



AD HOC ARBITRATION

DORICK NAVIGATION, S.A. ./ SCHUYLER LINE NAVIGATION, LLC ./ KPI BRIDGE OIL,
INC.

PARTIAL FINAL AWARD

06 January 2020

Tribunal:

[J. Stephen Simms](#) (Appointed by the claimant)

[Alain E. Colletti](#) (Appointed by the respondent)

[Louis P. Sheinbaum](#) (President)

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Partial Final Award

- [1]. In November of 2017 Schuyler Line Navigation Company, LLC ("Schuyler" or "Charterer"), as time charterer of the MTV BETTY K IX ("the Vessel") provided alleged off-specification fuel oil (delivered by barge) at Point Lisas, Trinidad and Tobago, to the Vessel, owned by Dorick Navigation, S. A. ("Dorick" or "Owner"). The fuel oil was provided and sold to Schuyler by KPI Bridge Oil. Inc. ("KPI").
- [2]. In this consolidated proceeding Dorick alleges that the Vessel/Owner sustained damages by reason of the delivery of the contaminated fuel oil to the Vessel, and makes claim against Schuyler: and Schuyler makes claim against KPI for indemnity.
- [3]. On August 8, 2019 KPI moved to dismiss the claim of Schuyler against KPI on the ground of time bar.
- [4]. This Panel having entertained and considered the motion of KPI to dismiss the indemnity claim of Schuyler ("the Motion"), together with all briefing and related submissions by KPI and Schuyler, issues this, its Partial Final Award, granting the KPI motion. Schuyler and KPI have thoroughly presented their respective positions, and the majority of the Panel further finds there is no evidence or basis to infer or find that there is a need for further discovery to decide the instant motion.¹
- [5]. The April 16, 2019 Partial Final Award on Consolidation of Arbitration Proceedings by Mr. Robert G. Shaw, President of the Society of Maritime Arbitrators ("SMA") effectively confirmed that the fuel sale contract between Schuyler as buyer and KPI as seller (the "Contract") for the bunkers provided to the Vessel incorporates KPI's contractual "Standard Terms and Conditions of Sale of Marine Fuel by KPI Bridge Oil Inc." ("T&Cs").² That Partial Final Award also confirmed that SMA Rules Section 2 applied to the arbitration of disputes arising under the Contract.³
- [6]. As indicated, the above Partial Final Award arises from two disputes in which (i) Dorick claims that Schuyler breached the Time Charter ("Charter") between Dorick and Schuyler when Schuyler allegedly fueled the Vessel through KPI with off-specification fuel, and (ii) Schuyler claims against KPI for indemnity against KPI for supplying said fuel. The Contract documented the fuel delivery and sale.⁴

¹ Arbitrator Colletti would have the Panel reserve its decision on time bar pending limited discovery regarding the communications between Dorick and KPI regarding this dispute.

² The Sale Contract incorporates the 'Seller's Standard Terms and Conditions of Marine Fuel' dated July 1, 2015 that provide for arbitration in New York under the SMA Rules. (SMA 4367 at 2 (2019))

³ SMA No. 4367 at 3 (2019).

⁴ KPI's Mot. to Dismiss, Coyne Decl., Ex. 1. The first document making up the Contract was KPI's "CONFIRMATION OF ORDER" dated November 3, 2017. (Ex. 1 to Coyne Declaration attached to KPI's Motion to Dismiss dated August 8, 2019). The "Notes" at the bottom of KPI's Confirmation of Order (bold emphasis in original) include the following:

...Seller's [KPI's] terms and conditions to apply to this contract and the latest version is available from our website <http://www.kpibridgeoil.com/1245-1339.aspx>. [T]hese are an integral part of this contract. ('this contract' emphasis added.)

Schuyler argues that the above website address "does not produce any terms and conditions, and instead directs the user to a page stating that access is denied", i.e.,

Forbidden

You don't have permission to access/1245-1339.aspx on this server. (Schuyler memo in opposition to the Motion, at 7; and Ex. Q.)

There is no evidence that Schuyler tried the above link at anytime prior to the arbitrations herein; Schuyler does not claim that it ever

[7]. On June 8, 2018 Dorick demanded arbitration against Schuyler, and named its arbitrator. On June 28, 2018, by letter addressed to both Dorick and KPI. Schuyler named its arbitrator; demanded arbitration against KPI; and demanded and requested that the arbitrations be consolidated. (Schuyler Exh. P.) KPI did not name/appoint an arbitrator, and did not agree to a consolidation. In March of 2019 Schuyler applied to SMA President Shaw for consolidation as provided for in the SMA Rules Section 2. KPI opposed consolidation, arguing that the T&Cs time-barred Schuyler from claiming against KPI.⁵ Over this opposition, President Shaw Ordered consolidation; Ordered KPI to name a third arbitrator; and confirmed that the Contract incorporated the T&Cs. and that the T&Cs' application was to be a subject of this consolidated arbitration. Thus, the above Partial Final Award of Mr. Shaw reserved for this Panel on the question of whether or not the T&Cs time-barred Schuyler from claiming against KPI.⁶

[8]. Consistent with the Partial Final Award, this Panel finds that the Contract fully incorporates the I &Cs. Clause 1.2 of the T&Cs states that "[t]he Bunker Confirmation shall incorporate the Standard Terms by reference and the Bunker Confirmation and the Standard Terms together constitute the complete Bunker Contract."⁷ The T&Cs Clause 10.6 states the following:

Any claims against the Seller in respect of this contact shall be brought before the relevant court or arbitral tribunal in accordance with Article 19/20 within 6 months of the date of the delivery of the Bunker Fuel, failing which such claims shall be deemed waived time barred.⁸ (Emphasis added)

[9]. May 10, 2018 is the date six months after the KPI fuel delivery. Schuyler on June 28, 2018 first demanded arbitration against KPI and demanded consolidation. Ergo the Motion.

[10]. Schuyler asserts the time bar of six months is not applicable and the T&C's should not be incorporated into the Contract because:

1. The T&Cs of KPI were not identified beyond all reasonable doubt, citing *Ward v. TheLadders.Com, Inc.*, 3 F. Supp.3d 151, (S.D.N.Y. 2014) and *Valley Stream Foreign Cars, Inc. v. American Honda Motor Co., Inc.*, 209 F. Supp.3d 547 (S.D.N.Y 2016);

2. The above internet/link/address reply or alleged dead page response to counsel for Schuyler to the address given in the "Notes" in the Confirmation of Order;

3. The six month time bar is unreasonable under the circumstances present here;

4. Even if the six month period is reasonable, the time bar should not be enforced by the Panel on account of equitable grounds, or applying the doctrine of laches in this maritime dispute; and

5. In the exercise of discretion, the Panel should permit Schuyler to have discovery regarding the communications between KPI and Dorick regarding this dispute.

asked KPI for a copy of its T&Cs.; and the same July 1, 2015 T&Cs of KPI (Ex. 2 to the Coyne Declaration) are, at this writing, easily googled (with the evidence being that the same 2015 T&Cs have been in place since 2015).

⁵ SMA No. 4367 at 3 (2019).

⁶ SMA No. 4367 at 4, 5 (2019).

⁷ KPI's Mot. to Dismiss. Ex. 2.

⁸ *Id.*

[11]. In *Ward*, 3 F. Supp. 3d at 163, the Court stated:

It is well established under New York law^[9] that '[t]he doctrine of incorporation by reference requires that the paper to be incorporated into the written instrument by reference must be so described in the instrument that the paper may be identified 'beyond all reasonable doubt' [citing authorities]...Courts have emphasized that incorporation by reference must meet an 'exacting standard'; vague references to documents not specifically identified do not suffice. [citing authorities].

[12]. In *Valley*, 209 F. Supp.3d at 553, the U.S. District Court for the Southern District of New York reiterated the above quoted principle stated in *Ward*, and added:

'there must be a clear manifestation of an intent to be bound by the terms of the incorporated instrument'

[13]. The Panel finds that the "Notes" of the Order of Confirmation of the Contract clearly and specifically identified the T&Cs of KPI as the document that was incorporated beyond all and any reasonable doubt. As to how KPI manifested its intent to be bound by the T&Cs of KPI:

[14]. In its June 28, 2018 demand for arbitration and request for consolidation to KPI, counsel for Schuyler slated:

Both the governing Charter Party and the Seller's Standard Terms and Conditions of Sale of Marine Fuel by KPI Bridge Oil, Inc.^[10] call for any and all disputes to be resolved by arbitration in New York pursuant to the Maritime Arbitration Rules of the New York Society of Maritime Arbitrators (the "SMA Rules"). Pursuant to the SMA Rules. Charterers hereby nominate Mr. Alan E Coletti... and demand that these disputes be consolidated... The appointment of Charterer's Arbitrator is made pursuant [to] the terms and conditions of the Charter Party. Article 20 of seller's Standard Terms and Conditions and Section 2 ^[11] of the SMA Rules. In accordance with Section 2 of the SMA Rules. Charterers hereby request a consolidated arbitration before a consolidated panel of arbitrators. (Emphasis added.) (Schuyler Ex. P.)

[15]. Thus, the *specific basis* asserted by Schuyler for its demands for arbitration with KPI and consolidation were the T&Cs of KPI; and the Panel finds that KPI thereby clearly manifested its right and intent to invoke and to be bound by the terms of the T&Cs of KPI.

[16]. *One Beacon Ins. Co. v. Crowley Marine Servs.*, 648 F.3d 258 (5th Cir. 2011) involved the question of whether a ship repair contractor was bound by the terms and conditions of a vessel owner (Crowley) that were incorporated into the agreement (oral) between the contractor (Tubal-Cain) and Crowley by Crowley's Repair Service Order ("RSO") that gave an internet address for Crowley's

⁹ The T&Cs provide:

18.1 The Bunker Contract shall be governed by the laws of the United States of America.

¹⁰ Article 20 of the T&Cs provides:

20.1 Any dispute between the parties arising out of...any Bunker Contract, including the existence, validity or termination, shall be referred to three persons at New York... the proceeding shall be conducted in accordance with the Rules of the Society of Maritime Arbitrators, Inc.

¹¹ Section 2 "Consolidation" provides:

Whenever a dispute or disputes arise under two or more contracts that are subject to these rules... (Emphasis added).

terms and conditions. During the course of its Opinion, which held that the terms and conditions of Crowley were incorporated and binding on the contractor, the 5th Circuit found:

a. "The chief consideration when determining the validity of contractual terms -in contracts with or without a nexus to the internet is whether the party to be bound had reasonable notice of the terms at issue and whether the party manifested assent to those terms." (*Id.* at 269);

* * *

b. "We hold that the district court did not err in concluding that the RSO terms and conditions supplemented the oral agreement between the parties because notice of the terms and conditions was clearly and conspicuously displayed in every RSO that Crowley sent to Tubal-Cain. the terms and conditions were at all times reasonably accessible and available to Tubal-Cain, and Tubal-Cain manifested assent by accepting the RSOs without objection to the terms and conditions. Under ordinary contract principles. Tubal-Cain is therefore bound by those terms and conditions, even if neither Van-Huns [whose job it was to review the terms and conditions] nor anyone else at Tubal-Cain ever visited Crowley's website in order to familiarize himself with those terms and conditions" (*Id.* at 270);

c. The general maritime law of the United States recognized and included the above principles enunciated by *Ward* and *Valley Stream* (*Id.* at 267 269);

d. The issue of incorporating terms was controlled by the general maritime law or admiralty' law (*Id.* at 269); and

e. Notice to Tubal-Cam of the terms and conditions of Crowley was reasonable under the circumstances (*Id.* at 269).

Similarly, the Panel finds that Schuyler had reasonable notice of the T&Cs of KPI, including the six month time limit.

[17]. The Panel also finds that a six month period for a time bar in this case is not unreasonable, especially under the circumstance that on the next day after the delivery, Schuyler knew that claim was made by the Vessel that the fuel was off-specification. On November 11, 2017 the Master emailed Schuyler:

In the new bunkered MGO we have found large content of water and dirt. Kindly accept the master notice regarding... this. (Schuyler Ex. A).

And by January 29, 2018 (long before six months from the fuel delivery' had run) Schuyler knew that the Owner of the Vessel was going to proceed formally against Schuyler (by arbitration or court action if necessary) with a claim of \$86,686.75. (Schuyler Ex. I)

[18]. In the view of the Panel there are no facts relating to events between the time of delivery (November 10, 2017) and May 10, 2018 that support a conclusion that equity or the doctrine of laches call for the non-application of the six month time limit of the T&Cs of KPI against Schuyler.

[19]. Schuyler put bunker suppliers on notice of a claim just three days after delivery' of the fuel.

(Schuyler Ex. A) On November 17, 2017, four days after putting the suppliers on notice, testing by AmSpec. indicated off-specification fuel. (Schuyler Ex. C). Consequently, Schuyler's claim that it could not have commenced arbitration within the six month period is inconsistent with the notice that it gave three days after delivery'. Schuyler had to have believed as soon as three days after delivery that it had a claim against the seller of the bunkers it had purchased -KPI. It could have demanded arbitration then. There is no merit in law or equity to Schuyler's arguments or defenses against the application of the six month time limit in favor of KPI and the Motion on the grounds that (1) no formal proceeding was commenced against Schuyler by Dorick within six months of the event giving rise to a claim to be made by Schuyler against KPI; and (2) Schuyler's time to commence arbitration against KPI for indemnity had not begun to run as of June 28, 2018 because it had not yet been held liable, and therefore its claim for indemnity' had not yet accrued.

- [20]. Schuyler knew on day one that the vessel owner was looking to hold Schuyler responsible in the first instance for any damage to the Vessel or damages for the off-spec fuel provided by Schuyler to the vessel but sold/supplied by KPI to Schuyler. Neither circumstance or contention constitutes a valid defense to the time limit of T&C 10.6 biting herein against Schuyler, which goes to: Any claims against the Seller [KPI] in respect of this contract shall be brought before the relevant...tribunal within 6 months of the date of delivery... (Emphasis added.)

Moreover, as a matter of fact and equity, Schuyler knew the vessel owner was making claim against it on day one; and neither circumstance (1) or (2) was a bar to Schuyler starting a protective arbitration (to stay, or to proceed with) against KPI anytime between November 11, 2017 and May 10, 2018; and, in addition, Schuyler's position totally disregards the everyday/forever/reality/practice in the marine business/claim world of obtaining extensions of time to commence arbitration (or suit) which, if not agreed, is countered with a protective suit or arbitration. Testing certainly could have continued during any arbitration proceeding had Schuyler made a timely arbitration demand.

- [21]. After asserting its claim against bunker interests, Schuyler had the burden to pursue that claim, including to press KPI to test any further samples. KPI's failure to respond to Schuyler's requests for further testing did not toll the six month time Schuyler had to demand KPI to arbitrate.
- [22]. Dorick's position also did not toll the Schuyler-KPI six month arbitration demand time limit. In fact, Dorick's January 29, 2018 (Schuyler Ex. I) communication to Schuyler suggesting to waive the arbitration of the Charter should have made Schuyler further aware of the need for Schuyler to demand KPI to arbitrate and protect its position for indemnity. By at least this time, Schuyler knew that Dorick had a direct claim against Schuyler for USD \$86,686.75, apparently for alleged engine damage, from the KPI off-specification fuel.¹²

- [23]. Dorick did not coerce Schuyler to waive arbitration or settle with KPI, and of course, Schuyler neither waived arbitration nor settled with Dorick. Dorick's letter to Schuyler includes the following, which certainly does not indicate coercion:
We write to see whether Schuyler Line Navigation Co. is agreeable to litigate this matter in the United States District Court instead of incurring the expense associated with arbitration.

¹² Schuyler Ex. I.

* * *

Please let us know whether litigation is of interest to your company.¹³

- [24]. The letter concludes that without a Schuyler response within 10 days (also still well in advance of the May 10, 2018 six month Contract time bar) Dorick would proceed with arbitration under the Charter. Schuyler consequently was by this pre-May 10, 2018 time well aware of the possibility of arbitration proceedings. This was further reason for Schuyler at even this date (1/29/18) to obtain the T&Cs (if it had not done that already).
- [25]. On June 28, 2018, 49 days after the May 10, 2018 six months after delivery deadline, Schuyler demanded that KPI participate in a consolidated arbitration proceeding.¹⁴ Again, had Schuyler not been aware (at least by this point) of the T&Cs' arbitration clause, it would not have known that it had any right to demand KPI to arbitrate under the Rules of the SMA and/or to seek consolidation.
- [26]. Time bars are common in bunker sales contracts. The Minerva Bunkering terms and conditions.¹⁵ for example, state in pertinent part as follows:

[9](d) Time Bar

In each and every case any and all claims, including those under Subclauses 9(a)(i), 9(b)(i) and 9(c), by the Buyers shall be time barred unless arbitration proceedings have been commenced in accordance with Clause 25 hereof within twelve (12) months of the date of delivery of the Marine Fuels or the day that delivery should have commenced as per the Confirmation Note.

The BIMCO Bunker Terms 2018 (Clause 9) also have a time bar (of 12 months) to commence arbitration. See https://www.datocms-assets.com/4161_/1538135553-bimco-2018-hunker-one-terms.pdf.

- [27]. Schuyler, in its opposition to the Motion, presents no excuse for its failure to start a timely arbitration against KPI. Its conclusory statement, in support of its request that the Panel permit discovery "regarding communications between Dorick and KPI" (without any allegation, showing or evidence of any wrongdoing by Dorick or KPI) simply states what happened as Schuyler sees it: ... KPI scheduled an inspection to allow the parties to properly understand their rights, invited SLNC [Schuyler] to attend that inspection, represented to SLNC that their reservation of rights was duly noted, and then ceased all communications. The evidence likewise shows that Dorick demanded that that SLNC waive its right to arbitration [with Dorick under the Charter], aggressively attempted to obtain a settlement payment from SLNC, and then likewise ceased communications until shortly after the purported six month time bar [with KPI] expired. (Emphasis by SLNC.) (Schuyler's Opposition to the Motion, at 13.)

In the view of the majority' of the Panel. SLNC has not made a case (factual, legal, equitable or under

¹³ Schuyler Ex. I

¹⁴ KPI's. Mot. to Dismiss at 3; and Schuyler Exh. P.

¹⁵ <http://www.minervabunkering.com/wp-content/uploads/2019/07/Minerva-Bunkering-Terms-20199.pdf>

laches) for the Panel to allow the requested discovery, or delay its decision on the time bar issue any further, or until the entire consolidated arbitration proceeding is concluded.

- [28]. After fully considering all of the extensive briefing and supporting evidence which Schuyler and KPI have submitted, this Panel finds no acceptable or excusable reason for Schuyler failing to demand that KPI arbitrate within the six month contractual deadline for that demand. This Panel therefore concludes that Schuyler failed to timely demand arbitration as the Contract, including the T&Cs, reasonably and clearly required. This Panel therefore grants KPI's motion to dismiss the claim of Schuyler against KPI.
- [29]. The Panel awards KPI the right to presently recover legal fees and costs from Schuyler in the amount of \$9,475.68 pursuant to Section 30 of the SMA Rules. If said amount is not paid within 30 days of the date of this Partial Final Award, then interest on the unpaid amount is to be owing from the date of this Partial Final Award, at the prime commercial lending rate published by the Federal Reserve Bank, to the date same is paid, or judgement for same is entered, whichever first occurs.
- [30]. The fees of the Panel in connection with the Motion are to be presently paid subject to, and as set forth in, Appendix A to this Partial Final Award, which is hereby made part of this Partial Final Award. The fees of each member of the Panel are to be first paid equally by Schuyler and KPI from the escrow/trust accounts held by counsel for Schuyler and KPI as security' for fees of the panel, and KPI is then entitled to be fully reimbursed by Schuyler for the payments KPI has made, as more fully set forth in Appendix A.
- [31]. This Partial Final Award may be reduced to and entered as a judgment in any court of competent jurisdiction in accordance with Clause 20.1 of the T&Cs of KPI.