INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
International Arbitration Tribunal

CONOCOPHILLIPS COMPANY AND CONOCOPHILLIPS (U.K.) LIMITED,	CLAIMANTS
v.	CASE NO. 50 198 T 00297 09
RAIN CII CARBON, LLC, a successor-in-interest to CII CARBON, L.L.C.	RESPONDENT

AWARD OF ARBITRATOR

I, the undersigned arbitrator, having been designated in accordance with the Arbitration Agreement contained in the Green Anode Coke Sales Agreement (the "Agreement") entered into between the above-named parties and dated August 23, 2005, and having heard the proofs and allegations of the parties, do hereby find as follows:

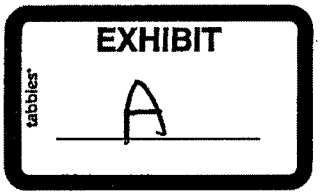
Introduction

ConocoPhillips Company and ConocoPhillips (U.K.) Limited (collectively, "COP") are the Claimants and Counter-Respondents in this proceeding. Rain CII Carbon LLC ("Rain CII") is the Respondent and Counter-Claimant.

This dispute arises out of the Agreement, pursuant to which COP supplies to Rain CII on a long-term basis all the output of Green Anode Coke ("coke") produced by COP at its Alliance Refinery (coke produced from this refinery is referred to as "Alliance coke"). Under article 4 of the Agreement, Rain CII is obligated to pay COP a market level price. The parties agreed to apply a formula to achieve this market level price. In the event, however, that either party reasonably concluded that, over a period of at least four quarters, the pricing formula had not yielded a market level price, then the Agreement permits the parties to agree on a replacement formula. Failing such agreement, the parties agreed to submit their dispute to binding arbitration, in which each side proposes a replacement formula and I, as the parties duly appointed arbitrator under the Agreement, select and apply one of the formulas proposed.

In late 2007-early 2008, COP initiated the pricing redetermination provisions of the Agreement. The parties were unable to reach agreement, resulting in this arbitration proceeding.

In addition to seeking a pricing redetermination in the arbitration and a monetary award based thereon, COP asserted a claim for damages breach of contract claims based on the parties' alleged oral agreements to apply the replacement formula COP proposed as of April 1, 2008 and as a result of Rain CII's filing of a lawsuit, rather than complying with the arbitration provisions



of the Agreement. Rain CII denied COP's claims and asserted a counterclaim for monetary damages based on COP's alleged withholding of funds due Rain CII. Rain CII also moved for summary judgment on COP's breach of oral contract claim.

Procedural Background

I established a procedural order on January 5, 2010, which was subsequently amended on February 16, 2010, March 15, 2010, August 18, 2010, and September 8, 2010. Pursuant to the procedural order, as amended, the parties were required to submit pre-hearing, written submissions on September 20, 2010, and to present evidence at a hearing in New Orleans, Louisiana beginning September 27, 2010. In addition, Rain CII filed a motion for partial summary judgment and a jurisdictional objection. COP filed responses thereto.

On September 23, 2010, I held an oral hearing on Rain CII's motion for partial summary judgment and Rain CII's jurisdictional objection. By orders dated September 25, 2010, I denied Rain CII's motion for partial summary judgment and Rain CII's jurisdictional objection.

The parties submitted written pre-hearing submissions on September 20, 2010.

A hearing on the merits was commenced in New Orleans, Louisiana on September 27, 2010. At the start of the hearing, COP dismissed its breach of oral contract claim. Evidence was heard on all other issues, and the evidence was closed as of September 29, 2010. At the conclusion of this hearing, I requested each side to provide written post-hearing submissions 30 days after receipt of the transcript of the hearing. I subsequently fixed such date at November 15, 2010, and scheduled an oral argument on such submissions for December 15, 2010.

The parties submitted their written closing submissions on November 15, 2010. At that time, Rain CII also moved to supplement the record with the submission of additional damage amounts, as well as documents labeled Exhibit 82 and 83. COP did not respond to Rain CII's motion to supplement the record. Accordingly, Rain CII's motion to supplement the record is hereby Granted.

Closing oral submissions were heard in Jackson, Mississippi on December 15, 2010. At the conclusion of this hearing, I requested each side to provide a proposed final award 30 days after receipt of the transcript of the hearing. I subsequently fixed such date at February 3, 2011.

On February 3, 2011, both sides submitted their proposed final awards.

This Award is the product of my consideration of all the evidence and arguments presented in this case.

Jurisdiction

As a threshold matter, and under the Commercial Arbitration Rules of the American Arbitration Association ("AAA") R-7, the Agreement defines my jurisdiction in this case as follows:

> Article 4: "[T]he arbitrator shall be required to select from the two proposed mechanisms that one which, in the judgment of the arbitrator, is

> more likely to yield a market level price for Green Anode Coke to be supplied under this Agreement for the balance of the term then in effect."
>
> Article 18: "This Agreement is to be governed and construed under the laws of the state of New York...."
>
> Article 19(c): "The arbitrator shall have no authority to award any indirect, consequential, punitive or exemplary damages of any kind...."

Accordingly, based upon these express grants and limits of authority, I find that I am authorized: **(1)** to determine which of the two replacement formulas proposed is more likely to achieve a market level price, **(2)** to determine the "as of" date for such replacement formula, and **(3)** to make a monetary award for direct losses based on the application of the replacement formula.

Both parties also seek recovery of interest on any monetary awards, their attorneys' fees and expenses. Under New York law, interest is recoverable, but attorneys' fees and expenses are not recoverable absent a provision in the parties' contract making such fees and expenses recoverable. No such provision exists in the Agreement. However, the parties have also incorporated into the Agreement the AAA Commercial Arbitration Rules in effect at the time the arbitration was commenced. Two provisions of the AAA Commercial Arbitration Rules then in effect apply to a determination of my jurisdiction in respect to these subjects. The first is AAA R-43(c), which permits the arbitrator to apportion, as he deems appropriate, the AAA administrative fees, witness expenses, and arbitrator compensation between the parties. The second provision is AAA R-43(d), which provides that the arbitrator's award may include interest and an award of attorneys' fees if all parties have requested such an award. Based upon these provisions and the submissions of the parties, I therefore find that I am authorized **(4)** to award interest on a monetary award, **(5)** to apportion the (non-attorney) fees and expenses of the arbitration between the parties, **(6)** to apportion attorneys' fees between the parties, and **(7)** related matters.

Analysis

Issue 1: Which of the two replacement formulas proposed is more likely to achieve a market level price?

Brief Summary of the Contentions of the Parties

COP contends that the "market" referred to in the Agreement as the "market level price" was the market that existed for Alliance coke as of the time of the Agreement. In that market, (1) COP received a premium over the price of Pace A for coke of comparable quality, and (2) the higher the quality of coke, the more buyers paid for it. COP contends that it has not received a market level price for at least four quarters since, and including, the first quarter of 2007. Since that time, the market has paid increasingly higher prices for Pace A, notwithstanding that the quality of Pace A has increasingly deteriorated over the same period of time. Conversely, the premium over Pace A that COP is receiving under the formula has collapsed, notwithstanding that the quality of Alliance coke has been much better than Pace A over this time period.

COP contends that its replacement formula is more likely to reflect a market level price. In the replacement formula it proposes, COP has made two adjustments to the original formula. The first adjustment is to add the price of Pace A as one of the variables. The original formula did not do so based on COP's then-concern that once Alliance coke was removed from the reported Pace A quantities, the quality of Pace A would decrease (which it did), and the price would correspondingly decrease (which it did not). However, given that the market has, since 2007, valued more highly lesser grades of A quality coke than it did before 2007, it is appropriate likewise to enhance the value of Alliance coke by reference to the value of Pace A. The second adjustment is to add a floor and a ceiling so that the parties are less subject to extreme, temporary swings in the marketplace.

Rain CII contends that the relief COP seeks should be denied because COP failed to show a condition precedent to arbitration – *i.e.*, that the formula failed to yield a market level price for at least four quarters. As for the merits, Rain CII contends that the formula, whatever the result, is the "market" and thus it can never fail to yield a market level price. Rain CII further contends that the formula reflects a market level price because it has yielded a premium over Pace A. Accordingly, Rain CII contends that I should select the original formula as the replacement formula.

The Arbitrator's Ruling

Based upon the testimony, exhibits, arguments, and submissions presented to me in this matter, I find that the price formula contained in Section 4 of the Green Anoda Coke Sales Agreement dated August 23, 2005, as amended January, 2007, and July, 2008, shall remain in effect for the balance of the term as stated in the contract.

Issue 2: As of what date should the replacement formula be applied?

Brief Summary of the Contentions of the Parties

COP contends that the replacement formula should be made effective as of April 1, 2008, as the only reasonable and fair interpretation of the Agreement, which required COP to wait four quarters before instituting the price re-opening provisions of the Agreement. COP further points to Rain CII's contemporaneous conduct – in agreeing to April 1, 2008, as the date on which to apply a replacement formula and by accruing the increased costs Rain CII would owe COP under a replacement formula as of April 1, 2008 – as further evidence that Rain CII interpreted the Agreement similarly before this arbitration.

Rain CII contends that the language of the Agreement requires only the prospective application of the replacement formula.

The Arbitrator's Ruling

Under New York law, contracts should be interpreted in the light most fair and reasonable. A court will endeavor to give the construction most equitable to both parties instead of a construction which will give one of them an unfair and unreasonable advantage over the other.

Based on a construction of Article 4(c) that gives effect to the entirety of the provision and is interpreted in light most fair and reasonable to both parties, I find that the replacement language of the Agreement requires only the prospective application of the replacement formula.

Issue 3: What are the direct losses based on an application of the replacement formula as of the date it becomes first applicable?

The Contentions of the Parties

The parties agree on matters of accounting, which are explained below in Section I of my ruling.

The Arbitrator's Ruling

COP owes Rain CII $5,562,753.27 for timing "true ups" for the fourth quarter of 2008 and the first quarter of 2009.

Rain CII has paid the replacement formula rate under protest since the second quarter of 2009 (since April 1, 2009).

1. Rain CII is entitled to the uncontested amount of $5,562,753.27 from COP.

COP admits that it owes Rain CII $5,562,753.27 for fourth quarter 2008 and first quarter 2009 timing "true ups." COP repeatedly acknowledged the validity and amount of Rain CII's "true-ups" totaling $5,562.753.27, but refused to apply the "true-up" credits due to "ongoing litigation." Accordingly, Rain CII is entitled to this uncontested amount of $5,562,753.27.

Applying the replacement formula from April 1, 2008 until March 31, 2009 results in an increased payment by Rain CII to COP of $6,920,234.07. Offsetting the amount of the true up COP owes Rain CII results in a net payment owed by Rain CII to COP in the amount of $1,357,480.82.

2. In addition, Rain CII is entitled to damages for overpayments since the Second Quarter of 2009 in the amount of $10,796,015.06.

Rain CII is entitled to recover its overpayments on invoices since the second quarter of 2009 in the amount of $10,796,015.06, representing the amount COP unilaterally invoiced Rain CII at COP's proposed formula price, not the contractually agreed price. COP has continued to invoice Rain CII based on COP's proposed formula, and each "true-up" since the second quarter of 2009 has been based on COP's proposed formula. Rain CII has paid these amounts under protest, resulting in overpayment by Rain CII as shown on Exhibit 83, in the amount of $10,796,015.06. Accordingly, Rain CII is entitled to also recover these overpayments.

3. Rain CII is entitled to interest through February 2011.

Section 10(e) of the Contract provides for interest "at the prime rate quoted in JP Morgan Chase Bank on the day payment is late, plus 5% percent, but not to exceed the maximum rate

permitted by law." Because the amounts COP owes Rain CII should have been paid but were not, they are late payments and accordingly, COP owes Rain CII interest.

COP admitted as early as May 11, 2009 that it owed Rain CII the $5,562,753.27 "true-up" for the first quarter 2009 and fourth quarter 2008, as shown on Joint Exhibit 52. Accordingly, based on the interest rate contained in Section 4(e) of the Contract, COP owes Rain CII interest on the Contract rate of 8.25% (JP Morgan Chase 3.25% plus 5%) in the amount of $803,122.50 on the $5,562,753.27 amount of Rain CII's claim measured through February 2011 for a total principal plus interest amount of $6,365,875.77 on that claim.

Furthermore, Rain CII is entitled to interest in the total amount of $540,694.50 on the $10,796,015.06 overpayment (through the third quarter of 2010) component of its claim, measured through February 2011 at the Contract rate of 8.25% (JP Morgan Chase 3.25% plus 5%), as shown in the following chart:

Quarter	Amount Due (Exhibit 83)	Interest Due per Month	Number of Months*	Interest Due (Through Jan. 2011)	Total (Principal, plus Interest)
2Q 2009	$968,967.14	$6,661.65	17	$113,248.05	$1,082,215.19
3Q 2009	$1,188,213.29	$8,168.97	14	$114,365.58	$1,302,578.87
4Q 2009	$971,319.00	$6,677.82	11	$73,456.02	$1,044,775.02
1Q 2010	$2,198,562.82	$15,115.12	8	$120,920.96	$2,319,483.78
2Q 2010	$2,109,371.70	$14,501.93	5	$72,509.65	$2,181,881.35
3Q 2010	$3,359,581.11	$23,097.12	2	$46,194.24	$3,405,775.35
TOTALS	$10,796,015.06			$540,694.50	$11,336,709.56

**These calculations assume a starting point of the first day of two quarters subsequent, for example October 1, 2009 for the second quarter of 2009.*

Accordingly, Rain CII is entitled to interest in the total amount of $1,343,817.00 through February 2011 ($540,694.50 for interest on Rain CII's overpayment claim shown in the chart above, plus $803,122.50 for interest on Rain CII's conceded but unpaid fourth quarter 2008/first quarter 2009 "true up" claim). Interest will continue to accrue at the contractual rate until paid.

4. Total Amount Due Rain CII is $17,702,585.33.

The total amount due Rain CII from COP through the end of February 2011, exclusive of attorneys' fees and costs, is $17,702,585.33, as shown in the following chart:

Description	Amount
Uncontested Amount (Conceded by COP in Ex. 52)	$5,562,753.27
Overpayments by Rain CII (as shown on Ex. 83)	$10,796,015.06
Interest ($803,122.50 on the Uncontested Amount & $540,694.50 on the Overpayments)	$1,343,817.00
TOTAL AWARD TO RAIN CII	**$17,702,585.33**

Issue 4: What interest is owed on the monetary award?

The Contentions of the Parties

The parties agree that the Agreement requires interest at the prime rate quoted by JPMorgan Chase Bank on the day(s) payment is late, plus 5 percent. Both sides have used an interest rate of 8.25% as representing the proper contractual interest rate to apply.

The Arbitrator's Ruling

Applying the contractual rate of interest to the outstanding amount for the number from April 1, 2009 to February 3, 2011 results in the sum of $214,984.96.

Issue 5: Should, and to what extent should, the (non-attorney) fees and expenses of the arbitration be allocated between the parties?

The Contentions of the Parties

Both parties seek reimbursement of their arbitration fees and expenses.

The Arbitrator's Ruling

Each party shall be responsible for their respective costs and expenses incurred in connection with this Arbitration.

Issue 6: Should, and to what extent should, attorneys' fees be apportioned between the parties.

The Contentions of the Parties

Both sides seek an award of their attorneys' fees.

The Arbitrator's Ruling

The parties will bear their own attorneys' fees. However, the fees COP incurred in defending the lawsuit Rain II filed in Louisiana State Court prior to removal to the U.S. District Court, Eastern District of Louisiana in the amount of $57,584.00 are recoverable in this arbitration as damages from Rain CII's breach of the parties' agreement to arbitrate their disputes.

Award

Rain CII is awarded the total sum of **$17,702,585.33** against COP. COP shall pay to Rain CII the sum of **$17,702,585.33** within forty-five (45) days of the date of this Award.

COP is awarded the total sum $57,584.00.

These Awards shall bear interest at the rate of 8.5 percent per annum if not paid within forty-five (45) days of the date of this Award.

The administrative fees and expenses of the International Centre for Dispute Resolution ("ICDR") totaling $33,870.46 shall be borne as incurred, and the compensation and expenses of the arbitrator totaling $36,402.85 shall be borne as incurred.

This Award is final and binding with respect to all claims and counterclaims presented to the arbitrator. All relief not expressly granted herein is denied.

I hereby certify that, for the purposes of Article 1 of the New York Convention of 1958, on the Recognition and Enforcement of Foreign Arbitral Awards, this Final Award was made in Jackson, Mississippi, USA.

Signed this 7th day of March 2011.