(2012) 01 BOM CK 0075

Bombay High Court

Case No: Arbitration Petition No. 132 of 2009

Axios Navigation Co. Ltd.		APPELLANT
	Vs	
Indian Oil Corporation Limited, Refineries Division		RESPONDENT

Date of Decision: Jan. 4, 2012

Acts Referred:

- Arbitration Act, 1940 - Section 2
- Arbitration and Conciliation Act, 1996 - Section 19, 28, 31, 34
- Bills of Lading Act, 1856 - Section 3
- Civil Procedure Code, 1908 (CPC) - Section 89
- Contract Act, 1872 - Section 28

Citation: (2012) 2 ALLMR 881 : (2012) 2 BomCR 271 : (2012) 114 BOMLR 392 : (2012) 3 MhLj 701

Hon'ble Judges: Anoop V. Mohta, J

Bench: Single Bench

Advocate: V.K. Ramabhadran with Mr. Shimit Jose, for the Appellant; Rahul Narichania with Mr. Firdaus N. Pavri and Mr. Rahul Rajpurohit instructed by y, M/s. Mulla and Mulla and C.B.C., for the Respondent

Judgement

Anoop V. Mohta, J.

The Petitioners (the Claimants) have challenged a majority award passed by an Arbitral Tribunal consists of three commercial minded Arbitrators, dated 18 August 2008, and supported the reasons of minority award dated 26 September 2008. The Arbitral Tribunal was nominated under the Maritime Arbitration Rules of the Indian Council of Arbitration (Maritime Rules).

2. By a Tanker Voyage charterparty dated 30 September 2002, the Respondents chartered the (Owners) Claimants vessel, M.T. Pride Independence (the vessel) on certain terms and conditions. Laytime under the Charterparty was 72 hours and demurrage payable was US $ 22,000 per day or prorata for the part of the day. Since there was delay, the Petitioners made a claim of US $166,442.99 through their broker by invoice dated 29 November 2002 with 12% interest till realization, from 1 January 2003.

3. The Respondents (Charterers) disputed the time barred demurrage claims of the Petitioners as it was admittedly received beyond the period of 45 days from the date of completion of the discharge of the vessel.

4. On 23 October 2007, after a period of more than five years, after the closure of evidence of the witnesses and during the course of oral submissions, the counsel on behalf of the Respondents tendered a substantially revised statement of their counter claims to the Arbitral Tribunal. No affidavit or any document was filed setting out the reasons for such revision in the claims.

5. There is no direct or substantial material provided by the Petitioners on record to show the claim was lodged and received by the Respondents are within agreed period. There is a finding given by the majority arbitrators that though the claimant''s invoice of demurrage is dated 29 November 2002, it was received through cover letter dated 3 January 2003 of Marshal Produce Co. Pvt. Ltd. their broker, and the same was received by the Respondent on 6 January 2003. It was received beyond agreed period as contemplated in clause 24 of Charter Party.

6. On 13 October 2008, the copy of the Award received along with letter dated 7 October 2008 from the Indian Council of Arbitration, New Delhi. The majority of the Arbitrators viz. Shri Jagdish C. Sheth and Capt. V.K. Gupta dismissed the claims filed by the Petitioners on the ground that it being demurraged, was not presented to the Respondents within a period of 45 days. The majority Arbitrators did not deal with the merits or demerits of the claims of the Petitioners. The counterclaim of the Respondents was allowed. The dissenter Arbitrator, however, upheld the claim of the Petitioners, by treating period of 45 days nonbinding and awarded the claim, by observing that there was no serious dispute on merit of the claim, and rejected the counterclaim of the Respondents in toto.

The majority award and the minority award

7. The operative part of the majority award is as under:

1. The Claimants herein shall pay to the Respondents, the sum of US $ 259,638 (United States Dollars two hundred fifty nine thousand six hundred and thirty eight only) being the amount of loss suffered by the Respondents due to short delivery of the cargo.

2. The Claimants shall pay the Respondents the sum of US $ 35,440.59 (United States Dollars thirty five thousand four hundred forty and fifty nine cents only) being the amount

of interest due on US $ 259,638 from 24th September 2004 to 18th August 2008 (being the date of this Award) at the rate of 3.5% per annum.

3. Indian Council of Arbitration shall remit Rs. 268,333/(Rupees two hundred and sixty eight thousand three hundred and thirty three only) as fees due and payable to each of the three arbitrators - i.e. to Shri J.C. Sheth, Shri R.S. Saran and to Capt. V.K. Gupta before or contemporaneously with the release and publication of this Award.

8. The conclusion of the minority award is as under, after rejecting the Respondents'' counter claim/set off on account of short delivery.

(i) The Respondents (Indian Oil Corporation Ltd.) do forthwith pay to the Claimants (Axios Navigation Co. Ltd.) a sum of USD 1,66,442.99 (USD One Lakh sixty six thousand four hundred forty two and pence ninety nine only) with simple interest at the rate of 3.5% per annum from 6th February 2003 till the date of the award. If the sum awarded is not paid within a period of 30 (thirty) days from the receipt of award by the Respondents, the principal sum awarded shall thereafter carry simple interest at the rate of 5 (five) per cent per annum till the date of payment.

(ii) The Indian Council of Arbitration to disburse a sum of Rs.2,68,333.00 to each of the Arbitrators as fees due and payable from the amounts already paid by, and collected by ICA from the two parties.

(iii) The parties to bear their own costs of Arbitration.

(iv) The Indian Council of Arbitration is hereby authorized to file the award in the competent court of jurisdiction at the request of either of the parties.

(v) This award shall form part and parcel of the majority award.

9. Following are the clauses of the Charter Party agreement: Clause

13- GA/Arbitration India Indian law to apply to this Charter Party."

Clause 24- Charterers shall in no event be liable for demurrage unless the demurrage claim including in responsible detail, the specific facts upon which the claim is based provided available to owners, has been presented to charterers in writing within forty five (45) days upon completion of discharge.

Clause- 25" The demurrage, if any, is to be remitted by charterers within 90 days of submission of laytime statement copy of signed statement of fax and copy of Charter party by owners to charterers."

Clause 29- "All disputes arising under this charter party shall be settled in India in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (No. 26 of 1996) or any further amendments thereof, and under the Maritime Arbitration rules of the

Indian Council of Arbitration. The arbitrators to be appointed from out of the Maritime Panel of Arbitrators of the Indian Council of Arbitration. The arbitrators shall be commercial men.

10. It is necessary to consider the scope and power of the Court u/s 34 of the Arbitration and Conciliation Act, 1996 (for short "the Arbitration Act") in a situation like this. The Full Bench of this Court in R.S. Jiwani Vs. Ircon International Ltd., A Government of India, held that doctrine of severability can be applied to awards which are severable. I have already observed that the Court has power u/s 34 of the Arbitration Act to modify the claim and/or the award u/s 34 of the Arbitration Act. (Union of India (UOI) Vs. Sun Media Services,).

11. There is no bar that dissenting Arbitrator should not express his opinion/view on the subjected dispute. It is relevant to note that Section 31 of the Arbitration Act, which provides that an Arbitral Award shall be signed by the members of the Arbitral Tribunal, at least the majority of the members of the Arbitral Tribunal, unless explained for the omission of the signature by others specifically when the Tribunal is of more than one Arbitrator. The dissenting view, if any, cannot be treated as award. Omission of the dissenter member''s signature will not make the award invalid. But in a situation where dissenter member also permitted to give reasons and/or expressed his dissenting opinion separately, still the majority assenting opinion shall be treated as an award. The Court u/s 34 of the Arbitration Act is not debarred from looking into the reasonings and/or the view expressed by the dissenting Arbitrator.

Majority view X Minority view:

12. The learned counsel appearing for the Respondents had strongly relied on the observations made in Chowgule Brothers and Others Vs. Rashtriya Chemicals and Fertilizers Ltd. and Others, which are reproduced as under:

66. In our view, it is not permissible to look at the minority award while considering a petition to set aside a majority award for several reasons. Firstly, such an approach predicates that the majority arbitrators took into consideration only those facts and documents which were relied upon in the minority award. Such an approach also predicates that the majority arbitrators did not consider the question from any other angle. It also predicates that the majority arbitrators considered only the questions of law considered by the minority award. These presumptions would be incorrect. This would also be unfair to the majority arbitrators. Such an approach would, in fact, lead to tremendous confusion in the adjudication of petitions for setting aside arbitration awards. The majority award can only be set aside on the basis of what is stated therein and not on the basis of what is stated in the minority award. To hold otherwise would open up a pandora''s box.

13. First of all, the case was dealing with the Arbitration Act, 1940. We are dealing with the Arbitration Act, 1996. As settled scheme of these two Acts are different, still we need to consider the observations so referred above in the context of present facts and circumstances and also the existing international trade and the practice of Maritime and Arbitration laws.

14. In MMTC Vs. M/s. Sterlite Industries (India) Ltd. 2003 Vol. 105(1) Bom. L.R. 45 a Single Judge of this Court, based upon Section 34 of the Arbitration Act, 1996 has observed in Paragraph No.26 as under:

26. The learned Counsel appearing on behalf of the Petitioner has sought to place reliance on the award of the dissenting award. With the assistance of the learned Counsel, I have perused the award of the dissenting Arbitrator. In my view, it would not be open to the Court while considering the challenge u/s 34 of the Arbitration and Conciliation Act, 1996, to reappreciate the evidence which was adduced before the learned Arbitrators. It is no part of the function of the reviewing Court to determine whether the award of the dissenting Arbitrator is more plausible than that of the majority. If the view which is taken by the majority is a possible view on the basis of the evidence adduced, the view of the majority must pass muster. However, having regard to the nature of controversy, I have with the assistance of the learned Counsel, perused the two awards of the majority and of the dissenting Arbitrator, and the underlying documentary material. I am of the view that the award of the majority which fairly and correctly construes the terms of the contract and the oral and documentary material does not warrant interference."

15. Therefore, the Court u/s 34 needs to consider whether the majority view is a possible view on the basis of material on the record. The opinion expressed by dissenting Arbitrator if supports the contentions raised by the loosing party, the Court just cannot overlook and deny the right of the loosing party to refer to the well assessed and detailed opinion of dissenting Arbitrator. There is no quarrel with the proportion that the majority award can only be set aside on what is stated therein if challenge is sustained and not on the basis of what is stated in the minority award as observed in Chowgule Brothers (Supra). But the issue is if the Court independently come to the conclusion and finds that the majority award is not correct and/or perverse and/or illegal, in that case, the Court is bound to interfere with the majority award. It cannot be stated that the Court has accepted the minority opinion to set aside the majority award. It all depends upon the facts and circumstances of each case. The loosing party and/or the Petitioners cannot be totally debarred from pointing out the opinion expressed by the dissenting Arbitrator. Every Arbitrators, in my view, is entitled to express his opinion as the institution has at the instance of the parties and selected all these Arbitrators to adjudicate their dispute. To say that the dissenting Arbitrator should not express his opinion and/or should not sign even the award, considering the scheme and purpose of the Arbitration Act and/or the principle of fair and equitable justice, will cause hardship and injustice will hamper the scheme of the Arbitration Act, where the parties are entitled to choose their private judge

and also entitled to know the view or opinion on the dispute raised.

The Court may look into majority and minority views:

16. It be noted that the Division Bench of Delhi High Court in Government of India Bharat Sanchar Nigam Limited Vs. Acome and Others, while considering the aspect of majority and dissenting opinion in reference to Arbitration Act, expressly noted Russel on Arbitration, 21st Edition (1997), para 6059, Page 271 as under:

If however there is no chairman, then decisions, orders and awards must be made by all or a majority of the tribunal. Any member of the tribunal who does not assent to an award need not sign it and may set out his own views of the case in a "dissenting opinion". This is for the parties information only and does not form part of the award, but it may be useful in terms of adding weight to the arguments of a party wishing to appeal against the award.

The aforesaid commentary makes a reference to the specific provisions of the Arbitration Act, 1996 as in force in England. The scheme of the two Acts is similar and same principles of law would apply in the context of Indian Act.

17. This scheme of Arbitration is well recognized and accepted in national and international arbitration, but always subject to agreed terms and conditions. This was not referred in Chowgule Brother''s (Supra) as it was case on Arbitration Act, 1940.

18. Therefore, I am inclined to observe that when the parties have aggrieved by the reasoned award, though for the purpose of finality and/or decision, the majority assenting opinion shall be treated as an award, yet the dissenting Arbitrator''s reasoned opinion cannot be overlooked while deciding the objection/contention raised by the loosing party/petitioner who has challenged the majority opinion. The Court''s view is final, whether based upon majority or minority views:

19. The Court even otherwise, is entitled and empowered to express opinion on merits of the matter if case is made out even by setting aside the majority view/opinion. It cannot be stated here that the Court ought not to have looked into the reasons given by dissenting Arbitrator''s opinion. Any opinion given by any of the Arbitrator whether by majority and/or by minority, if based upon the valid foundation of law and the record, just cannot be overlooked by the Court u/s 34 of the Arbitration Act, 1996. The Court''s independent reasonings irrespective of the reasons given by the majority and/or minority Arbitrator should prevail.

20. Admittedly, the appointment of the Arbitrator was by the consent of the parties. The matter was heard by all the Arbitrators as they agreed for the common procedure to be followed. Only because the dissenting Arbitrator has expressed his opinion on same facts and material differently, that cannot be the reason to overlook the well reasoned dissenting opinion. It is permissible to express individual opinion even by the Arbitrator.

There is no bar at all for the Arbitrator to express their independent views though for the purposes of award, the majority decision is required.

21. In any judicial decision making process, every Judge is entitled to express his views on the subject. Therefore, in case of conflict of view which is not uncommon and in fact it is useful as it provides another dimension to the same issue based upon the same material which is important for any judicial decision making process. I am of the view, therefore, that the view expressed by the dissenting Arbitrator and if relied upon by the loosing party and/or aggrieved party who wants to support the same reasoning, such right just cannot be denied merely because the scheme of the Act required in case of conflict, the majority view need to be treated as an awardable opinion.

22. Therefore, heard both the parties and as referred and relied upon by the learned counsel appearing for the Petitioners even on the reasoning given by the dissenting Arbitrator read with the material placed before the Arbitrators, I am inclined to consider the rival contentions of both the parties, based upon the majority views, as well as, dissenting views. Because at this stage of the hearing, there was no question of forming any opinion of either of the views. Therefore, ends of justice and to give equal opportunity to both the parties and to treat parties fairly and equally and considering the principle of natural justice, I am inclined to consider both the reasonings given by the Arbitrators i.e. majority view, as well as, the dissenting view.

23. In Oil and Natural Gas Corporation Ltd. vs. Schlumberger Services Ltd. (Delhi) 2006 (3) ARB. L.R. 610, as relied upon by the counsel appearing for the Petitioners, the learned Judge even observed that the dissenting arbitrator applied the correct principle of interpretation of contract and the fundamental error committed by the majority Arbitrators. The minority Award was conformed following the basic principles of revolving around Section 34 of the Arbitration Act.

24. The important submission made by the learned counsel appearing for the Petitioners is revolved around Section 28 of the Contract Act which is as under :

28. Agreements in restraint of legal proceedings, void. Every agreement,

(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or

(b) which extinguishes the rights of any party

thereto, or discharges any party thereto, from any liability, under or in respect of any contact on the expiry of a specified period so ass to restrict any party from enforcing his rights, is void to that extent.

The agreed clause extinguishing the right to claim damages, if not asserted within stipulated time, is not void or bad in law?

25. The basic contention of the Petitioners'' counsel was that such clauses which constrain and/or restrict the rights of the parties to make claim within agreed period though the statutory period is of three years, is void and, therefore, needs to be overlooked. The majority decision therefore given by the Arbitrators rejecting the claims of the Petitioners on this sole ground without considering the merit of the matter is therefore liable to be set aside. The submission was also made that the view expressed by the dissenting Arbitrator, in the facts and circumstances, needs to be restored and the Award be modified accordingly.

26. The reliance has been made on the following judgments by the learned counsel appearing for the Petitioners:

1. Punj Lloyd Ltd. vs. National Highways Authority of India 2009 (3) Arb. LR 506 (Delhi) (SB)

2. M/s. Indian Oil Corporation Ltd. vs. M/s. KTL Mayfair Inc. & anr. O.M.P. No. of 2008 dt. 482010 (Delhi) (Delhi High Court) (SB).

3. Biba Sethi vs. Dyna Securities Limited 2009(3) Arb. LR 494 (Delhi) (SB)

4. Pandit Construction Company vs. Delhi Development Authority and anr. 2007 (3) Ar. LR 205 (Delhi) (SB)

5. Chander Kant and Co. Vs. The Vice Chairman, DDA and Others

6. Mahajan Silk Mills Pvt.Ltd. v. M.V. MSC Elena 2000 (3) Bom.C.R. 841

7. Atlantic Shipping and Trading Company Limited vs. Louis Dreyfus and Company (1922) PC 250

8. Union of India through Textile Commissioner vs. Bhagwati Cottons Ltd. & anr. 2008(5) Bom. C.R. 909

27. In all the above matters, the issue was in reference to Section 28 of the Contract Act and specifically the effect of 1997 amendment to the Section. In most of above judgments, the learned Judges have taken the view, on facts and circumstances, that any such contractual clauses which restricts or disentitle the party to claim damages and/or monetary and/or compensation, if they fail to raise the said claim within the stipulated period are void and illegal.

28. In answer to this the learned counsel appearing for the Respondents has strongly relied on a Division Bench decision of this Court to which I was also a party. (M/s. Indusind Bank Ltd. vs. Union of India and ors., Appeal No.258/2008 decided on

20.04.2011 (Per D.K. Deshmukh, J.)

29. In that case, considering the facts and circumstances and referring to bank guarantee, a commercial document and the Supreme Court judgments in the case of The Food Corporation of India Vs. The New India Assurance Co. Ltd. and others, and National Insurance Co. Ltd. Vs. Sujir Ganesh Nayak and Co. and another, , read with the effect of amended provision of Section 28(b) of the Contract, we have observed as under :

Thus, the Supreme Court has held that the term in the contract which deals with assertion of right is in no way connected with what is contemplated by section 28 of the Act. The term in the bank guarantee requiring the respondents to make their claim or demand with the Bank on or before 30th April 1997 does not affect the right of the respondents to enforce their rights by approaching the court of law within the normal period of limitation if the respondents assert their right or make a demand or claim with the Bank within the period mentioned in the bank guarantee. In our opinion, really speaking, in view of the law laid down by the Supreme Court in its judgment in the case of Good Corporation of India, there does not remain any possibility of any debate whether a term in the bank guarantee requiring beneficiaries of the bank guarantee to make claim under the bank guarantee within the stipulated period would be void because of the provisions of section 28 of the Act because such a term in the agreement is relatable to the assertion of right so as to perfect that right and not in relation to enforcement of that right in the court of laws. In our opinion, therefore, the learned Single Judge was not justified in holding that the above quoted term in the bank guarantee is void in view of the provisions of section 28(b) of the Contract Act.

In the result therefore, appeals succeed and are allowed, the orders of the learned Single Judge decreeing the suits as against the present appellants are set aside. However, the bank guarantee that has been furnished by the appellants shall stand discharged only after a period of eight weeks from today.

30. The learned counsel appearing for the Respondents in support of majority opinion has also relied on the following authorities :

1. Babanaft International Co. S.A. v. Avant Petroleum Inc. (The Olentia) (1982) 1 Lloyd''s reports 486. It was upheld the clause in the contract provides for presenting the claim with supporting document within a period of 90 days from the completion of discharge.

2. Waterfront Shipping Company Ltd. vs. Trafigura AG (The Sabrewing) (2008) Vol. 1 Lloyd''s Law Reports 286. It provides for claim to be filed within 90 days.

3. Evergos Naftiki Eteria vs. Cargill Plc (The Voltaz) (1997) Vol. 1 Lloyd''s Report 35. It provides for filing of the claim within a period of 60 days.

4. Mira Oil Resources of Tortola vs. BOCIMAR N.V. (1999) 2 LR 101. It was upheld the clause providing for presenting the claim within a period of 90 days.

5. Metalimex Foreign Trade Corp. vs. Eugenie Maritime Co.Ltd. (1962) 1 LR 378 It was held that the clause in the charter party that claim has to be made within 6 months from the date of completion of discharge was held to be valid.

31. The submission was made referring to above judgments by the counsel appearing for the Respondents, that considering the amended provisions of Section 28 read with the agreed commercial document clauses between the parties, which are internationally well recognized and settled practice in such types of contract, need to be accepted. This type of restrictive clauses are regularly followed in national or international contracts specifically referring to claims of demurrage and/or related aspects in such charter party agreements/treaties, in Maritime laws related disputes. The parties, having agreed and in fact acted accordingly, bound by such restrictive clauses. The opposite submission that such clauses are void as it restricts their rights to claim damages which are otherwise available under the Indian law of limitation is not correct.

The Arbitrators are bound by the agreed clauses:

32. The Division Bench of this Court (M/s. Indusind Bank Ltd) (Supra) has set aside the judgment and decree by the learned Single Judge, whereby such restrictive clause was declared to be void. We have held that such clause is not void as by such clauses right to claim damages or compensation in regular Court is not restricted. What is restricted is their claim or demand and/or assertion of their right, as agreed, within the period mentioned in such document. Therefore, we have also observed that such clause does not affect the right of the parties to enforce their rights by approaching the Court of law within normal period of limitation, but it should be subject to the assertion of their right within agreed period. It is also observed that the provisions of Section 28 of the Contract Act and the terms in the agreement is relatable to the assertion of right so as to perfect that right and not in relation to enforcement of that right in the Court of laws.

33. I see no reason to overlook the above observations/findings given by the Division Bench by interpreting the amended Section 28(b) and the similar nature of clauses. I am also of the view that the commercial documents need to be interpreted on the basis of commercial usages and practices, followed and adopted in such type of transaction at national or international level. The commercial document and the clause in question and/or similar clause has been interpreted in above cases as cited by the learned counsel appearing for the Respondents which, in my view, cannot be overlooked as the commercial intention underlying these clauses have been to ensure that the claims need to be mentioned by the owners within a short period of final discharge so that the claims would be investigated and resolved as early as possible (Babanaft International (supra). The documentary requirement along with such claim within the specified period with details and amount is also relevant for the early disposal of the claim. The rejection of

such time barred claim, as it was not filed with the document within specified period, in my view, are in consistent with the commercial sense and certainty. [The Sabrewing, The Voltaz, Mira Oil, and Metalimex (Supra) specially in view of clear and unambiguous and independent clause 24 in question. The other clauses, even if any, of the agreement, cannot prevail over such clear agreed terms. There was no question to look into other clauses.

34. The submission of the learned counsel appearing for the Petitioners by referring to above judgments cited by him are therefore of no assistance as the facts and circumstances were totally different and distinguishable. The Court needs to consider the relevant facts and the nature of commercial document between the parties. The judgments so referred and relied upon by the counsel appearing for the Respondents and apart from the judgment of the Division Bench of this Court to which I was also a party, in my view, is correct view of the matter. Such clauses are permissible and not prohibited u/s 28(b) of the Contract Act.

35. I am not inclined to accept the submission to refer the matter to the larger Bench, in view of the following Supreme Court judgments, as it were not referred by the Division Bench (M/s. Indusind Bank Ltd.). Bharat Coking Coal Ltd. Vs. Annapurna Construction, and V.M. Salgaocar and Bros. Vs. Board of Trustees of Port of Mormugao and Another, . The facts and the related laws were different. The scheme and the purpose of the Arbitration Act was not at all referred and discussed.

36. The reliance on Atlantic Shipping (supra) by the learned counsel appearing for the Petitioners is also of no assistance in view of the direct decision given by the Division Bench of this Court (M/s. Indusind Bank Ltd.), based upon the Supreme Court judgment. Even otherwise the case before the Division Bench was in reference to banking transactions based upon well established practice specially revolving around the prescription of fixed time to give effect to the bank guarantees. In the absence of such prescription and/or fixed period, the banking transaction will not serve the purpose and object of the business community. The commercial transaction read with the agreed clauses based upon the laws and regulation, national and international needs to be respected. As observed, the assertion of right within the prescribed period in no way destroy and/or affect the right of the parties to file Suit or raise claim within prescribed limitation under the general law.

37. The decisions, so relied and referred of the Supreme Court in State of Orissa and Another Vs. Mamata Mohanty, and/or Union of India, through Textile Commissioner (Supra), are also not sufficient to refer the matter to the larger Bench as contended by the learned counsel for the Petitioners specifically when we are dealing with the arbitration proceedings arising out of the provisions of the Arbitration Act, apart from the facts and circumstances.

International Arbitration and the agreed clauses based upon international trade and practice:

38. It is relevant to note Sections 19 and 28 of the Arbitration Act, 1996 which reads as under:

19 Determination of rules of procedure.

(1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).

(2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.

(3) Failing any agreement referred to in subsection (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.

(4) The power of the arbitral tribunal under subsection

(3)includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

28. Rules applicable to substance of dispute.

(1) Where the place of arbitration is situate in India.

(a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;

(b) in international commercial arbitration,

(i) the arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute;

(ii) any designation by the parties of the law or legal system of a given country shall be construed, unless otherwise expressed, as directly referring to the substantive law of that country and not to its conflict of laws rules;

(iii) failing any designation of the law under clause

(a) by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.

(2) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorised it to do so.

(3) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

39. It is relevant to note the scheme and purpose of Arbitration Act. Section 19 of the Arbitration Act permits and provides the parties to execute and/or agree for a particular procedure and/or Rules to be followed in case of any dispute arising out of the contract between the parties. Having once agreed for such clause though the amended provision of Section 28(b) of the Contract Act was in force and as such clauses bind the parties to assert their rights within the prescribed period cannot be stated to be against the public policy. Section 28(1)(b) of the Arbitration Act provides that the arbitral Tribunal should decide the disputes in accordance with the rule of law defined by the parties. Admittedly, the Indian law was made applicable to decide the issue between the parties. It is specifically agreed in clause 13 and clause 29 in Charter Party dated 30 September 2002, the Indian law to apply to this charter party and be settled in accordance with the provisions of the Arbitration Act. Under the Maritime Arbitration Rules of the Indian council of Arbitration, the Arbitrators were appointed from the Maritime Panel of Arbitrators. It is specifically provided that the Arbitrators should be commercial men. Therefore, in view of the specific provisions of the Arbitration Act read with the agreement between the parties, to say that such clauses by which a party is discharged from any liability upon the expiry of a specific period is void, in my view, is unacceptable. This will frustrate the whole purpose and the provisions of the Arbitration Act, apart from national and international trade and commercial Maritime Law practice.

40. I am not inclined to accept the view expressed in Indian Oil Corporation Ltd. (supra) by Delhi High Court that "Clause 24 is nothing but an agreement which seeks to extinguish the right of the ship owner, and to discharge IOC from its liability on the expiry of 45 days from the date of discharge in respect of a claim for discharge demurrage". The scheme and purpose of the Arbitration Act and its provisions have not been dealt with in detail by the Delhi High Court, apart from the judgment of the Division Bench of this Court in Indusind Bank (supra). I am bound by the Division Bench judgment to which I was also a party, apart from my views expressed above.

The clause which mandate to assert rights within stipulated time is permissible and binding:

41. Another facet is, Section 28 of the Contract Act itself permits the parties to get their dispute settled through the Arbitration and the amount so awarded in the Arbitration shall only be recoverable. In totality, therefore, I am not inclined to accept the submission that any Arbitration Proceedings, based upon the commercial documents, where an agreement limiting the time within which party must assert its right failing which the claim of damages/compensation shall be forfeited and/or not entitled to claim damages after prescribed period, can be stated to be against the public policy and/or any such Analogue doctrine.

42. The Limitation Act itself permits for a shorter period of limitation if a particular statute and/or special Acts restrict the same. The special Acts, therefore, a prescribing shorter period of limitation than that provided under the limitation Act is not a foreign concept and/or against any public policy Act and/or Law. Therefore, if the Constitution of India and law of the land contemplates and provides the freedom of contract in the matter of trade and/or commerce and further permits the parties to settle their disputes through the provisions of Arbitration and/or such other alternative modes as available and as referred u/s 89 of the CPC (for short, CPC), and the particular business or transaction and/or trade or practice if permits the parties to restrict and/or provide fixed period to assert their claims for damages or compensation and therefore, to say that such clause/clauses of Arbitration and/or agreement between the parties is against Section 28(b), in my view, specially in Arbitration matter is unacceptable. Such restriction will frustrate the whole purpose and object of Arbitration Act and also infringes the freedom of free trade and the commercial contract.

43. I have also noted in Union of India Vs. Sagar Thermit Corporation Ltd. (Supra), it is settled that the Arbitral Tribunal cannot go beyond the agreed terms on any count by referring to the Supreme Court Judgment in Ramnath International Construction Pvt. Ltd. Vs. Union of India & Anr25. Therefore, the agreed terms between the parties play important role so far as the Arbitrators are concerned. Therefore, if clause provides that the Arbitrator should make award within 12 months of entering into the reference, there is no question of waiting beyond 12 months by anyone, without consent of the parties. If consent is not given and/or time not enlarged the Arbitral Tribunal ceases automatically after expiry of the time so fixed. The Court cannot exercise its inherent power to extend the time fixed by the parties in absence of the consent of both the parties. (N.B.C.C. Ltd. Vs. J.G. Engineering Pvt. Ltd., Therefore, award if any passed by the Arbitral Tribunal beyond agreed period and/or beyond the time so stipulated, liable to be quashed and set aside. (Ramnath International Construction Pvt. Ltd. Vs. Union of India (UOI) and Another, B.K. Gopakumar Vs. National Film Development Corporation Ltd.,

44. The Supreme Court in H.P. State Forest Company Ltd. Vs. United India Insurance Co. Ltd., by upholding the National Insurance Co. Ltd. Vs. Sujir Ganesh Nayak and Co. and another, accepted that the extinction of the right if not asserted in specific time is permissible and can be imposed. The policy clause 6(b)(ii) of similar nature was held to be outside the scope of Section 28 of the Contract Act. Clause 6(b)(ii) was binding between the parties, therefore, the claim raised after 12 months of the final amount received under the settlement was not maintainable and also observed that the Arbitrator could not have considered the claim and thereby set aside the award. Therefore, taking over all view of the matter, I am also of the view that, such demurrage time barred clause which is based upon International Convention Treaties and trade practice, if not accepted, would affect such international trade practice and contract. Admittedly, one of the parties is a foreign control company and therefore, in view of Section 2(f) of the Arbitration Act, this would be a international commercial Arbitration. Therefore, the contract so entered

into including the clause in question definitely needs to be respected in view of International usage and practices also, apart from nature of business and its requirement of timely action.

45. There is clear finding given and also the submission so made during the course of the argument that the Petitioners did not submit claim for demurrage within 45 days upon completion of discharge as contemplated under clause 24 of the Agreement. It is, therefore, clear in view of Clause 24 that the Petitioners as agreed, was not entitled to enforce its claim for the demurrage through the Arbitration proceedings, as he failed to file claim Petition within 45 days upon completion of discharge. The other legal rights to file a Civil Suit within prescribed period of limitation under the Indian Law was not prohibited. The prohibition as agreed by the parties was and in reference to the Arbitration proceedings whereby the Arbitrators are not permitted to pass or grant any demurrage if the application was not filed within 45 days upon the completion of discharge. As settled, the Arbitrators are bound by the Agreement between the parties. Such Agreements as recorded above, if not against any public policy and in fact it is well within the purview of the trade and practice of the industry and the commercial persons, knowing fully the provisions of law and in fact voluntarily entered into such Agreement and invoked the Arbitration proceedings, I see the view expressed by the majority Arbitrators that the claims so raised beyond 45 days is time barred and/or cannot be granted, needs no interference. It follows that the view expressed by the dissenting Arbitrator on this point is unacceptable. The Arbitrators are not empowered to direct the other parties to pay demurrages though not filed with agreed period. They are also bound by the clause. The majority view is correct that claim of the Petitioners is time barred as not presented within 45 days, by observing as under:

7.6.10 In our view Clause 24 should be looked at in light of the commercial exigencies - especially exigencies and practices of international shipping business. This clause requires the Claimant/ owner to quantify the amount of demurrage due (if any) and to present the same to the Charterers / Respondents within the agreed period of time along with specific facts upon which such quantification is based - if such details are available at that time. The Owner''s/ Claimant''s right to receive and the Charterer''s / Respondent''s liability to pay demurrage arise only if the quantification of demurrage has been presented within the agreed period - not otherwise. If, after so presenting the demurrage claim, there is a dispute between the parties (whether as to the quantification of demurrage or as to some other question concerning demurrage), then either party is free to commence appropriate legal proceedings within the time permissible by the proper law applicable to the contract - Clause 24 places no restriction whatsoever upon the rights of any of the parties to seek/ commence legal proceedings within the statutory period. Clause 24 does not extinguish the rights any of the parties. Nor does Clause 24 discharge any of the parties from any liability.

7.6.13 As the Respondents have declined to consider that claim, it is not within out competence/ jurisdiction to interfere with that decision of the Respondents. In view of the

aforesaid, it is not necessary for us to go into the questions of time for which the vessel was on demurrage, the amount of demurrage due (if any) or the interest that may be due on such demurrage. Accordingly, we dismiss the Claim and hold that the Claimants are not entitled to any relief.

46. The judgment cited by the learned counsel appearing for the Petitioners basically Delhi High Court Judgment, Indian Oil Corporation,(Supra) has not considered the Supreme Court Judgments of Himachal Pradesh (Supra) and M/s. United India Insurance (Supra) and from the point of view expressed by us in M/s. Indusind Bank Ltd. (Supra), followed by the reasons in this matter.

47. I have already observed in Ispat Industries Ltd. Vs. Shipping Corporation of India Ltd., and Jigar Vikamsey, An Indian National Vs. Bombay Stock Exchange Limited, the scope of the power of Arbitrator while dealing with Section 34 Petition in the following words.

11. The Petition is u/s 34 of the Act. The Apex Court recently in G. Ramachandra Reddy and Co. Vs. Union of India (UOI) and Another, and in M.P. Housing Board Vs. Progressive Writers and Publishers, , while dealing with both the Arbitration Acts and considering the principles to challenge the Arbitral Award has reiterated the following points :

(a) The reappraisal of the evidence by the Court is not permissible (M/s. Ispat Engineering and Foundry Works, B.S. City, Bokaro Vs. M/s. steel Authority of India Ltd., B.S. City, Bokaro,). An Award of an Arbitrator need to be read as a whole to find out the implication and meaning thereof of the reasons. The Court, however, does not sit in Appeal over the Award.

(b) The interference, where reasons are given would still be less, unless there exists a total perversity and/or the Award is based on a wrong proposition of law.

(c) Even if two views are possible on an interpretation of central clause, that would not be justification in interfering with the Award specially when the view so taken is possible/plausible one (State of U.P. Vs. Allied Constructions,). [G. Ramchandran (Supra)] But the interpretation of the clause which is wholly contrary to law should not be upheld by the Court. [Numaligarh Refinery Ltd. Vs. Daelim Industrial Company Ltd.,].

The challenge to the counter claim:

48. With regard to the counter claim of the Respondents as granted by the majority Arbitrators, I have gone through the documents, all the reasoning of the award and heard both the parties.

49. There is no dispute that the dispute arose between the parties over demurrage and short delivery of cargo. Clause 13 of the Special Provisions of C/P provides for Indian law to apply to the charter party. Clause 29 provides for settlement of dispute in accordance

with the provisions of Indian Arbitration and Conciliation Act, 1996 under the Maritime Arbitration Rules of the Indian Council of Arbitration (ICA). The challenge was also raised by the Petitioners to the counter claim which has been awarded by the majority award. The discharge was completed in November 2002; notice of shortage was given and duly acknowledged; the claim for loss of cargo was sent by the Respondents to the claimants on 8 April 2003; the counter claim was filed in April 2005. Admittedly, there was no such restrictive clause for the Respondents to lodge any counter claim within any specified period though the same was for the claim for demurrages. The finding is given by majority Arbitrators that the counter claim is not barred by limitation. The learned counsel appearing for the Petitioners fairly not pressed this issue of limitation of the counter claim.

50. The findings are clearly based upon the bill of lading and its contents and the fact that the claimants admittedly delivered the part goods as the Respondents submitted invoices for the goods and remitted the amount. The finding therefore that the Respondents had title to the goods and are entitled to sue for the alleged shortage/loss of goods. There is no contra material and/or submission placed before the Court.

51. The counter claim of shortage of goods need to be proved by the Respondents and/or the party one who alleges the same. The basic documents are the bills of lading, the survey reports of ship, the shore discrepancy at the load port dated 25 December 2002 and the subsequent discrepancy in B/L quantity. To the reports of respective surveyors, which reflect difference in the quantity discharge, the claimants placed on record also a quantity survey report of his surveyor, Phoenix Cargo Controllers & Claim Adjusters who carried out the quantity survey at discharge port. The bills of lading is principally a conclusive evidence of the quantity entrusted to the claimants. The cargo was delivered to IOC. Both the reports show the less quantities than the bills of lading. The Respondents, therefore, based upon the bills of lading substantiated the case that the goods which were delivered were less in quantity and accordingly the details of lesser quantity were provided and placed on the record.

52 It is relevant to note Section 3 of the Indian Bills of Lading Act, 1856 which is as under :

3 Bill of Lading in hands of consignee, etc. conclusive evidence of the shipment as against master etc.

Every bill of lading in the hands of a consignee or endorsee..... shall be conclusive evidence as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not in fact been laden on board.

Provided that the master or other person so signing may exonerate himself in respect of such misrepresentation, by showing that it was caused without default on his part, and

wholly by the fraud of the shipper, or the holder, or some person under whom the holder claims.

The effect of filing revised statement after closing of evidence and during the course of argument:

53. The Respondents did not lead any oral evidence. The Claimants led evidence through the Video Conferencing of the Master of the vessel. The presumption of bills of lading in view of above provisions is always subject to supporting documents. The other side in given case, can bring contra material on record to show contrary. There is no total bar. The majority view has been that the quantity mentioned in the bills of lading is conclusive evidence of the quantities shipped out and the claimants (owner) are not entitled to question the same. It is necessary while awarding the counter claim and/or while accepting the case of the Respondents to consider the supporting material with regard to the quantity actually received and/or delivered, specifically when the claimants disputed various aspects of Bills of Lading and the discrepancy in quantity. Admittedly, there was a discrepancy as recorded by the majority Arbitrators in the bills of lading quantities and in those two reports filed by both the parties. The marginal discrepancy of quantity which in the given case is permissible. The majority Arbitrators have given reasons while awarding the counter claim of the Respondents even by providing the chart of showing difference between bills of lading quantity and the discharge quantity and thereby arrived at the conclusion so recorded above. But the important facet in such matters, specifically when the challenge which raised to the quantity supplied and/or received and as the Respondents failed to lead supporting oral evidence and as relied on the documents on record, it was necessary for the Arbitrator to consider the submission and the case of the claimants to oppose the counter claim, with regard to the unsupported statement of discrepancy.

Admission of deficiency in counter claim:

54. Admittedly, there was overwhelming data, figures, objections produced through various documents referred and relied by the parties, including the reports. The Respondents have noted the quantum of alleged loss after a lapse of 2 years and 7 months based upon their calculation through the counter claim dated 12 April 2005. Admittedly, during the course of proceedings on 22 and 23 November 2007, the Respondents recalculated their claim and filed a revised statement of cargo loss. The same was again without any supporting documents which were vague, hypothetical and stated to be arithmetical calculation only. The loss was revised to 6310 barrels of Arab light as against 7918 barrels as claimed initially. As the loss of 3395 barrels of Arab heavy as against 1980 barrels claimed initially. The submission of learned counsel appearing for the claimants, opposing the counter claim of the Respondents has some force, specially when the Respondents not lead any oral evidence in support of the counter claim so raised and revised. The reliance is only on the basis of documents placed on record supported by uncleared, vague and hypothetical statements. The fact remains that

though counter claim was filed in 2005 such revised statement of cargo loss was submitted on 22 and 23 November 2007 in the middle of hearing. I am not inclined to accept the case of the Respondents that it was just to simplify the claim and/or that the monetary claim can always be reduced. The statement so revised shows that there was huge difference in every aspect with regard to the initial claims of cargo loss. Though final calculation was about 700 barrels, but the fact remains that there was vast difference in the specific barrels of Arab light, as well as, Arab heavy. Therefore, when the counter claim was raised, it was vague and hypothetical without supporting material. But during the course of the argument it was substantially corrected as referred above, on the ground that it was for simplification of the claim. This uncleared and vague statement, therefore, have not been placed immediately along with the basic claim with justification and/or as early as possible before the evidence of claimants'' witness was recorded. The majority Arbitrators have recorded without giving the reasons for such discrepancies and vagueness, in fact recorded that there was a clear discrepancy in paragraph 8.8.1, "It is not possible to ascertain the exact quantity of cargo short delivered", therefore awarding the counter claim based upon such statements, which in my view, is incorrect. This deprives the other party to put his case at the appropriate place before closing of his witness. This, in fact, supports the case of the claimants that the figures so arrived at and so claimed by the Respondents in counter claim was vague and uncleared since its inception.

55. Another facet is that the initial claim was based on the difference between the bills of lading quantities and the quantities actually received but the revisions so made was on the basis of difference of bills of lading quantities and the quantities measured on the ships arrival. It was question from time to time, though attested by the Respondents'' Inspector, cannot be accepted as full and final documents as observed by the majority Arbitrators while awarding the contract. It also supports the case of the claimants that the quantity mentioned in the bills of lading was overstated.

56. It is necessary to note that the witness of the claimants stated that there was discrepancy of shore figures and therefore, he instructed the agent about the discrepancy, but why it was not attached to the bills of lading, he could not answer. He denied the discrepancies by stating that he arrived with the cargo which was loaded. There was no occasion for him to compare his arrival with the bills of lading figures as he has a surveyor of P & I Club. As noted, the Respondents did not lead any contra evidence. Whole case was based upon the above documents. The discrepancies were admittedly tried to correct even by the Respondents by filing the revised statement.

57. The majority Arbitrator in their reasonings, have not even dealt any details of such discrepancy and the revised statement and the effect of submission of such revised statement during the course of hearing and the evidence of claimants'' Master. They have passed the award on the basis of the bills of lading and its contents and just overlooked the specific case of discrepancies as pointed out by the claimants. This facet, in my view, goes to the root of the matter for awarding the contract, specifically when the Arbitrator if

relied upon the new documents or statement which admittedly were vague and uncleared and accepting those documents during the course of hearing certainly cause great injustice and hardship and it is against the principle of natural justice. This cannot be stated to be giving a full and fair opportunity to both the parties.

58. It is to be noted that the award of the majority Arbitrator was not based upon the interpretation of agreement and/or any particular clause so far as the counter claim in question is concerned. The reasonings are based upon the material evidence placed by the rival parties on record. In view of above, if there is a wrong appreciation of material by not giving equal opportunity to both the parties and breach the principle of natural justice, the majority award, in my view, with regard to the grant of counter claim needs interference.

59. I have observed in Bombay Construction and Engineering Private Limited Vs. Mehta Finstock Pvt. Ltd., Mumbai & Anr. 2009 (6) Mh.L.J. 595 as under:

3. Admittedly, the surrejoinder and the sursurrejoinder were filed after the closing of the matter. The parties were represented by the advocates. Therefore, in my view, the decision based upon the surrejoinder and sursurrejoinder which were filed after closing of the matter, need to be reconsidered again. The submission that even otherwise, the averments made in those surrejoinder and/or sursurrejoinder could not have changed the basic award, is not acceptable. Because, it amounts no full opportunity, as contemplated under the principle of natural justice. There is nothing on record to show that the parties have accepted and or consented for such procedural mode and mechanism. Without expressing anything on merits of the matter, on this ground itself, I am quashing this award. However, it is made clear that the Hon''ble Tribunal may fix the matter and pass appropriate order after hearing both the parties within a period of 6 weeks, on the basis of material available on record.

60. I have already observed in Anupam Engineer, Mumbai Vs. Indian Oil Corporation Ltd., Mumbai 2010 (2) Mh.L.J. 632 that Arbitral Award can be modified by the Court u/s 34 of the Arbitration Act by referring the various Supreme Court Judgments, and further in Union of India (UOI) and Dy. Chief Engineer (Const.) Vs. Sagar Thermit Corp. Ltd., by referring to R.S. Jiwani (Supra) Therefore, if the Court has power to modify the award, then there is no reason not to modify the majority award in part. It is also made clear that if there is a question of reappreciation of documents and material on record, then it will be difficult for the Court u/s 34 to grant the award for the first time by reappreciating the material on record, but if there is a question of law involved and/or only question of interpretation or clause and/or related aspects, whether appreciation of evidence is not necessary, the Court may pass and/or modify the award accordingly.

61. There is no doubt that the agreement as entered into between the parties is the commercial document, based upon the international trade and practice. The Arbitration Act which is on the foundation to UNCITRAL is also based upon the international

commercial Arbitration practice and proceedings. Therefore, it is necessary to give business like interpretation to achieve the commercial object which commercial persons have adopted and agreed accordingly. In my view, therefore, it is necessary to give business common sense and meaning based upon the international trade and practice of such transaction. Therefore, I am not inclined to accept the submission that such clause which put the restriction to make the claim within a prescribed period is against the public policy. The international transaction/contract needs to be made by the parties on the basis of the international trade and practice and laws in contra intention, in my view, will disturb the international trade and commerce.

62. Therefore, so far as the interpretation given by the majority of the Arbitrators with regard to the dismissing of claim under the basis of agreed clause, as it nowhere restricts the right of claimants to recover the claim in ordinary Court jurisdiction, but as restricts the power and jurisdiction of Arbitrators to grant any claim as the claimants failed to file claim within stipulated period, and therefore, cannot be stated to be contrary to law. However, at the same stroke so far as the grant of counter claim in favour of the Respondents, as recorded above, the Arbitrator though in majority, awarded the claim on the basis of new and changed statement of claims filed after closing of evidence of the claimants and/or during the course of argument and specifically when the contents of the statement were denied and not admitted by the Respondents, ought not to have been relied, therefore, needs to be interfered with.

63. As noted, in R.S. Jiwani (Supra) the Court u/s 34 has power to modify the award therefore, in the present facts and circumstances of the case I am modifying the award in the following terms.

64. In the result, the majority Award is modified. Clauses 1 and 2 are set aside and Clause 3 is maintained. However, the rejection of the claim of the Petitioners/original claimant is maintained. The matter is remanded to the extent of original Respondents Counterclaim in every aspect. The same Tribunal or such other Tribunal to hear and decide the matter afresh within reasonable time, by giving opportunity to both the parties.

65. There shall be no order as to costs.