



AD HOC ARBITRATION

EUROCHEM TRADING USA CORPORATION V. WS AG CENTER, INC.

FINAL AWARD

06 March 2019

Tribunal:

[Michael D. Young](#) (Sole arbitrator)

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Final Award

I. Introduction

- [1]. On January 2, 2019, the undersigned Arbitrator issued a Partial Final Award in this matter. In that Partial Final Award, I ordered the following items of relief, among others:
1. Claimant EuroChem Trading USA Corporation ("ECTUS" or "Claimant") is entitled to compensatory damages of \$14,283,519.42;
 2. Claimant is entitled to pre-judgment interest on the \$14,283,519.42, to be calculated pursuant to sections 687.01 and 55.03 of the Florida Statutes, commencing from June 1, 2017 until the effective date of this Partial Final Award; and
 3. Claimant may seek reimbursement of its attorneys' fees and costs and Respondent WS AG Center, Inc. ("WS AG" or "Respondent") may oppose any such application.
- [2]. The Partial Final Award, including the above referenced relief and all other rulings and findings, is attached as Exhibit A and is incorporated herein.
- [3]. Claimant submitted its application for fees, interest and costs on January 16, 2019. In addition to a memorandum, Claimant submitted on January 16 an affidavit (from counsel Steve R. Wirth) and exhibits documenting the expenses paid and fees incurred. In its January 16 application, Claimant seeks \$1,382,253.5 in interest (for the period June 1, 2017 through January 2, 2019) and \$2383.20 for each day between January 3, 2019 and the date of the Final Award, \$249,571.94 in attorneys' fees (including \$15,000 for the preparation of the fee application) and \$37,347.39 in reimbursable costs. Respondent submitted its opposition on February 4, 2019. Claimant filed a reply on February 19, 2019, amending its requests such that it now seeks \$1,186,643.23 in interest (starting on various dates prior to June 1, 2017 through January 2, 2019) and \$2,477.12 for each day between January 3, 2019 and the date of the Final Award, \$228,173.70 in attorneys' fees and \$38,151.64 in costs. Respondent filed a sur-reply on March 1, 2019.¹
- [4]. The undersigned Arbitrator considers the amounts set forth in Claimant's February 19 submission as constituting the request to be analyzed.

II. General Entitlement of Claimant to Reimbursement of Fees and

¹ Respondent suggests that there was something inappropriate in the Arbitrator's February 12, 2019 request that Claimant reply to certain specified points made by Respondent in its February 4, 2019 submission. In addition, Respondent suggests that there was also something inappropriate in the Arbitrator's limiting Respondent's sur-reply to five double-spaced pages. I reject such suggestions. With respect to the former, even though Claimant initially did not seek leave to file a reply, I believed that my ability to adjudicate the claim would benefit from limited submissions by Claimant on certain of the issues raised by Respondent and therefore I properly requested such a submission; and, with respect to limiting the number of pages Respondent could submit in a sur-reply, I note that there is ordinarily no entitlement to a sur-reply and, in any event, Respondent more than adequately made its points in four-plus pages.

Costs and to Pre-Final Award Interest

- [5]. Claimant seeks the reimbursement of its attorneys' fees and costs pursuant to Rule 30 of the Rules of the Society of Maritime Arbitrators which are the rules that Claimant argues govern this Arbitration. Respondent argues that there is no authority whatsoever in the governing contracts for the shifting or reimbursement of attorneys' fees and costs, both because the contracts on their face lack any explicit authority for the shifting or reimbursement of attorneys' fees and costs, and because the contracts refer to the arbitration being governed by the "rules of the Society of Marine Arbitrators" and no such rules exist.
- [6]. I find that there is authority for the award of the reimbursement of fees and costs for the following reasons:
- [7]. First, while Respondent correctly states that the contracts do not explicitly authorize the award of such reimbursement, it is also correct that if particular arbitration rules are incorporated into the contracts, and if those rules authorize the award of such reimbursement, the absence of explicit authority for the award of fees and costs in the contracts does not matter. Thus, Respondent's first basis for denying such authority is unavailing.
- [8]. Second, while Respondent correctly states that the contracts refer to the "rules of the Society of Marine Arbitrators" and there are no such rules, the parties have acted throughout this proceeding as though the Rules of the Society of Maritime Arbitrators ("Rules") apply. For example, the submissions to this Arbitrator throughout the proceeding — including Respondent's Pre-Hearing and Post-Hearing memoranda — all refer to the Society of Maritime Arbitrators and its Rules, and when counsel made particular discovery and evidence arguments, including those made orally, they referred to the relevant provisions of these Rules. Thus, while the reference in the contracts to the "rules of the Society of Marine Arbitrators" may have been a mistake,² no one, during the course of the proceeding, acted as if the Rules of the Society of Maritime Arbitrators did not apply.³
- [9]. I further find that Claimant correctly argues that these Rules authorize the Arbitrator to order the reimbursement of fees and costs — under certain circumstances. Rule 30, in pertinent part, provides:
- ... The Panel, in its Award, shall assess arbitration expenses and fees as provided in Sections 15, 36 and 37 and shall address the issue of attorneys' fees and costs incurred by the parties. The Panel is empowered to award reasonable attorneys' fees and expenses and costs incurred by a party or parties in the prosecution or defense of the case.

Specifically, Rule 30 requires that the Arbitrator "shall assess" certain expenses and fees — Section

² In at least one of the cases cited by Claimant on page 3 of its opening brief — *In re Arbitration at New York Under Rules of Soc 'y of Mar. Arbitrators, Inc. between IMC Mar. Grp., Inc. & Russian Farm Cmty. Project*, No. 04 CIV. 3154 (RMB), 2004 WL 2914099, at *1 (S.D.N.Y. Dec. 14, 2004), of 'd sub nom. *IMC Mar. Grp., Inc. v. Russian Farm Cmty. Project*, 167 F. App'x 845 (2d Cir. 2006) — the Court treats the "rules of the Society of Maritime Arbitrators" as the same as the "rules of the Society of Marine Arbitrators." It is, thus, not clear whether the reference in the contracts here to the "rules of the Society of Marine Arbitrators" is a mistake or not.

³ While Respondent did raise the inconsistency in the nomenclature in some of its submissions, see, e.g., Page 4 of "Respondents' Reply to Response in Opposition to Objection to Participation and Motion to Dismiss" and Page 2 of "Respondents' Response to Claimant's Statement of Claim," Respondent did not, prior to making the argument in its opposition to fee and cost shifting, ever argue that the Rules do not govern this proceeding.

15: stenographic record; Section 36: certain expenses of witnesses and the arbitrator; and Section 37: arbitrator's fees. In addition, Rule 30 "empowers" the arbitrator to award "reasonable attorneys' fees and costs." I interpret the preceding reference to "costs" to be costs other than referenced in Section 15, 36 and 37. Accordingly, I must assess the shifting of the costs of the transcript and of the arbitrator's fees; and I may, in my discretion, order the reimbursement of Claimant's attorneys' fees and of certain other costs.

- [10]. I exercise my discretion to award the reimbursement of reasonable attorneys' fees. (What I consider to be reasonable is addressed in Point IV below.) Claimant is the clear prevailing party. Its claim on the merits, at least against WS AG, was strong. Respondent unsuccessfully made difficult the collection of an amount that I found it clearly owed. While I am not finding that WS AG or its counsel in any way acted in bad faith, I find that the just described circumstances — a strong claim for which collection was made difficult — justifies the shifting of fees and costs to the prevailing party.
- [11]. Finally, I also find that Claimant is entitled to statutory pre judgment interest, calculated pursuant to the Florida statutes. I reject Respondent's argument that the absence of a provision in the governing contracts entitling Claimant to such prejudgment interest is determinative of Claimant's rights. I read Florida law to provide otherwise. See generally *Argonaut Ins. Co. v. May Plumbing Co.*, 474 So. 2d 212, 214, 215 (Fla. 1985) ("Florida has adopted the position that prejudgment interest is merely another element of pecuniary damages" and "The amount of interest to be paid, absent a controlling contractual provision, is a matter of policy to be determined by the legislature."); *Fid. & Guar. Ins. Underwriters, Inc. v. Federated Dep't Stores, Inc.*, 845 So. 2d 896, 903 (Fla. Dist. Ct. App. 2003) ("The rule is that if it is finally determined that the debt was due, the person to whom it was due is entitled not only to the payment of the principal of the debt but to interest at the lawful rate from the due date thereof.").

III. Interest Calculation

- [12]. In the Partial Final Award, I ordered the award of pre-judgment interest and that the amount be calculated "pursuant to sections 687.01 and 55.03 of the Florida Statutes, at the statutory interest rate of 6.09%, commencing from June 1, 2017 until the effective date of this Partial Final Award." In its opposition to the award of pre-judgment interest, Respondent argued that the just referenced rate is incorrect. In its reply, Claimant agreed that the relevant statutes provide for different rates depending on what dates interest is accruing. Claimant also argues that — despite its having previously requested that interest should start accruing on June 1, 2017 — that date is incorrect and interest should start accruing on the dates on which the particular contract was breached, which dates are earlier than June 1, 2017.
- [13]. I rule herein that interest in the amount of \$1,124,040.03 is awarded through the date of the Partial Final Award based on the rate analysis set forth on pages 6 and 7 of the Claimant's reply submission, but also based on the accrual date of June 1, 2017. I adopt the rate analysis proposed by Claimant in its reply submission because it purports to apply the rules that Respondent argued are appropriate in its opposition submission and Respondent, in its sur-reply, does not take issue with the

calculation methodology nor the number except for the accrual date issue. As for the accrual date, I agree with Respondent — Claimant presumably chose that accrual date initially because it had agreed to forbear on collection until May 31, 2017 and thus the date of the breach, under each of the nine contracts, would not be until June 1, 2017 (when it was apparent that Respondent would not pay the amounts owed under those contracts). I also accept the assertion by Respondent that if one shifted the accrual date to June 1, 2017, the amount owed from June 1, 2017 until the date of the Partial Final Award is \$1,124,040.03 (and not the \$1,186,643.23 in interest sought by Claimant for the period starting on February 28, 2017 until the date of the Partial Final Award).

- [14]. Finally, I also rule that Claimant is entitled to \$2,477.12 in interest for 2019 for each day between the date of the Partial Final Award and either the date the Final Award is entered as a judgment or the date the amount owed is paid (or otherwise resolved). Claimant may be entitled to such pre-judgment interest in 2020 and in subsequent years, but the daily accrual of interest may be at a different rate.

IV. Amounts of Fees and Costs to Be Reimbursed

- [15]. As noted above, in its January 16 application, Claimant seeks \$249,571.94 in attorneys' fees (including \$15,000 for the preparation of the fee application) and \$37,347.39 in reimbursable costs. In response to certain arguments made by Respondent in its February 4 opposition, Claimant amends its requests such that it now seeks \$228,123.70 in attorneys' fees (including \$17,350 for the preparation of the fee application) and \$38,151.64 in costs.

- [16]. I find that Claimant has met its burden of showing the reasonableness of the fees sought, albeit when reduced as described below.

- [17]. The following objections by Respondent to Claimant's request for reimbursement are disputed. I set forth the objection and my ruling with respect to it:

1. Respondent argues that the hourly rates for the relevant time-keepers are not reasonable — I find that the rates charged appear to be those charged by the relevant attorneys to all clients minus a 20% discount. I decline to find them to be unreasonable. However, as noted below, I will apply a discount of 10% to the total amount of fee reimbursement requested on the basis that most of the work — and perhaps too much — was performed by the two highest billing time-keepers.

2. Respondent argues that certain work, such as review of financial audits (which Respondent argues relates to the efforts to bring into the arbitration proceeding the non-signatories), work related to the federal court litigation, and review of involuntary bankruptcy as an option to force the collection of the debts as well review of mortgages and liens, is un-related to the arbitration proceeding, and otherwise unnecessary — I find that the fees to be reimbursed are only to be those related to the conduct of the arbitration proceeding and should not include those related either to the federal court litigation or to the effort generally to collect on this debt. Therefore, I reject the argument of Claimant that, for example, fees for "investigating what encumbered assets a judgment debtor has against which a judgment creditor may execute" is reimbursable. I will apply a discount of 5% to the total amount of fee reimbursement requested on the preceding basis — that certain

tasks are un-related to the conduct of the arbitration proceeding.

3. Respondent also argues that the parties agreed to bear their own fees and costs through the end of the litigation of the preliminary motions and therefore any accrual of fees and costs to be shifted should start as of the resolution of said motions. But, this argument is rebutted by the language of the agreement reached by the parties, as was reflected in the Arbitrator's Order # 2, dated April 2, 2018, which held, in relevant part, that "All parties will bear their own fees and costs with regard to [the] motion to dismiss the non-signatories in the arbitration." Accordingly, only fees and costs for the preliminary motion practice should be excluded — not all fees incurred up until that point in time — and Claimant has eliminated the fees and costs for the preliminary motion practice from its request for reimbursement.

4. Respondent argues that certain work is administrative and should have been performed by a para-legal or administrator, not a lawyer — It appears to me that, generally, lawyers were not conducting administrative tasks and therefore I find that no deduction is warranted on this basis.

5. Respondent argues that Claimant is seeking reimbursement for an excessive or unreasonable number of hours for certain tasks, such as, for example, the drafting the Arbitration Demand — Without being specific, but taking into account the problems inherent in evaluating a fee request that contains block billing, I will apply a discount of 5% to the total amount of fee reimbursement requested on the basis that there was an unreasonable number of hours for certain tasks. I agree with Respondent that, for example, there was an excessive number of hours for the drafting of the Arbitration Demand.

6. Respondent argues that any time spent correcting certain mistakes in discovery responses should not be reimbursable — I rule that mistakes occasionally occur and the time incurred for correcting them is reimbursable. To the extent that any such mistakes are less excusable, such as initially proposing the wrong interest rates, any deduction attributable to the foregoing is part of the 5% discount stated in paragraph 2 above.

7. Respondent argues that travel time, or at least to the extent Claimant requests, should not be reimbursable — I find that travel time is generally reimbursable. To the extent the request is excessive, it is part of the 5% discount stated in paragraph 5 above.

8. Respondent argues that block billing should either not be reimbursed or should be discounted — To the extent that any discount should be taken for this reason, it is part of the 5% discount stated in paragraph 5 above.

[18]. As for certain costs, I will not order the reimbursement of the following costs: duplicating; FedEx; Library research; telephone; and postage. With the possible exception of FedEx, these costs should be part of the litigating firm's overhead. In addition, I will reduce the travel expenses marginally as \$5510.99 for a two-day hearing for two attorneys seems excessive.

[19]. Finally, Respondent also argues that it should not be ordered to reimburse certain expenses, such as the fees of the Arbitrator and the costs of the transcript. I find, however, that Sections 15 and 37 of the Rules explicitly require that these costs be reimbursed by the non-prevailing party.

[20]. Accordingly, I order the reimbursement of \$34,000 in costs and \$182,498.96 in fees.

[21]. All other arguments or claims by the parties have been considered and are either rejected or considered not material to the foregoing analysis.

V. Conclusion and Final Award

[22]. Based upon the analysis contained in the Partial Final Award (Exhibit A) as well as in the above analysis, the undersigned Arbitrator makes the following Final Award:

1. Claimant has established liability against WS AG on Claimant's claim for breach of contract under the nine Contracts and, alternatively, under Claimant's claim for account stated;
2. Claimant's request for liquidated damages is denied;
3. Claimant is entitled to compensatory damages of \$ 14,283,519.42;
4. Claimant is entitled to pre-judgment interest in the amount of \$1,124,040.03 until the effective date of the Partial Final Award, as well as pre-judgment interest in the amount of \$2,477.12 per day (during 2019) until either the date the Final Award is entered as a judgment or the date the amount owed is paid (or otherwise resolved). Claimant may be entitled to such pre-judgment interest in 2020 (if the Final Award has not been entered as a judgment or the amount owed has not been paid or otherwise resolved) and in subsequent years, but the daily accrual of interest may be at a different rate;
5. Claimant is entitled to \$182,498.96 in attorneys' fees and \$34,000 in costs, to be reimbursed by Respondent; and
6. All other claims, by either party, are denied.