

ASK Patrick V. Martin – ASBA Counsel – ASBA News - Dec. 2008

“COMPETITIVE” DOES NOT MEAN “LOWEST”

The vessel's agent at any particular port is the agent of the owner and is paid by the owner. This means, amongst other matters, that the agent is the servant of the owner and owes the owner a duty of loyalty and good faith. If there is nothing in the charter to the contrary, then the owner has the right and obligation to appoint the agent. As discussed below, oftentimes the charter gives the charterer the right to nominate the agent to be appointed by the owner. This however does not change the basic rule that the agent is the servant of the owner and not the charterer.

In the past, many charters simply provided that the charterer shall nominate and owner appoint the port agents. In more recent times, the owner sometimes insists that the appointing clause be modified to include “provided competitive” or similar wording. A more elaborate modification is the INTERTANKO Agency Clause which provides, in part, that Charterers shall nominate agents “...who are reliable, competent, *competitive in price and service* ...”

In instances where the charterer has nominated the agent, the owner may object or complain that the agent's fee is not competitive. Generally, this means that the owner has obtained or can obtain a fee from another agent that is lower. The owner then insists that the nominated agent accept the lower fee. There then follows an extended discussion or argument about the meaning of competitive as used in shipping trades.

One of our ASBA members has obtained a legal opinion on the subject. The meaning of “competitive” depends on the context in which it is used. When dealing with goods and commodities, such as fuel oil, where there is a readily ascertainable “market price” the word seems to mean the lowest unit price available in the market for oil of similar quality. One dictionary defines the term as “...low enough to compare favorably with those of rival traders.” However, when used in defining what agents can charge for their services, a different meaning becomes apparent. An agent deals in services, not goods. These services will vary in scope and detail depending on the particular owner, particular vessel and, indeed, the specific requirements of each port call. Thus, an agency's services are not fungible and cannot be compared to commodity prices. It is similar to comparing apples to oranges

There is no case or arbitration award dealing with this precise issue. The issue, similar to that in many areas of the law, is what is reasonable in the circumstances. Thus, where an owner sued the charterer for the cost of cleaning the holds after a voyage with iron ore concentrates, the court stated that the shipyard charges for the cleaning were fair and reasonable even though “the plaintiff did not obtain competitive bids on the repair work, [because] the charges were in line with the customary charges in the area”. In an arbitration where the charterer was to attempt to provide “make-up” cargoes at competitive freight rates, the owner offered vessels where the freight rate was above what the charterer considered competitive and therefore charterer rejected the nominations. The panel held that the rates were competitive because “...there are recognized market ranges, and it is these ranges which we must consider as a benchmark” rejecting the argument that the lowest rate is the only competitive rate.

In conclusion, if the agent's fee is reasonable for the services provided, the owner cannot refuse to accept and pay them on the basis that there may be agents who charge lower fees.