IN THE HIGH COURT OF SINDH
AT KARACHI

SUIT NO. 1785 OF 2017

Applicant/Claimant	:	Coniston Ltd Hong Kong, through Mr. Shaiq Usmani, Advocate
Respondent	:	Pakistan Steel Mills Corporation Pvt. Ltd Bin Qasim, Karachi, through Mr. Agha Zafar S, Advocate
Date of hearing	:	28.11.2018, 13.12.2018, 16.10.2019 & 17.10.2019

J U D G M E N T

YOUSUF ALI SAYEED, J - This Suit stems from an Award pronounced on 08.04.2017 by Mr. Justice (R) Muhammad Ather Saeed, upon a referral of the matter to him by this Court as an Umpire, following the divergent Awards made by the Arbitrators appointed by the parties on a preliminary issue, which is as follows:

> "Whether the Respondents are liable to pay 10% balance freight to the Claimants on submission of original documents or on relevant information that may be provided by Claimants under English Law?"

2. Briefly stated, the facts underpinning the referral of the matter to the learned Umpire and giving rise to the Award, are as follows:

   (i) On 20.08.2008 the parties entered into 3 Contracts of Affreighment (the "**COA's**") whereby 750,000 metric tons of coal was to be brought to Karachi, with the terms of carriage stipulating inter alia that 90% of the freight was to be paid by the Respondent in advance and the balance 10% to be paid upon delivery and submission of certain documents.

(ii) Out of a total of 10 shipments envisaged under the COAs, 8 were completed, however the balance 10% freight was paid in respect of only 3 of those shipments, and the Respondent also failed to perform the other two shipments.

(iii) That under the circumstances Arbitration was commenced on 25.02.2010 before two Arbitrators comprising of one nominee of the Claimant and one nominee of the Respondent seeking the following reliefs:-

(a) "An immediate interim Final Award in the sum of USD 3,746,331.75 for the outstanding freight;

(b) An immediate interim Final Award in the sum of USD 193,057.19 for the outstanding demurrage;

(c) Damages for detention less dispatch in the sum of USD 3,993,579.77;

(d) Damages estimated at USD 19,251,632.86 due to Charterers' failure to perform the five (5) outstanding shipments;

(e) Interest as aforesaid in Paragraph 51; and

(f) Cast of Arbitration." [Sic]

(iv) After examining the case, the learned Arbitrators, framed eight Issues, of which the first related to the claim for payment of the 10% Balance freight.

(v) On Application, the Arbitrators agreed to treat the first Issue as a preliminary Issue, and following a hearing in that regard, returned different/divergent findings, with one of the Arbitrators holding that the 10% freight, as claimed, could not be released by the Respondent due to the failure of the Claimant in furnishing the original documents as evidence, whereas the other Arbitrator held that since the quantity delivered was indisputable, non-production of the original documents could not be a crucial factor or a condition precedent release of the freight amount due.

(vi) Thereafter, in the absence of agreement as to appointment of an umpire, an Application was filed before this Court under Section 8(2) of the Arbitration Act, 1940 (the "**Act**"), being numbered as JM No. 32/2012, which culminated in the appointment of the learned Umpire vide an Order dated 25.04.2016.

(vii) The learned Umpire accordingly entered upon the Reference and after hearing the parties on the subject of the 10% Balance Freight, made the Award in favour of the Applicant in the sum of US$.2,542,440/96, directing the Respondent to pay the same after deducting Dispatch money admittedly due to the Respondent.

3. The Award was then filed in Court on 07.06.2017 under Section 14(2) of the Act, and met by certain Objections from the side of the Respondent under Sections 30 and 33 thereof, asserting that:

(i) The learned Umpire should have decided all issues and not only the preliminary issue, hence the Award was illegal and invalid;

(ii) The original documents in support of the claim underpinning the preliminary issue were not produced, and the learned Umpire decided the point on the basis of 'relevant information' under English Law without deciding whether English Law was applicable or not;

(iii) The reference to Dispatch in the Award reflects that evidence was required, and since no evidence was recorded the Award suffers from material irregularity;

(iv) The learned Umpire's reliance on Order VIII Rule 5 CPC (regarding admission in pleadings with regard to the quantity discharged) was misplaced;

(v) The charterers liability ceases as per line 136, Clause 26 of the COAs, thus the Respondent has no further liability as regards the balance freight;

(vi) The balance Freight was only payable upon Delivery and production of Original Documents, but as the Applicant had failed to submit original documents, the 10% Balance freight was not payable.

4. Proceeding on these Objections, learned counsel for the Respondent essentially reiterated the same during the course of his submissions, contending that as the arbitrators had not specifically reserved the determination of any matter/issues to themselves, the learned Umpire ought to have decided the points in issue in their entirety, but had fettered his jurisdiction by curtailing his determination solely to the preliminary issue. He contended that all the issues were intertwined and that the reference to the learned Umpire was not on any one issue, but in relation to the entire dispute, and that no determination of liability could have been made unless and until all the points were decided. Reliance was placed on the judgment of the Honourable Supreme Court in the case reported as A. Z. Company Karachi v. Government of Pakistan & others PLD 1973 SC 311. Furthermore, it was submitted that whilst the COAs were silent on the subject of the governing law, the same had been signed and were to be performed in Pakistan, hence the proper law governing the COAs was a matter that fell to be determined, but had instead been assumed for purpose of deciding the preliminary issue as being English law. It was further submitted that the determination of the preliminary issue had been made without proper evidence, on the basis of photocopies, on the assumption that English law was applicable and the further assumption that the claim could therefore be so entertained. It was stated that even before the Arbitrators, there had been a divergence of opinion as to the need for production of the original documents. It was also contended that the learned Umpire was precluded from making an Award, and could at best have made a decision on the preliminary issue, which would then have been considered for purpose of the final award to be made by the Arbitrators.

5. Conversely, learned counsel for the Applicant endorsed the correctness of the Award and sought that the same be made a Rule of the Court. He pointed out that all of the Objections raised on behalf of the Respondent represented arguments that had been raised before the learned Umpire and addressed in terms of the Award in a reasoned manner. He submitted that a presumption of correctness is to be attached to an award, which ought not to be disturbed for merely technical reasons that do not materially affect the findings on merit, and while addressing objections and dealing with the question of making the award a rule of the Court, the Court would not sit as an appellate forum so as to minutely scrutinize the same for discovering any latent error, and interference would only be justified where it is necessary, upon there being an error apparent on the face of award. He relied on the judgment of the Honourable Supreme Court in the case reported as Gerry's International (Pvt.) Ltd v. Aeroflot Russian International Airlines 2018 SCMR 662, and submitted that in the instant case, the Award was unexceptionable and interference by the Court was unwarranted.

6. Having examined the Award and considered the arguments advanced at the bar, it merits consideration at the outset that the principles circumscribing the scope of challenge to an arbitral award under Sections 30 and 33 of the Act were delineated by the Apex Court in the case of Gerry's International (Supra) as follows:

> "7. It is a settled principle of law that the award of the arbitrator who is chosen as Judge of facts and of law, between the parties, cannot be set aside unless the error is apparent on the face of the award or from the award it can be inferred that the arbitrator has misconducted himself under sections 30 and 33 of the Arbitration Act. While making an award the Rule of the Court, in case parties have not filed objections, the Court is not supposed to act in a mechanical manner, like the post office and put its seal on it but has to look into the award and if it

finds patent illegality on the face of the award, it can remit the award or any of the matter(s) referred to arbitrator for reconsideration or set aside the same. However, while doing so, the Court will not try to find out patent irregularity, and only if any patent irregularities can be seen on the face of award/arbitration proceedings like the award is beyond the scope of the reference or the agreement of arbitration was a void agreement, or the arbitrator awarded damages on black market price, which is prohibited by law, or the award was given after superseding of the arbitration, etc., can the same be set aside.

8. The principles which emerge from the analysis of above case-law can be summarized as under:-

(1) When a claim or matters in dispute are referred to an arbitrator, he is the sole and final Judge of all questions, both of law and of fact.

(2) The arbitrator alone is the judge of the quality as well as the quantity of evidence.

(3) The very incorporation of section 26-A of the Arbitration Act requiring the arbitrator to furnish reasons for his finding was to enable the Court to examine that the reasons are not inconsistent and contradictory to the material on the record. Although mere brevity of reasons shall not be ground for interference in the award by the Court.

(4) A dispute, the determination of which turns on the true construction of the contract, would be a dispute, under or arising out of or concerning the contract. Such dispute would fall within the arbitration clause.

(5) The test is whether recourse to the contract, by which the parties are bound, is necessary for the purpose of determining the matter in dispute between them. If such recourse to the contract is necessary, then the matter must come within the scope of the arbitrator's jurisdiction.

(6) The arbitrator could not act arbitrarily, irrationally, capriciously or independently of the contract.

(7) The authority of an arbitrator is derived from the contract and is governed by the Arbitration Act. A deliberate departure or conscious disregard of the contract not only manifests a disregard of his authority or misconduct on his part but it may tantamount to malafide action and vitiate the award.

(8) If no specific question of law is referred, the decision of the arbitrator on that question is not final however much it may be within his jurisdiction and indeed essential for him to decide the question incidentally.

(9) To find out whether the arbitrator has travelled beyond his jurisdiction, it would be necessary to consider the agreement between the parties containing the arbitration clause. An arbitrator acting beyond his jurisdiction is a different ground from an error apparent on the face of the award.

(10) The Court cannot review the award, nor entertain any question as to whether the arbitrators decided properly or not in point of law or otherwise.

(11) It is not open to the Court to re-examine and reappraise the evidence considered by the arbitrator to hold that the conclusion reached by the arbitrator is wrong.

(12) Where two views are possible, the Court cannot interfere with the award by adopting its own interpretation.

(13) Reasonableness of an award is not a matter for the Court to consider unless the award is preposterous or absurd.

(14) An award is not invalid if by a process of reasoning it may be demonstrated that the arbitrator has committed some mistake in arriving at his conclusion.

(15) The only exceptions to the above rule are those cases where the award is the result of corruption or fraud, and where the question of law necessarily arises on the face of the award, which one can say is erroneous.

(16) It is not open to the Court to speculate, where no reasons are given by the arbitrator, as to what impelled the arbitrator to arrive at his conclusion.

(17) It is not open to the Court to attempt to probe the mental process by which the arbitrator has reached his conclusion where it is not disclosed by the terms of his award.

(18) The Court does not sit in appeal over the award and should not try to fish or dig out the latent errors in the proceedings or the award. It can set aside the award only if it is apparent from the award that there is no evidence to support the conclusions or if the award is based upon any legal proposition which is incorrect.

(19) The Court can set aside the award if there is any error, factual or legal, which floats on the surface of the award or the record.

(20) The arbitrator is not a conciliator and cannot ignore the law or misapply it in order to do what he thinks is just and reasonable. The arbitrator is a tribunal selected by the parties to decide their disputes according to law and so is bound to follow and apply the law, and if he does not do so he can be set right by the Court provided the error committed by him appears on the face of the award.

(21) There are two different and distinct grounds; one is the error apparent on the face of the award, and the other is that the arbitrator exceeded his jurisdiction. In the latter case, the Courts can look into the arbitration agreement but in the former, it cannot, unless the agreement was incorporated or recited in the award.

(22) An error in law on the face of the award means that one can find in the award some legal proposition which is the basis of the award and which you can then say is erroneous.

(23) A contract is not frustrated merely because the circumstances in which the contract was made are altered.

(24) Even in the absence of objections, the Award may be set aside and not made a Rule of the Court if it is a nullity or is prima facie illegal or for any other reason, not fit to be maintained; or suffers from an invalidity which is self-evident or apparent on the face of the record. The adjudicatory process is limited to the aforesaid extent only.

(25) While making an award rule of the Court, in case parties have not filed objections, the Court is not supposed to act in a mechanical manner, like a post office but must subject the award to its judicial scrutiny.

(26) Though it is not possible to give an exhaustive definition as to what may amount to misconduct, it is not misconduct on the part of the arbitrator to come to an erroneous decision, whether his error is one of fact or law and whether or not his findings of fact are supported by evidence.

(27) Misconduct is of two types: "legal misconduct" and "moral misconduct". Legal misconduct means misconduct in the judicial sense of the word, for example, some honest, though erroneous, breach of duty causing miscarriage of justice; failure to perform the essential duties which are cast on an arbitrator; and any

irregularity of action which is not consistent with general principles of equity and good conscience. Regarding moral misconduct; it is essential that there must be lack of good faith, and the arbitrator must be shown to be neither disinterested nor impartial, and proved to have acted without scrupulous regard for the ends of justice.

(28) The arbitrator is said to have misconducted himself in not deciding a specific objection raised by a party regarding the legality of extra claim of the other party.

(29) some of the examples of the term "misconduct" are:

(i) if the arbitrator or umpire fails to decide all the matters which were referred to him;

(ii) if by his award the arbitrator or umpire purports to decide matters which have not in fact been included in the agreement or reference;

(ii) if the award is inconsistent, or is uncertain or ambiguous; or even if there is some mistake of fact, although in that case the mistake must be either admitted or at least clear beyond any reasonable doubt; and

(iv) if there has been irregularity in the proceedings.

(30) Misconduct is not akin to fraud, but it means neglect of duties and responsibilities of the Arbitrator."

7. As such, in this framework, it is noteworthy that the Objections raised by the Respondent are indeed on the same footing as the arguments taken before the learned Umpire, and gravitate around two propositions, being firstly that the learned Umpire ought to have decided the dispute in its entirety by determining all of the issues framed by the Arbitrators rather than confining himself to the preliminary issue on the subject of the 10% balance freight, and secondly that the evidentiary burden was to discharged by the Applicant, with the Award being rendered without production of original documents.

8. As to the first objection, relating to the scope of the proceedings before the learned Umpire, it falls to be considered that the very contention as has now been raised was in fact dispelled by the learned Umpire on 15.10.2016, prior to embarking upon a determination of the preliminary issue.

9. Observing that the Arbitrators had themselves proceeded only on the preliminary issue and that the Applicant had filed J.M. 32/2012 on the basis of the divergent Awards made thereon, with the appointment of an umpire being sought accordingly, the learned Umpire nonetheless framed a question as to whether it was the preliminary issue on which the Arbitrators had dissented that alone was to be decided or all of the issues framed for purpose of the arbitration were to be determined, with such question being decided as follows:

> *"Initiating the arguments, Mr. Aga Zafar learned counsel for the Respondent argued that the entire arbitration must be decided by the Umpire and these arbitration proceedings were not limited to the preliminary issue as alleged by the Claimant. He relied primarily on a Full Bench Judgment of the Honourable Supreme Court of Pakistan authored by CJ Hamood-ur-Rehman A.Z. Company Karachi v. Government of Pakistan and Others reported as PLD 1973 SC 311, and strongly relied on the following observation of the learned Supreme Court in the concluding paragraph:*
>
> *"As a general rule, where an umpire enters upon the difference between the arbitrators, all the matters referred to arbitration are to be decided and not merely the matters on which the arbitrators have disagreed..."*
>
> *Mr. J.(r) Shaiq Usmani appearing for the Claimant submitted that the two parties failed to reach a mutual agreement for appointment of an Umpire, and therefore a JM. Application No. 32 of 2012 u/s 8(2) of the Act was filed for appointment of the same. Mr. Shaiq Usmani reiterated the facts which led up to the appointment of the Umpire, Justice (r) Muhammad Ather Saeed and presented copies of Diary Sheet No. 19 dated 28.8.10, Diary Sheet No. 24 dated 13.11.2010, Application for hearing of preliminary issue, Application u/s 8(2) of the Act, and the Order dated 25.04.2016 by Justice Muhammad Junaid Ghaffar, Honourable Judge of the learned High Court of Sindh, as evidence.*

Mr. Usmani submitted that reading JM. Application No. 32 of 2012, in conjunction with Order dated 25.04.2016, makes the status of the Arbitration Agreement and the jurisdiction of the Umpire clear. He proceeded to read para 2 and prayer of JM Application No. 32 of 2012, which have been reproduced-above.

Mr. Usmani contented that on consideration of the facts and circumstances, and the holistic reading of the abovementioned texts, the Honorable High Court of Sindh dismissed JM Application 40 of 2012 and JM Applications 32 of 2012 and 58 of 2014 were allowed as prayed and an Umpire was appointed and time enlarged. Since the prayer clearly stated that an Umpire must be appointed in the Arbitration continuing between the parties, the legal principle that the Umpire's role is limited to only deciding the matter of difference between the Arbitrators was reinforced. The Order dated 25.04.2016 is also unequivocal in stating that the Arbitration Agreement subsists.

I have examined the preliminary issue in the light of the arguments of the learned counsel and have carefully perused the judgment and the extracts from the various documents relied upon and have also perused the relevant provisions of the Arbitration Act 1940.

The power of the Court to appoint an Umpire is under Section 8 of the Act 1940.

'Umpire' as defined under the Black's Law Dictionary states as follows:

> *"One cloaked with the authority to act alone in rendering a decision where arbitrators have disagreed."*

Therefore it appears that the jurisdiction of an Umpire commences only after a difference of opinion between the Arbitrators. This position of law has been further enunciated upon by SC judgment, reported as 2006 SCMR 1657 wherein it is stated as follows:

> *"...the ordinary meaning of the word 'umpire' is a person, who is to decide upon disagreement. There is a technical meaning attached to the expression, which denotes a person, who is to settle any difference that may arise between the Arbitrators. It is in this sense that the expression is used in the Act."*

The abovementioned position of the Umpire under Act has been further elaborated upon by the Honourable Lahore High Court in 2012 CLD 935 which states as follows;

> *"It is a settled position of low that umpire is a person who has to make an award if the two arbitrators disagree. Where two or more arbitrators are appointed and the arbitration agreement itself provides that in the event of their disagreement, the matter in dispute shall be referred to the decision of third person, the umpire acts only when there exists a difference between the arbitrators themselves. Jurisdiction of umpire commences only after difference of opinion between the arbitrators and not before"*

On an examination of the JM 32 of 2012 Application filed by the Claimant under the Section 8(2) of the Act and from the judgment of the Honourable Sindh High Court appointing me as the Umpire, the arguments made by the learned counsel for the Claimant that JM 32 of 2012 was filed for the appointment of an Umpire only to give his opinion on the dissenting order of the learned Arbitrators and that the Honourable High Court had allowed JM No. 32 in toto from which conclusion can be drawn that the Honourable High Court of Sindh had concurred completely with the submission and prayer made therein which was to appoint an Umpire to decide on the dissenting orders of the learned Arbitrators on the preliminary issue.

I have also examined in detail the judgment in the case of A.Z. Company Karachi v. Government of Pakistan and Others, quoted supra which has been relied upon by the learned Counsel for the Respondent. The learned Counsel had relied on the following observation of the Honourable Supreme Court:

> *"As a general rule, where an umpire enters upon the difference between the arbitrators, all the matters referred to arbitration are to be decided and not merely the matters on which the arbitrators have disagreed..,"*

But when the entire paragraph is read, it transpires that the learned Court has also observed as under:

> *"...but there might as well be cases where arbitrators might make an award on some matters and refer the others on which they have disagreed to the umpire. In such a case, the scope of the jurisdiction of the umpire will be confined to the matters which have been referred to him."*

This judgment is not only distinguishable in as much as the matter has not been referred to me by the Arbitrators nor is it clear from the orders as to what matters they wanted to refer to the Umpire but the matter has been referred by the Honourable High Court of Sindh on the Application under S. 8(2) of the Act filed by the Claimant and the contents of the application and the order of the Honourable High Court of Sindh have already been discussed by me in the earlier paragraphs, even otherwise the concluding observation in this paragraph makes it clear that the jurisdiction of the Umpire will be confined to the matters which have been referred to him. This case is therefore distinguishable because it is clearly stated in this judgment that the Umpire will be confined to matters that have been referred to him and only the dissenting views on the preliminary question has been referred to me.

On the basis of the above discussion, I am of the considered opinion that my jurisdiction is confined only to the extent of deciding the preliminary question on which the learned Arbitrators have dissented and not to decide the entire Arbitration.

The matter will now be fixed for hearing the arguments on the preliminary issue on which the learned Arbitrators have dissented."

10. In this regard, it merits consideration that the objection as to the scope of the proceedings undertaken by the learned Umpire and the Award made by him is clearly unfounded as the Arbitrators had themselves also treated the first issue as a preliminary issue and made their respective rewards only to that extent. Even otherwise, the Umpire was to have apparently been appointed by the Arbitrators if they differed in their Award, and in the present case, the matter came to Court as they could not agree on such appointment. What is obvious is that the role of the Umpire comes into play only when the arbitrators differ, which in the instant case was only to the extent of the divergent views held by them on the preliminary issue. Accordingly, the Applicant filed JM 32/2012, and, needless to say, the appointment of the Umpire and the scope of the proceeding before him was then circumscribed accordingly.

11. As to the further Objections taken by the Respondent, the same are intertwined and essentially regurgitate the assertion that there was a failure of evidence in the absence of the original documents whilst further alleging that as per line 136, Clause 26 of the COAs, the charterers liability ceases upon shipment, thus the Respondent has no further liability for the balance freight. These contentions have also been dealt with by the learned Umpire, who considered that the 8 shipments had been delivered with no claim as to short landing or the quantities delivered and that on the contrary, there was an admission on the part of the Respondent as to the quantities discharged. As such, it was held that the Claimant was not required to prove the quantities discharged in light of Order VIII rule 5 CPC and the only point remaining unresolved in respect of those consignments was as to the 10% balance freight remaining unpaid. It was also considered that a number of files containing original documents had been seized by the Federal Investigation Agency, that the Respondent had earlier paid the balance freight in respect of certain shipments without requiring the production of the original Draught Survey Report; that the COA's did not specifically require production of the original, and the Respondent had not even claimed that the faxed copy thereof was forged or incorrect. As such, the learned Umpire answered the contentions as follows:

> "42. I am of the considered view that the only original document which has been referred to' by the Arbitrators and the learned Counsel is the non-production of original Draught Survey Report. I am of the opinion that under the provisions of the CoA the production of original Draught Survey Report is not mandatory for payment of balance freight, especially as the quantity of discharge at the Discharge Port has never been objected to by the Respondent and no shortage had been claimed. I would therefore, decide the

preliminary issue that the Claimant has made out a case for the payment of balance freight.

43. I have also examined the record which had been provided to the Arbitrators. This record includes a memo of production and seizure dated 20.01.2010 in which the FIA officer has stated that he has seized a number of files containing original documents relating to transportation of coal. These files include File Nos. 3 and 4, File Nos. 9 and 10, and File Nos. 13, 15 and 16. which relate to two (2) LC Numbers in respect of goods transported to MV Cemtex Orient, two (2) LC Numbers relating to MV Kayo Alkyon, one (1) File in respect of cargo transported though MV Cultivation and two (2) Files containing the cargo transported through two (2) LC by the ship MV First Endeavour. Just as an example, I will reproduce one of the description given by the FIA Officer as to the documents he had seized:

> *"File No. 3 containing original as well as photocopies from pages 1-52 relating to freight LC Number 238040-012-2009 dated 14.07.2009 opened through NBP in connection with the transportation of cargo of 50,000 MTN of coal right from Newcastle Australia through MV Cemtex Orient."*

44. All the other Files contain the same averments of original and photocopies in respect of different freight LCs of different ships. In my view, this gives credence to the argument of learned Counsel for the Claimant, that the original draught survey reports were in possession of the Respondent, as it is a matter of common sense/practice that the original Draught Survey Reports must have been tagged in the concerned files which according to the Seizure Report were seized during the raid by FIA.

45. Mr. Aga Zafar has argued that the balance freight has to be paid alongwith demurrage after subtracting dispatch from their total, I have seen that there is an issue, number 2 *"whether the Claimants are entitled to any demurrage as claimed by the Claimants?"* and there is also number 7 which reads as under: *"Whether the Claimants are entitled to any damages for detention form Respondents in respect of detention from Respondent in respect of alleged three ships MV YM Cultivator, MV First Endeavour and MV Cemtex Orient under English Low?"* So the matter of demurrage and detention is before the Arbitrators and I will not adjudicate on demurrage and detention. However, as per clause 11 of the Claim, the Claimant has conceded that the dispatch at the load port and

the disport is totals USD 169,370.28/-.

46. I will therefore, make the award in favour of the Claimant for the net outstanding freight amounting to 2,542,440.96/- which is computed in the following manner:

Balance Freight Payable	USD 2,711,811.24
Less Dispatch admitted by Claimant	USD 169,370.28/-
Net Freight Payable	USD 2,542,440.96/-

This amount shall be paid to the Claimant within a period of 45 days from the date of this Award. In passing it may be mentioned that if the Respondent has any Claim that the dispatch has not been properly allowed, they may provide the details to the learned Arbitrators who after deciding the demurrage payable and damages for detention, may adjust the additional claim for dispatch against the above payments. If however, the Arbitrators do not allow the demurrage or the detention and allow the balance dispatch the same shall be paid by the Claimant to the Respondent. The Arbitrators are also directed to decide whether the Claimants are entitled to mark-up on unpaid freight."

12. Having considered the treatment of the matter by the learned Umpire, I am of the view that the conclusion drawn in that regard appears unexceptionable as a presumption would indeed arise that the full cargo has been discharged as per the bills of lading, and as the purpose of the draught survey report could only have been to establish this fact, which of itself was never in dispute, there was then no necessity as such for production of said report and the approach adopted is in reality one grounded in good sense rather than any principle of law. As such, the applicability or non-applicability of English law is also not of any particular consequence as regards the conclusion reached. Additionally, as to line 136 of Clause 26 of the COAs, it transpires from a plain reading thereof that the provision deals with liability for the cargo and not the freight. Needless to say, the payment of freight cannot be

avoided, as it is the underlying consideration for the carriage of goods by sea.

13. Under the circumstances, it is apparent that there is no patent error of any material nature underpinning the Award, hence no case for interference stands made out.

14. That being said, the Objections are dismissed and the Award is hereby made a rule of the Court, and the Suit is decreed accordingly along with mark-up at the prevailing bank from the date of the decree rate till final settlement, with the parties being left to bear their own costs in respect of the proceedings.

JUDGE

Karachi
Dated ___________