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IN THE HIGH COURT DELHI AT NEW DELHI

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O.M.P. 790/2014

Reserved on : June 1, 2015

Date of decision: July 10, 2015

MMTC LTD.

.... Petitioner

Through: Mr. P. Chidambaram, Mr. S. Ganesh, and
Mr. Sanjeev Puri, Senior Advocates with
Mr. Rohit Puri, Mr. Prateek Khanna, Mr.
Akshay Chandra, and Mr. Bharya Sethi,
Advocates.

versus

ANGLO AMERICAN

METALLURGICAL COAL PTY. LTD.

.... Respondent

Through: Mr. Sumeet Kachwaha, Mr. Ashok Sagar,
Ms. Ankit Khushu & Mr. Suryadeep Singh,
Advocates.

CORAM: JUSTICE S.MURALIDHAR

J U D G M E N T

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10.07.2015

1. The Petitioner, MMTC Limited ('MMTC'), has filed this petition under Section 34 of the Arbitration and Conciliation Act, 1996 ('Act') against the final Award dated 12th May, 2014 of the Arbitral Tribunal ('AT') by a majority of 2:1 in the disputes between the parties. By the impugned majority Award the claim filed by the Respondent, Anglo American

Metallurgical Coal Pty. Ltd. (formerly known as Anglo Coal Australia Pty. Ltd.) [‘Anglo’] for damages on account of alleged non-lifting of 453,034 MT of coking coal of MMTC was allowed and Anglo was held to be entitled to recover damages from MMTC in the sum of US dollars (USD) 78,720,414.92 together with *pendente lite* and future interest. A dissenting Award dated 13th March, 2014 was passed by the third learned Arbitrator dismissing the claim petition filed by Anglo.

Background facts

2. On 7th March, 2007 an agreement was entered into between the parties for sale and purchaser of coking coal. This was a Long Term Agreement (‘LTA’) in terms of which MMTC was to purchase ‘freshly mined and washed coking coal’ from Anglo on FOB (trimmed) basis from DBCT Gladstone in Australia. The LTA encompassed three delivery periods of one year each, commencing on 1st July, 2004 and ending on 30th June, 2007. Under Clause 1.3 of the LTA, MMTC was given the option of extending the LTA for two more delivery periods. MMTC accordingly exercised this option. The fourth delivery period was between 1st July, 2007 and 30th June, 2008 and the fifth delivery period from 1st July, 2008 to 30th June, 2009.

3. Under Clause 1.1.1 of the LTA, MMTC was to purchase an annual base quantity of 466,000 MT of coking coal during the additional delivery period. No issues arose till the completion of the fourth delivery period. The fifth delivery period was initially up to 30th June, 2009. However, Anglo’s letter dated 14th August, 2008 addressed to MMTC confirmed the agreement between the parties that the fifth delivery period would expire only on 30th

September, 2009. The coking coal to be supplied was of two types: Isaac coking coal blend and Dawson Valley blend. The price agreed for the fifth delivery period was USD 300 per MT. The letter dated 20th November, 2008 from MMTC to Anglo confirmed this position and enclosed an addendum to the agreement. The LTA was to be read along with Addendum No. 2 dated 20th November, 2008 which in turn was also to be read collectively with the LTA.

4. During the fifth delivery period MMTC lifted two shipments at USD 300 per MT. The first was on 30th October, 2008 for a quantity of 2,366 MT and the second was on 5th August, 2009 for a quantity of 9,600 MT. As far as the first of the above shipments was concerned, it was part of a larger shipment of 48,655 MT due under the fourth delivery period. For this period the agreed rate was USD 96.40 PMT. Of the aforementioned quantum, it was agreed that delivery of 2,366 MT can be attributed to the fifth delivery period and lifted at the agreed price of USD 300 per MT.

5. The second of the shipments during the fifth delivery period was pursuant to an *ad hoc* agreement arrived at in a meeting held on 15th July, 2009 and confirmed in writing by MMTC on 22nd July, 2009. The *ad hoc* agreement was for MMTC to lift 50,000 MT of coal under which 9,600 MT was to be purchased at USD 300 per MT, and the balance 40,400 MT at an *ad hoc* price of USD 128.25 per MT. Consequently, as far as the fifth delivery period was concerned, coal at the agreed price of USD 300 per MT was lifted only to an extent of 2,366 plus 9,600 MT, i.e., 11,966 MT. The

contracted quantity being 466,000 MT, the shortfall worked out to 454,034 MT.

6. The LTA envisaged a sequence to be followed for the delivery of coking coal. Under Clause 4 of Annexure IV, based on the delivery schedule agreed to between the parties, MMTC was to nominate a vessel about two weeks prior to effecting of the shipment. Anglo was to then confirm to MMTC via fax/email the acceptance of such vessel within two working days of such nomination. The lay days for each vessel was to be narrowed down to 10 days in advance of the expected time of arrival of the vessel at the loadport. Clause 7 of the LTA concerned the delivery of coking coal. Under Clause 7.1, MMTC was to arrange for chartering suitable vessels for taking delivery of the coking coal on the basis of FOB (trimmed) at the port of loading. Under Clause 7.2, Anglo was to take necessary steps to ensure that sufficient quantity was ready for delivery at the load port “as to enable the nomination of vessels on a continuing basis so that the off-take of the quantity is completed within the delivery period.” Under Clause 7.2.1, to facilitate smooth nomination of the vessels, Anglo was to indicate to MMTC ‘stem’ (subject to enough material) availability with proposed lay days and quantities for each month, ‘at least six weeks in advance.’ MMTC was to then endeavour to nominate vessels accordingly. Anglo could have, however, accepted vessels with minor change in lay days and quantities.

7. Subsequent to the commencement of the fifth delivery period, there was a world-wide slump in the prices of coal. Anglo had contracts not only with MMTC but with other major steel manufacturers in India including Steel

Authority of India Limited ('SAIL') and Rashtriya Ispat Nigam Limited ('RINL'). Even in respect of the contracts with those parties, difficulties were encountered with the Indian parties being unable to lift the coking coal at the agreed price.

8. The case of Anglo was that on 11th March, 2009 it wrote to MMTC referring to the discussions which were held in New Delhi on 24th February, 2009 between Mr. Suresh Babu of MMTC (who later would be examined in the arbitral proceedings as the Respondent's Witness) and Mr. John Wilcox of Anglo (later appearing as Claimant's Witness). In the said letter Anglo expressed its anxiety that deliveries for the fifth delivery period remained unperformed by MMTC, and that till then MMTC had not intimated any arrangements for the performance of its obligations arising under the LTA. Anglo accordingly requested MMTC to send the proposed delivery schedule for the fifth delivery period. It sought a response by the close of business Brisbane time on Friday 20th March, 2009.

9. It must be noted at this stage that MMTC denies receipt of the above letter dated 11th March 2009. This was one of the issues that arose in the arbitral proceedings.

10. What is not in dispute, however, that is on 2nd July, 2009 MMTC wrote to Anglo stating that MMTC would like to avail "two stems in August 2009 and one in September 2009. Please confirm availability and convey the laycans." On 3rd July, 2009 Anglo wrote to MMTC stating that it looked forward to the vessel nomination against the agreed stem in laydays 20-30

of July earliest. As regards other shipments, it promised to revert shortly. Another *email* was sent on 21st July, 2009 by MMTC to Anglo again requesting for stem availability confirmation for August 2009. Anglo wrote on 22nd July, 2009 stating that ‘unfortunately at this stage we are unable to confirm a stem in August/September for MMTC due to cargo availability. We are continuing to review our position and will advise our preferred schedule for October-December 2009 as soon as possible.’

11. On 4th September, 2009 MMTC again wrote to Anglo stating that its cokery had increased the pushings and its requirements had gone up to 90,000 per month. It was reminded that after the *Sea Venus* laycan, Anglo had not given any stem to MMTC. It was therefore requested that Anglo should give MMTC one stem of 50,000 MT each in October and November 2009. On 7th September, 2009 Anglo wrote to MMTC stating that it did not have any coal availability for the remainder of the year. It was stated that “we will continue to monitor the situation and let you know if the position changes.”

12. There is controversy as regards the above correspondence exchanged between the parties regarding the requisition for stem from MMTC and the response of Anglo that it was not in a position to supply the required quantity. While MMTC maintains that the above requests were for coal in terms of the LTA, Anglo’s case is that the above requests were for supply of coal under *ad hoc* arrangements not at the rate of USD 300 per MT but USD 128 per MT. In other words, according to Anglo, what was sought by MMTC was not the supply of the agreed quantity in terms of LTA under the

fifth delivery period, for which MMTC would have to pay USD 300 per MT, but for *ad hoc* quantities at the then prevailing market price of USD 128.12 per MT. This was, therefore, another issue that had to be dealt with by the AT.

13. The case of the MMTC is that by expressing inability to deliver coal as requested by MMTC, Anglo had by its emails of 22nd July, 2009 and 7th September, 2009 repudiated the agreement. It was in this context, according to MMTC, that the letter dated 21st September, 2009 of Anglo was required to be read.

14. Before coming to the letter of 21st September, 2009 it is important to refer to a letter dated 20th November, 2008 written by MMTC to Anglo confirming acceptance of coking coal supply during the period 2008-2009. The subject matter of the letter is titled “addendum to long term supply of coking coal contract for the delivery period 2008-09.” The letter acknowledges that “due to worldwide crisis in financial markets, there has been unprecedented fall in prices of major commodities including steel.” It noted that the prices of iron and steel products in the international market had ‘nose-dived in the month of September and October 2008’ and that ‘pig iron, a finished product manufactured and being exported is not getting customer on date even at USD 300 FOB.’ The letter noted that the situation in the domestic market was the same and that “we are not able to sell our product.” Consequently, it was requested that in view of unprecedented recessionary trends in the economy, Anglo should consider a reduction in the price of coal for quantities finalized for the fifth delivery period to a

level that was settled for the fourth delivery period. The letter ended with the request: “This only will help us to keep the plant running and to produce on consistent basis.” This is an indication that MMTC was not in a position to continue buying coal at USD 300 per MT. This is also evident from one sentence in the above letter where MMTC asked Anglo to appreciate that “it has become absolutely unviable to produce and sell pig iron based on the imported coking coal having price of USD 300 per tonne FOB for hard coking coal.”

15. It appears that during the negotiations that took place between the parties reference was constantly made to the separate agreements Anglo had with SAIL and RINL. There was an Empowered Joint Committee (‘EJC’) that was constituted as regards the performance of obligations under the said separate agreements. Problems were encountered both by SAIL and RINL even with regard to the first delivery periods. There was a question of carryover of the outstanding quantity in the next delivery period and of agreeing to lift at least a percentage of the carryover at the agreed price. An *ad hoc* price was agreed at USD 128 per MT FOB as regards supplies of the second delivery period. In a letter addressed to the Chairman, EJC on 11th May, 2009 Anglo confirmed the above arrangements.

16. As regards the stem offered in June 2009, MMTC had conveyed that it would accept a June lifting in line with the EJC terms, i.e., 25% carryover from one delivery period to another and the balance at the provisional rate of USD 128 PMT.

17. The letter dated 15th July, 2009 from Anglo to MMTC confirmed the above *ad hoc* arrangements. It agreed that there will be one full shipment of Isaac Hard coking Coal to load 50,000 MT +/- 5% from Dalrymple bay Coal terminal, Queensland under the LTA. This was under the vessel MV *Sea Venus*. 9,600 MT was the carryover which was to be supplied at USD 300 per MT and the balance 40,400 MT at the *ad hoc* price of USD 128.25 per MT (as finalized with EJC on 16th June, 2009). This letter clearly stated that these supplies were under the LTA. The letter ended by stating that “the parties acknowledge and agree that this arrangement (Ad Hoc Sale) is made without prejudice to either parties’ rights and obligations under the LTA”. In other words what had been worked out was an arrangement whereby the carryover of the 2008-09 delivery period was accommodated to some extent at the agreed rate of USD 300 per MT and the balance 40,400 MT at reduced price of USD 128.25 per MT.

18. On 16th July, 2009 Anglo wrote to the Chairman, EJC as regards supply of coking coal under the LTAs with SAIL and RINL. In effect these arrangements acknowledged a carryover into the subsequent delivery periods of the unlifted quantities with some percentage being at the agreed price and the remaining as per the prevailing market price.

The letter dated 21st September 2009 and the ensuing correspondence

19.1 The above background is relevant to be kept in purview while examining the next important development, i.e., letter dated 21st September, 2009 written by Anglo to MMTC. This letter in fact is the most crucial document as far as the present case is concerned. The letter opens with the

protest by Anglo referring to its letter dated 11th March 2009 to which it had not yet received any response. The subject matter of the letter itself is the LTA dated 7th March, 2007. The second paragraph of the letter dated 21st September, 2009 declares that the fifth delivery period of the LTA “has now finished bringing the term of the Agreement to an end.” Anglo then stated that MMTC had taken delivery of only 11,966 MT of coal out of a total contracted tonnage of 466,000 MT for the fifth delivery period.

19.2 The third paragraph stated that despite repeated requests, MMTC had not provided Anglo with a schedule for taking delivery of the balance quantity (carryover) from the fifth delivery period except to state that “it will agree to the same arrangements made between Anglo and SAIL and RINL with regards delivery of 2008 carryover tonnes.” The letter proceeded to set out what had been agreed with SAIL and RINL. The agreement with those two entities was that during the subsequent delivery period 18.7% of the total remaining carryover would be performed; the remainder of the carryover tonnes would be performed equally over the following two delivery periods.

19.3 On that basis Anglo submitted the following proposals to MMTC:

“MMTC to perform a total of 38% of the total contracted tonnage for the fifth delivery period on the terms and conditions (including price) applicable under the Agreement (a further 172,533 tonnes) by March 31, 2010. This will bring MMTC into line with the contract performance of SAIL and RINIL for the 2008/2009 delivery period.

In addition, MMTC is to perform 18.7% of the remaining carryover (a further 52,641 tonnes) by March 31, 2010 on the terms and

conditions of the Agreement (including price) as agreed with SAIL and RINIL.

Anglo will enter into a new long term agreement with MMTC on the same terms and conditions as the current long term agreements with SAIL and RINL (including performance of the remaining carryover) for 466,000 tonnes per annum for a period of 3 years commencing 1st April 2010.”

19.4 The letter ended by stating “this proposal is made without prejudice to our rights under the Agreement. It will remain open and capable of acceptance until 5.00 pm (Brisbane time) on Wednesday 30th September 2009.”

20. In a reply to the above letter dated 25th September, 2009, MMTC stated that ‘as usual’ it was awaiting the contract signed between SAIL and Anglo “as it forms the basis of contract between MMTC and Anglo.” Strangely in this letter MMTC made no protest that it had not received Anglo’s letter dated 11th March, 2009. After setting out the delivery arrangements that had been arrived at between SAIL and Anglo, MMTC conveyed its intention to lift 18.7% of the carryover quantity. However, it expressed inability to lift 2,25,174 MT by 31st March, 2010 since it seemed “near to impossible as it worked out to 56.7% of the carryover tonnage.” MMTC reminded Anglo that its subsidiary NINL was a producer of LAM coke and pig iron where the value addition is negligible or even negative. MMTC reminded Anglo of the economic recession and requested for time to lift the carryover tonnage. It ended with the request to “please review and reconsider our request for

allotting at least one shipment of 50,000 MT each from October 2009 onwards instead of zero stem till end of 2009.”

21. On 25th November, 2009 Anglo wrote to MMTC referring to the proposal of 21st September, 2009, the proposal dated 25th September, 2009 and the discussions held in New Delhi on 13th November 2009. The fresh proposal now made read as under:

“In order to progress matters we now propose that MMTC perform the remaining 454,034 metric tonnes of 2008 Contract year in line with our agreements with SAIL and RINL, at the 2008 price of US\$ 300, according to the following schedule:

January – March 2010	85,000	18.7%
April 2010- March 2011	184,566	40.65%
April 2011- March 2012	184,566	40.65%

We trust that this arrangement meets with your approval.

This proposal is made without prejudice to our rights under the Agreement. It will remain open and capable of acceptance 5.00 pm (Brisbane time) on Friday 4th December 2009.”

22. On 27th November, 2009 MMTC conveyed its acceptance of the above proposal subject to Anglo allocating the left over quantities of 2009 contract at 2009 prices based on the terms and conditions agreed upon in the EJC of SAIL and RINL. In other words MMTC was insisting that the balance supply of 4,25,600 MT be made available at the 2009 price level of USD 128.25 PMT.

23. Anglo declined to make any additional tonnage commitment beyond what had been stated in its letter dated 25th November, 2009. The letter dated 3rd December, 2009 of MMTC to Anglo reflected the impasse between the parties. It appears that no agreement could be reached.

24. On 4th March, 2010 Anglo wrote a letter to MMTC demanding compensatory damages in the sum of USD 78,720,414.92 along with interest @ 12% per annum from 30th September 2009 till the date of payment pointing out to the default committed by MMTC under the LTA dated 7th March, 2007 with the addendum dated 20th November, 2008.

25. On 24th May, 2010 this was replied to by MMTC stating that it was Anglo which was in breach of the obligations under the LTA read with the addendum and that Anglo was liable to pay damages to MMTC.

Limitation

26. One of the issues arising from the letter dated 21st September, 2009 is whether it constituted the termination of the LTA by Anglo and whether the limitation for Anglo preferring the claim should begin to run from that date. This is because admittedly Anglo preferred its claim in terms of the arbitration clause in the LTA on 24th September, 2012. According to MMTC, the cause of action arose on or before 21st September, 2012 on which date the fifth delivery period came to an end. The claim made by Anglo with reference to the breach of obligations under the LTA had to, in terms of Article 55 of Schedule to the Limitation Act, 1963 ('LA') be preferred within three years from that date.

27. The case of Anglo on the other hand is that the said letter only set out an offer to MMTC regarding the carryover of the unlifted quantities of the fifth delivery period on concessional terms that were offered to SAIL and RINL and that in any event MMTC's obligations under the fifth delivery period continued till 30th September, 2009.

28. The issue framed by the majority of the AT on this aspect as stated in para 46 of the impugned award under clause (c) is whether the Claimant's claims are barred by limitation?

29. In para 102 of the impugned majority Award, reference was made to Article 55 of the LA. Para 103 of the impugned majority Award encapsulates the submission of MMTC regarding the claim being barred by limitation. It notes that the request for arbitration was received by ICC Secretariat on the same day it was dated, i.e., 24th September 2012.

30. The majority Award deals with the issue of limitation thereafter in paras 152 to 155. The majority first observed that MMTC's contention that the letter dated 21st September, 2009 was a repudiation of the LTA by Anglo was difficult to understand legally much less factually since "any cause of action relied on by the Claimant is based upon a breach of contract on the part of the Respondent, not on a supposed breach of contract by the Claimant."

31. The majority construed MMTC's letter dated 21st September, 2009 as reflecting the continuing validity of the agreement. According to the majority, there was no repudiation by Anglo much less an acceptance of such repudiation by MMTC and therefore, the contract remained binding on, and enforceable by both the parties.

32. They held that since the fifth delivery period ended only on 30th September, 2009 that was the date upon which the cause of action arose, since MMTC could, at any time, up to that date, have undertaken to lift the relevant goods.

33. Mr. P. Chidambaram, learned Senior counsel appearing for MMTC urged that the very understanding of Article 55 of the Schedule to the LA by the majority of the AT was erroneous. He submitted that limitation had to be computed from the last of the breaches of the contract by Anglo and if the claim was by Anglo then from the date of the last of the breaches by MMTC. According to him, if the fifth delivery period came to an end, as was stated by Anglo, on 21st September, 2009, then all breaches complained of by Anglo had to be prior to that date. So, the last of the breaches by MMTC of the LTA could not, even according to Anglo, possibly be later than 21st September, 2009. The three year period had to be counted from the last of breaches and therefore, at the latest came to an end on 20th September, 2012.

34. To the Court it appears that although this argument is attractive at first blush, on closer scrutiny it appears to be contrary to what appears from the

record. The letter dated 21st September, 2009 has to be read as a whole and not selectively as it sought to be done by MMTC. No doubt, in the second paragraph of the letter Anglo refers to the fact that the fifth delivery period has 'now finished'. This cannot obviously be taken literally to mean that 21st September, 2009 was the date on which the agreement terminated. Clearly, as per the LTA read with the addendum, the delivery period came to an end on 30th September, 2009.

35. Further a distinction has to be drawn between stating the above and that the agreement itself came to an end. What was being conveyed by Anglo was that the delivery period was coming to an end very soon thereafter, i.e., within nine days and it was in that context that an offer was being made for the carryover of the unlifted quantities by MMTC on the same terms that were offered to SAIL and RINL. In fact, the entire letter is about the offer by Anglo to MMTC to enable the latter to comply with its obligations under the LTA in the fifth delivery period pursuant to the repeated requests made by MMTC that it should be offered the same terms as were offered to SAIL and RINL.

36. That the parties understood the continuation of MMTC's obligations under the LTA is also evident from the response of MMTC by its letter dated 25th September, 2009. There is no statement in the said letter by MMTC that since the agreement itself has to come to an end there is absolutely no obligation on them to lift any quantity. On the contrary, that letter seems to suggest that MMTC wanted further accommodation as

regards the carryover of the unlifted stocks and parity on the terms offered to RINL and SAIL.

37. The stand of MMTC, as spoken to by its witness Mr. Suresh Babu, was that by the letter dated 25th September, 2009 Anglo had put to an end to the fifth delivery period and made a fresh offer for a renewed agreement for the carryover quantity. In response to a pointed question by the AT that the witness knew that the LTA had not come to an end on 21st September 2009, he answered that since Anglo had unilaterally put an end to the contract and given a fresh proposal he was under the impression that Anglo had put an end to the agreement as far as the fifth delivery period was concerned. He insisted that the letter of 25th September, 2009 had to be seen in light of Anglo's letter dated 21st September, 2009 and he understood that Anglo had put to end to the fifth delivery period since they could not supply cargo "for want of availability".

38. The above answers of Mr. Suresh Babu are inconsistent with what was in fact written in the letter dated 25th September, 2009. Far from acknowledging any inability of Anglo to supply any cargo, MMTC was making a request for a stem in October 2009 to the extent of 50,000 MT. If MMTC was under the impression that Anglo had no coal to supply then it would be strange that MMTC was making such a request to Anglo. It appears that MMTC was insisting that the carryover quantity be entirely supplied at the reduced price and not at USD 300 per MT. The case that MMTC projected before the AT, viz., that Anglo brought the contract to an

end because of its inability to supply the coal appears to be an afterthought and is not reflected in the correspondence exchanged between the parties.

39. The correct position appears from the cross-examination of Mr. John Wilcox. He pointed out that the requests made by the emails of 21st July and 4th September, 2009 were for *ad hoc* and not contractual cargo. It was not for the supply of cargo at USD 300 per MT. He clarified that these requests were all for “split price cargo and he responded accordingly.” As pointed out by him, “had this been requests for USD 300 PMT” he would have been “delighted to perform them.”

40. The repeated responses of Mr. Suresh Babu that “since we had got the flexibility we had started asking for 300 PMT in writing from 2nd July 2009 onwards” belies the repeated stand taken by MMTC itself that it was totally unviable for it to produce pig iron by purchasing coal at the above rate. It also belies the repeated requests for reduction in price as prayed for by MMTC. The others answers of Mr. Babu to the effect that “by the time our request was received by the claimant that they were left that no cargo as had been communicated by emails”, is inconsistent with MMTC’s own repeated request for stems. The requests would only be consistent with the plea that stems be offered at the reduced price of USD 128 per MT and not at USD 300 per MT. There was no shortage of coal stock as far as Anglo was concerned. This is evident from the Question 40 put to Mr Wilcox in the cross-examination which reads as under:

"Q.40 I put it to you that the Claimant did not have any cargo to supply to MMTC between July 2009 and 21st September 2009 in the

fifth delivery period since the Claimant had entered into several *ad hoc* agreements with the other buyers by virtue of which the demand for cargo had increased manifold. As a result the Claimant was left with no cargo to supply to MMTC under the contract?

Ans.: I disagree with this statement. At the time we were producing around 1 million tonnes per month. From early July the market was starting to pick up and we did not do any further spot on *ad hoc* apart from the *sea venus* from end of June. It would be very easy for us to produce contractual coal for MMTC had they been willing to lift @ USD 300 per MT.”

41. The view taken by the majority of the AT that as far as MMTC was concerned, its obligation to lift the stocks continued till 30th September, 2009 is a correct view on the appreciation of the evidence. It cannot be said to be a perverse view at all. If the letter dated 21st September, 2009 is understood in the correct context, it is clear that it was actually an offer being made by Anglo to enable MMTC to discharge its obligations and that MMTC was never relieved of discharging its obligations at any time prior to 30th September 2009. Viewed from any angle the plea of MMTC that Anglos' claim was barred by limitation should fail and this issue has been rightly decided by the majority Award.

Did Anglo repudiate the contract?

42. The Court does not view the responses of Anglo as regards MMTC's request for stems at reduced price to be a repudiation of the contract by Anglo. Those requests were not for supply of contracted quantity at USD 300 per MT but for *ad hoc* quantities at the market price which was not within the scope of the agreement. The Court, therefore, finds that the

majority Award has correctly understood that there was, in fact, no repudiation of the contract by Anglo. In that view of the matter, the question of MMTC having to accept that repudiation did not arise.

43. Mr. Chidambaram repeatedly referred to Section 39 of the Contract Act and submitted that the party refusing to perform the contract if taken to be MMTC then the promisee, i.e., Anglo should be taken to have put an end to the contract and unless it had acquiesced in its continuance. He submitted that in the present case Anglo put to an end the contract by the letter dated 21st September 2009 and therefore, there was no question of acceptance of such any repudiation by MMTC.

44. MMTC's submission will have to be tested by examining whether the requirements in law for a 'repudiatory' breach stand fulfilled. As explained in *Spettabile Consorzio Veneziana di Armamento di Navigazione v Northumberland Shipbuilding Co Ltd. (1919) 121 LT 628* in order to constitute a repudiation it has to be shown that “the party to the contract made quite plain his own intention not to perform the contract.” In *Claude-Lila Parulekar v. Sakal Papers (P) Ltd. (2005) 11 SCC 73*, the Supreme Court cited with approval the opinion of Lord Coleridge CJ in *Freeth v. Burr (1874) L.R. 9 C.P. 208*, and observed that “repudiation of a contract is a serious matter, not to be lightly found or inferred.” Further, there must be an acceptance of such repudiation by the aggrieved party. In *Howard v. Pickford Tool Co (1951) 1 KB 417* it was held: “An unaccepted repudiation is a thing writ in water and of no value to anybody: it confers no legal rights of any sort or kind.” In *Mishra Bandhu Karyalaya v. Shivratn Lal Koshal*

AIR 1970 MP 261 it was noted that Section 39 of the ICA restates the above English common law principles.

45. The majority Award concluded that there was in fact no repudiation of the contract by Anglo and that in any event no acceptance of such repudiation by MMTC. The Court is required to examine whether such conclusion is perverse or patently illegal as contended by MMTC. In the first place it appears that it was not the case of MMTC earlier that the letter dated 21st September, 2009 constituted repudiation by Anglo of the contract. In its reply dated 25th September, 2009, MMTC did not suggest that Anglo had repudiated the contract. It viewed the said letter dated 21st September, 2009 as a request from Anglo to start lifting the contractual quantities. This explains why MMTC in the said reply expressed inability to lift 2,25,174 MT by 31st March, 2010 since it seemed "near to impossible as it worked out to 56.7% of the carryover tonnage." It sought a reduction in prices hoping that Anglo would "not ignore the economic realities completely". MMTC stated that "In short, we are not denying our obligation. The request is only for staggering the time frame for lifting..." In its letter dated 3rd December, 2009 MMTC sought Anglo's help in the matter "so that somehow we are able to run the plant by having a mixture of costly coal which we are committed to lift vis-a-vis the coal at new contract prices." The letter dated 21st September, 2009 when read as a whole and in the context of the above correspondence reflects what the majority Award has rightly understood, viz., that Anglo, far from repudiating the contract or bringing it to an end, was offering MMTC a way to spread out its obligation to lift the carry over quantity over the subsequent period.

46. The corollary of there having been no repudiation of the contract by Anglo was that MMTC too was not relieved of its obligations thereunder. Under Clause 1.2 of the contract it was possible for the delivery period to be extended. Even if it is taken that no agreement was reached between the parties as to the extended delivery period, MMTC could not be said to have been relieved of its obligations to lift the quantities under the fifth delivery period till 30th September 2009.

47. The Court rejects the plea of MMTC that there was no failure on its part to perform its obligations. MMTC failed to communicate to Anglo the proposed delivery schedule during the fifth delivery period. The correspondence between the parties which had been analysed extensively by the majority Award shows that it was MMTC which was asking for accommodation as regards the price during the fifth delivery period and was making clear that it was not in a position to lift the stocks at USD 300 per MT. The answers given by Mr. John Wilcox (CW-1) in his cross-examination that it was pointless to simply offer stems when MMTC was refusing to lift the stocks appears to be consistent with the factual position. The relevant questions and answers in this regard read as under:

“Q. 22 Is it correct that leaving aside 11th March 2009 letter no offer in writing was made by the Claimant to the Respondent for supplies to be made under the fifth delivery period?

Ans.: MMTC was refusing to lift any coal under the Agreement so there was little point in making formal stem offers. In our meetings of May and June we were proposing *ad hoc* non-contractual deliveries to at least get deliveries flowing. Also in

our meetings of May and June we of course requested US\$ 300 contracted coal that however MMTC was not prepared to take delivery of the contractual coal. That is why our discussions were around *ad hoc* non contractual deliveries.”

48. Consequently, the finding of the majority of the AT that no breach was committed by Anglo and it was MMTC that was in breach of its obligations cannot be said to be perverse or suffering from any patent illegality warranting interference by the Court.

Is the Award of the majority vitiated by bias?

49. The other major ground urged by Mr. Chidambaram concerns the alleged bias of the Arbitrator nominated by Anglo, Mr. Peter Leaver. The arbitration clause contained in the agreement is relevant in this context and reads as under:

“20.1 All disputes arising in connection with the present Agreement shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce, Paris by one or more Arbitrators appointed in accordance with the said Rules and the Award made in pursuance thereof shall be binding on the parties. The Arbitrator shall give a reasoned award. The venue of arbitration shall be New Delhi, India.”

50. Article 21.1 of the agreement states that it will be governed and construed according to laws in India for the time being in force.

51. The position that emerges is that the law governing the contract as well as the law governing the arbitration agreement is the Indian law. In other words as regards the arbitration it is the Arbitration and Conciliation Act,

1996 which would govern. However the curial law would be of the rules of the ICC as the arbitration clause states that the disputes shall be settled under the rules of the Arbitration of the ICC.

52. The Tribunal set up for the purpose of this dispute was a three-member AT with the nominee of Anglo being Mr. Peter Leaver and the nominee of MMTC being Justice V.K. Gupta, the former Chief Justice of the High Court of Jharkhand. The third Arbitrator and also the Presiding Arbitrator was Mr. Anthony Houghton.

53. Under Section 12 of the Act the grounds for challenge to the Arbitrator is provided. The challenge procedure is provided under Section 13 of the Act which reads as under:

“13. Challenge procedure.—

(1) Subject to sub-section (4), the parties are free to agree on a procedure for challenging an arbitrator.

(2) Failing any agreement referred to in sub-section (1), a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in sub-section (3) of section 12, send a written statement of the reasons for the challenge to the arbitral tribunal.

(3) Unless the arbitrator challenged under sub-section (2) withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(4) If a challenge under any procedure agreed upon by the parties or under the procedure under sub-section (2) is not successful, the Arbitral Tribunal shall continue the arbitral proceedings and make an arbitral award.

(5) Where an arbitral award is made under sub-section (4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with section 34.

(6) Where an arbitral award is set aside on an application made under sub-section (5), the Court may decide as to whether the arbitrator who is challenged is entitled to any fees.

54. The opening words of Section 13 (1) make this provision subject to sub-Section (4) which provides for “challenge under the procedure agreed upon by the parties.” The procedure agreed upon by the parties is the one governing ICC Arbitrations which is the ICC Arbitration Rules.

55. Article 14 of the ICC Arbitration Rules provides that a challenge to the arbitrators should be submitted within 30 days from the date when the party making the challenge was informed of the facts and circumstances on which the challenge is based. Under Article 14 (3) the challenge is to be decided, not by AT itself but by an International Court of Arbitration (ICA) which is an independent body of the ICC itself. Article 14.3 of the ICC Arbitration Rules reads as under:

“3. The Court shall decide on the admissibility and, at the same time, if necessary, on the merits of a challenge after the Secretariat has afforded an opportunity for the arbitrator concerned, the other party or parties and any other members of the arbitral tribunal to comment

in writing within a suitable period of time. Such comments shall be communicated to the parties and to the arbitrators.”

56. An application was filed by MMTC on 4th January, 2014 seeking the removal of Mr. Peter Leaver from the AT. It was filed within time in terms of Article 14 (3) of the ICC Arbitration Rules. The ground on which the removal of Mr. Leaver was sought was that he had asked questions of the witnesses “which generally the claimant would have asked on proving its case.” The application sets out some of these questions. The allegation was that by adopting the said line of questioning, Mr. Leaver was attempting to prove the case of Anglo and was helping it “to fill up the gaps left in the Claimant’s cross-examination of the Respondent’s witness.” Further it was alleged that the questions were “in the form of interrogation and the learned Member clearly adopted an intimidatory tone and was browbeating the witness to elicit from him answers to support the claim of the claimant.”

57. It was further averred by MMTC that the conduct of Mr. Leaver prompted counsel for MMTC to complain to the President of the AT, Mr. Houghton, that the manner in which Mr. Leaver conducted himself “clearly raise justified doubt in the Respondent’s mind about impartiality and does not inspire confidence and the Respondent does not expect fair and just decision in the matter”. MMTC anticipated that under Article 14 of the Arbitration Rules the ICA was not liable to communicate any reasons for their decision. It was pleaded that this was contrary to the Sections 12, 13 and 16 of the Act. It was urged that failure to decide an application seeking removal on the ground of lack of impartiality by a reasoned order would be

contrary to the Act and therefore, it was imperative that the AT itself hear and dispose of the application by a reasoned order.

58. In terms of the Rules of the ICC, comments were sought from the members of the AT. On 21st October, 2013 Mr. Anthony Houghton, the Presiding Arbitrator sent his response. He rejected the suggestion that Mr. Peter Leaver had acted in an unusual or improper manner. He denied that there was any such “badgering” of the witnesses, whether by the advocates or by the AT, and stated that he saw no reason to intervene in this case. In response to the allegation that some questions by Mr Leaver were not recorded by the Presiding Arbitrator, he stated that, “The transcript service was, frankly, poor. However it should not be understood that questions by Mr. Leaver were being left unrecorded for any other reason.” He pointed out that Mr. Leaver had put questions to both witnesses and nothing improper had taken place.

59. However, Mr. Justice P.K. Gupta in his comments, received on 30th October, 2013, stated that he would have not adopted the approach which Mr. Leaver did. He stated that “such a detailed and extensive questioning, which was also very lengthy, was very unusual as well as it was uncalled for. Actually, without any hesitation I do venture to say that if I were the Presiding Arbitrator, I might have intervened in favour of the witnesses. Also, I do recollect that initially some questions were so rapidly fired at the witnesses, the answers could not be properly recorded due to the rapidity.”

60. No comments were received from Mr. Leaver himself. The ICA considered the above application on 14th September, 2014 and rejected it. This was communicated by a letter written by Secretary, ICA which reads as under:

“Respondent request that the Secretariat provide it with “the orders/minutes of the Court recording deliberations/reasons for rejecting the challenge raised by Respondent against Mr. Peter Leaver, QC.

We refer to Article 11 (4) of the Rules, which provides in relevant part that the decisions of the Court as to the appointment, confirmation, challenges or replacement of an Arbitrator shall be final, and that the reasons for such decisions shall not be communicated. Further, pursuant to Article 1 (4) of Appendix II to the Rules, documents submitted to the Court, or drawn up by it or the Secretariat in the course of the Court’s proceedings, are communicated only to the members of the Court and to the Secretariat, as well as any persons authorized by the President to attend Court sessions. Therefore, we kindly inform you that we are unable to accede to Respondent’s request.”

61. As a result the reasons for which the ICA rejected the application were not available.

62. The question that arises is whether, as submitted by Mr. Chidambaram, the very fact that reasons were not given by the ICA for rejecting the challenge is itself sufficient to set aside the Award since the absence of reasons deprives MMTC of availing the remedy provided under Section 13 (5) of the Act, i.e., challenging the Award under Section 34 of the Act on

the ground that the challenge to the arbitrator was wrongly rejected by the ICA.

63. Mr. Sumeet Kachwaha, learned counsel for Anglo, urged that the parties had agreed to abide by the ICA procedure and this is accounted for in sub-section (1) of Section 13 read with sub-section (4) thereof. He, however, submitted that it is open for this Court while examining the award under Section 34 of the Act to also examine whether the ICA was justified in rejecting the above challenge. In other words Mr. Kachwaha submitted that the very application which was filed by MMTC before the ICA can be examined by the Court with reference to the reply thereto by Anglo and a decision taken on whether the ICA was justified in rejecting the challenge.

64. As far as the majority Award is concerned, it has considered this issue in paras 15 to 20 of the impugned Award. It has taken the view that by agreeing to an arbitral procedure that includes a mechanism by which challenges are to be resolved, the parties have, for the purpose of Section 13 (1) of the Act, agreed on a procedure for the challenge to an arbitrator as well. That challenge procedure is in terms of Articles 14 and 15 of the ICC Rules and has to be determined by the ICA.

65. The Court finds no error in the majority Award in its analysis of Section 13 of the Act and legal position as regards the curial law governing the procedure of arbitration. The question that remains is to what extent the Court can give effect to Section 13 (5) of the Act so that the remedy provided thereunder is not rendered meaningless. The course that the Court

is persuaded to adopt is to harmonise Section 13 (1) with Section 13 (4) and 13 (5) of the Act and acknowledge that the Court while examining the challenge to an Award under Section 34 of the Act would be obliged to examine the grounds urged with reference to Section 13 (5) of the Act by a party aggrieved by the rejection by the AT (or in this case the ICA) of its challenge to an Arbitrator.

66. The Court finds support for this position in a decision of the Court of Appeals in *AT&T Corporation v. Saudi Cable Company* [2000] EWCA Civ. 154 where a similar situation arose with the Court before whom the challenge to an ICC Award was laid, not having the benefit of the reasons of the ICA rejecting the challenge to the Arbitrator. It was held that:

“The finality of the provision does not operate to exclude the English Court's jurisdiction under s. 23 of the 1950 Act... In this case, the decision of the ICC court provides no assistance because the decision was not a reasoned one. We do not know the basis upon which the complaint of AT & T was dismissed.”

67. The Court is, therefore, inclined to accept the submission of Mr. Kachwaha that it will be open to the Court in exercise of its power under Section 13 (4) read with Section 13 (5) of the Act to go into the merits of the application filed by MMTC seeking the removal of Mr. Leaver as an Arbitrator.

68. There is obviously a difference of perception between Mr. Houghton and Justice Gupta as regards the conduct of Mr. Leaver. While Justice Gupta feels that the approach adopted by Mr Leaver was unusual, he does

not suggest that Mr. Leaver's conduct portrayed any real bias. Mr. Houghton is clear that there was no 'badgering' of witnesses. Justice Gupta's response does not bear out the principal allegation of MMTC that Mr. Leaver was adopting an 'intimidating tone' or 'browbeating' MMTC's witness alone. Justice Gupta does not suggest that Mr. Leaver was singling out a particular witness.

69. It should be open to an Arbitrator to elicit as much from the witness as is relevant for the issues between the parties. Each Arbitrator may have a different approach in the matter. It is not unusual for the members of the AT themselves to put questions to the witnesses. The arbitration proceedings themselves being less formal than court proceedings, questions by arbitrators should be seen as a welcome intervention so that the issues between the parties get further clarified. Of course if there is perception that the Tribunal has gone out of its way in putting questions to a witness only with a view to helping to one of the parties to the arbitration that will certainly be caused of concern. However, it is not possible for the Court to examine this issue as it would in a trial. The arbitrators obviously cannot be called as witnesses and asked to speak as to what happened during the arbitral proceedings. At best the procedure adopted by the ICA itself, i.e., seeking comments from the other members of the AT, is the only material which can be examined.

70. In the instant case, there is no unanimity between the two members who sent in their comments. While Justice Gupta felt the approach of Mr. Leaver was unusual Mr. Houghton did not think so. It is difficult for the Court in

the circumstances to come to any definitive conclusion from the comments of the members that the conduct of Mr. Leaver reflected a bias on his part and that he was trying to help the case of Anglo. In any event it was a three-member AT and although there is a dissenting opinion by the nominee of MMTC, that by itself does not constitute a sufficient reason for the Court to conclude the ICA erroneously rejected the challenge to the arbitrator.

71. This Court is not sitting in appeal over the decision of the ICA and at the same time it is not willing to decline to examine the issue in exercise of its powers under Section 34 read with Section 13 (5) of the Act. It now proceeds to examine the portions of the transcript of evidence which according to MMTC reflects the biased approach of Mr. Leaver.

72. The Court would like to preface the exercise by referring to the settled legal position as regards the test that is to be adopted in determining the issue of bias. In *Manak Lal v. Dr. Prem Chand* (1957) 1 SCR 575, the Supreme Court held:

“With regard to bias in relation to a judicial tribunal the test that is applied is not whether in fact a bias has affected the judgment but whether a litigant could reasonably apprehend that a bias attributable to a member of the tribunal might have operated against him in the final decision of the tribunal.”

73. In *S. Parthasarathi v. State of Andhra Pradesh* AIR 1973 SC 2701 the Supreme Court reformulated the ‘real likelihood’ test. In that case it was held that the appropriate enquiry for the question of bias is whether a reasonable person, who is not capricious or whimsical, would in the

circumstances be of the opinion that there was a real likelihood of bias. The court held as follows:

“The question then is: whether a real likelihood of bias existed is to be determined on the probabilities to be inferred from the circumstances by court objectively, or, upon the basis of the impressions that might reasonably be left on the minds of the party aggrieved or the public at large.

The tests of "real likelihood" and "reasonable suspicion" are really inconsistent with each other. We think that the reviewing authority must make a determination on the basis of the whole evidence before it whether a reasonable man would in the circumstances infer that there is real likelihood of bias. The court must look at the impression which other people have. This follows from the principle that justice must not only be done but seen to be done. If right minded persons would think that there is real likelihood of bias on the part of an inquiring officer, he must not conduct the enquiry; nevertheless, there must be a real likelihood of bias. Surmise or conjecture would not be enough. There must exist circumstances from which reasonable men would think it probable or likely that the inquiring officer will be prejudiced against the delinquent. The court will not inquire whether he was really prejudiced. If a reasonable man would think on the basis of the existing circumstances that he is likely to be prejudiced, that is sufficient to quash the decision.”

74. This test was endorsed by the Supreme Court in *N.K. Bajpai v. Union of India (2012) 4 SCC 653* where it held as follows:

“The question is whether the fair-minded and informed observer/ having considered the facts would conclude that there was a real possibility that the tribunal was biased.”

75. According to MMTC the following excerpt from the transcript of the questions put to its witness Mr. Suresh Babu by Mr. Leaver and the responses thereto illustrates Mr. Leaver's bias:

"Q:Please look at the last para. of the letter of 25th September, 2009. First sentence says, in short we are not denying your our obligation. What obligation is that?

Ans. Our obligation is to lift US\$ 300 Coal.

I thought you told us that the Fifth Delivery Period has come to an end so what was your obligation? .

Ans. In fact subsequent to the letter dated 21st September from the Claimant we were only trying to renegotiate with the Claimant.

What was the obligation you were referring to in your letter?

Ans. I only meant that the US\$ 300 coal was not lifted though by the 21st September letter the Claimant put an end to the Fifth Delivery Period.

What if the Claimant had put an end to the Fifth Delivery Period was the Respondent's obligation under the Long Term Agreement?

Ans. In fact there should not have been any obligation.

.....

What is meant by stem?

Ans. By stem it is meant that the cargo in so many metric tonnes available during a lay can.

Is what you are saying is that stem means when used by you taking delivery of a cargo of 50, 000 MT?

Ans. Any cargo size/ parcel size.

If that is right if you go to Volume 3 page 80) this is your email of 2nd July 2009.

When you say in the first line "Trans chart has already entered the market on behalf of MMTC for the vessel against July 09 stem" what you are saying is that transchart is trying to charter a vessel for MMTC to pick up the coal that was being purchased under the ad hoc agreement and if you want a reference for that the reference is Annexure C-1 0?

Ans. Yes.

Please go back to page 80, volume 3 in the 2nd para of your email you say "we would like to avail two stems in August 09 and, one in September 09. Please confirm: 'availability and convey the law cans". If stem simply means the cargo that is being picked up what volume are you speaking about in the 2nd para of this email? .

Ans. This will be two cargoes of size ranging from 50,000 to 75,000 tonnes.

So each cargo will be between 50,000 to 75,000 tonnes?

Ans. Yes.

How was the recipient of this email going to know that you were asking for between 50,000 and 75,000 tonnes?

Ans. The Respondent asks for the stem and the Claimant confirms availability and parcel size.

So if are you ask for stem and the Claimant supplies you 150000 tonnes, do you have to take it?

Ans. Acceptance of a stem depends on special factors one is the availability of the -draft at the discharge port, which is Paradeep, Orissa where the port can accommodate ships with capacity ranging from 50,000 to 75,000 tonnes because of the draft restrictions. So I cannot accept 150000 tonnes.

You said in your evidence earlier today the Claimants production was 12 million tonnes per annum. Do you remember saying that?

Ans. Yes.

Where do you get that figure from?

Ans. The Claimant's Additional Affidavit

If you turn page 6, para 9 (volume 7). Where do you get in Mr. Wilcox Additional Affidavit anything to support to evidence that the Claimant's production was 12 million tonnes per annum?"

76. As pointed out by Mr. Kachwaha, the AT had by Procedural Order No. 1, adopted the IBA Rules on Taking of Evidence in International Commercial Arbitration for conduct of the arbitration. Article 8.3 (g) of the IBA Rules state: "... the Arbitral Tribunal may ask questions to a witness at any time." The commentary on the IBA Rules by Nathan D O'Malley titled '*Rules of Evidence of International Arbitration*' (2012) states that the Arbitrators have "the express right to conduct its own questioning of witnesses at any time." The above transcript when viewed in that context

does not reflect a particularly biased view of Mr. Leaver who is stated to have asked the above questions of the witness.

77. Further, it is seen that his questioning of Anglo's witness Mr. Wilcox was no less searching. According to Anglo the following excerpt from the transcript of the questions put to its witness Mr. Wilcox by Mr. Leaver bears this out:

"In para 2 of your Additional Affidavit, Volume 7, it is your evidence that the Claimant had surplus material available during the period October 2008 and September 2009 and that the Claimant had to sell huge quantities of surplus production by way of distress sale. Can you point out what was the quantity of such distress sale during the said period and what was the price at which such sale was made by the Claimant during the Fifth Delivery Period?

Ans. The distress sales were between March 2009 and end of June 2009. In my Additional Affidavit on page 7 I set out the volume of distress sales to China in May and June at prices between US\$ 83 and US\$ 113. This was the majority of the distress sales.

Did the Claimant give any notice to the Respondent as regards to the above distress sale?

Ans. The answer is 'no'. We did not tell our customers that we were dumping coal to China at low prices.

I put it to you that there was no distress sale made by the Claimant to China. Do you agree?

Ans: No...

....

I put it to you that the Claimant did not have the contractual quantity available to supply during the Fifth Delivery Period and had in fact refused to supply the contracted quantity at the contracted price to the Respondent?

Ans. At all times we had the contracted quantity available to supply and never refused to supply any of the contracted quantity. MMTC refused to lift the contracted quantity."

78. The Court is of the considered view that the above excerpts do not make out a case for any 'real likelihood of bias' vis-a-vis Mr. Leaver. In this context, the Court would like to refer the decision of the Supreme Court in ***International Airports Authority v. K.D. Bali AIR 1988 SC 1099*** where it was observed:

"The purity of administration requires that the party to the proceedings should not have apprehension that the authority is biased and is likely to decide against the party, but it is equally true that it is not every suspicion felt by a party which must lead to the conclusion that the authority hearing the proceedings is biased, as held by the High Court. The apprehension must be judged from a healthy, reasonable and average point of view and not on a mere apprehension of any whimsical person.... It is the reasonableness and apprehension of an average honest man that must be taken note of."

79. The allegations by MMTC regarding Mr. Leaver being biased in favour of Anglo are not substantiated by the above excerpts of the evidence or by any other material placed on record. Consequently, the Court rejects the ground of challenge to the impugned Award that it is vitiated on the ground of bias of one of the members of the AT.

Quantum of Damages

80. Mr. Chidambaram next submitted that the finding in majority Award that the prevailing market price at the relevant time was USD 126 per MT was perverse and contrary to the evidence produced by MMTC which showed that it had purchased coal from BMA at USD 292.50 per MT. If the said rate had been adopted the actual damages would have worked out to approximately USD 30,000. He further submitted that the majority disregarded the evidence placed on record by MMTC which showed that the price of coal was during the relevant period steadily rising.

81. It is a settled legal position that the relevant date for the computation of damages as a result of breach of a contract for the sale of goods is the last date on which the seller/buyer ought to have fulfilled their obligations. In ***Ramchandra Ramvallabh v. Vasanji Sons and Co. AIR 1921 Bom 203*** it was held that “[T]he due date of the contract must be taken as the determining point for calculating the price which is to be taken in assessing damages.” Likewise in ***A.S Mackertich v. Nava Coomar Roy (1903) ILR 30 Cal 477*** it was held: “The measure of damages is the difference between the contract price and the higher price of the subject-matter on the last day of the period within which the delivery ought to have been made.”

82. The Court finds that the majority Award has proceeded to deal with the issue on the basis of the above legal position and has examined what the market price was on the last date for the performance of MMTC's obligations under the contract. The majority referred to the affidavit of Mr. Wilcox as to market price determination for the fiscal year 2009-10, the

price settled by Anglo in their contracts with SAIL/ RINL for the period 1st April, 2009 to 31st March, 2010 and the correspondence between the parties. The rate of USD 126.62 was expressly arrived at by calculating the average of the prices at which the two coal gradients under the LTA were settled in the contract between Anglo and SAIL/RINL, i.e., an average of USD 128.25 per MT for Isaac Coking Coal and USD 125 per MT for Dawson valley Blend Coking Coal which amounts to USD 126.62.

83. MMTC relied on statements made by Mr. Wilcox in his examination-in-chief by way of affidavit dated 12th July, 2013 to state that USD 126.62 does not reflect the market price as on 30th September, 2009. In paragraph 3 (vi), he stated:

“In a situation where the market demand was picking up (as it was in the second half of the 2009 calendar year) there was little room for the Claimant to enter into ad hoc sales or spot sales as MMTC was requesting for.”

84. Further in para 12 of his affidavit, Mr. Wilcox stated:

“By that time (i.e. July 2009) having already reduced our surplus stock to manageable limits (about 50% of the maximum capacity) and in view of the coal market picking up, we wanted to refocus on our long term contractual arrangements and commitments which in any case is our normal preferred business model. “

85. On the said issue his following answers in cross-examination are relevant:

"Q32. I put it to you that in the period July 2009 to September 2009 SMA had supplied 22,000 MT approximately contracted cargo @

US\$ 292.50 per MT since the Claimant had refused to supply any contracted cargo during the said period?

Ans. Yes. Although this was not contract volume. It was ad hoc volume with 18.7% of the cargo @ US\$ 292.50 and the remainder @ US\$ 128 as we have done on vessel Sea Venus as agreed on 15th of July. 22,000 tonnes would not constitute a single cargo as MMTC shipped in single cargoes of 50,000 tonnes each. The vessel Sea Venus was not a contracted cargo it was an ad hoc cargo. At no time during this period did Anglo refuse to perform a US\$ 300 cargo and we would have been delighted to do so given the price of the market price at that time was USD 128.

Clarification by witness after the lunch break: The reference in the previous answer to "this period" is a reference to "during the Fifth Delivery Period". The reference to the market price at the time was US\$ 128 be changed to market price from 1st April 2009 was US\$ 128."

86. MMTC's submission is belied by what it has itself stated in the correspondence exchanged with Anglo. In its letter dated 25th September, 2009, MMTC describes USD 128 as the '2009' rate. In its letter dated 27th November, 2009 it refers to "the 2009 price level of US\$ 128/125 PMT." In its letter dated 3rd December, 2009 MMTC referred to "coal being purchased at current price of US\$ 128.25 PMT." Further the re-negotiated contracts with SAIL and RINL acknowledge the slump in coal prices to USD 128 during the period from April, 2009 to March 2010. The date of 30th September, 2009 fell between the said dates and was the date to be reckoned for determining the prevalent market price.

87. The majority Award has based its conclusion as regards the prevalent market price of coal as on 30th September, 2009 on the basis of the above evidence. It was a view that was possible to be taken on the evidence made available to the AT. The Court is not persuaded to hold the said finding to be perverse or patently illegal.

Interest

88. The majority has awarded Anglo interest @ 7.5% per annum on the principal amount of USD 78,720,414.92 from 30th September 2009 till 12th May 2014. Post-award interest has been awarded at 15% per annum. Neither rates can be stated to be exorbitant or oppressive as contended by MMTC. What has been rendered is a domestic Award under the Act. Section 31 (7) of the Act envisages awarding interest at 18% per annum.

Costs

89. As regards costs, it has been pointed out by Anglo, and not contradicted by MMTC, that although under the ICC Rules the costs of arbitration (which includes the arbitrator's fees) are to be shared by the parties equally, MMTC contributed no costs of the arbitration including venue costs or fees of the arbitrators. Consequently, Anglo bore the entire costs.

90. The ICA, i.e. Court of the ICC, passed an advance order on costs on 23rd January, 2013 indicating the estimated costs of arbitration as USD 650,000. By a subsequent order on 24th April, 2014 the ICA confirmed the final costs of arbitration at the same figure. The break-up has been set out in a separate document appended to the majority Award. It indicates that the

entire costs were in fact deposited with the ICC by Anglo. In the circumstances, the above costs had to be reimbursed to Anglo, which was the successful party.

91. Apart from the costs of arbitration, Anglo had claimed for reimbursement of its costs. It claimed USD 417,125 (towards lawyers' fees) 3,940 (travel costs) and 3,455 (venue costs). The majority Award has granted Anglo, in respect of the above claim, USD 320,000+3,940+3,455+327,395. The Court is not persuaded to view the above award of costs and expenses to Anglo to be unreasonable or warranting interference.

Conclusion

92. For the aforementioned reasons, the Court finds no grounds having been made out by MMTC under Section 34 of the Act for interference with the impugned majority Award dated 12th May 2014. The petition is dismissed with costs of Rs. 1,00,000 which shall be paid by MMTC to Anglo within four weeks.

S. MURALIDHAR, J.

JULY 10, 2015/Rk