Saronic Spirit in first ..."
- September 19, 2022: "... M/V Saronic Spire (sic) is occupying berth with an ETD of Sept 19th..." [44]

On September 22 HM issued invoices for the cargoes carried on the CENTURY EMERALD providing that half of the invoice was due upon receipt, with the balance due October 7. On October 21 Sor served HM with its laytime statement. Later that day, HM's Ms. Boehm replied, providing Sor with a copy of the revised Hansen-Mueller Co. Houston Export Elevator Grain Tariff ("HM Tariff") and stating:

"Below is a quote from HM Tariff, HM is not liable for laytime while the MV Vokaria was occupying the city dock. Please send revised calculation. *All "City Docks" within POH including CD 16 are for public access. All dock assignments are determined by the governing authority of Port of Houston Authority. Vessels are given dock

[43] Abiven, Exs. 12-13.
[44] *Id , Ex.16.*

assignments on first come first serve basis. All delays in berthing caused by POHA scheduling is to the account of vessel." [45]

Clause 8 of the NAEGA 2 provides in pertinent part,

"Delivery shall be made between .... and .... to buyer's tonnage in readiness to load, in accordance with custom of the port and subject to the elevator tariff **to the extent that it does not conflict with the terms of this contract. Incorporation of a loading rate guaranty in this contract shall not entitle seller to delay delivery.** [Emphasis added][46]

The Issues for Determination

The issues for determination are whether Sor or HM bear the risk of congestion, and whether the terms of the HM Warehouse Tariff read against Clause 8 of NAEGA 2 reduces Sor's demurrage claim to $2,820.40?

The Parties' Contentions

Sor contends

1) Laytime commenced on September 9, 2022 following HM's express and unqualified acceptance of the vessel's NOR. Sor's claim reflects the excess period used by HM beyond the agreed laytime and HM has the burden of establishing a contractual exception to the running of demurrage; [47]
2) HM's reliance on the HM Revised Tariff is misplaced; at no time prior to October 21, 2022 did HM provide Sor with a copy; and in any event, it is invalid and unenforceable since it directly conflicts with Clause 8 of the parties' NAEGA 2 contract in which HM guaranteed that cargo would be loaded at a particular rate once the Vessel's NOR was accepted;

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[45] Abiven, Exs. 20 and 21.
[46] *Id.*, para 36 and Ex. 2.
[47] *The Edwin I Morrison*, 153 U.S. 199, 2176 (U.S. 1894); *GTS Indus. S.A. v. S/S Havtjeld*, 68 F.3d 1531, 1535 (2d. Cir. 1995), *accord; In re Marine Sulphur Queen,* 460 F.2d 89 (2d. Cir. 1972); *Great Elephant Corp. v. CPC Corp.*, SMA No. 4197 (2012); and *O.N.E. Shipping v. Schumann-Steir*, SMA No. 3671 (2001).

3) HM has failed to demonstrate that the Tariff provision applies and that the berthing delays did not result from an exercise of its own discretion; and
4) HM failed to provide a 60-calendar day advance notice of its intent to change any charges and rates under the Revised Tariff (issued on May 10, 2022) as required by the U.S. Warehouse Act. [48]

Sor concludes that it is entitled to demurrage in the amount of $179,512.69 plus attorneys' fees and costs.

HM contends

5) HM acknowledges that while demurrage was incurred and that it bears the burden of establishing an exception to the running of laytime, berthing delays were caused by POHA scheduling; and
6) Sor had notice of the publicly available HM Tariff which was valid and provided that berthing delays are for Sor's account.

HM concludes that since laytime did not commence until September 20 at 15:08. due to berth congestion, Sor is only entitled to demurrage of $2,820.14 and its claims for attorneys' fees and costs should be denied.

Discussion and Decision

Sor is awarded demurrage in the amount of $179,512.69 – Sor properly tendered the Vessel's NOR on September 9, 2022 which HM accepted without objection, thereby presenting Sor's *prima facie* claim for demurrage by establishing that time consumed in loading cargo at Houston exceeded agreed laytime. In order for HM to be excused from paying demurrage, it must establish - as it acknowledges - an exception to the running of laytime or demurrage. It has been unable to do so and I must conclude based on the evidence before me that HM's berthing decisions on September 9-19 caused or contributed to the demurrage incurred. I find that HM's reliance on the HT's provisions regarding berthing delays is misplaced as they clearly conflict with and do not prevail over Clause 8 of the parties' NAEGA 2 contract.

[48] 7 U.S.C. Sec. 241, *et seq.*

Interest

Interest is awarded at the Commercial Prime Rate as published by the Federal Reserve Board from the dates detailed below to today's date. Sor's unopposed contention in its June 26, 2023 *Application for a Final Award* was that in the event it prevailed, interest should be calculated "from the date of each of HM's breaches in June, 2022 (GANT FLAIR) and September, 2022 (EMERALD CENTURY)". [49] I have awarded interest accordingly on the GANT FLAIR's demurrage from the invoice date of September 14, 2022 [50] and on the EMERALD CENTURY 's demurrage from the invoice date of October 31, 2022. [51]

Attorneys' and Arbitral Fees and Expenses

This has been a hard-fought dispute and I commend counsel for their advocacy. I grant Sor as prevailing party allowances towards its attorneys' and arbitral fees in accordance with Section30 of the SMA Rules, which are itemized in Appendix A as an integral part of this Final Award.

Award

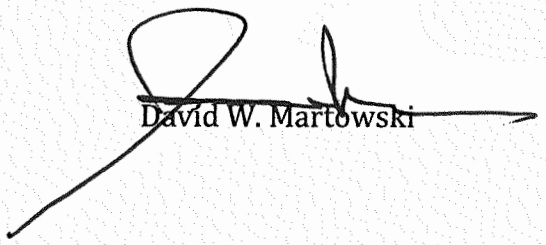
Sor is awarded demurrage, plus interest, an allowance towards its attorneys' and arbitral fees and expenses, in the total amount of $927,778.18 which is calculated as follows:

GANT FLAIR Demurrage		$596,690.25
Interest		71,100.15
CENTURY EMERALD Demurrage		179,512.69
Interest		19,975.09
Attorneys' Fees		50,000.00
Arbitration Fees		10,500.00
	Total	$927,778.18

[49] P. 23.
[50] Sor's Ex. 11, Inv. No. 20220919087.
[51] Sor's Ex. 22, Inv. No. 20221119277.

If payment has not been made within 30 days from this date, interest shall resume accruing on the principal amounts until this Final Award shall be satisfied or reduced to judgment, whichever first occurs.

This Award is final and binding in accordance with provision 3 of the Term Sheet executed by the parties on November 22, 2022. Judgment may be entered in the Supreme Court of the State of New York or any other court having jurisdiction thereof, in accordance with Clause 30 of the NAEGA 2 Contracts.



David W. Martowski

New York, N.Y.
March 14, 2024

In the Matter of the Arbitration

between

Soreidom S.A., Appendix A

Claimant,

and

Hansen-Mueller Co.,

Respondent,

arising under various NAEGA No. 2 Contracts.

The parties each deposited $17,500 or a total of $35,000 into the SMA Escrow Account as security for my fees and expenses, which are their joint and several responsibilities.

I have capped my fee and expenses at $32,000, of which HM's share is $28,000. Sor is directed to pay HM's shortfall of $10,500 ($28,000 – $17,500) from its deposit in the first instance, which it will recover as stated in the Final Award above. The remaining escrow balance of $3,000 is to be returned forthwith to Sor's attorneys.

New York, N.Y.
March 14, 2024