

Federal Court



Cour fédérale

Date: 20070720

Docket: T-2004-01

Citation: 2007 FC 761

[ENGLISH TRANSLATION]

Montréal, Quebec, July 20, 2007

PRESENT: Richard Morneau, Esq., Prothonotary

BETWEEN:

**AFROCEAN COMPANIA NAVIERA INC.
and
SOCIÉTÉ D'ÉTUDE ET DE RÉALISATIONS
AGRO-INDUSTRIELLES**

Plaintiffs

and

**VILHENA SHIPPING LTD.
and
THE VESSEL "ZODIO"
and
THE OWNERS OF THE VESSEL "ZODIO"**

Defendants

REASONS FOR ORDER AND ORDER

[1] The issue in this case is whether the charterer of the vessel "Zodio" is entitled to an order from this Court recognizing its right to be paid (its *Entitlement*), as well as the amount of that

right under a letter of undertaking (LOU) dated December 17, 2001, and issued by the charterer's insurers, the American Steamship Owners Mutual Protection & Indemnity Association, Inc. (hereinafter the Club).

[2] This letter of undertaking was issued by the Club after the grounding of the vessel "Zodio" in order to have said vessel reinstated and to guarantee payment of claims that various claimants might make following this incident.

[3] Litigation was initiated between the shipowner, Vilhena Shipping Ltd. (hereinafter Vilhena), and the charterer, Afrocean Compania Naviera Inc. (hereinafter Afrocean), regarding this incident involving the "Zodio."

[4] As agreed between the parties, they brought their dispute before the Chambre arbitrale maritime de Paris (hereinafter the Chambre), which, by an award dated May 23, 2006, (hereinafter the Award), made what now must be considered a final decision or award condemning in its formal judgment, by the voices of these adjudicators, Vilhena to repay a total sum to Afrocean that the latter assessed on the date of the motion of USD\$579,308.16.

[5] This amount, along with the Afrocean's status of claimant, is not disputed by Vilhena. The latter, however, objects to an order awarding this amount to Afrocean since, in its view, any net amount owed to Afrocean by Vilhena as a result of the Award must take into account any liability or involvement that Afrocean must have with respect to an account of general average referred to by the Award.

Analysis

[6] There is no doubt, and this aspect is not disputed by Vilhena subject to what is mentioned in paragraph 7 below, that the Award allows Afrocean to consider that it meets the definition of “Entitlement” within the meaning of the LOU. This definition reads as follows:

“[...] a claim or demand of a claimant against the Owners of the M.V. ZODIO, personally or against the ship *in rem*, that has been quantified and which has been adjudged due and owing on a final basis by way of a non-appealable court judgment or arbitration award, the finality and non-appealability of which shall be certified in a letter addressed to the Federal Court of Canada by the Claimant’s solicitor [...]”.

[7] The focus of Vilhena’s argument in its reply record, however, is found at paragraphs 26 and 27 of its written submissions, where it states the following:

When determining the amount awarded to Afrocean by virtue of the Award for the purposes of determining Afrocean’s Entitlement under the LOU, the Award as a whole must be considered. The Entitlement must in other words reflect not only the amounts that Vilhena was ordered to pay to Afrocean by virtue of the Award, but as well as those amounts which Afrocean was ordered to pay to Vilhena by virtue of the Award. Afrocean cannot at its entire discretion pick and choose those aspects of the Award which it seeks to translate into an Entitlement.

Thus, Defendants respectfully submit that a preliminary hearing should be held before the Court adjudicates upon the Motion in order to establish the amount that Afrocean was ordered to pay to Vilhena by virtue of the Award on account of general average.

(Emphasis added)

[8] For the reasons that follow, I cannot support Vilhena's claims.

[9] First, and contrary to Vilhena's view that the Court should first hold a preliminary hearing on the amount owed to Afrocean, the Court considers that the letter of undertaking provides for this possibility only if there appears to be a dispute regarding the role of collocation between various potential claimants.

[10] Here, no such situation exists. All other claimants who may potentially compete with Afrocean are in agreement with its motion under review.

[11] Second, in the Award, the Chambre liquidates the amounts owing to Afrocean. However, and in contrast with the clear language that the Chambre uses in its Award condemning Vilhena in its formal judgment to pay certain amounts, when it comes time to address Afrocean's involvement with respect to the general average situation, the wording becomes much less prescriptive.

[12] Specifically, although at page 19 of the Award the Chambre states following with respect to Afrocean and the general average that was stated, namely that [TRANSLATION] "since AFROCEAN did not, in the opinion of the adjudicators, provide proof of the unseaworthiness of the vessel, it will have to bear the consequences of the statement of general average," the fact remains that having reached what must be considered conclusive findings, i.e. its final judgment, the Chambre in its Award is limited to approving a statement of general average and a related settlement that occurred elsewhere than before the Chambre.

[13] This statement of general average referred to by the Chambre clearly makes reference to the amount relating to the entire general average and not the portion of the general average attributable to Afrocean. The Chambre specifically noted the following through its adjudicators:

[TRANSLATION]

Approve the statement of general average and the resulting settlement,
for a total of CAD\$990,049.89.

[14] It is therefore clear, in my opinion, that if the Chambre wished any form of compensation to occur under the Award between the specific amount owned by Vilhena and any amount owed by Afrocean, the Chambre would have used stronger and more specific language in its formal judgment.

[15] Fourth, the wording of the definition of “Entitlement,” reproduced above at paragraph 6, indicates that the letter of undertaking is primarily intended to satisfy claims by claimants, such as Afrocean, and not at the same time, by need of compensation or any other manner, a claim from the shipowner. This definition does in fact include the wording “claim ... of a Claimant against the Owners ...”.

[16] Finally, Afrocean filed in support of its motion a document entitled “Average Guarantee” signed by Groupama Transport, the very purpose of which is to guarantee the involvement of any party in the general average. It is highly likely that Vilhena should approach Groupama Transport.

[17] For all of these reasons, I consider that Afrocean is entitled to the order that it seeks and that I grant below.

ORDER

IT IS HEREBY ORDERED THAT:

- 1 - Plaintiff Afrocean Compania Naviera Inc., having a valid and sustainable claim asserted against Defendants, as evidenced by the arbitral Award issued by the Chambre arbitrale maritime de Paris dated March 23, 2006, is entitled to payment under the terms of that Letter of Undertaking posted by the American Steamship Owners Mutual Protection & Indemnity Association, Inc. to stand as security to effect the release from arrest of the vessel ZODIO in December 2001;

- 2 - The said American Steamship Owners Mutual Protection & Indemnity Association, Inc. is hereby directed to pay to the Plaintiffs the sum of US \$579,308.16 by way of bank wire transfer to the United States dollar trust account of Borden Ladner Gervais LLP or by way of US dollar bank draft or cashier's cheque made payable to Borden Ladner Gervais LLP in trust. In any event, all transmission or other bank charges levied with respect to the transfer of remittance of funds shall be assumed by the said American Steamship Owners Mutual Protection & Indemnity Association, Inc.;

- 3 - The American Steamship Owners Mutual Protection & Indemnity Association, Inc. shall pay interest on the said sum of US \$579,308.16 at a rate of 5% per annum from the date of this Order until payment;

- 4 - Costs on the motion are hereby awarded to Afrocean Compania Naviera Inc.

“Richard Morneau”

Prothonotary

Federal Court



Cour fédérale

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-2004-01

STYLE OF CAUSE: AFROCEAN COMPANIA NAVIERA INC.
and
SOCIÉTÉ D'ÉTUDE ET DE RÉALISATIONS
AGRO-INDUSTRIELLES
Plaintiffs
and
VILHENA SHIPPING LTD.
and
THE VESSEL "ZODIO"
and
THE OWNERS OF THE VESSEL « ZODIO »
Defendants

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: July 16, 2007

REASONS FOR ORDER: PROTHONOTARY MORNEAU

DATED: July 20, 2007

APPEARANCES:

Jeremy Bolger

FOR THE PLAINTIFFS

George J. Pollack
Brandon Wiener

FOR THE DEFENDANTS

SOLICITORS OF RECORD:

Borden Ladner Gervais LLP
Montréal, Quebec

FOR THE PLAINTIFFS

Davies Ward Phillips & Vineberg
LLP
Montréal, Quebec

FOR THE DEFENDANTS

