UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

U3996

In the Matter of the Arbitration

- between -

95 Civ. 3761 (LMM)

TEXACO PANAMA INC.,

Petitioner,

- and -

DUKE PETROLEUM TRANSPORT CORP.
as owner of the M/T Rich Duke
and Rich Duchess,

Respondent.

MEMORANDUM AND ORDER

McKENNA, D.J.

The motion of petitioner to confirm the Partial Final Award (the "Award") dated August 18, 1994, and respondent's cross-motion to vacate that award, are both denied, and the petition is dismissed, without prejudice.

The motion and cross-motion are governed by the federal Arbitration Act, 9 U.S.C. §§ 1 et seq. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, T.I.A.S. No. 6997, relied on (in the alternative) by respondent does not apply, since respondent is a Liberian corporation and Liberia is not a signatory to that convention.

Under the Arbitration Act, "a district court does not have the power to review an interlocutory ruling by an arbitration panel." Michaels v. Mariforum Shipping, S.A., 624 F.2d 411, 414 (2d Cir. 1980) (citations omitted). "Where . . . arbitrators make an interim ruling that does not purport to resolve finally the issues submitted to them, judicial review is unavailable." Id. However, an award that "finally and conclusively dispose[s] of a separate and independent claim," Metallgesellschaft A.G. v. M/V Capitan Constante, 790 F.2d 280, 283 (2d Cir. 1986), will be considered final for purposes of seeking confirmation of an award pursuant to the Arbitration Act, even if all claims are not disposed of.

In the present case, the Award (Petition, Ex. 3) noted that respondent had submitted two "alternative stated claims." (Award at 3.) The second of these, however, was introduced for the first time in respondent's closing briefs. The Award passed upon (denying) the first of the alternative stated claims, but not the second. However, the Award states that "the panel is prepared to consider [respondent's] alternate claim and take evidence on the theory, propriety, mathematical calculation and supporting data which [respondent] relies on," and that "we are prepared to promptly schedule hearings to conclude this long standing proceeding." (Award at 7.)

Subsequently, the arbitral panel, by a two to three vote, denied an application by respondent to reopen the hearings as to the first of its alternate stated claims on the ground of newly discovered (and allegedly improperly withheld) evidence. (Ruling, July 31, 1995, Ex. to Sullivan letter to Court, Aug. 8, 1995.). The Ruling states: "We are not inclined to reopen the issue nor do we believe we have the power to do so." (Ruling at 4.) One arbitrator, dissenting, stated:

> Since the panel has not yet decided the issue as to how much additional hire is due to owners by the charterers, the partial final award cannot be considered closed and the arbitrators should be eager to decide the issue on a complete record of additional evidence and sworn testimony without limitations.

(Dissenting Opinion.)

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This Court concludes that the Award is not final for purposes of the parties' respective motions to confirm and vacate. The arbitrators passed upon only one of two alternate damage claims, and have not, accordingly, come to a final award on respondent's claim. The rejection of the first claim, dealing with one damage theory, is not a final disposition of respondent's claim for damages. See Kerr-McGee Refining Corp. v. M/T Triumph, 924 F.2d 467, 471 (2d Cir.), cert. denied, 502 U.S. 821, 116 L. Ed. 2d 54, 112 S. Ct. 81 (1991). As the court's discussion of the claims in Metallgesellschaft makes clear, the present case is not like that one: there, the appellee's claim for freight was, for the reasons stated by the court, fully independent of the appellant's counterclaims. The present case is governed by Kerr-McGee, where the award covered some, but not all, of petitioner's damage claims.

The motion and cross-motion must, accordingly, be denied, and the petition dismissed, as premature, and therefore without prejudice, because the Award is not final.

A corollary of this result, of course, is that all issues, including those regarding the introduction of new evidence, remain before the arbitrators.

Petition dismissed, without prejudice.

SO ORDERED.

Dated: New York, New York
September 3, 1996

LAWRENCE M. McKENNA
U.S.D.J.

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