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Via FedEx

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Re: Agrifos Fertilizer, Inc. v. Transammonia, Inc.

Gentlemen,

The Panel encloses its Final Award and is pleased to have been of service to the parties in this matter.

Regards,

David W. Martowski
Chairman

cc: Louis P. Sheinbaum
John F. Ring

Ms. Sally C. Sielski
Administrative Secretary
Society of Maritime Arbitrators, Inc.

In the Matter of the Arbitration

between

Agrifos Fertilizer, Inc.,
as Claimant

Final Award

and

Transammonia, Inc.,
as Respondent and Counter Claimant

Before: John F. Ring
Louis P. Sheinbaum
David W. Martowski, Chairman

Appearances: Seward & Kissel LLP
on behalf of Agrifos Fertilizer, Inc.
by Bruce G. Paulsen, Esq. and
Michael B. Weitman, Esq.

DLA Piper LLP (US)
on behalf of Transammonia, Inc.
by Stanley McDermott III, Esq.

and

Louis Epstein, Esq.
Transammonia, Inc.

Introduction

This dispute arises out of a buyer's declaration of *force majeure* on September 18, 2008, and the same buyer's notice of cancellation on the same date of a CFR Contract dated July 11, 2008 for the sale of 10,000 metric tons of sulfuric acid in bulk that was transported on the M/V BOW HERON from Ronnskar, Sweden to Pasadena, Texas in October/November 2008 ("Contract"). Agrifos Fertilizer, Inc. [now known as Agrifos Fertilizer LLC], as buyer ("Agrifos"), seeks a declaration that (a) a bona fide event of *force majeure* occurred; (b) Agrifos validly cancelled the Contract pursuant to its terms; (c) no amounts are due and owing to the seller of the cargo, Transammonia, Inc. ("Transammonia"), either for the cargo or for demurrage or incidental expenses or damages; and (d) Agrifos is entitled to recover damages, interest, attorneys' and arbitrators' fees and costs. Transammonia, as seller, claims that Agrifos had no right to cancel the Contract; had no valid excuse for non-performance; and is obligated to pay the remaining amount due for the cargo and all demurrage for the BOW HERON. Thus, Transammonia counter-claims for (1) the remaining amount due for the cargo; (2) the incidental expenses incurred prior to entering into a provisional "without prejudice" agreement with Agrifos in October, 2008, under which Agrifos accepted the cargo and agreed to pay 50% of the price of the cargo under the Contract; (3) all demurrage paid by Transamonnia to Owners of the BOW HERON; and (4) interest and attorneys' and arbitrators' fees and costs.

Proceedings

Agrifos commenced these proceedings by appointing John F. Ring as its arbitrator and Transammonia responded with the appointment of Louis P. Sheinbaum. Messrs. Ring and Sheinbaum appointed David W. Martowski as chairman of the Panel. The Panel made several interlocutory rulings with respect to the parties' requests for discovery and held evidentiary hearings in New York City at which several fact and expert witnesses testified. The parties submitted voluminous documentary evidence and exchanged exceptionally well-prepared pre-hearing memoranda and post-hearing main and reply briefs. Oral argument was heard on July 14, 2009 and these proceedings were formally declared closed on August 5, 2009.

The Parties

Agrifos is a privately owned producer of phosphate fertilizers located in Pasadena, Texas on the Houston Ship Channel. Agrifos manufactures sulfuric acid, phosphoric acid, granular fertilizer, monoammonium phosphate (MAP) and diammonium phosphate (DAP). Agrifos is both a manufacturer and purchaser of sulfuric acid, as it cannot rely solely on its own sulfuric acid production to satisfy all of its manufacturing requirements and supply obligations, and regularly contracts with Transammonia and other suppliers to acquire sulfuric acid in bulk. Transammonia is an international merchandising and trading company headquartered in New York (with its main U.S. trading offices in Tampa). Transammonia markets, trades, distributes and transports fertilizer materials, liquefied petroleum gas, petrochemicals, methanol, crude oil and oil products.

Background

During the month of July, 2008, Transammonia sold two parcels of sulfuric acid to Agrifos that were to be transported on the BOW HERON and HOLMEN from Sweden and India, respectively, for delivery to Agrifos' Pasadena plant in October, 2008. A timeline summarizing the key events that followed is attached as Appendix A. One parcel (HOLMEN) was the third shipment under the first TA contract entered into in February, 2008. The other parcel (BOW HERON) was sold under the second TA contract of July, 2008.

Thus, on July 11, 2008 the parties entered into the above BOW HERON CFR Contract under which Agrifos agreed to purchase from Transammonia 10,000 mt "+/-5% in Seller's option" of sulfuric acid in bulk at $490 per ton. On July 17th Agrifos accepted Transammonia's nomination of the "M/T BOW CENTURY or Owner's substitution". On July 18th Transammonia nominated the same vessel to its supplier, Chem Trans Trading AG ("Chem Trans") to lift a total of 25,000 mt of sulfuric acid in Ronnskar, Sweden, including the parcel sold to Agrifos. On July 21st Transammonia confirmed a fixture with the vessel owner, Odfjell Tankers AS ("Oldfjell") to lift the cargo, and on September 3rd notified Agrifos and Chem Trans of the substitution of the BOW HERON as the performing vessel ("Vessel").

On July 16th Transammonia nominated and Agrifos accepted the "STOLT NANAMI or Owner's substitution" to deliver a cargo of 12,000 mt of sulfuric acid "+/- 10%" at a

price of $265 per ton. The fixture with Stolt was to lift a total of 18,000 metric tons, plus or minus 5%, of sulfuric acid. Owner later substituted the HOLMEN for this lifting.

On September 13th Hurricane Ike struck the Texas coast with wind gusts reported at upwards of 95 knots and tide surges of roughly 10 to 15 feet, damaging Agrifos' plant and disrupting its operations.

On September 17th the BOW HERON gave an ETA of September 29th for loading at Ronnskar and an ETA (basis Beaumont, Texas, one of her US Gulf discharging ports), of October 21-23rd. On September 17th the HOLMEN was waiting to load her cargo at Dahej, India and was scheduled to berth for loading the next day, with an expected ETA at Pasadena of October 25th.

On September 18th Agrifos declared *force majeure* and cancelled the BOW HERON cargo, stating:

> Reference is made to that certain CFR Contract (the "CFR Contract") IS 080236 between Agrifos Fertilzer Inc. and Transammonia, Inc. and except as otherwise expressly provided herein, all capitalized terms used herein shall have the meaning set forth for such terms in the CFR Contract.
>
> Pursuant to Section 11 of the CFR Contract, notice is hereby given of the occurrence of a force majeure event at the Agrifos facility due to the impact of Hurricane Ike in the greater Houston area.
>
> The major impacts of the storm on the Agrifos facility include:
>
> – Destruction of major roofing and siding elements of all dry warehouses:

- Flood and rain damage to the majority of our existing inventory of rock and finished product;

- Flooding of electrical distribution systems;

- Significant numbers of motors and pumps inundated by seawater and requiring rehabilitation, basically in all units of the plant;

- Numerous buildings completely flooded to the height of the ground floor, including our main spare part warehouse and maintenance shops;

- Significant general flooding and debris affecting rail tracks etc.

These circumstances suggests [sic] that plant is likely to be idled for a prolonged period of time. Moreover, production is likely to ramp up over time with individual operating units coming back on line at various times. Thus, the plant is unlikely to be operating at capacities requiring quantities of sulfuric acid over and above that which the plant produces in the sulfuric acid unit and the quantity aboard the MV Holman [sic] for the foreseeable future.

Accordingly, Agrifos hereby cancels the CFR Contract.

Agrifos did not give any notice or declaration of *force majeure* or cancellation with

respect to the HOLMEN cargo

On September 19th Transammonia responded:

1. First, your notice is not timely under Clause 11(b), which provides that "the party claiming force majeure shall notify the other party within two Tampa business days after the claiming party has notice thereof ..."

2. Second, based on your letter, it seems clear that there is no true event of force majeure. You state that you will be able to receive the MT Holmen cargo. Evidently, there is nothing wrong with your discharge facilities that would prevent you from also receiving the cargo from the Bow Heron. Your preference, apparently for economic reasons, to use your own sulfuric acid production rather than the Bow Heron cargo is not an event of force majeure and does not relieve you of your contractual obligations to receive the cargo.

3. Third, even if this were a force majeure event and even if you had given timely notice thereof, you would not be entitled, under Clause 11, to cancel the contract. In fact, you have no such right. As you know, we have chartered a vessel which will shortly be loading this product. Under Clause 11(b), you

> would be obligated to use your best efforts to minimize any possible waiting time and/or damages and/or costs of such event. Under clause 11(f), even a true event of force majeure would not relieve you of any obligation to pay for this product or to pay demurrage or detention for the vessels.
>
> We sympathize with Agrifos for the damage suffered to some of its facilities at Pasadena. However, we cannot accept Agrifos using those problems as pretext for canceling the Bow Heron cargo and replacing it with its own production. Your purported cancellation constitutes a repudiation of our contract. We urge you to promptly revoke that repudiation and to confirm that you will receive and pay for the cargo. We reserve all rights.

The HOLMEN loaded at Dahej on September 17 and/or 18 and departed. The BOW HERON loaded at Ronnskar on September 29 and/or 30 and departed.

Agrifos declined to withdraw its cancellation. Transammonia explored the possibility of selling or storing the BOW HERON's cargo with a number of potential receivers in North America, including discussions with Norfalco LLC for discharge at Belledune, New Brunswick. Transammonia instructed the BOW HERON to standby and remain drifting between October 13-16th at her deviation point at sea for Belledune, New Brunswick and the US Gulf to await further instructions. Transammonia's efforts proved unsuccessful and on October 9th Agrifos demanded an expedited arbitration hearing, ultimately contending that it had no storage capacity to receive its portion of the BOW HERON's cargo at Pasadena after accepting and discharging/receiving its portion of the HOLMEN's cargo.

Agrifos's October 9 demand for arbitration stated in part:

> . . . Agrifos will be in no position to receive the vessel or its cargo on October 23rd, as its wharf and property were badly damaged during Hurricane Ike, it has no capacity to discharge the sulfuric acid loaded on the M/V BOW HERON, and its plant operations are only now restarting.

Discussions followed and on October 16th the parties entered into an agreement (without prejudice to their rights in arbitration) whereby Agrifos agreed to accept the cargo onboard the BOW HERON and further agreed to pay a provisional price of $250 per metric ton or a total of about $2.5 million. Transammonia also agreed to pay in the first instance, (without prejudice to seeking indemnity for same) demurrage incurred on the second of the two vessels to arrive at Pasadena (which turned out to be the BOW HERON – the opposite of what was earlier anticipated). The parties ultimately memorialized these terms, in a "Without Prejudice Agreement" signed on January 14, 2009.

The HOLMEN arrived at Pasadena on October 29th and completed discharging on November 19th (with Agrifos paying demurrage for the HOLMEN). The BOW HERON arrived at Pasadena on November 15th and completed discharging on December 30th. [1]

Agrifos filed insurance claims exceeding $50 million for damage to its finished goods inventory, property damage and business interruption arising from Hurricane Ike.

The parties were unable to resolve their differences and these proceedings followed.

[1] The demurrage rate on the HOLMEN was $23,000 per day. The rate on the BOW HERON was $28,000 per day.

The Contract

The CFR Contract dated July 11, 2008 between the parties, covering the BOW HERON cargo, provided in pertinent part:

5. Quantity 10,000 metric tons +/- 5% in Seller's option

* * * *

7. Shipment September/October 2008

8. Destination Pasadena, TX

* * * *

10. Price US $490.00 per metric ton * * * CFR (INCOTERMS 2000), one safe port, one safe berth, Pasadena, TX.

* * * *

12. Payment Payment for cargo shall be due at least one week prior to delivery, buyer shall either: (1) open an operative L/C acceptable to Seller, or (2) prepay one half the total charges with payment for the balance due at least twenty four hours prior to discharge. Payment for cargo shall be made on the Bill of Lading quantity to the Seller's designated account against photocopies or copies of one original or a copy of the B/L, of the Sellers' invoice and of customary shipping documents, in US dollars, without discount, deduction, withholding or setoff, by telegraphic transfer ordered on or before the due date in immediately available funds, for credit to the Seller's bank account latest on the maturity date. The Seller shall have the option, in lieu of presenting bills of lading or other shipping documents, to present for payment a letter of indemnity for missing documents, in the Seller's customary format. If payment is due on a day on which the Seller's designated bank is not open for business, payment to be made on the preceding banking day. If, in the Seller's judgment, the Buyer's credit shall appear impaired at any time, the Seller may alter credit terms or require satisfactory assurance of payment or prepayment.

13. Vessel TBD By Seller

14. Discharge rate and demurrage * * * Asabatank voy (sic) C/P to apply.

"Transammonia General Terms and Conditions (CFR and CIF Sales)" annexed to the CFR Contract (collectively "Contract"), provided in pertinent part:

1. **INCOTERMS**: Except to the extent inconsistent herewith, this contract shall be governed by the provisions of the INCOTERMS 2000 for CFR-CIF Sales.

2. **Title and Risk**: Title and Risk of loss passes from the Seller to the Buyer progressively as the product passes the outer edge of the permanent intake flange of the vessel's load manifold at the load part.

3. **Delivery**: The Seller shall be deemed to have complied with its obligations regarding delivery of any product when the product has passed the performing vessel's permanent intake flange of the load manifold at the load port, notwithstanding that the Seller has retained a Bill of Lading or other document of title to the product, for the purpose of securing payment of the price or otherwise, which the Seller shall have the right to do.

* * * *

7. **Shipping Conditions**:
(a) Unless inconsistent herewith, the provisions of the ASBATANKVOY Charter Party form shall govern including, without limitation, the calculations of laydays and laytime, giving notice of readiness, computation of demurrage, provision of safe berth and shifting, pumping, provision of hoses, and payment of dues, taxes and wharfage, etc. The provisions of ASBATANKVOY are incorporated in this contract by reference, with the term "Owner" in ASBATANKVOY being deemed to refer to the Seller and the term "Charterer" being deemed to refer to the Buyer.

* * * *

(e) The Buyer shall pay demurrage per running hour and pro rata for a part thereof for all time that discharging and used laytime exceeds the allowed laytime specified above. Payment shall be made by telegraphic transfer to the Seller's designated account without discount latest 30 days from receipt of the Seller's invoice by fax.

* * * *

11. **Force Majeure**
(a) No failure or omission to carry out or to observe any of the terms, provisions or conditions of this agreement shall give rise to any claim by one party hereto against the other, or be deemed to be a breach of this agreement if the same shall be caused by, or arise out of, war, hostilities, sabotage, blockade, revolution, or disorder; expropriation or nationalization; cutoff of gas supplies to facilities for the production of ammonia; disruption of rail or pipeline transportation of product to the loadport, and consequent delays; breakdown or damage to storage, pipeline or loading **or unloading** facilities, prevention of

loading **or unloading** by terminal or port authorities; embargoes or export restrictions, acts of God, explosion, fire, frost. earthquake, storm, lightning, tide, tidal wave or perils of the sea; accidents of navigation or breakdown of or injury to vessels; accidents to or closing of harbors, docks, straits, canals or other assistances to or adjuncts of shipping or navigation; strikes, lockouts or other labor disturbances; or any other events, matter, or thing whatever occurring, of the same class or kind as those above set forth, which shall not be reasonably within the control of the party affected thereby and which by due diligence such party is unable to prevent or overcome (herein called "force majeure"). When the term "party" as used in this paragraph 11 applies to the Seller, it shall also include the Seller's suppliers of product if identified by Seller to Buyer in accordance with Clause 11(c).

(b) The party claiming force majeure shall notify the other party within 2 Tampa business days after the claiming party has notice thereof, and both parties will then jointly use their best efforts to minimize any possible resulting waiting time and/or damages and/or costs.

(c) The Buyer acknowledges that the Seller is not a producer of the product. If the Seller has notified the Buyer of the identity of its supplier, any force majeure conditions affecting the Seller's supplier shall constitute a force majeure condition affecting the Seller.

(d) If force majeure affects the Seller, the Seller may, at its option, exercised by notice to the Buyer within a reasonable time, either: (i) cancel from this contract any quantities which have not been delivered due to force majeure, without affecting the balance of this contract, or (ii) deliver such quantities in one or more lots, after the Seller deems the effect of force majeure to have ended, on the same terms as set forth in this contract. If, by reason of force majeure, there is a curtailment of or interference with the availability of any product from the source of supply nominated by the Seller for a specific shipment, Seller will be free to withhold, reduce or suspend deliveries hereunder to such extent as Sellers consider reasonable and equitable in all the circumstances and Sellers will not be required to acquire by purchase or otherwise additional quantities from other suppliers.

(e) Notwithstanding the foregoing provisions of this clause, force majeure shall not include occurrences arising out of the acts of any government or instrumentality which owns, directly or indirectly, any interest in the party claiming force majeure.

(f) Notwithstanding the foregoing provisions of this clause, the Buyer shall not be relieved of any obligation to make payment for product that has been delivered in accordance with Clause 3 or to pay demurrage or detention with respect to vessels chartered and/or loaded before the notification of the force majeure under this clause for a contractual shipment.

(g) The foregoing provisions of this Clause 11 shall have no application to the running of laytime or the Buyer's liability for demurrage, which are governed exclusively by Clause 7 and the provisions incorporated therein.

(h) Should an event of force majeure prevent loading of the performing vessel, the Seller shall, if the Buyer requests, use its best efforts to supply a sulfuric acid cargo to the Buyer from an alternate origin, on the same or another vessel, as soon as practicable in order to arrive at the discharge port as close as possible to the original estimated arrival dates. The price of such product would be determined in accordance with the particular conditions hereof and any extra costs incurred, compared to the originally scheduled shipment, will be for Buyer's account and added to the price agreed or calculated as per the particular conditions.

(i) Should an event of force majeure occur after the fixture of a performing vessel but prior to loading of the vessel from the nominated load port, the Seller shall be entitled to cancel the Charter Party of the nominated performing vessel, and any damages or other costs of doing so shall be borne by the Buyer. Should an event of force majeure occur after the performing vessel has lifted the Buyer's cargo, the Seller shall have the option, in order to mitigate waiting time and damages, to discharge the cargo at a port or ports other than the port mentioned in the Contract, and will inform the Buyer accordingly. The price of the cargo shall, in any event, be increased or decreased by any increase or decrease in freight or expenses incurred by the Seller in connection with the voyage, including, but not limited to demurrage, damages for detention, taxes or dues, minus any costs saved.

12. **Main Shipping Routes Closure**:
Should any major shipping route such as but not limited to * * * be closed or declared an excluded zone by the vessel's insurance underwriters and such closure or exclusion interferes with the delivery or transportation of the product under this Contract, then the Seller shall have the following options:
(a) The Seller may cancel the sale of the product by notice to the Buyer, and upon such cancellation, the Seller shall have no further liability to the Buyer.

* * * *

14. **Default**: If the Buyer fails to timely make payment or open a letter of credit in a form satisfactory to the Seller, or fails to perform of (sic) any of its obligations under this contract or any other contract between the Buyer and the Seller or any affiliate of the Seller, or if bankruptcy, reorganization, liquidation or receivership proceedings are instituted by or against the Buyer or any

affiliated company, or if the Seller deems the Buyer to be insolvent, it shall constitute an event of default under this contract, whereupon the Seller may, in its absolute discretion, and without prejudice to any other rights it may have in law or equity, take one of more of the following actions: terminate this contract upon written notice to the Buyer without liability of any kind; cancel any quantities which have not been delivered; treat the default as a repudiatory breach of contract and sue for damages. All amounts that are not paid when due shall automatically bear interest, at the rate of twelve per cent per annum, for the entire period that the amounts remain unpaid. Such interest shall be due and payable on demand, and any interest not paid when due shall be added to the overdue sum and itself bear interest accordingly.

* * * *

17. **Arbitration and Governing Law**:
(a) This contract shall be governed by the law of the state of New York. The United Nations Convention on the the International Sale of Goods shall not apply. Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or validity thereof, shall be referred to the arbitration of three persons in New York, one to be appointed by the Seller, one to be appointed buy the Buyer and the third by the two so chosen, who shall be chairman. The language of the arbitration shall be English. Except as provided herein, the terms of the Society of Maritime Arbitrators (the 'SMA') shall apply. The second arbitrator must be appointed within 20 calendar days of the appointment of the first arbitrator, failing which the first appointed arbitrator shall become the sole arbitrator. If the arbitrators appointed by the parties are unable to agree on a third arbitrator within twenty calendar days, the third arbitrator shall be appointed by the President of the SMA upon the application of either party. The award shall be final and the parties consent to the jurisdiction of any court for the recognition and enforcement thereof. The parties waive any defense based upon sovereign immunity, lack of jurisdiction or forum non conveniens.

* * * *

[NOTE: Language appearing in bold print was the subject of negotiations between the parties, ultimately agreed upon and added (by hand) to the General Terms and Conditions.]

The Parties' Contentions

The parties' main contentions may be briefly summarized as follows:

Agrifos contends that the damage to its Pasadena plant caused by Hurricane Ike constituted a bona fide *force majeure* event under the Contract; and it validly cancelled the Contract which was the most effective and required method of mitigating damages under the Contract. Plant operations at the time of the arrival and discharging of both the HOLMEN and BOW HERON were significantly limited by reason of Hurricane Ike and certainly had not returned to normal. As a result, no amounts are due and owing to Transammonia for demurrage, cargo, or incidental expenses/damages with respect to the BOW HERON. Moreover, Agrifos is entitled to either 1) $1.37 million, i.e., the difference between the provisional price/amount Agrifos paid to Transammonia ($2.5 million) without prejudice for the cargo onboard the BOW HERON, and the price paid by Transammonia to its supplier ($680,000) plus freight ($460,000); or 2) $1.0-1.2 million, i.e., the difference between the cost and freight paid by Agrifos for said cargo and the market price of sulfuric acid ($130-150 per ton) as of the date of the HOLMEN's discharge at Agrifos' plant - plus interest, attorneys' and arbitrators' fees and costs.

More particularly and/or in addition, Agrifos contends:

1. Hurricane Ike was a *force majeure* event.

2. The language of Clause 11(a) of the Contract that:

> (a) No failure or omission to carry out or to observe any of the terms, provisions or conditions of this agreement shall give rise to any claim by one party hereto against the other, or be deemed to be a breach of this agreement if the same shall be caused by, or arise out of . . . prevention of . . . loading or unloading [or] . . . storm .... which shall not be reasonably within the control of the party affected thereby and which by due diligence such party is unable to prevent or overcome [herein called "force majeure".]...

is tantamount to the Contract containing an express right of cancellation on the part of a buyer/Agrifos affected by a *force majeure event.*

3. Under Clause 11(b) which provided:

> (b) The party claiming force majeure shall notify the other party within 2 Tampa business days after the claiming party has notice thereof, and both parties will then jointly use their best efforts to minimize any possible resulting waiting time and/or damages and/or costs.

Transammonia was obligated to use its best efforts to mitigate damages and costs, and the best way to mitigate damages was cancellation of the Contract. Accordingly, Transammonia was obligated to accept Agrifos' cancellation because Agrifos had the express right to cancel; and Transammonia's refusal to accept the cancellation, and its loading of the BOW HERON after receiving Agrifos' declaration and notice of *force majeure* and cancellation, were failures to mitigate damages under Clause 11(b), in breach of the Contract. By reason of Transammonia's breach of the Contract, Agrifos was relieved of any duty or obligation to pay for the cargo or indemnify Transammonia for any demurrage payment to the BOW HERON, generally and/or under Clauses 11(f) and (g) [2]

4. As quoted above, Clause 11(f) of the Contract provided:

> (f) Notwithstanding the foregoing provisions of this clause, the Buyer shall not be relieved of any obligation to make payment

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[2] As quoted above, Clause 11(g) provided:
(g) The foregoing provisions of this Clause 11 shall have no application to the running of laytime or the Buyer's liability for demurrage, which are governed exclusively by Clause 7 and the provisions incorporated therein.

(Clause 7, inter alia, made applicable the provisions of the ASBATANKVOY Charter Party form.)

> for product that has been delivered in accordance with Clause 3 or to pay demurrage or detention with respect to vessels chartered and/or loaded before notification of the force majeure under this clause for a contractual shipment. [[3]]

Agrifos contends that the concluding language of this clause " . . . before the notification of the force majeure under this clause . . ." relates to the early language of the clause – " . . .the Buyer shall not be relieved of any obligation to make payment for the product that has been delivered in accordance with Clause 3 . . ." as well as the language "shall not be relieved of any obligation . . . to pay demurrage or detention with respect to vessels chartered and/or loaded .." Thus, there is no obligation to pay for the cargo because a proper, valid and enforceable declaration of *force majeure* was made before the BOW HERON was improperly loaded. Further, no unilateral, improper rejection or disregard of the notice of cancellation or declaration of *force majeure* by Transammonia, and subsequent loading of the Vessel, can or should result in Transammonia being entitled to payment for the cargo under 11(f) because the cargo was allegedly "delivered".

5. Agrifos further contends the cause of the buildup of sulfuric acid in Agrifos' shore tanks, and Agrifos not having storage capacity for the BOW HERON cargo when the vessel arrived, was Hurricane Ike and the damage it caused to the Agrifos facility at Pasadena, Texas.

[3] Under Clause 3 delivery is deemed to have taken place ". . . when the product has passed the performing vessel's permanent intake flange of the load manifold at the load port . . .".

6. All things considered, Agrifos acted reasonably and with due diligence after Hurricane Ike with respect to the operation of its plants and Pasadena facility to provide storage space for the BOW HERON cargo, to mitigate damages, and to prevent or overcome the lack of storage space at its Pasadena faculty for the BOW HERON cargo under Clauses 11(a) and (b) of the Contract. It specifically did so by running its plants and facility as best it could, and by directing its efforts to achieving better and normal levels of fertilizer production – which would result in better and normal reduction of sulfuric acid inventories.

7. Agrifos did not cancel the BOW HERON contract, and did not decide against cancelling the HOLMEN contract, for economic reasons or the high price of the BOW HERON contract ($490 per mt) as compared to the HOLMEN contract ($265 per mt). It did not declare *force majeure* with respect to the HOLMEN cargo because by the time it had evaluated the extent of the damage to its facility and knew enough to make such a declaration, it found out that the HOLMEN had completed loading. Therefore, under the HOLMEN contract, the cargo had been "delivered"; Agrifos understood it was stuck with the HOLMEN cargo and had to pay for same; and further believed or understood, rightly or wrongly, that it could not declare *force majeure* relating to the HOLMEN cargo because it was obligated to pay for it.

Transammonia contends that although there was flooding and damage to some of Agrifos' facilities as a result of Ike, Agrifos' sulfuric acid discharge and storage facilities were not damaged. Nor was there major mechanical damage to its fertilizer manufacturing plant. Yet, on September 18, 2008, long before any performance on Agrifos' part was due, and even though Agrifos then expected to and did restart its operating units in early October, Agrifos not only declared *force majeur* under the BOW HERON Contract, but unilaterally cancelled that contract without any right to do so. Agrifos' cancellation breached its obligations and constituted an anticipatory repudiation of the Contract. Therefore, Transammonia is entitled to recover the full amount of the Contract, including:

(a) $2,392,950 – the unpaid balance of the Contract price for Agrifos' cargo carried by the BOW HERON; (b) $1,258,444.44 – the demurrage Transammonia paid on the BOW HERON; (c) $67,654.17 – the incidental damages incurred by Transammonia (waiting time at the above deviation point) attempting to mitigate Agrifos' anticipatory repudiation and breach of contract, plus interest at the 12% per annum Contract rate, attorneys' and arbitrators' fees and costs.

More particularly, and/or in addition, Transammonia contends:

1. There is no express or implied right of cancellation by the Buyer in the Contract. Further, Agrifos certainly and especially had no right to cancel the Contract, and no right to be excused from performance on September 18, 2008 (5 days after Hurricane Ike) when Agrifos gave notice of *force majeure* and unilaterally cancelled the Contract. This is supported by the absence of any language in the Contract expressly giving Buyer a right to cancel a contract on

grounds of *force majeure*. The clear and express obligation of Agrifos under Clause 11(a) was, *inter alia*, to exercise due diligence to overcome the *force majeure* event and the effects of a *force majeure* event. The obligation of both parties under Clause 11(b), after notice of *force majeure* was to use their best efforts to minimize any possible resulting waiting time; and if the parties intended to give a party the right to cancel for an event of *force majeure* in the Contract, they knew how to do it and it was clearly done – as in Clause 11(d), 11(i), 12 and 12(a).[4]

2. Transammonia had no duty or obligation under the Contract or law to accept Agrifos' notice of cancellation or declaration of *force majeure*. Cancellation was not the best or any way to mitigate damages; and the refusal of Transammonia to accept the cancellation, and Transammonia's loading of the BOW HERON, were not breaches of the Contract.

3. Because of Agrifos' anticipatory repudiation of the Contract, under applicable New York law, Transammonia had the option to (1) accept the repudiation

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[4] As above, Clause 11(d) provided:
(d) If force majeure affects the Seller, the Seller may, at its option, exercised by notice to the Buyer within a reasonable time, either (i) cancel from this contract any quantities which have not been delivered due to force majeure . . . .(emphasis added).

Clause 11(i) provided:
Should an event of force majeure occur after the fixture of a performing vessel but prior to loading of the vessel from the nominated load port, the Seller shall be entitled to cancel the Charter Party of the nominated performing vessel, and any damages or other costs of doing so shall be borne by the Buyer . . . (emphasis added).

And Clause 12 and 12(a) provided;
12. Main Shipping Routes Closure:
Should any major shipping route . . . be closed or declared an excluded zone by the vessel's insurance underwriters and such closure or exclusion interferes with the delivery or transportation of the product under this Contract, then the Seller shall have the following options: (a) The Seller may cancel the sale of the product by notice to the Buyer , and upon such cancellation, the Seller shall have no further liability to the Buyer. (emphasis added).

and cancellation, consider the Contract at an end, and proceed against Agrifos by suit for damages, or (2) reject the cancellation and consider the Contract to still be valid and in place, perform, and await the designated time for performance by the cancelling party before bringing suit or making formal claim in arbitration. Transammonia chose the latter course of action.

4. Transammonia's efforts to market the BOW HERON cargo after Agrifos' improper notice of cancellation were reasonable and in accordance with its obligations to attempt to mitigate damages generally and under Clause 11(b).

5. Agrifos improperly cancelled and declared *force majeure* with respect to the $490 per ton BOW HERON cargo hours after the HOLMEN completed loading, and did not cancel or declare *force majeure* with respect to the $265 per ton HOLMEN cargo, for economic reasons and to avoid paying for the expensive BOW HERON Contract. Generally, the obligation to pay for a cargo does not prevent a buyer from declaring *force majeure*; and the declaration of a *force majeure* does not avoid a buyer's obligation to pay for a cargo. The Contract did not provide otherwise.

6. To the contrary, Clause 11(f) obligated Agrifos to pay for the BOW HERON cargo once it was loaded/"delivered" under Clause 3, whether or not there was a *force majeure* or a declaration of a *force majeure*, because the concluding language of Clause 11(f), to wit.;

> ...before notification of the force majeure under this clause . .

relates only to the language immediately preceding it, to wit,

> . . . to vessels chartered and/or loaded ...

Said concluding language does not relate to:

> . . . any obligation to make payment for the product that has been delivered in accordance with Clause 3 ...

7. Agrifos' lack of sufficient storage space to receive the BOW HERON cargo, and the buildup of sulfuric acid in its shore tanks, was not caused by Hurricane Ike. It was caused by Agrifos' lack of due diligence, prior to the arrival of the BOW HERON, to take measures to prevent and overcome the effects of Hurricane Ike. This lack of due diligence consisted of Agrifos not giving any thought, and not making any effort, to increasing and utilizing the storage space it could easily have made available and used to receive the BOW HERON cargo; and not giving any thought, and not making any effort, to reducing, preventing and overcoming the amount and/or buildup of sulfuric acid in its sulfuric acid inventory. More specifically:

   (a) Agrifos failed to make available for sulfuric acid storage, its empty tank No. 567 (with a 5,000 ton capacity) by easily completing its project to make it available by connecting its intake and discharge lines to its sulfuric acid distribution system, and installing a pump – which project Agrifos agreed/admitted had "fallen through the cracks" between September of 2008 and the arrival of the BOW HERON;

   (b) Agrifos failed to obtain and use, for a few days, a readily available temporary boiler to provide steam/heat for its fertilizer production, and to shut down its sulfuric acid production plant for the few days (which production normally provided steam/heat for its fertilizer production process), which would have substantially reduced sulfuric acid inventories by reason of the fertilizer production process continuing to use up sulfuric acid in the manufacture of phosphoric acid. Agrifos's use of such a temporary boiler, and shutdown of its sulfuric acid production, for 3 days in December of 2008 (for maintenance reasons), resulted in a reduction of sulfuric acid shore tank inventories of about 1,800 tons per day;

(c) Agrifos failed to at all utilize an empty shore tank (No. 101) with a capacity of 2,000 tons that could have been used to receive BOW HERON cargo;

(d) Agrifos failed to use a barge it had, with a capacity of 1,500 tons, that could have been used to receive BOW HERON cargo; and

(e) Agrifos failed to reduce its daily production of about 1,200 tons of sulfuric acid to about 1,000 tons per day; and failed to intermittently shut down the sulfuric acid plant for short periods of time to cause significant reductions in sulfuric acid inventories.

8. Agrifos' lack of due diligence deprived it of any valid excuse for non-performance under Clause 11 of the Contract.

Discussion and Decision

While a great deal of testimony and documentary evidence have been presented on whether a *force majeure* event or its effects existed at Agrifos' Pasadena plant and/or excused performance at the times in question, and whether Agrifos exercised due diligence to prevent or overcome the event or its effects, the threshold question for determination by this Panel is whether Clause 11 of the Contract provided Agrifos with the right to cancel the Contract on the grounds of *force majeure*. We unanimously find that it did not.

Cancellation of a contract is an extreme measure - for there is no more serious a step a contracting party might take, and our courts have rightfully placed the burden on the party cancelling a contract to prove by a preponderance of evidence that it was entitled to do so.

In this case Agrifos has the burden of proving that it was entitled to cancel the Contract for the BOW HERON's cargo on September 18th within the terms of Clause 11. Agrifos contends that a declaration of *force majeure* due to events beyond a party's control excuses non-performance and that it was permitted to cancel the contract unless the contract provided otherwise. In doing so, it primarily relies on *Harriscom Svenska, AB v. Harris Corporation et al.* [5], *PT Kaltim Prima Coal v. AES Barbers Point, Inc.* [6], *Toyomenka Pacific Petroleum, Inc. v. Hess Oil Virgin Islands Corp.* [7]; *Gulf Oil Corp. v. Federal Energy Regulatory Commission.* [8]; and N.Y.U.C.C. Sec. 2-615. We find Agrifos' reliance misplaced since while these decisions do indeed deal with *force majeure* situations and/or the interpretation of *force majeure* clauses, none grant the extreme remedy of cancellation to a party who is able to simply prove a *force majeure* event without more; and none of these cases support such a right for Agrifos under the Contract and *force majeure* provisions and facts herein. N.Y. U.C.C. Section 2-615(a) applies only to delay in delivery or non-delivery in whole or in part by a *Seller*, and as a commentator has observed, "The purpose of Section 2-615 was to provide a statutory basis for a claim of relief from burdensome contracts * ** where the parties had not thought to provide their own force majeure clause". [9]

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[5] 3 F.3d 576 (2d Cir. 1993).
[6] 180 F.Supp. 2d 475 (S.D.N.Y. 2001).
[7] 771 F.Supp. 63 (S.D.N.Y. 1991),
[8] 706 F.2d 444 (3d Cir. 1983).
[9] P.J.M. Declerq, "Modern Analysis of the Legal Effect of Force Majeur Clauses in Situations of Commercial Impracticability", 15. J.L. & Com. 213, 224 (1995).

What is crystal clear from the authorities cited by both parties is that each dispute must turn on the parties' express contractual undertakings – or lack thereof – read against the surrounding facts and circumstances. This brings us to Clause 11 of the Contract.

The language and specific obligations of Clause 11, and the time frame for the performance of these obligations compel us to find that the Contract did not provide Agrifos with the right to cancel the Contract as it did. Firstly, the language does *not* contain an express right to cancel. We disagree with Agrifos' contention that the opening language of Clause 11(a) is tantamount to providing an express right of cancellation. Secondly, Clause 11(a) continues by obligating the allegedly affected party to act (after the occurrence and impact of a *force majeure* event and its effects) to control, prevent or overcome same. Thirdly, Clause 11(b) obligates both parties to act down the time line to use their best efforts to minimize and mitigate any possible resulting waiting time (presumably relating to vessels and/or performance) and/or damages and/or costs. Fourthly, the express "Seller may . . . cancel from this contract" language of 11(d); "shall be entitled to cancel" language of 11(i); and "(t)he Seller may cancel" language of 12(a) shows that when the Contract intends to grant a right of cancellation to a party, it clearly says so.

The Panel unanimously finds that Agrifos was not entitled to cancel the Contract and its actions in doing so were wrongful. We therefore also find that Transammonia was not obligated as a matter of contract, or otherwise, to accept Agrifos' notice of cancellation

or cancel the Contract. [10] Transammonia's refusal to do so, and the loading of the BOW HERON, did not constitute any breach of contract; and Transammonia's attempts to find a buyer prior to the "without prejudice" agreement of October 16, 2008 were reasonable and in accordance with its mitigation obligations under Clause 11(b).

Due Diligence

As indicated above, much of the evidence presented went to the question of whether Agrifos exercised due diligence to make room at its Pasadena facility to receive the BOW HERON's cargo. This is understandable given the terms of Clause 11(a) [11] and the law in the area relating to burdens.

> The burden of demonstrating force majeure is on the party seeking to have its performance excused, . . . and the non-performing party must demonstrate its efforts to perform its contractual duties despite the occurrence of the event that its claims constituted force majeure. *Phillips Puerto Rico Core, Inc. v. Tradax Petroleum Ltd.*, 782 F.2d 314, 319 (2d Cir. 1985).

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[10] Little need be said of Agrifos' strained (if not strange) suggestion that the best way to mitigate the "damages" or costs (used in 11(b) as referring generally to loss rather than legally recoverable damages) was for the par*ties* to cancel the Contract, when it would have meant that Transammonia would thereby forego and sustain a loss of millions of dollars in profit and damages (whereas Agrifos would reap the benefit of shedding a $490 per ton contract at a time when the market for sulfuric acid was about $200 a ton). It should have been clear then, as it is now, that the better way to mitigate damages or costs flowing from Hurricane Ike with reference to Agrifos' storage capacity and the BOW HERON contract (or the HOLMEN contract) was to make room in its storage tanks for the receipt of the cargo in question at arrival.

[11] We will not here repeat the language of the due diligence requirements of Clause 11(a). However, it is interesting to note that the due diligence condition or requirement for Agrifos to be entitled to be excused from performance under the Clause for *force majeure*, is highlighted or reinforced by the fact that the Clause physically places and gives us what the phrase "*force majeure*" means, i.e., "(herein called '*force majeure*')" – *after* setting forth the due diligence obligations of the party "affected". In other words, the very structure of the Clause, and the placement of "(herein . . .)" in the Clause, is consistent with the overall substantive meaning of the Clause that there is only a true or valid *force majeure* claim, entitling a party to an excuse for nonperformance, if due diligence has been exercised by that party to overcome, inter alia, the effects of a claimed *force majeure* event.

In *Gulf Oil Corp. v. Federal Energy Regulatory Commission*, 706 F.2d 444 (3d Cir. 1983) , the contract and *force majeure* provision included

> . . . said term (force majeure) shall not mean or include any cause which by the exercise of due diligence the party claiming force majeure is able to overcome ... (448)

The Court stated:

> Specifically, we conclude that in order to use *force majeure* events to excuse nonperformance, Gulf must show that it tried to overcome the results of the events' occurrences by doing everything within its control to prevent or minimize the event's occurrence and its effects. (454)
>
> [and]
>
> We think that Gulf must show that it exercised due diligence to overcome the effects of the specific *force majeure* events. Gulf must show that it tried to limit the problem and was not able and that it did everything in its control to prevent or minimize its happening. (455)

Thus, it was Agrifos' burden to prove by a preponderance of the evidence that it exercised due diligence to make room for the BOW HERON cargo to be received when the Vessel arrived. In other words, Agrifos had to prove that it did "everything in its control to prevent or to minimize the events' occurrence and its effects" (*Gulf Oil)* i.e., to make ready, increase and utilize sulfuric acid storage space at its facility, and to prevent and overcome the amount and buildup of sulfuric acid in its tanks. We find that Agrifos failed to sustain this burden.

The record does establish that Hurricane Ike did cause major damage to portions of Agrifos' facility and property, and that its efforts to get its plant back into operation, much to its credit, were huge (even "Herculean" and "heroic" as stated by Transammonia), and were largely successful. However, the record also establishes that

it was clear very early that there was no significant problem with its berthing facility; its sulfuric acid discharge and storage facilities were undamaged; and there was not major mechanical damage to its fertilizer or sulfuric acid production plants.

Moreover, the record supports, and we find, that Agrifos did not focus on trying to make space available for the HOLMEN or BOW HERON cargoes to any significant extent. [12] It gave little if any thought, and made little if any effort, to make ready, increase and utilize sulfuric acid storage space at its facility, and to prevent or overcome the amount and buildup of sulfuric acid in its tanks. Agrifos' answer that it felt the best way to reduce sulfuric acid inventory was to get the plants up to functioning at normal capacity, falls very short of (a) justifying its lack of focus and action; (b) satisfying its due diligence obligation and burden with respect to the specific contract before us; and (c) justifying the contractual relief Agrifos would have us award to it. [13]

Getting down to some specifics, we refer to Transammonia's contentions 7(a) - (e) set forth above. We acknowledge there were arguments presented back and forth by counsel as to the reasonableness or merit of these alleged failures to exercise due diligence, but it would make no sense to go through them and the parties' back-and-forths herein. Suffice it to say that on balance, (a) – (e) all have merit on all the

[12] It is striking that in Agrifos' declaration of *force majeure* of September 18, 2008 (quoted in full above) there is no mention whatsoever of an anticipated lack of storage capacity for cargo that was to be delivered. Rather, the main concluding paragraph of the letter cancelling the Contract and declaring *force majeure*, fairly read, says that given the plant's capacity to produce sulfuric acid, and what was to be received from the HOLMEN, Agrifos did not need the BOW HERON cargo.

[13] Interestingly and ironically enough, one of the reasons given by Agrifos for concentrating so much of its efforts on getting production up and going was that it was very concerned about fulfilling its contractual obligations.

evidence presented, the strength and/or significance of which is somewhat or slightly less, moving from (a) to (e), with (a) and (b) having major strength and significance. Moreover, all of them combined, and the overall record, convinces us that if several of them had been accomplished or focused on by Agrifos, the BOW HERON could have been discharged on or very shortly after her arrival. [14]

All things considered, as aforesaid, Agrifos did not sustain its due diligence burden; it failed to demonstrate and prove that it is entitled to be excused for nonperformance under Clause 11(a); and Agrifos is obligated to pay the remaining amount of

[14] The magnitude and significance of Agrifos' lack of (and indeed acknowledgement of) specific focus and effort on/in making room for the receipt of cargo after Hurricane Ike, or avoiding demurrage, is demonstrated, in part, by the following: Shore tank 567 (with a capacity of 5,000 tons) was empty when Hurricane Ike arrived and remained empty thereafter. It had formerly been a super-phosphoric acid tank, which product Agrifos had stopped producing in May 2008. Tank 567 was capable of receiving sulfuric acid, but not discharging it. Immediately following Hurricane Ike, a project to bring tank 567 on line for the storage of an additional 5,000 tons of sulfuric acid was underway, but the engineer in charge had health problems, and Agrifos acknowledged that the project "fell through the cracks" – allegedly because of a shortage of engineers and/or personnel, all the other work that had to be done, and the continuous "fires" that had to be put out. In any event, it seems clear that the amount of work and time needed to complete the project was quite small, but the project was never revisited after about October 11, 2008. The HOLMEN arrived on October 29, 2008 with her cargo of about 12,500 tons of sulfuric acid, on which day inventory records (e.g. Transammonia Ex. 105) indicate Agrifos had 15,489 tons of 98% sulfuric acid in its shore tanks (which could hold a minimum – according to Agrifos – of about 20,000 tons); and the following day there was 14,147 tons in the tanks. The HOLMEN was discharged on November 19th and 20th. The day before she was discharged, the inventory records show there was a total of 9,316 tons in her shore tanks, i.e. there was open space for about 10,684 tons in the facility's capacity of about 20,000 tons. It appears that Agrifos paid demurrage to HOLMEN in the amount of $465,000 relating to the delay in discharge until November 19th and 20th. If tank 567 had been available for storage when the HOLMEN arrived (and without considering any other space-opening actions Agrifos could have taken), the sulfuric acid storage capacity of Agrifos would have been at least 25,000 tons; and the very day after the HOLMEN's arrival there would have been open space for 10,852 tons of cargo (i.e. just slightly more than the open space available when the HOLMEN did discharge on November 19th and 20th). Thus, it appears that if just tank 567 had been available, the HOLMEN could have been discharged the day after she arrived, and a very large amount of demurrage/damages/cost/loss would have been avoided. As aforesaid, the HOLMEN arrived on October 29, 2008. By October 20, sulfuric acid inventory had been reduced to between 9,000 and 10,000 tons. However, by the time the HOLMEN arrived, Agrifos' inaction had permitted the sulfuric acid inventory to increase to about 16,000 tons and had reduced the facility's open storage space for sulfuric acid to about 4,000 tons. Finally, inventory records also indicate that Agrifos could have discharged the BOW HERON on December 16, 2008 but the Vessel was not discharged until two weeks later.

$2,392,950 for the BOW HERON cargo (regardless of which of the parties' conflicting interpretations of Clause 11(f) is correct – which issue we need not and do not decide).

Demurrage

Having decided that: Agrifos was not entitled to cancel the Contract under Clause 11; Agrifos was not to be excused from performance; and Transammonia did not breach the Contract - the Panel looks to Clause 11(g) of the General Terms and Conditions. It specifically provides that the *force majeure* clause of the Contract "shall have no application to the running of laytime or the Buyer's liability for demurrage, which are governed exclusively by Clause 7 and the provisions [of the ASBATANKVOY form] incorporated therein".

The BOW HERON tendered her Notice of Readiness at Pasadena on November 15th at 0800 and completed discharging on December 30th. Clause 14 of the BOW HERON Contract provides that laytime at her discharging port is calculated based on the bill of lading quantity of 10,500 metric tons divided by 350 metric tons per hour or a total of 30 hours. Clause 14 of the Contract and Clause 7(a) of the General Terms and Conditions, provide that laytime and demurrage are governed by the provisions of the ASBATANKVOY Charter Party form. Clause 14 of the Contract also provides that the demurrage rate shall be determined as per vessel nomination which stated a rate of $28,000 per day pro rata.

Under Clause 6 of the ASBATANKVOY form, laytime commenced to run six hours after tender of NOR – i.e. 1430 on November 15th – and continued until disconnection

of hoses at 1840 on December 31st . This amounts to a total of 46 days, 4 hours, 40 minutes, which exceeds the allowed laytime by 44 days, 22 hours and 40 minutes. Demurrage at $28,000 per day amounts to a total of $1,258,444.44. Transammonia sent its invoice to Agrifos for this amount on January 6, 2009. Agrifos failed to pay this amount when due 30 days thereafter on February 5, 2009.

Transammonia's demurrage calculation in the total amount of $1,258,444.44 is uncontested and the Panel unanimously finds that Agrifos is liable for this amount in full.

Incidental Damages

After receiving Agrifos' notice of cancellation, Transammonia unsuccessfully explored alternative possibilities of disposing of the Agrifos parcel onboard the BOW HERON as a means of mitigating its damages. Between October 9 and 16th , it had discussions with Martin, and also with Norfalco as to the possibility of delivering the parcel to Norfalco at Belledune, New Brunswick. As mentioned above, Transammonia instructed the BOW HERON to standby and drift at sea between October 13 and 16th at her deviation point for Belledune and the US Gulf. On October 16th Agrifos agreed to accept the parcel without prejudice and the BOW HERON continued on her passage to Pasadena. Shipowner Odfjell invoiced Transammonia $67,654.17 for this period and Transammonia seeks to recover this amount as incidental damages under N.Y.U.C.C. Sec. 2-710 which provides that:

> Incidental damages to an aggrieved seller include any commercially reasonable charges, expenses or commissions incurred in stopping

> delivery, in the transportation, care and custody of the goods after the buyer's breach * * * .

The Panel has held that Agrifos was not entitled to cancel the Contract, and so forth. Transammonia attempted to dispose of the Agrifos parcel onboard the BOW HERON between October 9-16th , and while its discussions with Martin and Norfalco were unsuccessful, they were conducted in good faith in hopes of mitigating its damages arising from Agrifos' anticipatory repudiation. The Panel unanimously finds that Transammonia's instructions for the BOW HERON to standby for further instructions between October 13-16 during these attempts were reasonable within the meaning of Sec. 2-710, and grants its claim for incidental damages in the amount of $67,654.17.

Fees and Costs

The Panel has considered all of the facts and circumstances, the nature and value of the claims and counterclaims, the relative level of effort, the reasonableness of the expenditures and the level of success of the prevailing party. Based upon our analysis of the foregoing criteria, the Panel unanimously concludes that Transammonia is entitled to an allowance of $305,000 towards its attorneys' fees and costs, which is included in the Final Award below. The allocation of the Panel's fees and expenses are addressed in Appendix B which is made a part of this Final Award.

Interest

Interest is awarded at the rate of 12% per annum in accordance with Clause 14 of the Transammonia General Terms and Conditions annexed to the Contract, and is applied

to the (a) outstanding balance of $2,392,950, (b) demurrage of $1,258,444.44 and (c) incidental damages of $67,654.17, as follows:

a) Since the BOW HERON arrived at Pasadena on November 15, 2008, an initial payment of $2,392,950 was due on November 8, 2008. Agrifos paid only $1,196,475 on that date. Hence Transammonia is entitled to interest on the unpaid amount of $1,196,475 at the 12% rate specified in Clause 14 from November 15, 2008 until the date of this Final Award.

Clause 12 of the CFR Contract obligated Agrifos to make a further payment of $2,392,950 on December 29, 2008 – twenty four hours prior to discharge. Agrifos paid only $1,196,475 on that date and therefore Transammonia is entitled to interest on an additional $1,196,475 at the 12% contract rate from December 29, 2008 until the date of this Final Award.

b) Transammonia forwarded its demurrage invoice on January 6, 2009. Under Clause 7(e) of the General Terms and Conditions, payment was due 30 days thereafter – i.e., on February 5, 2009. Transammonia is therefore entitled to interest on that amount at the 12 % contract rate from February 5, 2009 until the date of this Final Award.

c) The Odfjell invoice in the amount of $67,654.17 dated October 17, 2008 was due when issued. Transammonia is entitled to interest on that amount at the 12% contractual rate from October 17, 2008 until the date of this Final Award.

Award

Agrifos is directed to pay Transammonia the sum of $4,068,288.61 which is calculated as follows:

a) Unpaid Balance of the Contract	$2,392,950.00
b) Outstanding Demurrage	1,258,444.44
c) Incidental Damages	67,654.17
d) Allowance for Attorneys' Fees and Costs	305,000.00
e) Reimbursement of Arbitration Fees and Costs [15]	44,240.00
Total due Transammonia	$4,068,288.61

plus interest in accordance with the above items a), b) and c).

[15] See Appendix B.

If this Final Award is not satisfied in full within 30 days from the date hereof, interest is to resume and accrue at the rate of 12% on the amounts awarded, including interest, until payment is received in full.

This award is final and the parties have consented to the jurisdiction of any court for its recognition and enforcement in accordance with Clause 17 of the Transammonia General Terms and Conditions annexed to the Contract.

John F. Ring

Louis P. Sheinbaum

David W. Martowski

New York, New York
November 12, 2009

Appendix A

In the Matter of the Arbitration between
Agrifos Fertilizer, Inc., as Claimant
and
Transammonia. Inc., as Respondent and Counter Claimant

Time Line of Events

2008

July 11	Second TA Contract is signed
September 12	Pasadena Plant closes in anticipation of Hurricane Ike
Sepember 13	Hurricane Ike strikes Texas
September 16-17	Transammonia loads the HOLMEN under the First TA Contract
September 18	Agrifos declares *force majeure* and cancels the Second TA Contract
September 29-30	Transammonia loads the BOW HERON under the Second TA Contract
October 9	Agrifos demands arbitration
October 16	Agrifos agrees to accept the BOW HERON without prejudice
October 29	The HOLMEN arrives at Pasadena, Texas
November 15	The BOW HERON arrives at Pasadena, Texas
November 19	The HOLMEN commences discharge
December 30	The BOW HERON commences discharge

Appendix B

In the Matter of the arbitration between
Agrifos Fertilizer, Inc., as Claimant
and
Transammonia, Inc., as Respondent and Counter Claimant

The Panel's final fees for services rendered in this arbitration are itemized as follows:

	Total Fee	Agrifos Pays	Transammonia Pays
John F. Ring	$ 43,800	$ 35,040	$ 8,760
Louis P. Sheinbaum	$ 48,500	$ 38,800	$ 9,700
David W. Martowski	$ 50,500	$ 40,400	$10,100
Totals	$142,800	$114,240	$28,560

All things considered, as indicated above, Agrifos is hereby directed to pay 80% of the foregoing fees while it is understood that payment remains the joint and several obligations of both parties.

Each party has deposited $70,000 or a total of $140,000 into the SMA escrow account established for that purpose. The SMA shall disburse Agrifos' $70,000 escrow deposit on a pro rata basis to each of the arbitrators. Since there is a shortfall in Agrifos' escrow account of $44,240 , the SMA shall disburse Transammonia's escrow deposit to pay its share of $28,560 plus $41,440 of Agrifos' shortfall on a pro rata basis to the arbitrators; and Transammonia shall pay an additional $2,800 to the arbitrators on a pro rata basis, in the first instance. This having been done, Transammonia is entitled to reimbursement from Agrifos for the amount it paid which is in excess of its 20% obligation, or $44,240, which is included, as is this Appendix B, in the Final Award.

The parties are to settle their respective obligations for payment and reimbursement within 30 days of the date of this Final Award, otherwise interest shall accrue and be payable at the Contract rate of 12% per annum thereafter until payment or reimbursement has been made.

New York, N.Y.
November 12, 2009