

**(2019) 08 DEL CK 0051**

**In the Delhi High Court**

**Case No :** Original Miscellaneous Petition (COMM) No. 220 Of 2018,  
Miscellaneous Application No. 7089 Of 2018

Indian Oil Corporation Ltd

APPELLANT

Vs

Neptuno Maritime Corp

RESPONDENT

**Date of Decision :** 06-08-2019

**Acts Referred:**

Arbitration And Conciliation Act, 1996 — Section 2(f), 18, 28(3), 31(3), 34, 34(2A),  
34(2)(a)(iii), 48, 48(2)(b)(ii)

**Citation :** (2019) 08 DEL CK 0051

**Hon'ble Judges :** Navin Chawla, J

**Bench :** Single Bench

**Advocate :** Meenakshi Arora, Rahul Narayan, Bharat Des, Shashwat Goel,  
Sudhanshu Batra, Arvind Kumar Gupta, Aditya Mishra, Prashant Bhardwaj,  
Jyotika Jain, Anuraj Tirthankar, Rishi Bhardwaj

**Final Decision :** Dismissed

## Judgement

Navin Chawla, J

1. This petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act") challenging the Arbitral Award (hereinafter referred to as the "Impugned Award") dated 05.04.2018 passed by the majority of the Arbitral Tribunal adjudicating the disputes that have arisen between the parties in relation to the Voyage Charterparty dated 18.04.2016.

2. The petitioner/charterer entered into the Asbatankvoy Charterparty Agreement dated 18.04.2016 ("Charterparty") with the respondent/owner for the charter of the vessel MT Antonis I Angelicoussis to carry a minimum cargo of 1,806,000 barrels of crude oil (903 Kbbbls Okwuibome Crude Oil and 903 Kbbbls Qua Ibo Crude Oil) upto full capacity of the vessel. The loading ports were at Tulja and Qua Iboe, Nigeria and the discharge port was at Vadinar, India.

3. The petitioner further entered into a Contract with a commodity dealer

Glencore Energy UK Limited (Glencore) for the purchase of 903 kbbbls of Qua Iboe Crude for loading in May 2016. Glencore in turn purchased Qua Iboe Crude from Exxonmobil Sales and Supply LLC (Exxon Mobil).

4. The vessel completed discharging the cargo of crude oil at Vadinar on 27.06.2016. The respondent sent a demurrage invoice for USD 804,366.67 (gross)/USD 778,476.12 (net) to the petitioner on 11.07.2016 stating that the vessel had cumulatively used 435 hours and 12 minutes in loading and discharging and as the laytime permitted under the Charterparty was 108 hours, the vessel was on demurrage for 327 hours and 12 minutes.

5. The petitioner sought deduction of some of the hours calculated by the respondent as laytime. Though the respondent disagreed with the petitioner, it revised the calculations and made a "without prejudice offer" dated 23.09.2016 for USD 786,666.67(gross) deducting 7 hours and 12 minutes of laytime. The respondent made further reduction of 6 hours in the laytime vide another "without prejudice offer" dated 24.01.2017 and raised invoice for USD 771,916.67 (gross) /USD 747,070.60 (net).

6. The respondent invoked arbitration on 27.02.2017 wherein it claimed the sum of USD 747,070.60 along with interest @ 8% p.a. from 09.10.2016 till payment/realization.

7. The petitioner sent an email on 03.04.2017 offering to settle the undisputed amount of demurrage and requested an invoice for the same.

8. The petitioner vide letter dated 11.04.2017 informed the respondent that out of the 314 hours claimed towards demurrage, 194 hours and 31 minutes are not to be counted and demurrage on the balance laytime of 119 hours and 29 minutes is not disputed. The petitioner claimed that the demurrage amount, therefore, was USD 293,729.86 (gross).

9. The respondent sent the revised invoice for USD 293,729.86 (gross)/ USD 284,275.43 (net) on 11.04.2017 itself, but reserved the right to continue through arbitration the claim for the disputed amount of demurrage as also interest on both the disputed as well as the undisputed demurrage amounts.

10. The petitioner remitted the aforesaid amount of USD 284,275.43 to the respondent with a value date of 28.04.2017.

11. The dispute between the parties is limited to the amount of demurrage on 194 hours and 31 minutes when the vessel was at Qua Iboe as well as interest and costs.

12. The petitioner claimed that due to an incident that occurred on 08.05.2016 close to the Submarine or Seabed pipelines in Nigerian National Petroleum Company / Mobil Producing Nigeria JV (NNPC/MPN JV) involving an Oil Rig called the "Monarch" which resulted in the release of oil into the water, the east and west shoreline of Qua Iboe river was infected and disrupted production of oil by

NNPC /MPN JV. As a consequence of this incident, some offshore production platforms were shut to mitigate the resultant oil spill resulting in production shortfall from 10.05.2016. A Force Majeure Notice (FMN) was addressed by Exxon Mobil to Glencore. The petitioner sent a copy of this notice to the respondent on 16.05.2016. It is claimed by the petitioner that due to shortfall in production, there was a delay in berthing of two other vessels ahead of the Charter vessel. The petitioner placed reliance on Clause 6 (Part II) of the Charterparty to claim exemption from payment of demurrage for the entire period in dispute. In the alternative, the petitioner also claimed that in terms of Clause 8 (Part II) of the Charterparty, it was liable to pay demurrage at half the rate stipulated in Part I of the Charter-party as this was a case of breakdown of the machinery or equipment in or about the Plant of the Charterer, Supplier, Shipper or Consignee of the Cargo.

13. Clause 6 and 8 of Part II of the Contract are reproduced as under:

"4. Clause 6 (Part II): NOTICE OF READINESS: Upon arrival at customary anchorage at each port of loading or discharge, the Master or his agent shall give Charterer or his agent notice by letter, telegraph, wireless or telephone that the Vessel is ready to load or discharge cargo, berth or no berth, and laytime, as hereinafter provided, shall commence upon the expiration of six (6) hours after receipt of such notice, or upon the Vessel's arrival in berth (i.e. finished mooring when at a sea-loading or discharging terminal and all fast when loading or discharging alongside a wharf), whichever first occurs. However, where delay is caused to Vessel getting into berth after giving notice of readiness for any reason over which Charterer has no control, such delay shall not count as used laytime.

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6. Clause 8 (Part II): DEMURRAGE: Charterer shall pay demurrage per running hour and pro rata for a part thereof at the rate specified in Part I for all time that loading and discharging and used laytime as elsewhere herein provided exceeds the allowed laytime elsewhere herein specified. If, however, demurrage shall be incurred at port of loading and / or discharge by reason of fire, explosion, storm or by strike, lockout, stoppage or restraint of labor or by breakdown of machinery or equipment in or about the plant of the Charterer, supplier, shipper or consignee of the cargo, the rate of demurrage shall be reduced one-half of the amount stated in Part I per running hour or pro rata for part of an hour for demurrage so incurred. The Charterer shall not be liable for any demurrage for delay caused by strike, lockout, stoppage or restraint of labor for Master, officers and crew of the Vessel or tugboat or pilots."

(Emphasis supplied)

14. The majority of the Arbitral Tribunal in its Impugned Award has rejected the contentions of the petitioner. It has held that the cause of the delay in berthing was the port congestion and the evidence produced by the petitioner was not sufficient to conclude that the reported slow down/disruption in production was

the proximate or effective cause of the delay. It has held that the petitioner has not discharged its evidentiary burden to establish an unbroken causal connection between the incidence with the oil rig and the delay in the berthing of the vessel. Arbitral Tribunal held that equally, there is no evidence to determine the extent of delay and therefore, it is difficult to conclude as a question of fact that the entire delay in waiting for the berth is attributable to the rig incident. It held that Clause 8 (Part II) would not apply to the facts of the case as the word "breakdown" in Clause 8 cannot be stretched to include circumstances where the equipment functions, but at suboptimal efficiency.

15. The majority of the Arbitral Tribunal further held that the "supplier" envisaged under Clause 8 can only be a direct and immediate supplier to the charterer and not others down the chain of multiple sellers or buyers. It held that Exxon Mobil was not the shipper for the purpose of Clause 8 (Part II) of the Agreement.

16. As far as the applicability of Clause 6 (Part II) is concerned, the majority of the Arbitral Tribunal held that the said Clause applies to delay of the vessels when getting to the designated berth and not to case of waiting for a berth to be ready or to become vacant.

17. Based on the above finding, the majority of Arbitral Tribunal directed the petitioner to pay to the respondent the following amounts:

"1. The sum of USD 462,795.17 (United States Dollars four hundred sixty two thousand seven hundred and ninety five dollars and seventeen cents);

2. Interest at the rate of 5% p.a. on USD 747,070.60 for two days - amounting to USD 204.67;

3. Interest at the rate of 5% p.a. on USD 462,795.17 from 29 April 2017 till the date of this Award (05 April 2018) amounting to USD 21,618.24;

4. Interest on the cumulative amount awarded under Sr. Nos.1, 2 and 3 above, amounting in all to USD 484,618.08 at the rate of 5% p.a. from the date of this Award until payment/realisation;

5. The sum of Indian Rupees 21,25,663 towards cost and expenses of the Claimants;

6. Interest on Indian Rupees 21,25,663 at the rate of 14% p.a. from the date of this Award until payment/realisation;"

18. At this stage itself, reference should also be made to the minority Award as much reliance has been placed thereon by the learned senior counsel appearing for the petitioner. The minority Award has held that the petitioner was able to establish the fact that the incident with the oil rig had caused damage to the oil pipeline, which in turn caused the delay in loading of the vessels. The minority Award, agreed with the finding of the majority Award that Clause 6 of the Charter Party cannot be invoked by the petitioner, however, based on the above

finding of the incident, as also on its finding that Exxon Mobil was the Shipper of the cargo, held that the petitioner was entitled to invoke Clause 8 of the Charter Party and therefore, was liable to pay only 50% of the rate of demurrage for the period in dispute.

19. Some of the admitted facts with respect to the berthing of the vessels at Qua Iboe are as under:

a. The vessels arrived at Qua Iboe on 18.05.2016 and tendered Notice of Readiness (NOR) at 15:30 hours;

b. At the time of NOR there were two vessels ahead of it, namely MT SCF Khibiny and MT ALMI GALAXY;

c. MT SCF Khibiny had arrived on 05.05.2016 but could berth only on 20.05.2016. It completed loading on 21.05.2016;

d. MT ALMI GALAXY arrived on 16-17.05.2016 but could berth on 26.05.2016. The said vessels completed loading and sailed on 28.05.2016;

e. MT ANTONIS, the vessel in question, could berth thereafter only on 30.05.2016 and loading began at 16:42 hours and completed at 19:06 hours on 31.05.2016 and it sailed on 01.06.2016 at 13:30 hours;

20. As noted hereinabove, it is the case of the petitioner that the delay in berthing of the vessel in question was due to the incident with the oil rig, which in turn resulted in no oil production from 12.05.2016 to 18.05.2016, whereafter also the production was not to the full capacity. It is contended by the learned senior counsel for the petitioner that the findings of the majority of the Arbitrators are purely speculative in nature bordering on being perverse. She submits that the FMN issued by Exxon Mobil to Glencore, various newspaper reports, as also the production details, all showed that the delay in berthing of the vessel was due to the incident at the oil rig. In this regard she has drawn my attention to various documents on record. She further places reliance on the judgment of *Portolana Compania Naviera Limited v. Vitol SA INC and Anr.*, [2004] EWCA Civ 864, to contend that the pipeline was an equipment and the words "breakdown of machinery or equipment" used in Clause 8 of the Charterparty must be given a wider meaning to include the circumstances in question in the present case. Relying on the above judgment, she submits that it was the duty of the Arbitral Tribunal to determine the true cause of delay in berthing of the vessels. Further, relying on the judgment of *Carboex SA v. Louis Dreyfus Commodities Suisse SA*, [2012] EWCA Civ 838, she submits that the cause of the delay can continue even after the incident has ended and it was the duty of the Arbitral Tribunal to determine the extent of delay caused by such incident in the berthing of the vessel in question. She further places reliance on the text book on *Voyage Charterers* (Fourth Edition) by Julian Cooke and submits that delay in berthing due to interruption in the working of prior vessels due to the excepted event would also apply as a laytime exception to the vessels awaiting a berth.

21. The learned senior counsel for the petitioner further submits that the majority of the Arbitral Tribunal has clearly erred in holding that Exxon Mobil is not the supplier of the cargo. Again referring to various documents including the Tanker Time, Loading Report, Vessel Loading and Sailing Advice, Letter of Protest, Bills of Lading etc. she submits that in these documents Exxon Mobil has been referred to as the consignee/shipper/supplier and therefore, the finding of the majority Arbitral Tribunal is completely perverse on this issue.

22. As far as the application of Clause 6 of the Charterparty is concerned, she reiterates that the delay in berthing of the vessel would discharge the petitioner from the payment of demurrage.

23. On the other hand, the learned senior counsel for the respondent submits that the petitioner failed to establish that there was, in fact, a force majeure event or the delay was attributable to such an event. He submits that atmost the regular oil production activities had slowed down however, there was nothing on record to support the case of the petitioner that the production/supply had been completely halted. He further submits that Clause 8 of the Charterparty does not in any manner, contemplate partial break down and there is no scope for the applicability of a partial force majeure. The breakdown should be one which is a complete Breakdown of Equipment.

24. The learned senior counsel for the respondent further submits that Exxon Mobil cannot be termed as a supplier under Clause 8 as this would mean tracing down indefinitely through every contract for supply and may theoretically encompass all people connected with the supply. He submits that the supplier as envisaged under the Clause would mean a direct supplier.

25. The learned senior counsel for the respondent further submits that the interpretation of Clause 6 cannot be stretched to excuse the charterer/petitioner from the consequences of its inability or failure to procure a vacant berth.

26. I have considered the submissions made by the learned senior counsels for the parties. At the outset, it would be advisable to remind myself that the present is a case of International Commercial Arbitration as defined in Section 2(f) of the Act. The contours and limits of the power of the Court exercising jurisdiction under Section 34 of the Act have been recently elaborated by the Supreme Court in its judgment of *Ssangyong Engineering & Construction Co. Ltd. vs. National Highways Authority of India (NHAI)*, 2019 SCC OnLine SC 677, in the following words:

"35. What is clear, therefore, is that the expression "public policy of India", whether contained in Section 34 or in Section 48, would now mean the "fundamental policy of Indian law" as explained in paragraphs 18 and 27 of *Associate Builders (supra)*, i.e., the fundamental policy of Indian law would be relegated to the "Renusagar" understanding of this expression. This would necessarily mean that the *Western Geco (supra)* expansion has been done away with. In short, *Western Geco (supra)*, as explained in paragraphs 28 and 29 of

Associate Builders (supra), would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court's intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in paragraph 30 of Associate Builders (supra).

36. It is important to notice that the ground for interference insofar as it concerns "interest of India" has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the "most basic notions of morality or justice". This again would be in line with paragraphs 36 to 39 of Associate Builders (supra), as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.

37. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paragraphs 18 and 27 of Associate Builders (supra), or secondly, that such award is against basic notions of justice or morality as understood in paragraphs 36 to 39 of Associate Builders (supra). Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that Western Geco (supra), as understood in Associate Builders (supra), and paragraphs 28 and 29 in particular, is now done away with.

38. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within "the fundamental policy of Indian law", namely, the contravention of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

39. Secondly, it is also made clear that re-appreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.

40. To elucidate, paragraph 42.1 of Associate Builders (supra), namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Paragraph 42.2 of Associate Builders (supra), however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act that would certainly amount to a patent illegality on the face of the award.

41. The change made in Section 28(3) by the Amendment Act really follows what

is stated in paragraphs 42.3 to 45 in *Associate Builders* (supra), namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take. Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2A)."

27. A reading of the above would clearly show that this Court cannot exercise its power as a Court of Appeal against the Impugned Arbitral Award. The Arbitral Tribunal is the final adjudicator of the facts and even the interpretation of the contractual terms.

28. In *Portolana Compania Naviera Limited* (supra), the Court of Appeal has stated that the expression "breakdown of equipment" has to be considered by reference to the facts of the particular case and in the context of the particular Charterparty, it must be viewed against its factual matrix or surrounding circumstances. Therefore, the question whether the incident involving the oil rig would be a "breakdown of machinery or equipment" will be a finding of fact to be recorded by the Arbitral Tribunal based on the evidence led before it. This Court certainly cannot set aside an Award on the ground that upon re-appreciating the evidence, it has reached a different conclusion. Where the conclusion reached by the Arbitral Tribunal is a plausible one, the Arbitral Tribunal being the final judge of facts, its conclusion must prevail and the Court would refrain itself from interfering with such Award.

29. In the present case, as noted hereinabove, the majority of the Arbitral Tribunal has observed that even in the normal times, that is, when there was no disruption due to the oil rig incident, the rate of production at Qua Iboe was a little more than one-fourth of the rate of loading and lagged well behind the rate at which the oil was shipped out. It has held that there was a probability of port congestion even in normal circumstances. It has further held that the delay in berthing of MT-Almi Galaxy was due to "Cargo Treating". It has held that while the incident with the oil rig could have been a contributory factor, it was not a substantial or predominant and effective causative factor for the delay. It has further held that from the evidence it was difficult to conclude that the entire delay in waiting for the berth was attributable to the rig incident.

30. The above finding of the Arbitral Tribunal can certainly not be said to be perverse or one which no reasonably minded Arbitral Tribunal could have reached.

31. As far as the challenge to the finding of the majority Arbitral Tribunal that Exxon Mobil cannot be held to be the supplier/shipper/consignee of the cargo is concerned, the Arbitral Tribunal has held that these words can only refer to the direct and immediate suppliers to the charterer and not others down the chain of multiple sellers and buyers. It has also considered the various documents that



were relied upon by the learned senior counsel for the petitioner in the present proceedings, however, found them to be of no assistance to the case of the petitioner. With the limited jurisdiction of this Court, in my opinion, such finding of the majority of the Arbitral Tribunal, based on the interpretation of the Contract and effect of various documents, cannot be interfered with by this Court.

32. As far as the applicability of Clause 6 of the Charterparty is concerned, the Arbitral Tribunal has again interpreted the terms of the Contract, which in fact, I agree with. Clause 6 only applies to cases where the berth has been designated, however, there is delay in the vessel reaching the designated berth. It has no application in cases like the present, where the berth could not be designated in time due to any reason.

33. In view of the above, I find no merit in the challenge to the Award in so far as it determines that the petitioner is liable to pay demurrage charge for the period in dispute

34. Learned senior counsel for the petitioner has further challenged the Award of Interest by the Arbitral Tribunal. In *Vedanta Limited v. Shenzhen Shandong Nuclear Power Construction Co. Ltd.*, 2018 SCC OnLine SC 1922, the Supreme Court has held that it is necessary for the Arbitral Tribunal to coordinate the choice of currency with the interest rate. In the present case, the majority of the Arbitral Tribunal has given cogent reason for determining the rate of interest in the following words:

"44. According to the dicta in *Dobryl Eastern Cape* and in *Dan Bunkering* the interest rates on USD denominated claims may not exceed the rate of interest prevailing in the USA during the relevant period. Claimants relied on (*Ispat Industries*) case where the Bombay High Court declined to interfere with the Award of a sole arbitrator granting interest at 8% p.a. on USD denominated claim. The circumstances and the arbitrator's reasons for the grant of interest are not known. The dispute in this case arose out of a contract in 1996 when the interest rates were different from those now prevalent. Taking all the factors into account, in our opinion it is just and reasonable that the Respondents pay to the Claimants, interest at the rate of 5% per year on the amounts and for the periods, as discussed above."

35. Therefore, the Arbitral Tribunal was aware of the rate of interest applicable to foreign currency, which is US Dollar. It has further awarded interest at the rate of 14% p.a. on the Award which was made in the Indian currency. I, therefore, find no reason to interfere with the award of Interest.

36. In view of the above, I find no merit in the present petition and same is dismissed with cost quantified at Rs.50,000/-.

37. The amount deposited by the petitioner with the Registry of this Court pursuant to order dated 21.05.2018 alongwith interest accrued thereon, if any, shall be released in favour of the respondent.