

(2012) 02 DEL CK 0113
In the Delhi High Court
Case No : OMP No. 173 of 2005

Vishal Exports Overseas Limited

APPELLANT

Vs

Humburg Bulk Carriers, Gmbh

RESPONDENT

Date of Decision : 14-02-2012

Acts Referred:

Evidence Act, 1872 — Section 1

Voyage Charterparty Laytime Interpretation Rules, 1993 — Rule 22

Citation : (2012) 128 DRJ 241

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : Mihir Thakore, with Mr. Umesh Shukla, Ms. Manmeet Arora and Ms. Princy Ponnann, for the Appellant; Prashant S. Pratap with Mr. O.P. Gagggar, for the Respondent

Final Decision : Dismissed

Judgement

Justice S. Muralidhar

1. The Petitioner, Vishal Exports Overseas Limited, challenges an Award dated 30th August 2002 passed by the Arbitral Tribunal ("Tribunal") in the dispute between the Petitioner and the Respondent, Hamburg Bulk Carriers GMBH, whereby the Tribunal, by a majority of 2:1, allowed the claims of the Respondent and held that the Petitioner had to pay the Respondent a total amount of US \$ 210,499.18 together with interest @ 10% per annum from 4th July 2001 till payment or its realization. The counter claims of the Petitioner were rejected.

Background facts

2. The Respondent is the owner of the vessel m.v.ALEGRE-1. It entered into a Charterparty ('C/P') dated 23rd March 2001 on the GENCON form with the Petitioner for carriage of 20,000 MTs, 10% more or less at the owners' option, wheat in bulk from Mumbai to Umm Qasr, Iraq. The relevant clauses of GENCON C/P dated 23rd March 2001 read as under:

Clause 18 of Part-I

Demurrage rate (loading and discharging) (C1.7) US\$ 6000/per day pro rata/half dispatch working time saved both ends -lay time non-reversible.

Clause 8 of Part-II

Owners shall have a lien on the cargo for freight, dead-freight, demurrage, charterers shall remain responsible for dead-freight and demurrage incurred at port of loading and discharging. Charterers shall also responsible for freight and demurrage incurred at port of discharge, but only to such extent as the owners have been unable to obtain payment thereof by exercising the lien on the cargo.

Riders Clause -20

Cargo shall be located at the average rate of 2000 metric tons per weather working day of 24 consecutive hours, Saturday afternoon, Sundays and charter party holidays excepted event if used, basis five or more hatches, pro-rata if less. Time at load port shall begin to count from 1300 hours after vessels arrival within port limits and notice of readiness tendered and accepted to load prior 1200 noon and from 0800 hours next working day if notice of readiness tendered and accepted during official working hours afternoon, reported and in free pratique whether in berth or not but not between the hours of 5 pm and 8 am on a weekday or during day any of the periods above excepted, even if used unless the vessel is already on demurrage.

Time shall not count between noon Saturday and 8 am on Monday/next working day or between 1200 hours on the last working day preceding a charter party holiday and 0800 hours on the first working day thereafter, even if used, unless the vessel is already on demurrage. Charterers have the right to work during excepted periods, such time used not to count as laytime, time for loading and discharging to be non-reversible.

Riders Clause-29

Cargo shall be discharged at the average rate of 3000 metric tonnes per weather working day of 24 consecutive hours basis five or more hatches, prorated, if less, Thursday afternoon, Fridays, charter party holidays excepted, even if used.

At discharge port time shall begin to count 24 hours after vessel's arrive within port limits and notice of readiness tendered (such notice to be given during office working hours, i.e., 0800 hours to 1700 hours local time on Saturdays to Wednesdays and 0800 hours to 1200 hours on Thursday) provided vessel is ready in all respects to discharge, whether in berth or not, whether in free pratique or not, whether customs cleared or not.

3. In terms of Clause 39 of the C/P the disputes between the parties were to be settled in India in accordance with the provisions of Arbitration and Conciliation Act, 1996 ("Act") and under the Maritime Arbitration Rules of the Indian Council of Arbitration, New Delhi ("IRA"). However, the parties agreed to treat the

arbitration clause as an ad hoc arbitration before the Tribunal outside the ICA.

4. The vessel arrived at Mumbai on 27th March 2001 and tendered Notice of Readiness ("NOR") at 1845 hrs on the same day. The Petitioner's surveyors passed the vessel for loading at 1830 hours on 29th March 2001 and laytime commenced at 0800 hrs on 30th March 2001 in accordance with Clause 20 of the C/P.

5. From the very beginning of the loading, the Master of the vessel complained about the presence of foreign matter such as jute twine, plastic pieces and fragments of paper in the cargo being received in the holds. There were also complaints about some empty bags left in the holds after bleeding the bags and even the presence of some human excreta. The Master first lodged a protest on 1st April 2001 to the Stevedores, Hill Son & Dinshaw Limited, Mumbai ("Stevedores") requesting that it should look into the matter at the earliest and do the needful failing which the Master would have to clause the mate's receipts stating that the "bulk wheat loaded admixed with foreign matters."

6. On 3rd April 2001 the Master of M.V. Alegre-1 again addressed communication, this time not only to Stevedores but also the Petitioner and to M/s. Interocean Shipping Limited ("Agent") with copies to the Respondent, stating that there "has been a substantial amount of foreign matter such as jute twine, plastic pieces, papers and gas masks accumulated in the cargo holds" and that "the above has not been collected promptly and the same has been observed buried beneath the on-coming bulk cargo bled from bags." It was stated that "spillages from the wharf was also found with dirt dust, small stones and other foreign matters loaded into sling on the wharf and loaded in to the holds". Further, "the labours have committed nuisance (urinating etc) on the cargo in the holds and the cargo meant for human consumption is being admixed with this nuisance." The Master requested that the matter should be looked into at the earliest failing which he would have to clause the mates receipts and billing of loading ("B/L") as "bulk wheat loaded admixed with foreign matters human excrements and spoil cargo". The third reminder was sent on 5th April 2001 by the Master to the shippers, i.e., the Petitioner, Stevedores, Agent and to the Charterers. In this letter it was inter alia stated that "also the grain was found damaged and discoloured it seems that the cargo has not been inspected at the time of loading".

7. On 6th April 2001 the fourth reminder was sent by the Master stating that cargo had spilt on the wharf due to a number of bags being torn and that "the vessel and the owners will not be held responsible, if any shortage of cargo or claims whatsoever arising due this matter". A fifth reminder was sent on 12th April 2001 in which the Master recorded:

I on behalf my owners strongly protest for all the above occurrences due to negligence on your part and I have no other choice left except to clause the relevant mate's receipts accordingly.

8. The vessel eventually completed loading on 16th April 2001 at 0145 hrs. The Stevedores' Supervisor then presented Mate's Receipts ('MRs') to the Master for his signature. The Master insisted on clausing the MRs which the Stevedores refused. This led to the Master writing to the Stevedores and the Petitioner's Agent on 18th April 2001 as under:

The Supervisor presented the mates receipts on the 1st of April 2001. As stated in my letter on the same date with regards to the clausing of the mates receipts the Stevedores representative informed to me that the port authorities will not accept the claused mates receipts.

Since then the mates receipts were not presented till the 16th April 2001 after vessel completed loading and documentation. The mates receipts were again presented at noon for signing but it was again withdrawn as the clausing of mates receipts was not accepted.

The mates receipts were again presented on the 18th April 2001 at A-3 Inner Anchorage at 1400 hrs after completion on MMD survey and fumigation. However, the same were not signed due to the relevant clausing of the mates receipts.

Kindly note that that the vessel and its owners hold you fully responsible for all delays and detention with regards to the mates receipts mates being claused.

I also reserve the right to present this letter at a later date and time convenient.

9. The Respondent's lawyer addressed a letter to the Petitioner on 18th April 2001 recording the above sequence of events and stated that the Master would not permit "any misdescription of the cargo as that would amount to a false representation as to the condition of the cargo loaded. Since the cargo is admixed with foreign matter and other kinds of cargo, a remark to this effect will appear on the mate's receipts. Your Stevedores do not want the Master to put this remark and thus want the Master to falsify the condition of the cargo. Thus the Master will not do." It was further pointed out that B/L could not be issued unless the MRs were signed by the Master. Until this was done, the port authorities would not permit the vessel to sail. The Petitioner was asked to immediately submit the MRs to the Master for his signature failing which the vessel would continue to remain at the port. Further, the Petitioner was put on notice that the detention of the vessel would be to its account and the Respondents would recover the costs of detention including their right to exercise a lien on the cargo.

10. On 21st April 2001 the port authorities issued a letter to the Respondent stating that the vessel would not be allowed to sail until the issue of clausing of the MRs was resolved. This led to the Respondent's lawyer lodging another protest with the Petitioner on the same day requiring it to "take up the matter with the port authorities and issue appropriate letter of indemnity to them, if

necessary, absolving them of any cargo claims." A third notice was sent on 23rd April 2001 by the Respondent's lawyer to the Petitioner pointing out that in terms of the C/P "the vessel continues to be on demurrage at a rate of USD 6000/-per day." The C/P also provided for owners to have a lien on the cargo for demurrage. It was, accordingly, asserted that the Respondents would be well within their right not to permit discharge of cargo unless accrued demurrage was paid. On 26th April 2001 the Respondent's lawyer wrote to the port authorities pointing out that the vessel, despite being ready to sail, was not able to do so. It was inter alia stated that "it is also upto the shippers to provide you with any letter of indemnity that you may require in order for you to accept claused mate's receipts. This is now a matter for the shippers to sort out and my clients have already put them on notice".

11. In the above circumstances on 3rd May 2001 the Petitioner furnished to the Respondent a letter of indemnity ("LOI") in which inter alia the Petitioner indemnified the Master and the Respondent in respect of "any delay, costs, expenses, losses and damages that the vessel and/or the owners may suffer in the event the cargo shipped on board the vessel by us is rejected by the receivers/consignee or any local authority at the port of Umm Qasr, Iraq, including all detention to the vessel which is to be compensated by us at the rate of US\$ 7250.00 per day plus eventual daily charged harbour costs at Umm Qasr." The Petitioner also indemnified the Respondent against any loss or damage that may be suffered as a result of unloading and discharge of the cargo at the port of discharge and to provide sufficient funds to the Respondent in the event of any proceedings being commenced against it or any of its servants or agents and to provide on demand such bail or other security as may be required to prevent such arrest or detention or to secure the release of such property or vessel and also the Respondent was indemnified in respect of any liability, loss, damage or expenses caused to them. Any dispute arising under the LOI were to be referred to arbitration under the Act to a Tribunal of three members at Mumbai.

12. On 3rd May 2001 an agreement was entered into between the Petitioner and the Respondent whereby it was stated that notwithstanding anything contained in the C/P dated 23rd March 2001 the charterers shall remain fully liable for demurrage and/or damages for detention, if any, at the port of loading and discharge; the owners shall remain fully liable for despatch, if any, at the port of loading and discharge; and owners' claim for demurrage and/or damages for detention at the port of loading along with the charterers' claim for despatch at the ports of loading shall be referred to arbitration at Mumbai under Clause 39 of the C/P in accordance with provisions of the Act.

13. After completion of documents on 5th March 2001 the vessel sailed from Mumbai at 1630 hours. The vessel then proceeded to Umm Qasr in Iraq. After passing the UN inspection the vessel dropped anchor in position 29 39.3 North and 45 45.4 East in the vicinity of the pilot station for Umm Qasr at 1400 hours on 13th March 2001. Immediately thereafter, the Master gave NOR to the

Petitioner and Transchart New Delhi.

14. The case of the Respondent was that the vessel had completed her voyage at that stage and since there was congestion in the port she was waiting for berth. Pilotage at Umm Qasr was mandatory. The vessel could not proceed further without a Pilot. However, due to heavy congestion Pilot was not immediately provided. Thereupon the Petitioner opened negotiations with the Respondent to divert the vessel from Umm Qasr to Port Sudan/Jebel Ali for discharge of the chartered cargo and an addendum to the C/P was signed on 29th May 2001 in terms of which (a) lay time was to be calculated as per the C/P and (b) bunker charges from Umm Qasr to Jebel Ali were to be on the Petitioner's account.

15. The vessel was then instructed to proceed to Jebel Ali where she arrived at 1945 hrs on 29th May 2001 and tendered an NOR. The vessel berthed at Jebel Ali at 1245 hrs on 1st June 2001 and discharge was completed on 3rd June 2001 at 1700 hrs.

16. On 31st July 2001 the Respondent's lawyer issued notice to the Petitioner in which it was stated that the Respondent was claiming damages for detention for the period of 15 days 3 hours 54 minutes @ US\$ 7684.14 per day which aggregated to US\$ 116,510.76. In addition, the Respondent claimed additional costs for the said period which aggregated to Rs. 118,800, and additional barge hire of Rs. 14,800. All costs including fees paid to the MMD in the sum of Rs. 31,800 and launch hire charges of Rs. 4462.50 were also claimed. Further, the vessel was stated to be on demurrage for a total period of 11 days 6 hours 16 minutes. Out of this period, the detention of the vessel at Umm Qasr was for 3 days 2 hours 36 minutes, for which the Respondent claimed that it was entitled to demurrage at the agreed rate of US\$ 7250 plus the harbour costs at Umm Qasr. For the remaining period of 8 days 3 hours 40 minutes the Respondent was entitled to demurrage @ US\$ 6000 per day. With the total cost of bunkers consumed during the voyage coming to US\$ 4347.33, the balance freight was for the value of US\$ 52,295.55. Accordingly, the Respondent by the aforementioned legal notice claimed from the Petitioner the amount aggregating to US\$ 248,214.83 together with interest @ 18% per annum from 4th July 2001 till the date of payment.

17. The Petitioner through its lawyer denied the above claim totally by a letter dated 29th August 2001. It was claimed that the Petitioner was entitled to receive from the Respondent a sum of US\$ 14,101.36. The Respondent then invoked the arbitration clause by its letter dated 5th September 2001.

Proceedings before the Tribunal

18. The three-member Tribunal came to be constituted. The Respondent filed its claim and the Petitioner filed its counter claim. On the basis of the pleadings, the following issues were framed:

(a) Whether the claimant is entitled to clause the bills of lading in view of the

condition of the cargo.

(b) Whether the claimant had an effective lien on the cargo for freight and demurrage.

(c) Whether the claimant is entitled to damages for detention as claimed.

(d) Whether the NOR tendered on arrival at Umm Qasr was valid.

(e) Whether the Respondent has a valid counter-claim for dispatch."

19. By a majority of 2:1 the Tribunal answered the issues at (a), (c) and (d) in the affirmative and the issues at (b) and (e) in the negative. The claims of the Respondent were allowed in full, in the sum of US\$ 210,499.18 together with interest @10% per annum from 4th July 2001 till the date of the Award and at 15% thereafter until payment. The Respondent was also awarded legal costs of Rs. 2,50,000 and arbitration fees of Rs. 2,85,000.

Clausing of the MRs

20. The first issue concerns the justification for the Master who had insisted upon clausing the MRs. Mr. Mihir Thakore, learned Senior counsel appearing for the Petitioner, submitted that the Master could have easily offered to clause the MRs stating that there was presence of foreign matter in the cargo. The Petitioner had agreed to clausing the MRs to the extent that the percentage of foreign matter was not more than 2% which was within the permissible limit. Mr. Thakore referred to a certificate dated 6th April 2001 of GEO-CHEM Laboratories (P) Limited ["GEO-CHEM"] which stated that after drawing lot-wise samples it was found that 24000 MT (approx) of wheat was loaded in terms of the contractual specifications. The test undertaken on 27th April 2001 by GEO-CHEM gave the same result. It was found that "goods are free from dioxin of new crop free from live insects and fungus spots fit for human consumption and used at country of origin." It was submitted that the Master had to go by the above certificate which was sufficient for the purpose of LC and B/L. The Master could not have overridden the certificate issued by GEO-CHEM. Reliance was placed upon the decision of the England and Wales High Court (Admiralty Division) in *The Owners of the Cargo Lately laden on board the ship David Agmashenebeli v. The Owners of the Ship David Agmashenebeli* (2002) EWHC 104 (Admlty) (hereafter "David Agmashenebeli").

21. In reply, it was contended by Mr. Prashant S. Pratap, learned counsel for the Respondent that in terms of Clause 55 of the C/P, the B/L had to be endorsed as: "freight prepaid shipped clean on board." It was pointed out that there was a duty on the Master to ensure that the MR signed by him reflected the true condition of the cargo. This was the B/L, a negotiable document on which reliance was placed by the bankers and insurance companies as well as innocent holders in due course. He referred to the Indian Carriage of Goods By Sea Act, 1925 (CGSA) and Article III Rule 3 of the Hague Rules which placed a statutory duty on the Master to correctly certify the cargo to be in good condition. He

pointed out that if in fact a clean certification was endorsed on the B/L for the cargo subsequently found not to be in good order, the doctrine of estoppel would apply and the carrier would have no defence to a claim from the B/L holder. Referring to the treatise "Voyage Charters" by J. Cooke and others Mr. Pratap pointed out that the Captain of the ship was under no obligation to sign or to authorize the signing of B/L which contained factually wrong statements. He also referred to the decision in Trade Star Line Corporation v. Mitsui & Co. Limited (1996) 2 Lloyd's Rep. 449. He submitted that the LOI furnished by the Petitioner was an admission by the Petitioner that the cargo did not meet the required standard. Therefore, it was no longer open to the Petitioner to contend that the Master should have claused the MR as only containing foreign matters.

22. On this aspect, Mr. Pratap also referred to the present petition u/s 34 of the Act and in particular ground (E) wherein the only ground urged in this regard was that the decision on "issue No. 1 is contrary to Clause 55 of the Charter Party Agreement and bye-law No. 88 of the Bombay Port Trust". It is contended by the Petitioner thereunder that "the said finding being contrary to the provisions of the contract between the parties and the statutory provision of bye-law deserved to be set aside". He states that inasmuch no other ground was raised in the present petition it ought not to be permitted to be urged. He referred to the decision of the Supreme Court in M.P. Housing Board Vs. Progressive Writers and Publishers, to urge that the Court cannot substitute its own evaluation and come to the conclusion that the Arbitrator had acted contrary to the bargain between the parties. He also referred to the decision of the Supreme Court in Municipal Corporation of Delhi Vs. Jagan Nath Ashok Kumar and Another, .

23. The issue concerning the clausing of MRs appears to be governed by the Rider Cause 55 of the C/P which reads as under:

Riders Clause -55

B/L to be marked "freight prepaid shipped clean on board" duly signed by Master of the vessel and same to be kept in custody of load port agents or owner representative and to be released to the Charterers upon receipt payment confirmation from Charterers bank that freight has been irrevocably remitted to OWS nominated bank account.

24. The words "shipped clean on board" place a certain degree of responsibility on the Master of the ship. Articles 3 (3), 4 and 5 of Schedule 3 of the CGSA are relevant in this context and they read as under:

3 (3) After receiving the goods into his charge, the carrier of the Master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things :-

(a) The leading marks necessary for identification of the goods as the same furnished in writing by the shipper before the loading of such goods starts,

provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases of coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage;

(b) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper;"

(c) The apparent order and condition of the goods;

Provided that no carrier, master or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

4. Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3 (a), (b) and (c). However, proof of the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith.

5. The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages, expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnify shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

25. There is no doubt a duty is cast on the Master, both by the C/P and the statute to ensure that the certification of the cargo as being "clean onboard" is not a mere formality. There is an onus placed on the Master to properly clause the MRs. This aspect was discussed in the decision of the High Court of England in *David Agmashenebeli* where it was observed as under:

"Likewise, the extent to which and the terms in which the master considers it appropriate to qualify the bills of lading statement as to the order and condition of the cargo is again a matter of his judgment. Reasonably careful masters might use different words to describe the reason why and the extent to which the cargo was not in their view in apparent good order and condition. In many cases they may only have a limited command of English and little knowledge of the nature of the cargo. The approach which, in my judgment, properly reflects the master's duty is that the words used should have a range of meaning which reflects reasonably closely the actual apparent order and condition of the cargo and the extent of any defective condition which he, as a reasonable observant master, considers it to have.

Against the background, the ship owners' duty is to issue a bill of lading which records the apparent order and condition of the goods according to the reasonable assessment of the master. That is not, as I have indicated, any contractual guarantee of absolute accuracy as to the order and condition of the cargo or its apparent order and condition. There is no basis, in my judgment, for

the implication of any such term either on the proper construction of Article III Rule 3 or at Common Law. The shipper is taken to know the actual apparent order and condition of his own cargo. What the Hague-Visby Rules require is no more than that the bill of lading in its capacity of a receipt expresses that which is apparent to the master or other agent of the carrier, according to his own reasonable assessment.

26. This aspect was considered by the Court of Appeal in *Trade Star Line Corporation* where the Hague Rules were interpreted as under:

(4) The duty owed to shippers under Article III Rule 3 (3) of the Hague Rules is to issue, on demand, a bill of lading which states "(c) the apparent order and condition of the goods". This requires an accurate statement of fact. (We would reject Mr. Hamblen's somewhat extreme submission that the duty can be discharged by making any such statements, whether accurate or not.) It is moreover, in our judgment, an unqualified or "absolute" contractual undertaking, not merely one which the ship owner, or the master, must take reasonable care to perform. However, since making an accurate statement as to the apparent order and condition of goods may involve some degree of skill and expertise, though it does not necessarily do so, then in such cases the distinction between a duty to exercise reasonable skills and care in making an accurate statement, on the one hand, and a contractual duty to base the statement on the exercise of reasonable skill and care, is of no practical relevance. But one should not, in our judgment, lose sight of the fact that the duty is to make an accurate statement in the circumstances of the case.

27. In the present case, the Master of *m.v. Alegre I* was witness to the cargo being loaded with impurities. Repeated letters from him between 1st and 18th April 2001 were not responded to by the Petitioner. It was only on 3rd May 2001 that the Petitioner relented and furnished an LOI and also entered into a supplementary agreement with the Respondent. Thereafter it was not open to the Petitioner to contend either that the cargo contained less than 2% impurities or that it was good enough for despatch de hors the clausings of the MRs in the manner that the Master proposed. The Tribunal has held in the present case that it was the attitude of the Petitioner in not resolving the problem at the beginning that led to the detention of the ship and the consequent delay in setting sail for Umm Qasr. As regards the Master not stopping the loading, the Tribunal was justified in concluding that the Master, in the circumstances "acted reasonably" and allowed the loading to proceed in the bonafide belief that the Petitioner was reconciled to the clausings of the MRs and that "any drastic action on his part in stopping the work would have certainly created a problem with the port authorities themselves who are known in such circumstances to order the vessel out of the clock."

This Court is unable to find any illegality in the above conclusion of the Tribunal. The members of the Tribunal had considerable experience in admiralty issues and the governing law. The interpretation placed by the Tribunal on the clauses of the

C/P does not warrant interference by the Court. In this context, the following observations of the Supreme Court in *Municipal Corporation of Delhi v. M/s. Jagan Nath Ashok Kumar* are apposite (AIR @ 2319):

5. It is familiar learning but requires emphasis that Section 1 of the Evidence Act, 1872 in its rigour is not intended to apply to proceedings before an arbitrator. P.B. Mukharji, J. as the learned Chief Justice then was, expressed the above view in *Haji Ebrahim Kassam Cochinwalla Vs. Northern Indian Oil Industries Ltd.*, and we are of the opinion that this represents the correct statement of law on this aspect. Lord Goddard, C.J. in *Mediterranean & Eastern Export Co. Ltd. v. Fortress Fabrics Ltd.* [1948] 2 All E.R. 186 observed at pages 188/189 of the report as follows:

A man in the trade who is selected for his experience would be likely to know and indeed to be expected to know the fluctuations of the market and would have plenty of means of informing himself or refreshing his memory on any point on which he might find it necessary so to do. In this case according to the affidavit of sellers they did take the point before the Arbitrator that the Southern African market has slumped. Whether the buyers contested that statement does not appear but an experienced Arbitrator would know or have the means of knowing whether that was so or not and to what extent and I see no reason why in principle he should be required to have evidence on this point any more than on any other question relating to a particular trade. It must be taken I think that in fixing the amount that he has, he has acted on his own knowledge and experience. The day has long gone by when the Courts looked with jealousy on the jurisdiction of the Arbitrators. The modern tendency is in my opinion more especially in commercial arbitrations, to endeavour to uphold Awards of the skilled persons that the parties themselves have selected to decide the questions at issue between them. If an Arbitrator has acted within the terms of his submission and has not violated any rules of what is so often called natural justice the Courts should be slow indeed to set aside his award.

(emphasis supplied)

29. In the circumstances, the finding of the Tribunal on the issue of clausing of the MRs does not call for interference. The detention charges claimed by the Respondent on that basis as well as the additional costs of expenses awarded to the Respondent also do not call for interference.

Demurrage

30. The next issue concerns the demurrage claimed by the Respondent for the period of 11 days 6 hrs 16 minutes when the vessel was at the pilot station of Umm Qasr. The case of the Petitioner was that the Master could not have issued an NOR on arriving at the pilot station. The "port" in terms of Clause 29 of the C/P had to be a legally recognized port and not the pilot station which was at considerable distance from the port itself. It was submitted that the pilot station was in fact serving not only Umm Qasr but certain other ports in Iraq and Iran.

The NOR in this case was given on 14th May 2001 when in fact the ship was not within the legal limits of Umm Qasr port.

31. Elaborating on the interpretation to be placed on Clause 29 of the C/P, Mr. Thakore pointed out that each clause thereof had to be independently interpreted to arrive at the appropriate conclusion. Referring to certain passages in the Voyage Charters by Julian Cooke Mr. Thakore pointed out that "if the vessel arrives at a safe place where the port authorities exercise jurisdiction and which is within the limits of the port where she is to load or discharge, she is entitled to tender an effective notice of readiness." He referred to various passages of the decision of the House of Lords in *E.L. Oldendorff & Co. GMBH v. Tradax Export SA* (1973) 2 Lloyd's Rep. 285 (hereafter "Oldendorff") which was again considered in *Federal Commerce and Navigation Co. Limited v. Tradax Export SA* 1978 Appeal Cases 1 (hereafter "Tradax Export"). It is submitted that the Tribunal erred in placing reliance on the Regulations of the Baltic and International Maritime Conference ("BIMCO") and the Comité Maritime International, ("CMI") Fonasba and Intercargo which were neither statutory nor binding on courts and tribunals.

32. In reply, Mr. Pratap, learned counsel for the Respondent, first submitted that in the present petition, there is no ground taken about the ship not having arrived at the legal limits of the port Umm Qasr. The only ground urged, on the basis of the minority opinion, was that an appropriate NOR had not been received by the port authorities and therefore, laytime had not begun to run. The Petitioner should not be permitted to urge any further ground at the stage of arguments.

33. Mr. Pratap referred to the definition of "Port" in Clause 1 of the "Charter party Laytime Definitions 1980" set out in Appendix 4 of the book Voyage Charters by Julian Cooke which states: "Port means an area within which ships are loaded with and/or discharged of cargo and includes the usual places where ships wait for their turn or are ordered or obliged to wait for their turn no matter the distance from that area." He also referred to the definition of "port" in the Voyage Charter party Laytime Interpretation Rules 1993 (VOYLAY Rules) jointly issued by BIMCO, CMI and Intercargo also reads likewise. "Berth" is defined as the specific place within a port where the vessel is to load or discharge. He submitted that the Tribunal was fully justified in going by the said definitions and concluding that the ship in the present case had arrived within the legal limits of the port at Umm Qasr on 16th May 2001. He pointed out that before the Tribunal counsel for the Petitioner had himself tabled extracts from "Commencement of Laytime" by Donald Davies which stated that "the carrying voyage surely terminates when the vessel anchors at the usual waiting place when she can go no further through no failure on her part, it being irrelevant whether some commercially artificial line (fiscal, legal or administrative port limit) lies a few miles on one side or the other of the usual waiting place for the port in question."

34. Mr. Pratap is right in his contention that the Petitioner has not, in the present

petition u/s 34 of the Act, raised a specific objection that the Master could not have possibly issued an NOR when the vessel had not arrived within the legal limits of port Umm Qasr. The only ground urged appears to be based entirely on the minority opinion of the Tribunal which held that the NOR had not been communicated to the port authorities. Mr. Thakore tried to justify this point by pointing out that prior to the filing of the present petition in this Court, the Petitioner had filed Arbitration Petition No. 628 of 2002 in the City Civil Court at Ahmedabad, Gujarat challenging the Award. In the said petition a specific ground to the effect had been raised. The said petition came to be disposed of by an order 30th March 2005 directing the Petitioner to present the application before the appropriate court on or before 15th April 2005. This order was affirmed by the High Court of Gujarat in SCA No. 9054 of 2004. Subsequently in the present petition, by an order 2nd August 2005 the papers of the case in the City Civil Court at Ahmedabad were taken on record. It is accordingly submitted that the said ground should be construed as forming part of the grounds raised in the present petition. While the above explanation offered by the Petitioner is a plausible one, this Court does not wish to examine this issue further in view of the decision on merits. This question is, therefore, left open for decision in an appropriate case.

35. The point for consideration before the Tribunal was whether the NOR tendered at Umm Qasr was valid and it was answered by the majority of the Tribunal in the affirmative in favour of the Respondents. In doing so the Tribunal pointed out that the "real test is whether sailing has ended and the waiting has begun." Factually it was found that the vessel in question gave NOR "when she was at the Pilot Station beyond which she could not proceed without a mandatory Pilot and was awaiting berthing instructions."

36. Rider Clause 29 of the C/P in the present case made it clear that it was a port C/P and not a berth C/P. That Clause stated that discharge port time would begin to count 24 hours after vessel arrived within "port limits" and NOR tendered provided the vessel was ready in all respects to discharge, "whether in berth or not" (WIBON), "whether in free pratique or not" (WIFPON), "whether customs cleared or not" (WCCON). Rule 22 of the VOYLAY Rules defines WIBON to mean "if no loading or discharging berth is available on her arrival the vessel, on reaching any usual waiting place at or off the port, shall be entitled to tender notice of readiness from it and laytime shall commence in accordance with the charterparty. Laytime or time on demurrage shall cease to count once the berth becomes available and shall resume when the vessel is ready to load or discharge at the berth."

37. While Mr. Thakore may be right that in terms of the above Clause 29 it was necessary for the vessel to have arrived within the legal port limits of Umm Qasr, it does contain the WIBON clause, thereby anticipating the possibility of there not being a berth available when the vessel approached the port limits of Umm Qasr and was made to wait in the "usual waiting place" for ships. Importantly in the

instant case, the Petitioner has not disputed that the vessel was at the Pilot Station for Umm Qasr when the NOR was issued. The Petitioner has also not been able to show that the vessel could have validly proceeded beyond the said Pilot Station on the date the NOR was issued. As will be discussed hereafter, the rigidity of the vessel having to arrive at the defined legal limits of a port as emphasised in *Oldendorff* has since given rise to the VOYLAY Rules and other instruments of international maritime trade, arrived at by consensus, which recognise a port as including the usual waiting area beyond which ships cannot proceed due to congestion and non-availability of a berth. In the area of admiralty and maritime law, as in other specialist areas, the recognised trade practice assumes significance in interpreting the clauses of the C/P. The law has to recognise the above change in what constitutes the "legal limits" of a port area.

38. As was done before the Tribunal, considerable emphasis was placed by learned Senior counsel for the Petitioner on the decisions in *Oldendorff* and *Tradax Exports* to contend that the vessel in the present case could not be said to have arrived within the legal limits of port Umm Qasr and therefore could not have issued a valid NOR on 14th May 2001. The question in *Oldendorff* was whether a ship that had set sail for discharge of her cargo of grain at Liverpool/Birkenhead could be said to be an "arrived ship" when she reached the Mersey Bar light-vessel and pilot station, which anchorage was "at least 17 miles from the dock area, or commercial area of the port." The ship owner gave an NOR within a day of the ship arriving at the Bar anchorage whereas she finally discharged the cargo eighteen days later. Demurrage was claimed with reference to the date of the issuance of the NOR. The case of the charterers was that the ship "did not arrive until she proceeded to her unloading berth in the Birkenhead Docks." Lord Reid speaking for the House of Lords formulated the test as to when a ship could be said to be an "arrived ship" thus (Lloyd's Rep. p. 291):

"On the whole matter I think that it ought to be made clear that the essential factor is that before a ship can be treated as an arrived ship she must be within the port and at the immediate and effective disposition of the charterer and her geographical position is of secondary importance. But for practice purposes it is so much easier to establish that, if the ship is at a usual waiting place within the port, it can generally be presumed that she is there full at the charterer's disposal.

I would therefore state that what I would hope to be the true legal position in this way. Before a ship can be said to have arrived at a port she must, if she cannot proceed immediately to a berth, have reached a position within the port where she is at the immediate and effective disposition of the charterer. If she is at a place where waiting ships usually lie, she will be in such a position unless in some extraordinary circumstances proof of which would lie in the charterer. For as Mr. Justice Donaldson, [1971] 2 Lloyd's Rep. 96 at p.100 points out:"

.... In this context a delay of two or three hours between the nomination of a

berth and the ship reaching it is wholly immaterial because there will be at least this much notice before the berth becomes free...

If the ship is waiting at some other place in the port then it will be for the owner to prove that she is as fully at the disposition of the charterer as she would have been if the vicinity of the berth for loading or discharge.

39. Importantly in that case, it was noticed by Lord Reid that the Umpire had found on facts that the ship was "at the Bar anchorage, within the legal, administrative and fiscal areas of Liverpool/Birkenhead."

40. In Tradax Exports, four years after Oldendorff was decided, the House of Lords re-visited the law and affirmed Oldendorff. The facts in Tradax Exports were that a large vessel carrying grain was to discharge her cargo ultimately at the port of Brake on the river Weser, which had four ports of which Brake was one. The waiting area for ships for all four ports was the Weser Lightship. This was located 25 miles away from the mouth of Weser towards the sea. The vessel anchored at the lightship on 7th December 1970. On 8th and 12th December she made two voyages up the river in order to qualify as an "arrived ship" but had to return to the lightship and there she served an effective NOR on 12th December 1970. She ultimately berthed at Brake on 30th December 1970 and discharged her cargo in 10 days. The ship owners claimed demurrage on the basis that the vessel was an "arrived ship" on one of her qualifying voyages on 8th and 12th December 1970. The court of first instance upheld the charterer's contention that she was not an "arrived ship" before 30th December, 1970 and this view was upheld by the House of Lords. Lord Diplock applied the Reid test in Oldendorff and held that a ship waiting at the Weser Lighthouse was not an "arrived ship" with reference to port Brake. Importantly this conclusion was based on a concession by counsel for the parties as is evident from the following passages (p. 13):

"My Lords, it is conceded by counsel for the ship owners that the Weser Lightship anchorage is outside the legal, fiscal and administrative limits of the port of Brake. It lies 25 miles from the mouth of the river in an area in which none of the port authorities of Weser ports does any administrative acts or exercises any control over vessels waiting there. It was held by a German court in 1962 that a ship waiting at the Weser Lightship anchorage is not an arrived ship. A similar decision was reached by Donaldson J. in *Zim Israel Navigation Co. Limited v. Tradax Export SA (The Timma)* [1970] 2 Lloyd's Rep. 409 and approved by Megaw L.J. when the case came before the Court of Appeal [1971] 2 Lloyd's Rep. 91. Counsel also concedes that charterers, shippers and ship owners who use the Weser ports would not regard the waiting area at the lightship as forming part of any of them. All the evidence is to the contrary, the conduct of the parties and their agents, the correspondence and the oral evidence that was accepted by the Judge. So is the common use in charter parties of the special Weser Lightship clause, when it is intended that time spent in waiting there for a berth should count as laytime. This way of reconciling loyal adherence to the Reid test with an

inclination to find in favour of the ship owners in the instant case is not, in my view, available."

(emphasis supplied)

41. As already noticed, the above decisions were given at a time when the VOYLAY Rules and the other self-regulatory instruments of trade, referred to earlier, were not operative. There is much clarity on the issue since then. Oldendorff itself recognised that ships may have to wait outside the legal limits of a port and that a ship may be held to have "arrived" when she reaches that usual waiting area. Tradax Exports has reiterated the Reid Test laid down in Oldendorff with the only difference that in Tradax Exports it was conceded by counsel that the place where the ship had dropped anchor, viz., the Weser Lightship was not within the legal limits of the port of Brake.

42. In the present case, there appears to be nothing brought on record by the Petitioner to demonstrate that the Pilot Station was not the usual waiting area for ships headed for Umm Qasr. The Petitioner's case is not that on the date the NOR was issued, the vessel had a berth at Umm Qasr where the cargo could have been discharged. On the other hand, the case of the Respondent, which was not rebutted, was that even a pilot was not available to enable the vessel to proceed towards Umm Qasr. The NOR issued by the Master of the vessel as well as the "Deck Log Book" of the vessel were part of the arbitral record. They bear out the case of the Respondent entirely. There is no illegality whatsoever in the conclusion of the Tribunal that the NOR at Umm Qasr was validly tendered.

Counterclaim of the Petitioner

43. It is contended by learned counsel for the Petitioner that the Arbitral Tribunal failed to give reasons for rejecting the Petitioner's counter claim. It is submitted that the vessel arrived at Jebeli Ali port on 29th May 2001 and the NOR was tendered on that date itself. The Petitioner claimed that the cargo was discharged within a laytime of 2.528 days against 7.683 days available. It was, therefore, claimed that the Petitioner was entitled to 5.155 days of despatch. Mr. Thakore referred to Addendum No. 1 dated 29th May 2001 which stipulated that laytime was to be calculated as per the Charter party and bunker charges were to be calculated from Umm Qasr to Jebel Ali on the Charterer's account. It is further submitted that the said counter claim of the Petitioner was not dealt with adequately in the majority opinion whereas the dissenting opinion dealt with it and allowed it as prayed for.

44. It is pointed out by Mr. Pratap that the vessel was already on demurrage on arrival at Jebeli Ali on 29th May 2001. No fresh laytime commenced at Jebel Ali. It is denied that the vessel earned despatch at the second port. Once the claims of the Respondent were allowed by the Tribunal the question of entertaining a claim for despatch by the Petitioner did not arise.

45. The perusal of the Award of the majority reveals that the above contention of

the Petitioner has in fact been considered. The Tribunal has found the terms of the Addendum No. 1 dated 29th May 2001 to be "eminently reasonable". Further it was held that the Respondent had cooperated in assisting the Petitioner by agreeing to the diversion of the vessel from Umm Qasr to Jebel Ali. If the resultant burden of demurrage was found by the Petitioner to be onerous it was entirely because of the long time it took in coming to a decision on the diversion. Further, the majority appears to have accepted the contention of the Respondent that since its claim had succeeded totally, the counter claim of the Petitioner for despatch at Mumbai and Jebel Ali did not survive.

46. The discussion of the counter claim and reasons given by the majority in the impugned Award for rejecting it do not call for interference. While the Petitioner may want to commend the view of the minority for acceptance by the Court, given the limited scope of interference u/s 34 of the Act, this Court is not inclined to do so. The view taken by the majority is a plausible one. As pointed out in *State of U.P. Vs. Allied Constructions*, "once it is found that the view of the Arbitrator is a plausible one, the Court will refrain itself from interfering".

Conclusion

47. For the aforementioned reasons, this Court is not persuaded to interfere with the impugned Award in exercise of its powers u/s 34 of the Act. The petition is dismissed with costs of Rs. 20,000/- which shall be paid by the Petitioner to the Respondent within a period of four weeks.