Volume 6 Issue 5
February 2022

Chamber of Commerce and Industry

IMC ARBITRATION COMMITTEE

News Bulletin- Published and circulated monthly

Table of Contents:

Volume 6 Issue 5
February 2022

IMC ARBITRATION COMMITTEE

News Bulletin- Published and circulated monthly

MAINTAINING THE EQUILIBRIUM- BY RESOLVING THE CONTROVERSY BETWEEN SECTION 17 AND SECTION 9 OF THE ARBITRATION ACT.

By Priyanka Ajjannavar

Resolving the disagreement in yet another notable judgment dated September 14, 2021 in ***Arcelor Mittal Nippon Steel India Limited Vs. Essar Bulk Terminal Ltd.***[1] the divisional bench of the Hon'ble Supreme Court of India, comprising Justice Indira Banerjee and Justice J. K. Maheshwari has analyzed Court's power to adjudicate applications under Section 9 of Arbitration and Conciliation Act,1996 ('Act') for interim relief when the Arbitral Tribunal has been constituted during the pendency of the application under Section 9 of the Act.

[1] AIR 2021 SC 4350

IMC
Chamber of Commerce and Industry
IMC ARBITRATION COMMITTEE

News Bulletin- Published and circulated monthly

Factual Matrix

The *Arcelor Mittal Nippon Steel India Limited (Appellant) and Essar Bulk Terminal Ltd (Respondent) entered into an agreement for Cargo Handling at Hazira Port. Article 15 of the said agreement provided that dispute arising out of said agreement were to be settled in courts, in accordance with the provisions of Act and be referred to a Sole Arbitrator appointed by both the parties.*

Upon arising of disputes and differences, the Appellant invoked arbitration clause by issuing the notice of Arbitration. The Respondent failed to reply to the said notice. Hence, the Appellant approached Hon'ble High Court of Gujarat under Section 11(6) of the Act for appointment of an Arbitrator. Meanwhile, on 30th December, 2020, the Respondent replied to the Arbitration notice stating that, the dispute is not arbitrable.

Thereafter, on15th January, 2021 and 16th March, 2021 the Appellant and Respondent filed an application under Section 9 of Act before the Commercial Court, Surat, respectively seeking interim relief. On 9th July, 2021, the Application filed by Appellant under Section 11(6) was disposed by appointing 3 Arbitrators. On 16th July, 2021, the Appellant filed an interim application before the Commercial Court to refer the Section 9 application filed by both the parties before the Arbitral Tribunal. However, said application came to be rejected by the

IMC
Chamber of Commerce and Industry
IMC ARBITRATION COMMITTEE

News Bulletin- Published and circulated monthly

Hon'ble Commercial Court. Aggrieved by the order of Commercial Court, the Appellant approached the Hon'ble High Court of Gujarat under Article 227 of Constitution of India. The Hon'ble High Court of Gujrat rejected the application filed by Appellant on the ground that "commercial court has power to consider the application under section 9 whether the remedy under Section 17 of the Act is inefficacious and pass necessary under Section 9 of the said Act". The Appellant challenged the said order of the High Court before Hon'ble Supreme Court of India.

Question of Law

1. Whether the Court has power to entertain the Application under Section 9(1) of the Act, once the Tribunal has been constituted and if so, what is the true meaning and purport of expression "entertain" in Section 9(3) of the Arbitration Act?

2. Whether the Court is obliged to examine the efficacy of the remedy under Section 17, before passing an order under Section 9(1) of the Act, once the Tribunal is constituted?

Contention of the Parties

IMC
Chamber of Commerce and Industry
IMC ARBITRATION COMMITTEE

News Bulletin- Published and circulated monthly

The learned counsel for the Appellant contended that the object of introducing the Section 9(3) was to avoid courts being flooded with Section 9 petitions and to reduce the burden of Courts. He further argued that Section 9(3) was measure of negative Kompentz-Kompetenz. This is substantiated by introducing Section 17(2) which lends further efficacy and enforceability to orders passed by Tribunal under Section 17 of the Act.

On the other hand the learned Counsel for the Respondent stated that the Section 9(3) of the Act is neither *non-obstante* clause nor an ouster clause that gives courts powers to adjudicate the Application under Section 9 of the Act. Further, he contended that subject to checks and balances provided under Act itself, Court have powers to grant interim relief under Section 9 of the Act.

Judgement

The Supreme Court held that the expression "*entertain*" in Section 9(3) of the Act means "*to consider, by application of mind to the issues raised. The Court entertains a case when it takes a matter up for consideration.*" This can continue till the pronouncement of judgment. Once the arbitral tribunal is constituted, the Court cannot take up an application under Section 9 of the Act for consideration, unless the remedy under Section 17 is inefficacious.

Volume 6 Issue 5
February 2022

IMC
Chamber of Commerce and Industry

IMC ARBITRATION COMMITTEE

News Bulletin- Published and circulated monthly

The Court further held that intent behind Section 9(3) is not to turn back the clock and require a matter already reserved for orders, to be considered afresh by the arbitral tribunal under Section 17 of the Act. The bar of Section 9(3) of the Act would not operate once an interim relief application had already been entertained and taken up for consideration.

In light of the above, the Hon'ble Supreme Court held that since the application under Section 9 of the Act had already been entertained and considered by the Commercial Court, it was not necessary for the Commercial Court to consider the efficacy of relief under Section 17 of the Act.

ROLE OF ARBITRATION IN COPYRIGHTS

By C. Balaji

It is a well-established fact that arbitration in India is governed by the Arbitration and Conciliation Act, 1996. This Act ensured that there were frequent amendments being enforced and that it is in harmony with the UNCITRAL Model Law, this was in turn being done to incorporate and demarcate the laws concerning international arbitration and domestic arbitration and for enforcing

IMC
Chamber of Commerce and Industry
IMC ARBITRATION COMMITTEE

News Bulletin- Published and circulated monthly

foreign arbitral awards. While carefully perusing section 34 (2) (b) of the Arbitration and Conciliation Act, 1996, the provisions states that "the Courts have the power to set aside an arbitral award where the subject matter of the dispute is not capable of being subjected to arbitration.".

But it is quite bizarre to note that the extent of subject matter arbitrability is not defined under the Arbitration and Conciliation Act of 1996 or any of the statutes governing intellectual property in India. It has only been established through a succession of decisions rendered by our courts.

Some landmark case laws have again re-iterated the fact that arbitration could resolve key issues of several corporate giants, and one such landmark case law is: *Eros International Media Limited v. Telemax Links India Pvt. Ltd*[2], in this case the main issue was pertaining to arbitrability of copyright. Eros, the plaintiff in this case, was a movie exhibitor, distributor, and producer across several mediums. Eros was the owner of several copyrights and had been assigned a plethora of copyrights, as well as having the

[2] Eros International Media Ltd. v. Telemax Links India Pvt. Ltd. and Ors. 2016 (6) ARBLR 121 (BOM), 2016 (6) BomCR 321.

IMC
Chamber of Commerce and Industry
IMC ARBITRATION COMMITTEE

News Bulletin- Published and circulated monthly

exclusive license over certain additional copyrights. The defendants, Eros and Telemax, executed a term sheet to distribute material to device makers in order to have the content already available on the devices. The term sheet also included an arbitration provision that stated that any and all disputes arising from the term sheet would be resolved through arbitration. The Court observed that the arbitration clause was written in the widest extent feasible. Eros had argued that the term sheet could not be considered as binding since the parties had failed to complete a Long Form Agreement, which was required. They claimed that the case against Telemax was not based on a breach of contract, but rather on the Copyrights Act of 1957, which was fundamentally non-arbitrable. Telemax asserted that because the parties have an arbitration provision, any issues must be resolved through arbitration under Section 8 of the Arbitration and Conciliation Act of 1996. It further maintained that the disagreement emerging from the term sheet was contractual in nature, rather than merely a copyright infringement lawsuit. They further contended that Eros was attempting to assert their right in personam rather than a right in rem. There were no limitations on the arbitrability of issues involving rights in personam, as established by the Supreme Court in *Booz Allen and Hamilton Inc. v SBI Home Finance*

IMC
Chamber of Commerce and Industry
IMC ARBITRATION COMMITTEE

News Bulletin- Published and circulated monthly

Ltd. and Ors[3]. The Court ruled out that as a matter of fact an arbitration clause was incorporated in their agreement, they should be directed to arbitration in most cases. The arbitrability of copyrights was not prohibited by Section 62(1) of the Copyrights Act of 1957. In addressing the matter at hand, the Court stated that Eros was exercising their right in personam, which was arbitrable.

This was due to the fact that any remedy sought would be effective only against Telemax and not against any other party, making it solely a right exercisable by Eros against Telemax. Furthermore, the arbitrator was competent of granting Eros's requested remedy. As a result, because the Court determined that the remedy sought by Eros was for a claim against Telemax solely, i.e. in personam, the dispute between them was arbitrable.

This was a significant win on the subject of arbitrability in intellectual property issues. Intellectual property rights are primarily a right in rem, or against the entire world, but when disputes are of a contractual nature, that is, when the rights involved in intellectual property can be exercised against a specific person, these rights are arbitrable because

[3] Booz Allen & Hamilton Inc. v SBI Home Finance Ltd. & Ors. (2011) 5 SCC 532.

IMC
Chamber of Commerce and Industry
IMC ARBITRATION COMMITTEE

News Bulletin- Published and circulated monthly

they are rights in personam. As a result, whereas intellectual property rights are intrinsically non-arbitrable, rights in personam derived from such rights are arbitrable.

Arbitration of copyright disputes is a complicated issue with numerous subtleties. The Supreme Court established that rights in rem are fundamentally non-arbitrable, but rights in personam are arbitrable. Arbitration has various advantages, including speedy conflict resolution, absence of formal procedure, and confidentiality of proceedings, efficiency, voluntariness, and finality of award. Copyright conflicts are fairly prevalent, and their arbitrability would greatly simplify dispute resolution. On the side of the courts, there should be more incentive to use arbitration. Today, intellectual property rights are often enforced solely in courtrooms. There needs to be more legislative support for conflict resolution. The disadvantage of using arbitration to settle disputes is that there is no precedent system. The arbitrator's decision is solely binding between the parties.

CASE STUDY:

a. **PUNJAB STATE CIVIL SUPPLIES CORPORATION LTD & ANR V. M/S RAMESH KUMAR AND COMPANY & ORS.**

IMC
Chamber of Commerce and Industry
IMC ARBITRATION COMMITTEE

News Bulletin- Published and circulated monthly

(CIVIL APPEAL NO 6832 OF 2021 (ARISING OUT OF SLP(C) NO 10179 OF 2017)

By V.S. Pravallika

Ratio:

The Supreme Court held that while considering a petition under Section 34 of the Arbitration and Conciliation Act, 1996 Act ***(hereinafter referred to as "1996 Act"),*** the High Court cannot act as an appellate forum. The grounds on which interference with an arbitral award is contemplated have already been structured by the provisions of Section 34. There is no necessity for interference with the arbitral award under Section 34.

Facts:

The dispute between the Appellants and the Respondents arose from a contract which was entered into on 4 April 2002 for supply of 24,900 batons. Of the contracted supply, the appellants accepted only 22,389 batons while the rest were rejected. Pursuant to this contract, the respondents had deposited a sum of Rs 1,00,000 towards security. The dispute was initially referred to arbitration in terms of clause 17 of the agreement by an order of the Civil Judge (Junior Division), Faridkot on 28 June 2005. The respondents raised a claim in the amount of Rs 4,88,437 in addition to raising a grievance in regard to the forfeiture of the security deposit. In the written statement filed by the appellants, the defence was that the supply effected by the

IMC
Chamber of Commerce and Industry
IMC ARBITRATION COMMITTEE

News Bulletin- Published and circulated monthly

respondents was of sub-standard quality and not in accordance with the specifications of the tender. After recording evidence, the sole arbitrator rejected the claim. After considering the evidence of the witness for the claimant and for the appellants, the sole arbitrator arrived at the conclusion that the material that had been supplied was defective and that the forfeiture of the security deposit was valid.

By an arbitral award dated 20 December 2005, the sole arbitrator rejected the claims of the first and second respondents, amounting to Rs 4,88,437 and upheld the action of the appellants of forfeiting the security deposit. The award of the arbitrator was challenged under Section 34 of the 1996 Act before the District Judge at Chandigarh. The District Judge, finding no substance in the petition under Section 34 of the 1996 Act, rejected it. This judgment of the District Judge was challenged before the High Court under Section 37 of the 1996 Act. The High Court allowed the appeal, on the ground that the award lacked reasons and the reasons given to substantiate the award were arbitrary and erroneous. Having held that the award was liable to be set aside, *the High Court decreed the claim of the respondents for the supply of 22,389 wooden batons, together with the security deposit of Rs 1,00,000 and awarded interest at the rate of 12% from the date from which the amount became due.*

Held:

IMC
Chamber of Commerce and Industry
IMC ARBITRATION COMMITTEE

News Bulletin- Published and circulated monthly

The Supreme Court considering the facts and circumstances in the instant case, held that the High Court had proceeded as if it was exercising jurisdiction in a regular first appeal from a decree in a civil suit and moreover observed that the jurisdiction in a first appeal arising out of a decree in a civil suit is distinct from the jurisdiction of the High Court under Section 37 of the 1996 Act arising from the disposal of a petition challenging an arbitral award under Section 34 of the 1996 Act. The apex court also clarified that in arbitration appeal, the court is only required to determine the validity of the order under Section 34 of the 1996 Act, it cannot go to the extent of decreeing a claim.

b. TULSI DEVELOPERS INDIA PVT. LTD V. DR. APPU BENNY THOMAS

(ARBITRATION REQUEST NO. 105 OF 2020)

By Aheli Bhadra

Facts:

- There is a dispute between the Petitioner and the Respondent (collectively referred as **Parties)** related to the lease agreement entered between the Parties (**Agreement**).
- The Petitioner has come to the Courts for the appointment of a sole arbitrator under

IMC
Chamber of Commerce and Industry
IMC ARBITRATION COMMITTEE

News Bulletin- Published and circulated monthly

section 11(5) of the Arbitration and Conciliation Act, 1996 (**Act)** according to the arbitration clause (clause 27) of the Agreement which allows the Parties to the Agreement to adjudicate and decide certain disputes, which warrants resolution only through the mechanism of arbitration.

Issue:

- Whether the request of the Petitioner to appoint an arbitrator according to Section 11 (6) of the Act is maintainable?
- Whether the alleged disputes between the Parties are one which falls within the jurisdictional realm of the Rent Control Act and, therefore, can only be decided by the competent Rent Control Court?
- whether the respondent/lessor can now be allowed to appoint an Arbitrator?

Rationale:

a. Whether the request of the Petitioner to appoint an arbitrator according to Section 11 (6) of the Act is maintainable?

The Respondent contended that the appointment of the Arbitrator under 11(6) shall not be maintainable because the grounds raised by the Petitioner have disclosed that they have approached this Court under Section 11(5) of the Act, though

IMC
Chamber of Commerce and Industry
IMC ARBITRATION COMMITTEE

News Bulletin- Published and circulated monthly

styling it as being under Section 11(6) thereof; and therefore unless 30 days have expired after they made their demand to the Respondent, through a notice, for appointment of an arbitrator, this arbitration request is rendered premature and hence not maintainable under section 11(6) as the mandate under Section 11(5) requires to be followed.

In order to defend the maintainability of the appointment of the arbitrator under 11(6) of the Act, the Petitioner contented that the appointment of arbitrator is under 11(5) is only applicable when if the parties have not agreed on any procedure related to the appointment of the arbitrator. According to the fact of the case clause 27 of the Agreement provides the procedure for the appointment of the arbitrator, thus appointment of the arbitrator is maintainable under 11(6). The petitioner further argues that mandate related 30 days mentioned under 11(5) shall not be applicable in the present scenario because the Respondent has expressed their intention through a notice to the Petitioner of not appointing an arbitrator.

The Courts made following observation related to Section 11(2), 11(5) and 11(6) of the Act.

I. 11(2) is applicable when the parties are given liberty to enter into an agreement for procedure to appoint an Arbitrator;

IMC
Chamber of Commerce and Industry
IMC ARBITRATION COMMITTEE

News Bulletin- Published and circulated monthly

II. 11(5) of the Act is applicable in cases where an agreement as to the procedure for appointment of an Arbitrator, as referred to in Section 11(2), between the parties has failed.

III. Section 11(6) alone would apply and the mandate of the provisions therein will guide the appointment.

Base on the observation made the Courts have agreed that the request under section 11(6) by the petitioner is maintainable as it is in compliance with the procedure agreed between the Parties under the Agreement related to arbitration.

b. *Whether the respondent/lessor can now be allowed to appoint an Arbitrator*?

Section 12(5) of the Arbitration and Conciliation Act clearly states that any person whose relationship with the parties falls under any of the categories in the seventh Schedule of the Act is rendered ineligible to be appointed as an Arbitrator. Similarly in *TRF limited v. Engineering projects Ltd.*[4] the courts have declared that neither a party to the disputes nor a person nominated by it can be appointed as an Arbitrator.

[4] [(2017) 8 SCC 377]

IMC
Chamber of Commerce and Industry
IMC ARBITRATION COMMITTEE

News Bulletin- Published and circulated monthly

Thus, in the current case in hand the Courts have decided to omit the part of the arbitration clause in the Agreement that allows the Lessor to appoint the arbitrator.

c. ***Whether the alleged disputes between the Parties are one which falls within the jurisdictional realm of the Rent Control Act and, therefore, can only be decided by the competent Rent Control Court***?

Under Section 16 of the Act the Arbitrator has the competence to adjudicate and rule in is own jurisdiction related all disputes based on the doctrine of "kompetenz kompetenz", which has been expressly incorporated into the Act.

In the current case the Courts have considered to appoint a sole arbitrator resolve the disputes between the Parties.

GIFT CITY, GUJARAT – THE NEXT INTERNATIONAL ARBITRATION HUB FOR INDIA?

By Marc Ivor Martin

IMC
Chamber of Commerce and Industry
IMC ARBITRATION COMMITTEE

News Bulletin- Published and circulated monthly

The Government's vision of shaping India into a global hub for international arbitration is set to turn into a reality with the recent announcement at the Union Budget 2022-2023 of the International Arbitration Centre ("**ICA**") to be set up at the Gujarat International Finance Tec-City ("**GIFT City**").

Impetus in Budget

Earlier this month, the Union Finance Minister Nirmala Sitharaman announced a slew of sops for GIFT City while presenting the Budget 2022-23 in the Parliament which apart from the establishment of an International Arbitration Center also included the setting up of world-class foreign universities, tax exemptions for offshore fund management and offshore banking at International Financial Services Centre ("**IFSC**") and tax exemption for ship leasing and financing.

GIFT City - India's First Greenfield Smart City

Recognizing the State's potential as a financial services hub, the Gujarat government has devised a major initiative to bring this ambition to fruition. GIFT-IFSC is currently the sole international financial services centre in India, located strategically on the bank of the river Sabarmati connecting

IMC
Chamber of Commerce and Industry
IMC ARBITRATION COMMITTEE

News Bulletin- Published and circulated monthly

the business capital of Ahmedabad with the political capital of the Gujarat, Gandhinagar. Termed as the upcoming "Financial & Technology Gateway of India for the World", the city encompasses an integrated development on 886 acres of land with 62 million sq. ft. of urban spread including office spaces, schools, clubs, hotels, retail and recreational facilities and residential apartments. More particularly, state-of-the-art connectivity, infrastructure and transportation access have been integrated into the design of the city. The city also boasts of a conducive Multi-Service SEZ (Special Economic Zone) and an exclusive Domestic Area. The Indian Financial Services Centre Authority (IFSCA), GIFT City's regulator has also reported that GIFT-IFSC has an entirely separate financial jurisdiction with IFSCA acting as the unified regulator, having been empowered under 14 separate Central Acts.

Home to India's First Maritime Arbitration Centre

The newly proposed International Arbitration Centre isn't the first of its kind though. Just last year in June, the Government announced the setting up of the Gujarat International Maritime Arbitration Centre ("**GIMAC**") with the Gujarat Maritime University signing a Memorandum of Association with International Financial Services Centres

IMC
Chamber of Commerce and Industry
IMC ARBITRATION COMMITTEE

News Bulletin- Published and circulated monthly

Authority ("**IFSCA**"). This was the country's first centre of its kind, handling arbitration and mediation cases involving disputes in the maritime and shipping sectors. According to an IE Report, arbitrations involving players from India were previously heard at the Singapore Arbitration Centre. Additionally, London had always been the preferred destination for arbitration relating to the maritime and shipping sectors. GIMAC is a part of the maritime cluster that has been set up by the Gujarat Maritime Board ("**GMB**"). The main intention of setting up the maritime cluster was to draw back all the business of the maritime and shipping sector, which is currently located offshore like Singapore or Dubai. According to Smt. Avantika Singh, Vice Chairman and CEO of GMB, "arbitration is an add-on maritime service that is sought to be included within the cluster being developed within GIFT City and is a much-needed addition because, for instance, the ship owners belong to one country and the person leasing the ship is from a different nation. If any dispute were to arise between these parties, such dispute could be resolved within this centre. As an official of GIMAC puts it, "GIMAC is envisaged to shape the alternate dispute resolution system in maritime and shipping sector in India with access to the experienced arbitrators, mediators and legal professionals in maritime and admiralty law." GIMAC is presently in the process of empanelling arbitrators and is

IMC
Chamber of Commerce and Industry
IMC ARBITRATION COMMITTEE

News Bulletin- Published and circulated monthly

set to draft rules for the arbitration process shortly.

Establishment of the International Arbitration Centre

At the centre of every successful global financial centre is a robust alternative dispute resolution mechanism. Seen as positive step towards decreasing the burden on the courts, the proposed International Arbitration Centre is aimed at strengthening the dispute resolution mechanism at GIFT, thereby attracting investors by enhancing the ease of doing business at GIFT by ensuring the fast disposal of disputes in international jurisprudence.

The IAC has been set up, distinct from the maritime arbitration centre. The IAC will not only boost foreign investor confidence to set up businesses in GIFT but also seeks to place GIFT on par with competing jurisdictions. The IAC will be set up along similar lines of the Singapore International Arbitration Centre (SIAC) and the London Court of International Arbitration (LCIA). GIFT City has had a SIAC office for the last 4 years, but it never took off, owing to the fact that this office could only hear cases and not deliver arbitration awards. The lack of regulatory backing was another element that led to the poor success rate. The proposed IAC seeks to remedy this with the regulatory

IMC
Chamber of Commerce and Industry
IMC ARBITRATION COMMITTEE

News Bulletin- Published and circulated monthly

support of the IFSCA and by obtaining other necessary statutory approval.

Union Minister of Law and Justice, Mr. Kiren Rijiju has said that the move to set up the IAC further strengthens Prime Minister Modi's vision of making India a hub for international arbitration and the Government is hopeful of the centre improving India's ranking for contract enforcement globally.

WHOSE POWER IS IT ANYWAYS?

By Natasha Ponnappa

Background

Recently on February 3, 2022, a two judge bench of the High Court of Gujarat ("**Court**") comprising of Hon'ble Mr. Justice J.B. Pardiwala and Hon'ble Mr. Justice Niral R. Mehta observed that in the event Section 9 of

IMC
Chamber of Commerce and Industry
IMC ARBITRATION COMMITTEE

News Bulletin- Published and circulated monthly

the Arbitration and Conciliation Act, 1996 ("**Act**") is invoked and a remedy has been sought under the Act from the court, the parties to the dispute cannot subsequently seek interim measure before an arbitral tribunal on the similar grounds.

In the matter of ***Essar Bulk Terminal Limited ("EBTL") V/s Arcelor Mittal Nippon Steel India Limited ("AMNS")***[5]**,** the Court clubbed interrelated cases challenging common orders passed by the Commercial Court at Surat, under Section 9 of the Act. These first appeals were taken up for hearing by the Court and a common judgement and order was passed to dispose of the case.

AMNS, a steel manufacturing plant situated at Hazira, Surat was in need of huge quantities of iron ore for its plant. In the instant case, AMNS and EBTL had executed a Principal Agreement relating to the cargo handling charges on February 21, 2011 which was further amended from time to time. The Principal Agreement set out the tariff at which EBTL will handle the cargo of AMNS at the DeepWater Jetties. In this regard, on May 17, 2013 the third amendment to the Principal Agreement stated that the cargo handling charges shall be paid by the AMNS in the INR equivalent of USD denominated tariff, at the base exchange rate of USD 1 =

[5] R/First Appeal No. 3040 of 2021

IMC
Chamber of Commerce and Industry
IMC ARBITRATION COMMITTEE

News Bulletin- Published and circulated monthly

INR 54.2190 (i.e. the base exchange rate prevailing on 30th April 2013 which meant that the parties agreed that from May 1 2013, the cargo handling charges shall be paid at the USD 4.0309 per metric
tonne of cargo (subject to 3% annual escalation).

EBTL stated that the AMNS had agreed in June 2019 to pay additional cargo handling charges at the rate of INR 21 per metric tonne as per the annual escalation, and in such circumstances, the depth of the channel was deepened to 12 meters below the chart datum. EBTL had been deepening the channel over a period of few years and was able to achieve the channel depth of 12 meters below the chart datum in June 2019. However, AMNS refused to pay this additional charge to EBTL.

On June 27 2020, EBTL informed the AMNS that it was unable to afford the maintenance dredging to maintain the channel depth at 12 meters and again provided the advance notice to the AMNS of its intention to declare the terminal draft at 10 meters. Pursuant to this AMNS issued a letter to the EBTL invoking the arbitration under Clause 15 of CHA 2011 and under Section 11 of the Act filed an application for appointment of an arbitrator.

Thereafter, on January 15th 2021, the AMNS filed an application under Section 9 of the Act

IMC
Chamber of Commerce and Industry
IMC ARBITRATION COMMITTEE

News Bulletin- Published and circulated monthly

against the EBTL seeking for discharge of the vessels waiting at anchorage and continue to service vessels without any disruption and to maintain terminal draft and channel depth at the same level as on January 10, 2021 amongst other reliefs. Further, the other issue to be dealt with was that the parties had agreed to move to a USD denomination. In this regard, the parties had agreed to suspend the dollar tariff till EBTL would draw loans in dollars. However, AMNS denied payment to EBTL at such time when EBTL withdrew its first dollar loan.

Based on the application filed by AMNS under Section 9 of the Act, the Commercial Court passed an order stating that by way of an interim measure under Section 9(1)(ii)(e) of the Act, EBTL shall maintain the channel depth of 10 meters and continue to service the vessels of AMNS.

Issues

Keeping in mind the aforementioned facts, EBTL as appellant has raised the following issues before the Court:

1. *Whether the Commercial Court, in exercise of its power under Section 9 of the Arbitration Act, could have directed the EBTL to maintain a depth in the channel of 10 meters below the chart*

IMC
Chamber of Commerce and Industry
IMC ARBITRATION COMMITTEE

News Bulletin- Published and circulated monthly

datum by way of an interim measure in favour of the AMNS?

Argument: It was argued by EBTL that the Commercial Court had overstepped its jurisdiction under Section 9 as EBTL based on contractual obligations had to undertake a lot of labour and other monetary expenses to reach a channel depth of 12 meters and that it was in no way under the Principal Agreement restricted to 10 meters as the Principal Agreement laid out that minimum depth of 10 meters was to be maintained at the terminal and at the chart datum of the channel.

2. *Whether the Commercial Court was justified in directing the EBTL to continue to provide services without the AMNS required to pay the agreed "Dollar Tariff"?*

Argument: EBTL relied on the case of Union of India vs. Kishorilal Gupta[6] and stated that that when the words in the agreement are clear and unambiguous, there is no scope for drawing hypothetical consideration or the supposed intention of the parties. Therefore, the Third Amendment of the Principal Agreement was binding on the parties and AMNS was liable to pay EBTL to

[6] AIR 1959 SC 1362

IMC
Chamber of Commerce and Industry
IMC ARBITRATION COMMITTEE

News Bulletin- Published and circulated monthly

pay the additional tariff of Rs.300 crore per annum.

To the above contentions, the respondent argued that as the reliefs granted by the Commercial Court were interim, the Commercial Court had not exceeded its jurisdiction by passing such orders and furthermore stated that at the level of interim reliefs the Commercial Court could not pass a decision on substantive matters such as the dollar tariff and hence passed the judgement in accordance.

Judgement

Scope of Section 9 of the Act

The High of Gujarat emphasized that courts while dealing with matters under Section 9 of the Act, have to be very conscious of the power vested with the arbitral tribunal/arbitrator under Section 17 of the Act.

The Court referred to a judgement of the Bombay High Court in the case of Bank of Maharashtra vs. M.V.River Oghese[7] which deals with the measures put in place for exercise of the jurisdiction vested under Section 9 of the Act. The 'interim reliefs', as held by the Bombay High Court '*are granted*

[7] 1990 AIR (Bom) 107

IMC
Chamber of Commerce and Industry
IMC ARBITRATION COMMITTEE

News Bulletin- Published and circulated monthly

to serve the temporary purpose of protecting the plaintiff's interest so that the suit is not frustrated'.

The Court further went on to quote, "*The court, while exercising jurisdiction under Section 9, even at a pre-arbitration stage, cannot, therefore, usurp the jurisdiction which would, otherwise, be vested in the arbitrator, or the arbitral tribunal, yet to be constituted. The court is also required to ensure that Section 9 is not employed, by litigants, who feel that it is easier to obtain interim relief from a court, rather than from an arbitrator or arbitral tribunal, to forum shop. If left unchecked, Section 9 is easily amenable to such misuse.*"

Emphasizes was made on the principals laid down in the judgement of V.Sekar vs. Akash Housing, 2011[8] pertaining to Section 9 of the Act which states that for a court to grant interim injunction, the Court must be satisfied (i) existence of prima facie case, (ii) balance of convenience and (iii) potential for irreparable loss or injury.

The Court also reiterated on a judgement held by its own court in the case of Kiritkumar Futarmal Jain vs. Valencia Corporation[9] that, "…..*once the jurisdiction of the court is*

[8] AIR (Mad) 110 : (2011) 3 Arb LR 327 (DB)

[9] (2019) 3 GLH 667

IMC
Chamber of Commerce and Industry
IMC ARBITRATION COMMITTEE

News Bulletin- Published and circulated monthly

invoked under Section 9 of the Act for interim measures as contemplated therein, either before or during the pendency of arbitral proceedings or at any time after the making of arbitral award but before it is enforced in accordance with Section 36 of that Act and such remedy is exhausted, similar interim measures cannot be claimed before the arbitral tribunal under sub-section (2) of Section 17 of the Act, in as much as, it would give rise to a situation where there would simultaneously be two orders in existence in respect of the same cause of action, one passed by the court and the other passed by the arbitral tribunal, which order is also required to be treated as an order of the court for all purposes, which could not have been the intention of the legislature."

In light of the aforementioned facts, arguments by the counsels and judgements, the Court observed that the interim relief granted by the Commercial Court in favour of the AMNS directing EBTL to provide and maintain a channel depth of 10 meters below the chart datum for all times overlooks the concept of balance of convenience. Further, by directing that *EBTL* continue to provide services without the AMNS required to pay the agreed "Dollar Tariff", the Commercial Court had stepped into looking into the substantive part of the dispute exceeding its jurisdiction on a decision which was to be

IMC
Chamber of Commerce and Industry
IMC ARBITRATION COMMITTEE

News Bulletin- Published and circulated monthly

taken by the arbitral tribunal on a prima facie level.

The Court thus passed an order quashing and setting aside the order passed by the Commercial Court directing EBTL to maintain the channel depth of 10 meters at all times along other three appeals which were clubbed under this case. Therefore, the connected civil applications also stood disposed of.

"CHAIRMAN OF THE INTERESTED PARTY CANNOT BE AN ARBITRATOR" RULES SUPREME COURT OF INDIA

By Amogha Varsha

The Hon'ble Supreme Court in the recent judgment of *Jaipur Zila Dugdh Utpadak*

IMC
Chamber of Commerce and Industry
IMC ARBITRATION COMMITTEE

News Bulletin- Published and circulated monthly

Sahkari Sangh Limited and Ors. v. M/s Ajay Sales and Suppliers has ruled that the chairman of one of the parties to the Arbitration proceedings would not be eligible to be an arbitrator under the Arbitration and Conciliation Act, 1996. The Hon'ble Supreme Court has emphasised upon the independence and impartiality of an arbitrator in the aforementioned judgment.

Brief facts of the case:

Jaipur Zila Dugdh Utpadak Sahkari Sangh Limited ("Sangh") entered into Distributorship Agreement for the distribution of milk and butter milk in certain zones in Jaipur, which was for a period of two years. The dispute arose between the parties. Clause 13 of the distributorship agreement contains an arbitration clause and it provides that all disputes and differences arising out of or in any way touching or concerning the agreement, whatsoever shall be referred to the sole Arbitrator, the Chairman, Jaipur Zila Dugdh Utpadak Sahkari Sangh Ltd. and his decision shall be final and binding for the parties.

Earlier, the arbitration proceedings were initiated by the Chairman after a dispute arose between the respondents and the sangh. During the pendency of the said arbitration proceedings, the firms approached the High Court under Section 11 of the Arbitration and Conciliation Act, 1996 ("Act") for appointment of an arbitrator. The High Court

IMC
Chamber of Commerce and Industry
IMC ARBITRATION COMMITTEE

News Bulletin- Published and circulated monthly

allowed the said application and appointed a former District and Sessions Judge to act as an arbitrator.

The bench consisting of Justices MR Shah and Aniruddha Bose, were to decide whether the Chairman who is an elected member of the petitioner Sahkari Sangh can be said to be 'ineligible' under Sub-section (5) of Section 12 read with Seventh Schedule to the Act or not?

The Sangh's submitted that as per the Act, in the Seventh Schedule, the term 'Chairman' is not mentioned and only Manager, Director or part of the Management can be said to be ineligible.

Supreme Court held:

The court rejected the aforesaid contention, while observing that the Chairman of the Sangh can certainly be held to be 'ineligible' to continue as an arbitrator. The Hon'ble court referred to the judgement passed in Voestalpine Schienen GMBH vs. Delhi Metro Rail Corporation Limited, [*(2017) 4 SCC 665*], the court held as follows:

Sub-section (5) of Section 12 read with Seventh Schedule has been inserted bearing in mind the 'impartiality and independence' of the arbitrators. It has been inserted with the purpose of 'neutrality of arbitrators'. Independence and impartiality of the

IMC
Chamber of Commerce and Industry
IMC ARBITRATION COMMITTEE

News Bulletin- Published and circulated monthly

arbitrators are the hallmarks of any arbitration proceedings as observed in the case of Voestalpine Schienen (Supra). Rule against bias is one of the fundamental principles of natural justice which apply to all judicial proceedings and quasi-judicial proceedings and it is for this reason that despite the contractually agreed upon, the persons mentioned in Subsection (5) of Section 12 read with Seventh Schedule to the Act would render himself ineligible to conduct (Para 8)

The court held that, though the word 'Chairman' is specifically not mentioned, he would fall in the category of the following clauses:

(1) The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.

(2) The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.

(5) The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.

(12) The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties.

The Court said that disqualification conditions under Subsection (5) of Section 12

IMC
Chamber of Commerce and Industry
IMC ARBITRATION COMMITTEE

News Bulletin- Published and circulated monthly

read with Seventh Schedule to the Act is to be read as a whole and considering the object and purpose for which Subsection (5) of Section 12 read with Seventh Schedule to the Act came to be inserted.

The apex court also rejected the contention of the appellant Sangh that since the respondents participated in the arbitration proceedings before the arbitrator / Chairman, the Respondents could not have approached the High Court for appointment of arbitrator under Section 11. The court held that there must be an 'express agreement' in writing to remove the ineligibility of the arbitrator, while referring to Section 12(5) proviso. The apex court referred to the following observations made in Bharat Broadband Network Limited vs United Telecoms Limited (2019) 5 SCC 755;

Section 12(5), on the other hand, is a new provision which relates to the de jure inability of an arbitrator to act as such. Under this provision, any prior agreement to the contrary is wiped out by the non obstante clause in Section 12(5) the moment any person whose relationship with the parties or the counsel or the subject matter of the dispute falls under the Seventh Schedule. The subsection then declares that such person shall be "ineligible" to be appointed as arbitrator. The only way in which this ineligibility can be removed is by the proviso,

IMC
Chamber of Commerce and Industry
IMC ARBITRATION COMMITTEE

News Bulletin- Published and circulated monthly

which again is a special provision which states that parties may, subsequent to disputes having arisen between them, waive the applicability of Section 12(5) by an express agreement in writing. What is clear, therefore, is that where, under any agreement between the parties, a person falls within any of the categories set out in the Seventh Schedule, he is, as a matter of law, ineligible to be appointed as an arbitrator. The only way in which this ineligibility can be removed, again, in law, is that parties may after disputes have arisen between them, waive the applicability of this subsection by an "express agreement in writing". Obviously, the "express agreement in writing" has reference to a person who is interdicted by the Seventh Schedule, but who is stated by parties (after the disputes have arisen between them) to be a person in whom they have faith notwithstanding the fact that such person is interdicted by the Seventh Schedule. (Para 10).

The bench of Justices MR Shah and Aniruddha Bose observed that the ineligibility of an arbitrator can be removed only by an 'express agreement' and that the interested party in an Arbitration proceeding or its chairman, would not be eligible to be an arbitrator under the Arbitration and Conciliation Act, 1996.

Volume 6 Issue 5
February 2022

Chamber of Commerce and Industry

IMC ARBITRATION COMMITTEE

News Bulletin- Published and circulated monthly

Organizing Committee:

ARBITRATION
Mr. Gautam T. Mehta
Mr. Bhavesh V. Panjuani
Mr. Janak D. Dwarkadas
Mr. Ketan D. Parikh
Mr. Rajiv Kumar
Mr. Anant Shende
Mr. S. D. Israni
Mr. Prashant D. Popat
Mr. Raj R. Panchmatia
Mr. Rakesh B. Mandavkar
Dr. Ms. Mohana J. Raje
Mr. Kirti G. Munshi
Mr. Naushad Engineer
Mr. Rohan Dakshini
Mr. Shikhil Suri
Mr. Harsh S. Moorjani

(*Please send in your entries to legal@imcnet.org.*)

****

Note from the editorial: Credits to all the members for encouraging and offering suggestions for this bulletin. Thank you for making this possible. Though the issue is being circulated in February 2022, we have covered recent developments from previous months.

Committee Member for Bulletin:

Mr. Prashant Popat