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In the Matter of the Arbitration	:	
	:	
Between	:	
	:	
KINGSBURY NAVIGATION LTD.	:	
as Claimant and Owner	:	<u>Final Award</u>
	:	
-and-	:	
	:	
KOCH SHIPPING INC.	:	
as Respondent and Charterer	:	
of the MT SEADANCER	:	June 24, 2011
	:	
under an	:	
ASBATANKVOY Form	:	
Tanker Voyage Charter Party	:	
dated November 21, 2007	:	
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Before: Jack Berg; A.J. Siciliano (dissenting); Donald J. Szostak, Chair

Appearances:

For Kingsbury Navigation Ltd.: Freehill Hogan and Mahar, LLP
by Peter J. Gutowski, Esq., Gina M. Venezia, Esq. and Barbara G.
Carnevale, Esq.

For Koch Shipping Inc.: Cichanowicz, Callan, Keane, Vengrow
& Textor, LLP
by James M. Textor, Esq. and Joseph DeMay, Jr., Esq.

BACKGROUND

The disputes that are the subject of this arbitration arise out of a Tanker Voyage Charter Party dated November 21, 2007 on an amended ASBATANKVOY Voyage Tanker Charter Party form with Charterers and Owners Additional Clauses (hereinafter “Charter”) between Kingsbury Navigation Ltd. (hereinafter “Kingsbury” or “Owner”) as owner and Koch Shipping Inc. (hereinafter “Koch” or “Charterer”) as charterer of the **MT SEADANCER** (hereinafter “Vessel”), a Bahamas flag 163,288 metric tons deadweight motor tanker built in 2006. The Charter provided for the carriage of MIN 110,000 metric tons 1/3 grades of NHC and/or fuel oil cargoes from “1/2 SP BALTIC” to “Discharging port(s)

1/2 SP UKC (N.SPAIN-HAMBURG RGE) EXC
MSC/TR/AV/LB/PHD/DDEE

OR

1/2 SP USAC EXC FLA, IF NY NNGWB

OR

1/2 SP USG EXC FLA.

OR

1/2 SP CARIBS EXC C/O/H

CHOPT DISCH CBS F/B USG BUT MAX 4 PORTS TOTAL
LOAD/DISCH.

IF DISCHARGE UKC DECLARATION LATEST BY 1700

LDN 23RD NOV Charterer’s option”

- - - - -

- F. Freight Rate:

- WS 107.5 IF TA

- - - - -

- I: Demurrage per day:

- USD 35,000 PDPR

- - - - -

Pursuant to orders from Koch the Vessel arrived at Tallinn/Muuga, Estonia on November 27, 2007, loaded approximately 132,000 metric tons of fuel oil and departed on December 1, 2007, under Charterer's instruction, to the US Gulf for orders. By December 11, 2007, the Master's daily noon position report indicated an ETA at Corpus Christi of December 22, 2007.

The Vessel subsequently discharged at Corpus Christi and completed discharge at Galveston.

THE CLAIMS

The invoiced demurrage and detention charges for the delays at discharge have been paid. The sole issue in this arbitration is for Owner's loss of earnings claim in the amount of \$2,025,639.00 due to cancellation of the TOTAL follow-on charter. Owner also claims interest at 4.75% from the end of February 2008, costs and attorney's fees.

Koch urges the panel to reject Owner's claim for loss of profits from the cancelled follow-on voyage and award Charterer its reasonable attorney's fees and costs. Although Koch denies liability for the loss of earnings claim, it nevertheless does not challenge the quantum of Owner's claim calculation.

THE PROCEEDING

Authority for this proceeding is found in Owner's Exhibit 78, the Main Recap of the fixture:

"Arbitration and Laws NY/U.S. ";

further elucidated in Charterers Additional Clauses:

“3.2 If required, General Average & Arbitration to take place in New York under US Law.”

and finally delineated in the well known Clause 24 of Part II of the ASBATANKVOY Tanker Voyage Charter Party form.

The panel was completed with selection of the Chairman on June 4, 2008 and the matter proceeded with numerous exchanges of letters and documentation followed by four hearings during which the Panel heard testimony from three witnesses. The panel, after receiving in excess of 150 exhibits to support the parties’ witnesses, arguments, briefs and reply briefs, closed the proceedings on March 17, 2011 with the receipt of counsels’ Attorney Affidavits.

NEGOTIATING THE TOTAL FIXTURE

On December 3, two days after departure from Muuga on December 1, the Owner marketed the Vessel to charter brokers with open dates as of December 23 in the U.S. Gulf. On December 17, the Vessel was offered open in the U.S. Gulf as of December 29 with a narrow two-day laycan at West Africa.

At the heart of Owner’s claim in this proceeding is the contention that Koch misled the Owner about the Vessel’s availability after discharge and that Owner relied on this misinformation to fix its next voyage. The Koch voyage orders that Owner contends it relied on were issued on December 17 and stated in part:

*“VOYAGE DESCRIPTION
Weather and safe navigation always permitting, the vessel is to proceed directly to intended discharge port, offshore Corpus Christi lightering area, approximate position Lat. 27-20 N, Long. 96-50 W, to discharge cargo to 1 lightering vessel(s) TBN. Vessel will then*

proceed to a berth for the balance cargo. Detailed instructions to follow.

The Intended port(s) indicated in these orders, in and of themselves, are not a declaration of port options. Charterer reserves the right to change and or modify the port(s) in accordance with the applicable C/P."

Koch contends Owner commenced marketing the Vessel almost immediately after departing the load port and placed the Vessel on subjects to TOTAL on December 17, before Owner's receipt of the interim voyage orders it received in Greece on December 18. Koch contends the unequivocal language establishes the voyage orders were not final and that Owner's representative was not aware of the voyage orders when he fixed the Vessel to TOTAL and therefore could not have relied on them.

The TOTAL subjects for the follow-on charter were lifted on December 19 and provided for Worldscale 250 and demurrage at US\$100,000 PDPR, the market rate at that time. The freight rates had more than doubled and the demurrage rates had almost tripled from the level they were at when the Vessel was fixed by Koch on November 21.

Owner maintains Koch's instructions from the outset indicated the Vessel was bound for the U.S. Gulf for discharge. Owner contends it is customary for an owner to advertise for subsequent employment and that is exactly what Owner did here. When Owner thereafter, on December 17, received Koch's orders that the Vessel would initially lighter offshore at Corpus Christi and then proceed to a berth for the balance of its cargo, Owner felt free to negotiate and fix the Vessel for an ongoing charter with TOTAL and be reasonably assured there would be ample time to cover the discharge process and unforeseen events with respect to the next voyage.

Owner contends it acted in a commercially reasonable manner in fixing the ongoing TOTAL charter especially in view of the information Koch provided. It argues that the follow-on charter was based upon sound judgment with ample room for contingencies.

It is Owner's position that Koch's purposeful detention of the Vessel as floating storage caused it to lose the TOTAL charter. The charter was canceled by mutual consent on January 3, 2008. Thereafter, Owner was able to fix the Vessel to Shell for a voyage from Bonny to Lavera. As the market had significantly declined, the revenue earned on this mitigation voyage was significantly less than it would have been under the TOTAL charter.

DISCHARGING THE SEADANCER IN THE U.S. GULF

By December 11, the Master's daily noon position report indicated an ETA at Corpus Christi of December 22. Commencing on or about December 11, there were internal Koch discussions through at least December 17, regarding the disposition of the cargo. In addition to investigating the availability of shore side storage facilities, Koch explored the possibility of utilizing the Vessel or another chartered vessel for floating storage. Floating storage was not an option under the Charter, the clause permitting storage having been deleted at the time of fixture.

The Vessel arrived at the Corpus Christi lightering site on December 22 and commenced lightering the following day. Lightering was completed on December 24.

On December 27, Koch advised the Owner that there was no place, either ashore or afloat to place the cargo that remained aboard the Vessel. A series of exchanges then followed:

December 28 -- Owner reserved the right to claim against Koch for detention and lost earnings from subsequent voyage, if missed. Koch rejected Owner's claim.

December 31 – Owner advised Koch if the Vessel didn't sail by January 2, 2008 employment would be lost and Owner would look to Koch for reimbursement. Koch rejected Owner's right to claim lost earnings.

January 3, 2008 – TOTAL charter canceled by mutual consent.

January 5 – Vessel arrived off Galveston lightering area.

January 7 – Discharge of Vessel is completed.

After the completion of the initial discharge operation on December 24, the Vessel remained at anchor for 11 days before ultimate discharge was completed off Galveston. After completion, Koch was billed for demurrage and detention charges, plus interest, and ultimately paid \$827,116.05.

It is Owner's primary contention that Koch deliberately parked the Vessel following the initial lightering and discharge alongside in Corpus Christi, considering her to be cheap storage despite its knowledge that the storage rider clause had been deleted from the charter. Furthermore, it is argued that Koch continued to detain the Vessel despite having knowledge of Owner's follow-on charter. Owner maintains the detention involved a conscious election by Koch to utilize the Vessel outside the terms of the agreement, which it purposely concealed from Owner.

Owner further alleges that Koch failed to provide timely and accurate instructions regarding the discharge berth. Owner maintains that the instructions, commencing with the December 17 voyage orders, were inaccurate, misleading and offered in bad faith considering Koch had already decided to park the Vessel.

Koch submits that the period from completion of lightering until final discharge was 11 days, not an unusual delay in the U.S. Gulf for a SUEZMAX in the winter. Koch argues that under well-established U.S.

law, if the charter party does not contain an expressed/specific period of time that the cargo must be discharged, and this Charter did not incorporate such a provision, the charterer has the benefit of the charter party subject to demurrage and perhaps even detention.

Koch argues it made reasonable attempts to market the balance of cargo and/or locate short-term storage both before and after lightering in Corpus Christi but was unsuccessful.

DISCUSSION AND DECISION

A panel majority rules in favor of Charterer for the reasons stated below. Mr. Siciliano's dissent is included as Appendix A.

Counsel have placed in evidence considerable documentary material and the testimony of three witnesses, all of which was directed to the circumstances of the discharge at Corpus Christi, the detention and delays at that port and the subsequent discharge at Galveston. The documentary evidence and witness testimony also addressed the background of the negotiations of the TOTAL fixture.

Clearly, Koch detained the Vessel at Corpus Christi so that it could more profitably market the balance of cargo still onboard. The delays attributable to Koch's actions at Corpus Christi amounted to 11 days. For this period Koch paid demurrage and detention damages at the existing market rate. We are hard pressed to find that Koch's actions, deliberate though they were, warrant further action. The general rule on demurrage is well settled:

The Charterer may keep the ship for a time on demurrage, but not forever. The length of time for frustration has been said to be until 'the delay becomes so prolonged that the breach assumes a character

so grave as to go to the root of the contract.' [*Universal Cargo Carriers v. Citati*, (1957) 2 Q.B. 401, 430]

If the charterparty has not been frustrated or repudiated, an owner has no remedy outside of demurrage for the charterer's delay beyond laydays, even if charterer deliberately chooses to delay the vessel. [*Suisse Atlantique Societe d'Armement Maritime SA v. NV Rotterdamsche Kolen Centrale* (The General Guisan) [1966] 1 Lloyd's Rep 529 (HL)]

. . . demurrage at the charter party rate should be assessed even when delays are the result of a charterer's willful delay. So long as the charter party remains in force, the liquidated demurrage provision extends to all forms of breaches associated with cargo operations." (TRADE RESOLVE, S.M.A. 3125)

It is Owner's position that it acted reasonably in fixing the TOTAL follow-on charter and relied on Koch's December 17 interim voyage orders. First of all, there are serious questions about the timing of the voyage orders, their receipt in Greece and the date of the fixture. In addition, Owner's chartering representative testified that he hadn't seen the interim voyage orders until just before he testified. Furthermore, and more importantly, the language of the voyage orders was not final. They stated in part:

The Intended port(s) indicated in these orders, in and of themselves, are not a declaration of port option. Charterer reserves the right to change and or modify the port(s) in accordance with the applicable C/P.

Clearly, Owner fixed a very lucrative charter at the top of a very volatile market with tight and inflexible laydays. However, in doing so before it could be reasonably certain of Koch's discharge schedule it exposed itself to the risk that it could miss its canceling date in West Africa. That is exactly what happened when the Vessel was detained at the

discharge port. Perhaps the risk of aggressively marketing the Vessel was not as great as it appears on the surface. If the Vessel was able to make the narrow laydays in West Africa, Owner would have realized a very profitable venture. However, there was not much downside because the TOTAL fixture provided:

If due to circumstances vessel appears to be missing her cancelling date owners to notify charterers of the delay involved and charterers to declare within one working day from receipt owners notification their decision to maintain the charter party thus granting relevant extension or cancelling same without any reservation/recourse by either party.

Furthermore, Owner did not advise Koch of the details of the TOTAL fixture or even that it had been made. It is uncertain if anything would have changed since presumably Koch had market knowledge of the fixture although it may not have had all the pertinent details.

We now address the question of whether, under U.S. law, a charterer who wrongfully and purposely detains a vessel may be held accountable for the monetary losses that result when an owner is compelled to cancel a follow-on charter. Without question, the express terms of the Charter provide for arbitration in New York and the application of U.S. law. Therefore, the relevant law to be considered with respect to the loss of profits claim is U.S. law and SMA precedent. However, we should note it is accepted that in maritime matters, conformity with English law is a desired objective rather than an exception. The U.S. Court of Appeals for the Second Circuit has taken the position that:

. . . . in matters of commercial law our decisions should conform to English decisions, in the absence of some rule of public policy which would forbid, *Senator Linie GMBH & Co. KG v. Sunway*

Line, Inc., 291 F. 3d 145, 170 (2d Cir. 2002).

and:

. . . . Today we reaffirm our earlier decisions in recognizing the importance of international uniformity in the laws governing the maritime trade. *Id*

Owner contends U.S. law unquestionably allows for the recovery of lost profits in the circumstances of a breach causing delay. It is argued that under U.S. law, sophisticated parties cannot hide behind the *Hadley v. Baxendale*, 9 Exch. 341 (Ct of Exchequer) (hereafter Hadley) foreseeability rationale to avoid the consequences of a breach resulting in delay to a ship.

Nevertheless, Owner's counsel has set forth the two described paths of the Hadley doctrine indicating that damages flowing from a breach of contract will be recoverable if they are considered to have either: 1) arisen naturally, according to the usual course of things that may result from that type of breach; or 2) as may be reasonably considered within the contemplation of the parties at the time of the contract as the consequences of such a breach.

Owner contends that under the circumstances of an admitted and conscious breach, damages may be recovered under either path. Owner maintains there is SMA precedent for the entitlement of lost profits as direct damages flowing from a deliberate breach causing delay.

Owner further argues that lost profits are recoverable under the second path, as consequential damages, given Koch's knowledge and experience in the tanker trade. Owner maintains there is authority that overwhelmingly supports recovery where the breaching party is knowledgeable about the trade and the nature of losses that would be the probable result of a breach.

We should first note that Hadley remains the guiding light under both English and American law in determining what damages may be recovered in the case of a breach of charter. Only those losses which were reasonably within the contemplation of the parties or foreseeable at the time the charter was entered into may be recovered. See *Voyage Charters* Third Edition 21.151. Therefore, we do not accept Owner's argument that we should not look to English law on the issue of loss of profits but rather direct our attention to U.S. law and SMA precedent. The fact of the matter is that the Hadley doctrine is very much a part of U.S. law and is consistent with arbitration precedent in New York.

The loss of profits relating to the TOTAL fixture falls within the consequential damage category. Hadley is the leading precedent that governs the recovery of consequential damages. Koch's position with respect to the loss of profit claim relies heavily on Hadley and the more recent English House of Lords decision in *Transfield Shipping Inc. v. Mercator Shipping Inc., M/V Achilleas* [2009] 1 AC61, [2008] 2 Lloyd's Rep 275. (hereinafter *Achilleas*).

The *Achilleas* involved a shipowner's claim for the loss of profits from a follow-on fixture due to the charterer's late redelivery under an existing time charter. The panel majority in the London arbitration did not find the damages to be too remote and awarded them. The Commercial Court confirmed the award as did the Court of Appeals. The House of Lords reversed the two lower courts. The House of Lords decision concluded, in part:

A charterer cannot reasonably be held to have accepted the risk of a future follow-on fixture not in existence at the time the parties

entered into their contract. Such a risk would be unknowable and unquantifiable.

Consequential damages which turn out to be exceptionally large may be looked upon as not within the contemplation of the parties if the amount was unforeseeable at the time of contracting. Rate volatility may be an unusual occurrence.

To hold charterers liable for loss of a follow-on fixture not in existence at the time of contracting, with volatile rates, would undermine the rule limiting a contracting party's damages to those that flow ordinarily or generally from the breach.

The *Achilleas* decision incorporates the following pertinent comments:

10. . . . there is no [English] case in which the question now in issue has been raised. Nowhere is there a suggestion of even a theoretical possibility of damages for the loss of a following fixture.

15. . . . one must first decide whether the loss for which compensation is sought is of a "kind" or "type" for which the contract-breaker might fairly to be taken to have accepted responsibility.

16. . . . the consequences for which the contracting party will be liable are those which "the law regards as best giving effect to the express obligations assumed" and "(not) extending them to impose on the (contracting party) a liability greater than he could reasonably have thought he was undertaking".

21. . . . A party may not be liable for foreseeable losses if they are not of the type or kind for which he can be treated as having assumed responsibility.

23. . . . If one considers what the parties, contracting against the background of market [volatility], would reasonably have considered the extent of the liability they were undertaking, they would have considered losses arising from the loss of the following fixture a type or kind of loss for which the charterer was not assuming responsibility. Such a risk would be completely unquantifiable.

32. . . . The fact that the loss was foreseeable is not the test. Greater precision than that is needed. The question is whether the loss was a type of loss for which the party can reasonably be assumed to have

assumed responsibility.

34. . . It was within the parties' contemplation that an injury which would arise from the late delivery would be loss of use at the market rate, as compared with the charter rate, during the relevant period. This was something that everybody who deals in the market knows about and can be expected to take into account. But the Charterers could not be expected to know how, if - as was not unlikely - there was a subsequent fixture, the Owners would deal with any new charterers. This was something over which they had no control and, at the time of entering into the contract, was completely unpredictable.

36. . . A party cannot be expected to assume responsibility for something that he cannot control and, because he does not know anything about it, cannot quantify. It is not enough for him to know in general and on open-ended terms that there is likely to be a follow-on fixture. What he needs is some information that will enable him to assess the extent of any liability. The policy of the law is that effect should be given to the presumed intention of the parties. That is why the damages that are recoverable for breach of contract are limited to what happens in ordinary circumstances - in the great multitude of cases where an assumption of responsibility can be presumed, or what arises from special circumstances known to or communicated to the party who is in breach at the time of entering into the contract which because he knew about he can be expected to provide for.

92. . . One must ask, not only whether the parties must be taken to have had this type of loss within their contemplation when the contract was made, but also whether they must be taken to have had liability for this type of loss within their contemplation then. Is the charterer to be taken to have undertaken legal responsibility for this type of loss? What should the unspoken terms of their contract be taken to be? If that is the question, then it becomes relevant to ask what has been the normal expectation of the parties to such contracts in this particular market. If charterers would not normally expect to pay more than the market rate for the days they were late, and ship owners would not normally expect to get more than that, then one would expect something extra before liability for an unusual loss such as this would arise.

Owner failed to provide evidence of any precedent, U.S. or English, wherein lost profits in a cancelled follow-on voyage were awarded in any arbitration or court action. Owner's reliance on SMA decisions in *Neptune Dorado* (S.M.A. 3987), *Mercure* (S.M.A.. 3785), *Felicity L* (S.M.A. 3235), *China Trident* (S.M.A. 2756), *Maaskant* (S.M.A. 2688), *Elbe Ore* (S.M.A. 2561), *Island Gem* (S.M.A. 2560), *Bonnie* (S.M.A. 1485) and also *Strider 9*, 131 F. Supp. 2d 412 (S.D.N.Y. 2000) all dealt with losses incurred within ongoing relationships, i.e., the damaged party was put back, within an existing business dealing, to a position they would have been in but for the breach.

It is well established that parties are entitled to economic information at the time of contracting to enable them to acquire compensation commensurate with the liabilities being assumed:

However, a party breaching a contract is entitled to sufficient details of the economic consequences of its breach to take them into account to determine the price of the bargain. This has been so since the decision in the celebrated English case of *Hadley v. Baxendale*, 9 Exch. 341 (1854). There a drayman was instructed to carry a millstone to a mill. The drayman was not told the mill would be inoperative until the stone was delivered. On the miller's claim for damages for the time the mill was inoperative, the Court held the drayman would be liable for consequential damages only if at the time of contracting the carrier-drayman is on notice of the particular purpose the cargo will serve and the fact that there is no available substitute for the cargo which is delayed, lost or injured in transit. (J. Calamari & J. Perillo, *The Law of Contracts* § 14-16 (2d ed. 1977)) Only under those circumstances will such damages "reasonably be supposed to have been in the contemplation of both parties, at the time they made their contract, as the probable result of the breach of [the contract]." (*Id.*, quoting *Hadley*) [*Trade & Transp., Inc. v. Transoil Jersey Limited (M.V. TRADE COURIER)*, S.M.A. 2394 (1978)]

Despite Owner's arguments to the contrary, Koch could not foresee at the time the charter was entered into on November 21, 2007 that Owner would have fixed the Vessel on a follow-on charter a week before its arrival at the discharge port and before a firm discharge schedule had been prepared. The *Achilleas* decision makes a point that extreme rate volatility, as in this case here, is an unusual occurrence and may be considered as not within the contemplation of the parties at the time of contracting.

Owner emphasizes Koch's purposeful detention of the Vessel at Corpus Christi somehow takes its claim for lost profits outside of the ambit of Hadley and *Achilleas*. It does not. Owner was adequately compensated under the contract for the 11-day period by Koch's payment of demurrage and detention in the range of \$90,000 to \$100,000 per day.

For all the reasons stated above, the panel majority denies Owner's claim.

Legal Fees and Costs

The parties submitted affidavits attesting to the attorneys' hours, fees and costs expended in the prosecution and/or defense in this matter. The panel has considered the value of the claims/counterclaims asserted by the parties, the relative level of effort, the reasonableness of the expenditures and the level of success achieved by the parties and herewith awards an allowance of \$150,000.00 toward Charterer's legal fees and expenses.

Arbitrators' Fees

The arbitrators' fees in this matter are as designated in Appendix B, attached hereto, which is part of this Final Award and are the joint and

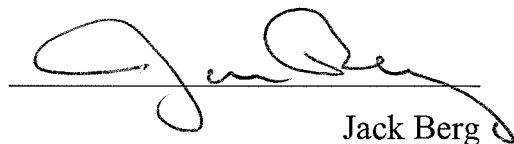
several obligations of the parties.

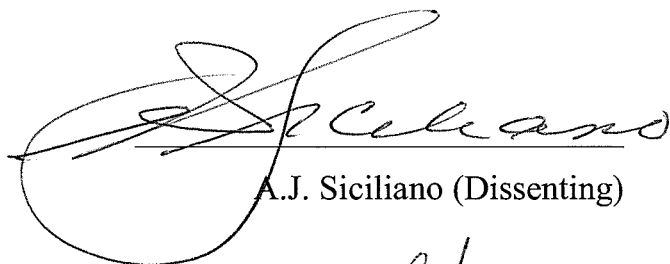
AWARD

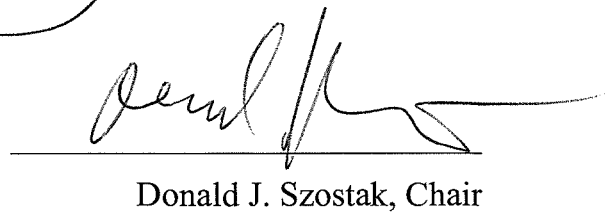
Owner's claim for recovery of profits lost due to cancellation of a follow-on fixture is denied. Owner is herewith ordered to pay Charterer \$155,762.50, calculated as follows:

Attorneys' Fees and Costs	\$150,000.00
<u>Arbitrators' Fees</u>	<u>\$5,762.50</u>
Total	\$155,762.50

Owner is to pay \$155,762.50 to Charterer within 30 days of the date of this Final Award failing which interest will accrue at the prime rate from the date of this award until payment is made. This Final Award may be reduced to judgment in a court of competent jurisdiction.


Jack Berg


A.J. Siciliano (Dissenting)


Donald J. Szostak, Chair

New York, New York
June 24, 2011

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 As Claimant and Owner :
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 As Respondent and Charterer :
 of the **MT SEADANCER** :
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Appendix A

Dissenting Opinion of A.J. Siciliano

Despite the high regard I have for my fellow arbitrators, I could not disagree more with their decision to excuse the Charterer’s purposeful breach of a barred activity and deny Owner the lost profits that flowed directly from the decision by Koch’s Geneva based traders to impermissibly “park” the vessel in violation of the charter party. As more fully discussed below, I consider the majority’s reliance upon the House of Lords decision in the *Achilleas* to be sorely misplaced, if not completely inapplicable.

In the *Achilleas*, for reasons beyond its personal control, the time charterer was unable to redeliver the vessel when due, causing owner to lose a lucrative follow-on charter. Owner claimed the higher rate differential for the full period of the follow-on charter. The charterer, however, contended that the owner was only entitled to the rate differential for the length of the acknowledged overrun. An arbitration followed in which the majority held that a the loss from a follow-on charter was recoverable under the *Hadley v Baxendale* foreseeability rule, if that loss arose naturally from the breach and was such that the charterer ought to have known was “not unlikely” to occur. The charterer appealed but the Court of Appeal upheld the majority’s decision. A further appeal to the House of Lords followed. In ruling for the charterer, their Lordships found that the lost profits were brought on by volatile market which amounted to an “unusual occurrence outside the parties’ contemplation”.

The case of *Sylvia Shipping Co. Ltd. v Progress Bulk Carriers Ltd.* [2010] EWHC 542 (Comm) soon followed the *Achilleas*. There the shipowner appealed from the decision of an arbitration panel awarding lost profits to the time charterer for a failed sub-voyage charter fixture caused by the owner having breached its obligation to properly maintain the ship’s steel work. The

owner, relying upon the July 9, 2009 House of Lords *Achilleas* decision, argued that the charterer's damages were limited to the difference between the charter and the market rate during the period of delay. In dismissing the owner's appeal, the court, in part, pointedly observed:

"The decision in The Achilleas resulted in an amalgam of the orthodox approach to remoteness and a broader approach involving the assumption of responsibility. The orthodox approach remained the general test of remoteness applicable in the great majority of cases. However, there might be unusual cases, such as The Achilleas itself, in which the context, surrounding circumstances or general understanding in the relevant market made it necessary specifically to consider whether there had been an assumption of responsibility. That was most likely to be in those relatively rare cases where the application of the general test led or might lead to an unquantifiable, unpredictable or disproportionate liability or where there was clear evidence that such liability would be contrary to market understanding and expectations. In the great majority of cases it would not be necessary specifically to address the issue of assumption of responsibility. Usually the fact that the type of loss arose in the ordinary course of things or out of special known circumstances would carry with it the necessary assumption of responsibility." (Cites omitted)

and

"... this was not a case in which it could be said that the resulting liability was likely to be unquantifiable, unpredictable, uncontrollable or disproportionate. Where a follow-on fixture was made at the end of a charter it could be made for any period. By contrast, the loss of a sub-charter during the currency of a time charter could never be for a longer period than the time charter itself."

As was the case in *Sylvia Shipping*, the *Seadancer* did not involve an unquantifiable, unpredictable or disproportionate liability. The follow-on charter was for a single discrete voyage at rates known to Koch before its planned breach to float the vessel began. It is important to understand that Koch's breach was intentional and not brought about by circumstances beyond its control, thus distinguishing this case from those of the *Universal Cargo Carriers v. Citati* (1957) 2 Q.B. 401, 403. , *Suisse Atlantique Societe d'Armement Maritime S.A. v. NV Rotterdamsche Kolen Centrale* (The General Guisan) [1966] 1 Lloyd's Rep 529 (HL), and the *Trade Resolve*, SMA 3125, *Hadley v. Baxendale* 9 Ex. 341, 156 Eng. Rep. 145 (1854) and the *Transfield Shipping Inc. v. Mercator Shipping Inc.*, [2009] 1 AC61, [2008] 2 Lloyd's Rep. 275 *Achilleas*. Factually, the *Seadancer* resembles the above mentioned *Sylvia Shipping* decision, where the court upheld the arbitrators' decision to award the charterer its lost profits from a sub-charter fixture.

The record is clear that the Geneva based Koch product traders controlling the sale of the

premium M-100 remaining aboard the Seadancer always intended and did finally deliver that cargo to Hovensa in St. Croix, under a lucrative sale agreement. In fairness, the traders, neither of whom gave testimony, may not originally have understood that St. Croix was outside the discharge range permitted by the charter or that the Seadancer was too large to service that installation. If so, that could partially explain their belated January 2, 2008 request for Koch's U.S. based personnel to ask both Owner and Hovensa to hurriedly consider taking the Seadancer into St. Croix for discharge. I say "partially" because I think it more likely the traders were responding to the Koch USA's same day request for instructions as to what to tell the Owner, (O-85), and "belated" because as early as December 11, 2007, Koch USA had informed the traders that neither a St. Croix discharge nor the ability to float the Seadancer was contractually available to Koch. Albeit reluctant, the Owner did indicate a willingness to consider the proposal but, due to her size, the Hovensa terminal predictably declined to accept the Seadancer. Undeterred by that refusal the traders pressed on with their still hidden agenda to impermissibly "float" the Seadancer to accommodate a Hovensa January, 2008 delivery window.

The following are representative excerpts from emails exchanged between Koch Geneva and Koch U.S.A. that illustrate Koch's traders' plan to impermissibly float the Seadancer originated shortly after the charter was agreed and continued beyond December 11, 2007, when the traders were informed that the storage option was not contractually available:

Nov. 27, 2007 – from Koch, Geneva to Koch, U.S.A. (O-103)

"Please note that we have around 110kt M100 loading onto Seadancer loading this week for 20-25 Dec arrival into USGC. Not great timing but can float out into January ..." (Underlining added)

Dec.11, 2007 - from the KOCH, Geneva to Koch U.S.A (O-75)

- a) "We should use the 'Seadancer' as floating storage as she is cheap"
- b) "Think we get E4 off Seadancer and then use Seadancer for floating storage"

Dec. 12, 2007 – from Koch, Geneva to Koch U.S.A. (Koch -001349)

"We should not take the Seadancer to St. Croix she is too cheap and should be used as floating storage in the USG.

Dec. 27, 2007 - from Koch's V. Cantu to Koch's K. Davis/others (O -83)

"Has anything changed on the Seadancer (E4) ? Harbormaster just called saying that they were told to bring in the Seadancer to Ingleside or West Plant. We told them it is being used for storage by KS&T."

K. Davis replied saying: "Seadancer is not to move She is to remain at anchor"
(Underlining added)

Dec. 31, 2007 – from Koch’s K. Davis to Koch’s P. Ramirez and others (Koch 001551)

“Re: M100 Juggling

What I would like to get done on these two vessels is,

- 1) Send the Crusader direct to St. Croix to discharge ...deliver against the Jan 10-15 contract ...
- 2) Transfer to an AET lighter vessel the remaining bbls onboard the Seadancer and let her go off Koch charter. AET’s vessel will costs (sic) us the same amount per day as the Seadancer is now. AET will have to agree to sit for a bit and then sail down to St. Croix to deliver bbls against the Jan 25-31, contract.”

Jan. 2, 2008 – from Koch, USA to Koch, Geneva (O-85)

“Owners getting very anxious to know what we are up to. The “please bear with us as we try to work this cargo” is no longer working. What do you want me to tell them ?

Jan. 2, 2008 – from Koch, Geneva to Koch, U.S.A (Koch 003111)

“Now fingers crossed on speedy lighter as looks like Seadancer deal would involve us accepting \$90k detention from 24th Dec.

Will leave (named Koch U.S.A staff member) to work out cheapest option but my guess its (sic) to take prompt lighter ship and fight the demurrage/detention issue with the Seadancer...” (Underlining added)

Jan. 3, 2008 – from Koch U.S.A to Koch, Geneva (Koch 003143)

“Aframax coming off some what so getting closer to our original \$550K type number for USG to St. Croix. Had \$800 from AET and \$775K, plus \$40K lighter, from Genmar. Should be getting closer to the \$700K.

Seadancer numbers now are bit immaterial as Hess will not take the ship.”

To which Koch, Geneva promptly replied:

“ Agreed – we need to find cheapest/promptest ship to get the lighter (sic) done.”

It is even possible that when Koch’s plans were first set into motion, the traders may not have known that the Seadancer was fixed without Koch having the customary privilege to “float” the vessel. However, if that was the case, the traders were dis-abused of that faulty presumption on December 11, 2007 by Koch’s own U.S. based chartering and operational staff. Nevertheless, as reflected in their December 12th email, the traders remained steadfast in their plan to impermissibly “float” the vessel until such time as the Hovensa January 2008 delivery window drew near. The traders continued to regard the ship as “cheap storage” and directed Koch’s operational staff to conceal their true intentions from the shipowner with false indications that Koch was either readying a berth at which to discharge the ship or was actively searching for land-based storage. In fact, neither was true. On the contrary, the traders’ secretive plan to wrongly float the ship into January 2008 remained intact. Indeed, Koch’s own spreadsheet (O-96) confirms that pursuant to an

existing Lightering COA between itself and American Eagle Tankers (AET), (excluding the Seadancer) Koch used no less than nine (9) AET tankers to lighter other large vessels in the U.S. Gulf during December 2007. No explanation was offered why AET tankers could not then also accommodate the cargo remaining aboard the Seadancer.

Both the operational and chartering witnesses for Koch testified they knew of the follow-on fixture to Total as early as December 18, 2007, i.e., 4 days before the Seadancer even arrived at the Corpus Christi lightering site and 6 days before the first partial lightering operation was completed on December 24th. Faithful to the instructions of its product traders, it was not until December 27th that Koch first informed Owner that, in fact, it had no floating or shore facility to receive the remaining cargo. That news completely contradicted Koch's prior December 17 advice that following the initial lightering at Corpus Christi, "*Vessel will then proceed to a berth for the balance of the cargo. Detailed instructions to follow.*"

The unexpected news that the Seadancer would not "proceed to berth" or otherwise timely lighter her remaining cargo provoked the following exchanges and events (also are shown at pages 6 and 7 of the majority's opinion):

December 28, 2007 – Owner reserved its right to claim against Charterer for detention and lost earnings from subsequent voyage, if missed. Charterer rejected Owner's claim.

December 31, 2007 – Owner advised Charterer if Vessel doesn't sail by January 2, 2008 employment would be lost and Owner would look to Charterer for reimbursement. Charterer rejected Owner's right to claim lost earnings.

January 3, 2008 – Owner cancelled Total charter.

January 5, 2008 – Seadancer arrived off Galveston lightering area.

January 7, 2008 – Discharge of the Seadancer is completed.

But the point that needs to be emphasized is that prior to and from December 24th onward through January 4th, 2008, Koch had the opportunity but chose not to fix a Hovensa compliant substitute vessel to receive the cargo remaining aboard the Seadancer. Rather than pay the significantly higher market rates then prevailing, Koch (again on orders from its Geneva based traders) elected to simply "sit" the ship in flagrant violation of the terms of the charter. Apparently, Koch wrongly reasoned that its misdeeds would cost it no more than the charter party demurrage rate, which was then well below the prevailing market.

The majority adopts the view that since Koch was ultimately forced to concede and did finally pay both contract rate demurrage and the higher market detention differential, the Owner has received all of its "direct damages" and is not legally entitled to its so called "indirect" lost profits from the canceled "follow-on" Total fixture. In doing so, the majority relies primarily upon the more than 150 year old *Hadley v. Baxendale* decision (*Hadley*) and, more particularly, upon the

relatively recent *Achilleas* ruling by the House of Lords.

I have no quarrel with New York arbitrators taking appropriate guidance from British decisions, so long as those decisions are on point and do not conflict with the contract's choice of law provisions. However, in my view, those decisions are not on point nor do they reflect the contemporary thinking of New York arbitrators on "consequential" damages as reflected in both the *Neptune Dorado* and *Felicity L* hereinafter discussed. But assuming, arguendo, that both *Hadley* and the *Achilleas* do apply, the majority has overlooked a crucial distinction between those decisions and the *Seadancer* case now before us. In neither of the two British cases was the Court of the Exchequer or their Lordships confronted with or asked to rule upon an intentional post-fixture breach, nor one that the wrongdoer knew was a contractually barred activity. On the contrary, the respective drayman (*Hadley*) and the time charterer (*Achilleas*) were themselves victims of unplanned delays caused by circumstances beyond their personal control. Here the fact situation is very different and, in my view, requires Koch to be judged by a very different and far more exacting standard. I submit that it cannot be correct to excuse a wrongdoer's intentional breach of a contractually barred activity solely because that wrongdoer ignored, misjudged or did not entirely recognize the extent of damages its purposeful misdeeds would cause. Yet that is precisely the effect of the majority's decision and its narrow focus on what Koch claims not to have had in mind when the charter was agreed. Indeed, as a result of extensive panel ordered discovery, we now know from the trader's November 27, 2007 email (O-103), that barely 6 days after the charter was agreed, Koch was already secretly planning to impermissibly "float" the *Seadancer* into January 2008.

I submit that the lost profits claimed here arose naturally from Koch's decision to intentionally violate the charter, thus satisfying the so call *first limb* of the *Hadley* foreseeability test. Moreover, Koch, an acknowledged sophisticated charterer of Suezmax and Aframax sized tankers, took in more than 240 such vessels during 2007 alone. As an experienced vessel operator, Koch knew or should have known that a follow-on fixture for the *Seadancer* was not only likely, but something to be expected. This level of actual awareness more than meets the so called *second limb* of the *Hadley* test.

To its credit, Koch does not offer a serious contrary argument. Instead, taking a page from the *Achilleas* decision, what Koch actually contends could not be foreseen and for which it did not consciously accept responsibility, was the subsequent sudden and steep rise in the market for similarly sized and positioned ships. This argument might have some appeal if the breach was not so deliberate or some uncontrolled intervening event prevented Koch from discharging the ship sooner than it did. It is significant that Koch's own witnesses confirmed they knew of the follow-on *Seadancer* fixture to Total as early as December 18, 2007. That was before the *Seadancer* arrived Corpus Christi on December 22, 2007 and well prior to Koch's purposely delayed December 27th admission that it had no facility, other than the *Seadancer*, in which to house the

remaining cargo. What Koch self-servingly described as an unforeseen “logistical problem” was actually the natural consequence of its decision to impermissibly “float” rather than arrange the timely discharge of the vessel. In truth, Koch could have chartered-in a suitable substitute ship much earlier, but did not want to face the higher costs such tonnage would then fetch. Instead, Koch’s U.S. based operational personnel continued to follow the direction of the Geneva traders to violate the charter by wrongly using the Seadancer as “cheap storage”.

Koch has put forward the following defenses which I consider to be either incorrect or unpersuasive:

1. **The Owner Acted Too Aggressively in Fixing the Ship to Total on December 19, 2007**

I found Owner’s decision to advertise the Seadancer’s position and expected availability when it did, to be in keeping with what other similarly situated shipowners were doing at the time. I do not consider the timing of the December 20, 2007 Total fixture to have been overly aggressive, especially since Koch did not withdraw nor amend its misleading December 17th voyage instructions. Moreover, as more fully discussed below, it was not until December 27, 2007 that Koch finally acknowledged it had no berth or other facility into which to discharge the remaining cargo.

2. **As Koch Had Not Issued Final Discharge Instructions, the Total Fixture was at Least Pre-mature, if not Improper.**

The argument entreats the trier of fact to attach greater importance to a routine qualifier (with which Koch ends each and every voyage instruction) than the case specific operational instructions actually issued by Koch. This I am unable to do. Instead, I find that the purposely crafted language of those operational instructions succeeded to mislead the Owner into believing that after completing the Corpus Christi ship-to-ship lightering operation, the vessel would berth to discharge her remaining cargo. Certainly, there was no cause for the Owner to then suspect that those instructions were anything but an accurate expression of Koch’s true intentions. Although we now know Koch never intended to abide by those instructions, it strains credulity to suggest that the imprecise routine qualifier at issue can be read to trump the misleading but case specific voyage instructions. On the contrary, as shown below, the qualifier was itself qualified with “... *in accordance with the applicable C/P*”, which did not permit Koch to float the ship. The full text of the qualifier and corresponding voyage instructions issued by Koch on December 17th, 2007 read as follows:

“VOYAGE DESCRIPTION

Weather and safe navigation always permitting, the vessel is to proceed directly to intended discharge port, offshore Corpus Christi lightering area, approximate position Lat. 27-20 N, Long. 96-50 W, to discharge cargo to 1 lightering vessel(s) TBN. Vessel will then proceed to a berth for the balance cargo. Detailed

instructions to follow. (Emphasis added)

The Intended port(s) indicated in these orders, in and of themselves, are not a declaration of port options. Charterer reserves the right to change and or modify the port(s) in accordance with the applicable C/P." (Underlining added)

Koch argues Owner did not rely upon the December 17th voyage instructions to fix the ship to Total, because those instructions were only seen by its office in Greece the following day. The Total fixture, however, was made on subjects not lifted until December 20, 2007. Despite its admitted knowledge of the Total fixture on December 18th and having every opportunity to do so, Koch did not issue contrary instructions or otherwise indicate that its true plan was to float the vessel into January, 2008. Instead, Koch allowed its deceptively worded December 17th instructions to stand. That, in turn, not only reinforced Owner's presumption that the stated discharge plan was truthful, but also prevented Owner from renegotiating fresh dates with Total or, seeking alternative employment with others at rates still above those eventually agreed with Shell.

Koch has also questioned whether the Seadancer could reasonably be expected to meet the Total canceling date. I have examined and am satisfied that the Owner's voyage projection was not only reasonable, but included a more than adequate allowance for unforeseen contingencies.

3. Koch's Role as a Trading Company

During the proceeding there was a subtle suggestion that Koch, as a major trader of commodities, is somehow entitled to wider latitudes of conduct than would otherwise apply to charterers with a more narrow business model. However, whatever privileges Koch had, or thought it had, certainly did not extend to an intentional violation of the charter. I have absolutely no problem with a party exploiting every available contract advantage. But, in this case, the Koch traders' planned breach went far beyond what was permissible.

The following exchange between the Koch chartering witness and this arbitrator helps to illustrate the point:

Q "... I can't help but feel that this trade came about without the traders' personal knowledge that the storage clause was not included in this particular fixture. I almost get the impression that they assumed it was. Do you come away with that same impression ?

A Yes

Q It wasn't until December the 11th that you brought it to their attention. Where they shocked ? Were they surprised ?

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A Yes

Q It wasn't until December the 11th that you brought it to their attention. Where they shocked ? Were they surprised ?

A **Some were, and some probably didn't care.** (Emphasis added)
(Tr. Pages 471/472)

That candid response speaks volumes for the traders' disregard of their principal's contract obligations, and explains why the Koch breach developed as it did

4. **No Precedent for an Award of Lost Profits from a "Follow-on" Fixture.**

Koch argued that there is no record of a prior New York arbitral or legal decision expressly upholding an award for profits lost *from a canceled follow-on fixture* and this case should not be the first. Although the majority faults Owner for not citing a case that specifically awarded such damages, both the *Neptune Dorado*, SMA #3987, (2007) and *Felicity L*, SMA #3235 (1995) decisions came very close to doing so.

Following criminal charges brought against them by the U.S. Attorney for the Northern District of California, the vessel's registered owner, manager and master, all pled guilty to varying degrees of willfully failing to report hazardous conditions known to exist aboard the vessel that threatened life, limb and property. A plea agreement was entered into whereby the three collectively paid \$2,525,000 in civil and federal fines. Thereafter, the charterer initiated arbitration against the owner to recover the losses and extra costs it incurred due to the vessel's woeful condition and the delays that resulted from the refusal of U.S. Coast Guard to permit the Neptune Dorado to discharge. Among the charterer's claims was a \$100,000 cancellation fee imposed upon it under the terms of an entirely separate contract for the transport of refined product linked to the U.S. Coast Guard imposed delayed discharge of the Neptune Dorado cargo. Despite that separate contract not having been disclosed to the shipowner, an especially well qualified panel of seasoned New York arbitrators unanimously ruled that the charterer was entitled to recover the "consequential" cancellation charges. In doing so, the panel and offered the following contemporary and instructive commentary on the subject of consequential damages.

"The Panel notes with approval the discussion and more modern analysis or take on the tenets of *Hadley v. Baxendale* in the majority decision of the *MV FELICITY L*, SMA 3235 (1995), and the Panel agrees with the comments of the Court in *Ashland Management Inc. v. Janien*, 82 N.Y. 2d 395 (1933) that the breaching party (Owner here) need not have foreseen the breach itself, or the particular way the loss occurred. It is only necessary that loss from a breach is reasonably foreseeable and probable (and the damages suffered flow from that breach)."

The above referenced *MV FELICITY L* majority (chairperson Schlosser and arbitrator Berg) awarded *lost profits* to a charterer refinery resulting from the owner's initial bad faith representation of the vessel's expected readiness date and the owner's subsequent reluctance to agree to mutual cancellation of the charter. It was argued that the owner's refusal to concede the vessel would not

meet the canceling date, prevented the refinery from chartering in a ready substitute ship that could. Notwithstanding her proceeding at increased speed and favorable currents, the vessel arrived some 18 hours beyond the canceling date. In denying the owner's defense that the charterer refinery's lost profits were unforeseeable and therefore unrecoverable, the majority recited the familiar *Hadley* foreseeability test and its emphasis on what risks were or should have been foreseen at the time the contract was made" (underlining added). The majority found the owner to be an experienced operator of asphalt carriers and charged it with having sufficient knowledge of refinery practices such that it knew or should have anticipated that such losses were likely to result from the ship's late arrival. Quoting the majority, "... we believe that consequential damages are recoverable if the loss was reasonably foreseeable and [the] probable result of the breach."

I am in complete agreement with above quote, but do not accept as correct that damages attributable to a wrongdoer's willful misconduct are to be limited to what that wrongdoer perceived them to be "at the time the contract was made". Such a narrow position ignores willful breaches of the sort Koch visited upon the Owner of the *Seadancer* after the contract came into force. Neither the *Hadley* or *Achilles* decisions nor any of the other cases cited by Koch and endorsed by the majority deal with the intentional breach of a contractually barred activity after performance began. On the contrary, the cornerstone of both the *Hadley* and the *Achilleas* decisions was that a party to a contract cannot reasonably be expected to have assumed an open ended, un-quantified extra risk without the payment of some premium linked to the assumption of that added risk. Applying that strict premise to the *Seadancer*, would mean that in order for the Owner to collect its lost profits from the failed Total fixture, it would first have to anticipate the Koch's post-contractual breach, and then pay to Koch a premium commensurate with the damages that contractually barred breach would inflict upon the Owner. Although obviously absurd, I submit that is the unintended anomaly invited by the majority's decision. It bears repeating that Koch knew of the Total fixture on December 18, i.e., before the purposeful delay of the *Seadancer* first began.

Although the breach by Koch did not threaten life, limb or property, the unanimous award of consequential damages by the *Dorado Neptune* panel and the majority's award of lost profits in the *Felicity L* cannot be ignored. Indeed, it could be argued that Koch's plan to intentionally breach the charter by impermissibly using the *Seadancer*, as "cheap storage" introduces a new level of purposeful fault beyond that found in either the *Neptune Dorado* or *Felicity L*.

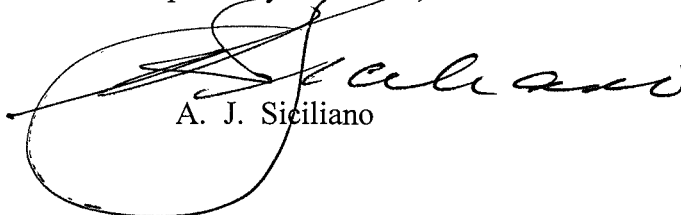
I think it folly that Koch is to be excused from paying the lost profits it knowingly inflicted upon Owner because it (Koch) claims it did not foresee just how far the damages caused by its willful breach would extend. Koch surely knew that a follow-on fixture was expected, but insists it

could not foresee and, therefore, did not accept the risk of the subsequent sudden market increase. That begs the question as to what higher market level Koch, as a sophisticated charterer could or did anticipate. It is undeniable that markets rise and fall unpredictably, and although the market did increase suddenly in this case, it did not rise to an unprecedented level. Experienced charterers and shipowners alike understand and accept market volatility as an ever present commercial risk inherent in their dealings with each other. As already stated, Koch knew that the Seadancer had been fixed to Total at Worldscale 250 well *before* its pre-planned breach to “float” the ship began. Despite this afore-knowledge, Koch nevertheless proceeded to impermissibly float the Seadancer, and it was that decision which so delayed the vessel that she was no longer able to meet the Total canceling date. In fact, the evidence strongly suggests that Koch purposely did not charter in a second lightering vessel until January 4, 2008, when the cost to do so had fallen significantly below that which prevailed when Seadancer arrived in Corpus Christi and this regrettable saga began. I submit that there are significant parallels in both the *Neptune Dorado* and *Felicity L* arbitral decisions that argue in favor of an award of lost profits to Owner here.

Although lost profits from a failed follow-on fixture may not themselves be previously awarded to a shipowner, I cannot conceive of a case more deserving of that remedy than the Seadancer now before me. It seems to me that in addition to its intentional breach of the agreed terms of the charter itself, Koch also ignored its implied overarching obligation of good faith and fair dealing. That said, I consider such conduct to be uncharacteristic of and inconsistent with my past arbitral and consultative dealings with Koch as an organization. Although my experience with Koch is admittedly limited, I have never found nor had reason to suspect that Koch ever knowingly acted in a fashion so plainly at odds with its contract obligations as it did here

Since Koch has stipulated that Owner’s computation of its lost profits is arithmetically correct, I would award Owner its revised claim of \$2,025,639.00, plus interest at the average prime rate from February 28, 2008 (when the Total charter would likely have been completed) through to the date of this award. In addition, I would have awarded Owner a generous allowance against its legal fees and related costs.

Respectfully submitted,



A. J. Siciliano

New York, NY
June 24, 2011