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In the Matter of the Arbitration

between

SH Tanker Limited,

as Owner

and

Koch Shipping, Inc.,

as Charterer

Partial Final Award

arising under a Time Charter Party of  
the M/V **SAMHO DREAM** dated  
February 25, 2010  
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Before:

Manfred W. Arnold  
Jack Berg  
David W. Martowski, Chairman

Appearances:

Holland & Knight LLP  
on behalf of SH Tanker Limited  
by William J. Honan, Esq.  
Christopher R. Nolan, Esq.  
K. Blythe Daly, Esq.

Cichanowicz, Callan, Keane,  
Vengrow & Textor  
on behalf of Koch Shipping, Inc.  
by James M. Textor, Esq.

## **Introduction**

Koch Shipping Inc., as Charterer (“KSI”) of the M/V SAMHO DREAM (“Vessel”), requests the panel to order ST Tanker Limited, as Owner (“Owner”), to post security in the amount of \$14.2 Million for KSI’s claims arising from Owner’s alleged breach of a Time Charter Party <sup>1</sup> dated February 25, 2010. KSI submitted its motion on April 1, 2011; Owner filed its response on June 30, to which KSI replied on July 6. Owner submitted a sur-reply on July 7.

## **Background**

Owner commenced these proceedings against KSI immediately following the seizure of the Vessel by Somali pirates about 800 miles east of Africa and 500 miles west of India on April 4, 2010 while transporting crude oil valued at \$170 Million. The Vessel was ultimately released on November 6, 2010 after payment of a ransom in the amount of approximately \$9 Million. Thereafter, the SAMHO DREAM proceeded to Salalah as a port of refuge where her officers and crew were repatriated and the Vessel underwent a survey and cleaning. The SAMHO DREAM then proceeded to Fujairah where her cargo was offloaded and transshipped to the GEMINI GLORY for on carriage to Galveston, Texas, its original U.S. destination, pursuant to an STS agreement entered into between KSI and voyage charterer/cargo interests dated December 17, 2010. KSI expressed reservations about the condition of the Vessel and her Owner’s capability to complete the duration of the Charter and subsequently canceled the Charter.

Several organizational and evidentiary hearings were held in New York City in 2010 and 2011 at which the parties submitted documentary evidence and testimony on issues other than those involving ultimate responsibility for the piracy incident.

Owner contends that the Vessel was following KSI’s East Africa routing instructions when she was seized on April 4, 2010. KSI strongly disagrees, and argues that Owner breached its voyage routing instructions and Best Management Practices obligations. KSI

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<sup>1</sup> SHELLTIME 4.

also contends that the Vessel was unseaworthy for lack of anti-piracy hardening equipment in violation of ISPS Rider Clause 76 of the Charter.

Owner initially claimed damages in the amount of \$11,820,734 for ransom negotiation, payment, delivery and insurance for loss of ransom in transit; Vessel repairs and expenses necessitated by her seizure; additional war risk premium; private security escort from Salalah to Fujairah; and crew-related expenses. Owner now also seeks damages for KSI's allegedly wrongful cancellation of the Charter, which have yet to be quantified.

KSI counterclaims for damages in the amount of \$13,416,817.60 for hire reimbursement, bunker consumption, transshipment costs at Fujairah, surveyors' charges at Salalah and demurrage incurred by the GEMINI GLORY at Fujairah.

Both parties also claim interest, attorneys' and arbitrators' fees and costs.

The panel's authority to address the issue of security is derived from the provisions of Clause 68 (The Law & Arbitration Clause) and Section 30 of the SMA Rules. Clause 68 states, *inter alia*:

This contract shall be governed by and construed in accordance with USA law and any dispute arising out of or in connection with this Contract shall be referred to an arbitration in New York

\* \* \*

The arbitration shall be conducted in accordance with the Society of Maritime Arbitrators of New York Terms current at the time when the arbitration proceedings are commenced.

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Section 30 of the SMA Rules provides in pertinent part:

The Panel, in its Award, shall grant any remedy or relief which it deems just and equitable, including, but not limited to, specific performance. \* \* \*.

## **DISCUSSION AND DECISION**

The panel unanimously grants KSI's motion for security in the amount of \$14,200,000. The security is to be issued in a form reasonably acceptable to KSI and is to be posted no later than 45 days from the date of this Partial Final Award. The considerations for this decision follow.

The charter party provides for the arbitration to proceed in accordance with the rules of the SMA, of which Section 30 is especially relevant with respect to the security issue and the powers of the arbitrators to order the posting of security.

Owner has argued that the language of Section 30 does not specifically empower the arbitrators to rule on security. We disagree. Section 30 is sufficiently broad with respect to the arbitrators' right to grant relief in a wide range of areas. Certainly the power to order the posting of security falls within the ambit of the remedies and powers provided for in the clause and granted to the arbitrators. There are any number of SMA awards that counsel have cited in their respective briefs in which the arbitrators have, without question, ordered the posting of security. There are also Second Circuit decisions cited to us which have noted with approval the power of arbitrators to post security. It has been a generally accepted practice in New York for counsel to make motions for security under SMA Rules, when appropriate, and it is, indeed, rarely argued that the arbitrators lack the power to address this issue. We unanimously conclude that the authority to address and to order the posting of security is a power granted to the arbitrators under Section 30.

The panel has seriously considered the question of whether there would be a source of funds to satisfy KSI's claim should it prevail on the merits. Obviously, if there is no other source of security available to KSI, any monetary award to KSI would be nothing more than a pyrrhic victory. Such an end result would not, in our view, be commercially acceptable.

We have received a great deal of evidence on Owner's financial interest in the Vessel, its financial status in general and KSI's inability to arrest the Vessel at its current position at anchor off Dubai. We are satisfied with the statement of KSI's Dubai counsel that the Vessel cannot be arrested under the law of the U.A.E. We have also taken note of the outstanding mortgages on the Vessel and the precarious state of Owner's finances.

Based on the evidence before us, it is the panel's conclusion that the only avenue of funds for KSI, should it be successful on the merits, would be the security KSI seeks in this arbitration. KSI's motion must be considered with this prospect in mind.

The panel has also given serious consideration to the all-important question of the fundamental breach KSI alleges and the likelihood it will prevail on the merits. We have received into evidence substantial documentary evidence and the testimony of a number of witnesses. The existing recorded evidence permits us to conclude that there is a likelihood KSI might prevail. Obviously, the standard we follow for the purpose of this motion is significantly different from the one we will apply when the evidentiary proceedings resume and the arbitration moves forward to a conclusion and Final Award.

Admittedly, the amount of security we have ordered here is substantially larger than amounts ordered to be posted in other SMA arbitrations. However, we should emphasize that the issues in this proceeding are of significant importance and the damages being asserted by both parties are indeed substantial.

We should note that KSI has already posted security for the general average that Owner declared. KSI has also offered to voluntarily post security for Owner's claims. As of now, Owner has not responded to the offer, but we are more than willing to entertain Owner's motion in this respect once Owner has posted the security now being ordered. It is our intention to make certain there is a level playing field on the security issue when we address the merits of the case.

Owner's counsel has advised that its firm has withdrawn from the case and will no longer represent Owner in this proceeding. We urge Owner to promptly appoint replacement counsel so that we may go forward with this proceeding and address the merits of the claims. It is our intention to schedule firm dates during the month of October 2011 for the presentation of documentary evidence and to take witness testimony. We expect Owner's replacement counsel will have reviewed the file by then and will be prepared to present its affirmative claims and its defense to KSI's claims.

The panel defers its ruling on costs and legal fees for this motion as well as on its own fees and expenses.

Judgment on this Partial Final Award may be entered in the United States District Court for the Southern District of New York or in any Court of competent jurisdiction.



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Manfred W. Arnold



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Jack Berg



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David W. Martowski

New York, New York  
July 15, 2011