The Less Obvious Benefit of New York's "Prompt" Arbitration

The Society of Maritime Arbitrators, Inc. of New York ("SMA") prides itself on providing prompt arbitration. If the charter party provides for New York arbitration pursuant to SMA Rules, the Owners and Charterers can agree to submit a dispute to prompt arbitration. The obvious benefit of this option is clear. Before an issue rises to the level of a *bona fide* dispute, or before a dispute reaches the tipping point and the resultant damages multiply, a Panel of seasoned New York arbitrators can hear and decide the issue or dispute, often within days of the parties' agreement. Especially in long term contracts, an immediate binding decision can result in significant savings to all involved.

What is not readily apparent from the foregoing, however, is that the offer of prompt arbitration to the opposing party, even if declined, may pay significant dividends. This is illustrated in *In the Matter of the Arbitration between Western Bulk Carriers KS and Deiulemar Shipping S.p.A*, SMA Award No. 4215 (Nichols, Mordhorst, Devine, July 26, 2013). In that case, Western Bulk Carriers ("WBC") had a Contract of Affreightment ("COA") to carry 1,000,000 mts of bauxite per year between Porto Trombetas, Brazil to Point Comfort, Texas. To satisfy its tonnage needs, WBC entered into COAs with three owners including Deiulemar Shipping. Because of the operational difficulties associated with loadings in Puerto Trombetas and discharge in Point Comfort, the COA had no canceling clause. Rather, the COA, at Clause 10(c), provided as follows:

> If a nominated vessel appears to be delaying past the scheduled laydays and either Charterer, Shipper, or Receiver cannot tolerate such delay, Charterers and Owner will mutually agree on a revised laycan suitable for the vessel.

To say that the clause was a constant source of controversy between Deiulemar and WBC would be an understatement. Almost every voyage involved a fight over the meaning of the

provision and the obligations of the respective parties. As the Panel Chairman noted in his own questioning of the WBC witness when he argued that the provision was intended to apply in the case of minor delays only:

> I don't see anything in there about minor delays. All I see is the words "will mutually agree." And to me it seems odd that in one sentence you say one party can't even tolerate it, but in the next sentence you say you will mutually agree to change it.

It is, as the Chairman so aptly noted, difficult to understand how a Charterer on the one hand is unable to "tolerate such delay" but in that event, is obligated by the phrase "will mutually agree" to revise the laycan to fit the vessel's needs ("laycan" itself being a misnomer since there is no canceling clause). The issue is made even more bizarre by the fact that this was WBC's form clause.

During the penultimate COA voyage, this issue came to a climax. Owners repeatedly asked to extend the projected date for the vessel's arrival, relying on Clause 10(c). WBC granted the first request and then "conditionally" granted the next request. Deiulemar rejected the conditions and insisted that WBC, in accordance with Clause 10(c), agree to extend the arrival date. If WBC would not so agree, Deiulemar threatened to withdraw the vessel and to call for prompt arbitration over the interpretation of Clause 10(c). WBC declined. Before this was resolved, Deiulemar made another extension request which WBC outright rejected. Instead, WBC canceled the vessel, replaced it with another and sought to hold Deiulemar responsible for the difference in freight and other damages, exceeding $1.2 million. There were other factors involved which are reflected in the Arbitrators' Award but, after the conclusion of the COA, WBC ultimately demanded arbitration of Deiulemar.

For a number of reasons, some not relevant to this point, the Panel unanimously held in favor of Deiulemar. A significant factor weighing in favor of Deiulemar which was repeatedly

referred to by the Panel was the fact that Deiulemar had demanded prompt arbitration and WBC declined, relying on their own misinterpretation of Clause 10(c). The Panel noted:

> At this point, we find that it important to emphasize that, had WBC accepted Deiulemar's suggestion on August 2, 2007 to then and there resolve the interpretation of COA Clause 10(c), by immediate arbitration, as provided for in the Dispute-Resolution Clause of the COA, this arbitration proceeding would not have run the course of some 6 years and would have greatly reduced the substantial and unnecessary expenses, now incurred by the parties.

In a separate concurring opinion on this point, Arbitrator Alexis Nichols wrote the following:

> If WBC felt strongly about its position, it should have invoked an Immediate Arbitration under the SMA Immediate Arbitration Rules, the outcome of which would have been published within days at the most.
>
> Instead, it ignored Deiulemar's arbitration demand and dragged its feet for 6 years causing the legal costs to sky-rocket close to half a million dollars. Savvy litigants are aware of the risk they run having to pay their opponents fees, if they lose. That said, I have no problem allowing Deiulemar a full refund of its legal costs, so that it can be made whole.

As noted earlier, the Panel relied on numerous bases in holding in favor of Deiulemar. However, when it came to the award of legal fees and costs in favor of Deiulemar there was no fact more compelling to the Panel than Deiulemar's demand for prompt arbitration. Especially in cases where the effect of a dispute can be significantly minimized or the operation of a long term contract can be eased, New York arbitrators are keen to step in to help sort out the issue as soon as humanly possible. Moreover, the ramifications for obstructing the counter-party's efforts for prompt arbitration can be substantial, as they were in this case.