Final award no. 2972, 26 April 1993

Arbitrators: Klaus C J. Mordhorst, Thomas E. Murphy, Jack Berg (Chairman)

Parties: Claimant: Nordic American Shipping A/S (Owner); Defendant: Bayoil (USA) Inc. (Charterer)

Place of Arbitration: New York, New York, USA

Published in: Award Service of the Society of Maritime Arbitrators, Inc., No. 2972

Subject matter:
- lighterage contracts
- unreasonable delay
- embargo on import of Iraqi and Kuwaiti goods constituting force majeure/restraint of princes
- ambiguity construed against drafter of contract
- double payment

Facts

Bayoil, whose primary business in 1990 involved the purchase of Iraqi crude oil from the State Oil Marketing Organization of Iraq (SOMO) for resale in the United States entered into two Tanker Lightering Voyage Charter Parties (hereinafter Lighterage Contracts), dated 18 July 1990 and 24 July 1990 with Nordic, as Owner of two mother ships, the STBL RIMULA and STBL CARTHOGA NOVA.

The Lighterage contracts contained the following exemption clause.

"General Exceptions Clause 19:

And neither the Vessel nor Master nor Owner, nor the Charterer, shall unless otherwise in this Charter expressly provided, be responsible for any loss or damage or delay of failure in performing hereunder, arising or resulting from:... arrest or restraint of princes, rulers or people...."

The Lighterage contracts also contained the following Rider Clause.
"Rider Clause MM4:

If after tendering of NOR (notice of readiness) by the Service Ship(s) darkness, weather, including but not limited to lightening, storm, wind, waves or swells or for any reason beyond Owners control prevents or delays the Service Ship(s) from carrying out the operation, time so lost shall count as time used for freight purposes."

The mother ship the STBL RIMULA loaded at Mina Al Bakr on 18 June 1990 and arrived in the United States Gulf on 27 July. The Lightering Contract dated 18 July was for three liftings, but only the third lightering to the AMBRA DOLPHIN was a part of the dispute that ensued. The RIMULA commenced lightering on 28 July, and the first two liftings were completed before the embargo imposed by the President of the United States an Iraqi and Kuwaiti crude oil products took effect on 2 August 1990. The last lightering was not completed until after the embargo took effect.

On 3 August 1993, the US Office of Foreign Asset Control (OFAC) promulgated Transition Rules to protect innocent buyers of Iraqi crude prior to 2 August who would otherwise suffer serious financial consequences if they were prohibited from landing their oil in the United States. Briefly, the Rules allowed the importation of petroleum when:

1. the oil was loaded prior to the effective date of the Executive Order, 5:01 A.M. EST, 2 August 1990, and was intended for ultimate delivery to the US;
2. the bill of lading was issued prior to the effective date;
3. any balance not yet paid to Iraq or Kuwait for the shipment must be paid into a blocked account in the US; and
4. such transaction is reported to the Blocked Assets Section, Office of Foreign Asset Control.

All cargoes were to be considered on an individual basis and each one had to be specifically cleared by OFAC. If a particular cargo qualified under the guidelines, OFAC would instruct customs to lift the embargo for that cargo. The mother ship STBL CARTHOGA NOVA loaded at Ceyhan on 6 July 1990 and arrived in the US Gulf on 30 July. The Lightering Contract was made on 24 July and provided for three liftings. The second and third lifting on the THORAAS and GLEFI I respectively were part of the dispute. The CARTOGA NOVA commenced her second lightering to the THORAAS on 1 August and that service vessel tendered her NOR at Sabine Pass on 2 August. The vessel proceeded into the Fina terminal at Corpus Christi on 4 August but was not permitted to discharge. She then shifted back into the Sun Nederland anchorage and remained there until later cleared by the OFAC. The third parcel off the CARTOGA NOVA was lightered to the GLEFI I, which remained at anchorage until 9 August, when it was cleared by OFAC for Import into the United States. She came to the berth 10 August and completed lightering on 12 August.

Bayoil paid SOMO for its cargoes by irrevocable letter of credit through a Swiss bank which was ultimately drawn on. The disputes arose out of delays which the STBLS' lightering vessels encountered when the President of the United States imposed on embargo an Iraqi and Kuwaiti crude oil and products on 2 August 1990. As a result of the delays, Nordic sought compensation for freight and overtime, extra port charges and shifting expenses and travel expenses in the amount of US$ 378,000.10.

Excerpt

[1] "The President of the United States issued an Executive Order, effective as of 0500 EST, 2 August 1990, prohibiting the importation of Iraqi and Kuwaiti products into the United States. The action was taken on the heels of the Iraqi Invasion of Kuwait and was intended to punish Iraq for its aggressive expansion. The Invasion, and the President's response to it, was precipitous and unexpected. The impact was universal and swift, and its consequences affected the worldwide trading community for some time thereafter. It most immediately affected companies that were in direct commercial contact with Iraq and Kuwait, especially those trading their petroleum products. The Business of lightering Iraqi and Kuwaiti Petroleum shipments in the United States Gulf was no exception. To ease the harsh Impact of government policy on companies that traded with Iraq prior to the Invasion and who were now directly affected by the embargo, the government promulgated Transition Rules which were officially published on 3 August 1990.
Notwithstanding the Executive Order, Nordic contends that OFAC's promulgation of Transition Rules and its further willingness to accept alternative proposals to expedite the discharge of embargoed cargoes precludes Bayoil from asserting a *force majeure/restraint of prince* defense under Clause 19. We should look to this argument as a first step in our analysis of Bayoil's right to invoke Clause 19, always bearing in mind that Bayoil bears the burden of demonstrating its entitlement to the benefits of the Clause.

The nub of Nordic's argument is that the substance of the Transition Rules was verbally released to the industry on the morning of 2 August, and that Bayoil could and should have acted on them at that time instead of waiting until they were formally published the following day; also, that Customs would have permitted the cargo to be discharged into sealed shore tanks or against the posting of security. To support its argument, Nordic points to Coastal Corporation's lighterage of the *HELLESPONT DIGNITY* from the *STBL BERGE BANKER*, Bayoil's own handling of the *METEORA* lighterage from the *STBL KATE MAERSK* and to assertions that Customs were verbally authorized to allow discharge of the affected cargoes into sealed shore tanks and that Customs would have permitted this on Friday, 3 August.

If discharge into sealed storage tanks was a possibility which Customs would accept, and something Bayoil should have pursued, where would this have been done and what terminal would have been willing to accept the cargo in sealed tanks? The evidence is that Fina, Sun and Amoco were unwilling to accept cargo in sealed tanks for obvious reasons. There was no way anyone could predict at that time just how long the crude would be tied up in those tanks. Nordic argues there was such an agreement for the *THORAAS* to discharge into sealed tanks at Fina but we don't believe the evidence supports Nordic's position.

Summarizing the above, the panel concludes the Executive Order prohibited by law the discharge and importation of Iraqi and Kuwaiti cargoes into the United States and that this prohibition temporarily reduced Bayoil's ability to perform under the Lightering Contracts. OFAC intended to review each shipment on a case-by-case basis, and obviously they had the right to be flexible in their judgment, but we see no evidence to suggest sealed shore tanks were a viable possibility. Nor do we agree that it would make any sort of commercial sense to expect Bayoil to possibly pay twice for the same cargo by requiring that it pay the purchase price into a blocked account. We note Nordic's argument that Nordic should not be penalized because Bayoil elected to pay by irrevocable letter of credit through a Swiss bank in Geneva instead of maintaining an open account. This sort of letter of credit arrangement is hardly unusual and perhaps expectable when trading with foreign government agencies.

Nordic further argues that Part I, Clause MM 4 is the operative charter provision to determine overtime, therefore, if the panel concludes the Executive Order was a *force majeure* or restraint of prince, it should not look to apply this finding to General Exception Clause 19. Clause 19 is contained in Part II, and Nordic contends the charter preamble expressly provides that Part I prevails over Part II in the event of a conflict. However, Part I Clause MM 4 does not read the way Nordic suggests.

"The Clause does not touch upon restraint of princes or *force majeure*, nor may one read those events into the Clause under the heading '...for any other reason beyond Owners control...'. At best, Nordic's argument raises a possible ambiguity if one reads the charter provisions together, therefore, any ambiguity would have to be construed against the drafter of the contract, Nordic in this case. The panel concludes Clause 19 is the effective Clause and that it affords Bayoil the right to temporarily suspend performance in accordance with the Executive Order."

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Referring Principles:

IV.5.4 - Interpretation against the party that supplied the term

VI.3 - Force majeure