IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL ARBITRATION PETITION NO. 214 OF 2024
WITH
INTERIM APPLICATION (L) NO. 20707 OF 2024

Trading and Agency Services Limited WLL
B-Ring Road, AI Manara Building, P. O. Box 1884,
Doha, Qatar ...Petitioner/ Applicant

Versus

Ion Exchange (India) Limited
Ion House, Dr. E. Moses Road, Mahalaxmi,
Mumbai – 400 011 ...Respondents

Mr. Sharan Jagtiani, **Senior Advocate** *a/w Ms. Sushmita Gandhi, Ms. Sanaya Patel, Mr. Vedant Chajed, Ms. Kritika Garg, Adv. Sankalpita Mallik i/b Trilegal, for the Petitioner.*

Mr. S. U. Kamdar, **Senior Advocate** *a/w Adv. Shaheda Madraswala, Adv. Devam Singh, Adv. Sharanya Sahadevan i/b Vashi and Vashi for the Respondent.*

CORAM : **SOMASEKHAR SUNDARESAN, J.**

RESERVED ON : **JANUARY 19, 2026**

PRONOUNCED ON : **MARCH 17, 2026**

JUDGMENT :

Context and Factual Background:

1. This is a Petition filed under Part II of the Arbitration and Conciliation Act, 1996 (***"the Act"***), seeking recognition and

enforcement of an Arbitral Award dated October 27, 2022 (***"Subject Award"***) passed by a Learned Sole Arbitrator under the aegis of the International Chamber of Commerce (***"ICC"***) in London.

2. The disputes and differences between the parties relate to a Memorandum of Understanding dated June 20, 2016 ("***MOU***"), pursuant to which the Petitioner, Trading and Agency Services Limited WLL (***"Trading and Agency"***) and the Respondent, Ion Exchange (India) Limited (***"Ion Exchange"***) entered into four sub-contracts, all dated October 27, 2016 ("***Sub-Contracts***"), in connection with plants set up by the ultimate clients of Trading and Agency, namely, Ras Laffan Olefins Company Ltd. (***"Ras Laffan"***) and Qatar Chemical Company Limited (***"Qatar Chemical"***). In this judgement, Ras Laffan and Qatar Chemical are collectively referred to as ***"Main Clients"***.

3. Trading and Agency entered into two contracts with the Main Clients on October 20, 2016 ("***Client Contracts***"), and for the purpose of performing said contracts, engaged Ion Exchange on a back-to-back basis as a sub-contractor via the MOU and the four Sub-Contracts. The Client Contracts were lumpsum contracts for the specific value of QAR (Qatari Riyal) 106.41 million with Ras Laffan, and QAR 122.97 million with Qatar Chemical. The services to be provided

were of engineering, procurement, installation and commissioning for the recovery and reuse of treated industrial water at the sites of the Main Clients in Qatar.

4. Disputes and differences arose between the parties in 2018. On May 13, 2018, the Main Clients terminated the contract with Trading and Agency and, on a back-to-back basis, the four Sub-Contracts with Ion Exchange also stood terminated. This led to Ion Exchange initiating the arbitration proceedings that culminated in the Subject Award.

5. In the Arbitration, Ion Exchange was the claimant and sought declarations that:

(a) Trading and Agency had not validly and legally terminated the Sub-Contracts with Ion Exchange;

(b) Trading and Agency had breached various provisions of the Sub-Contracts;

(c) The enforcement of a performance bank guarantee in the sum of USD 1.24 million was illegal;

(d) Reimbursement of certain amounts incurred towards design and engineering was due; and

(e) Damages were payable to Ion Exchange.

6. The Learned Arbitral Tribunal arrived at a finding that Ion Exchange had completed 46% of the work assigned and was required to be paid for the unpaid amount of work to the extent of 11%, resulting in an amount of USD 263,905.80 being payable by Trading and Agency to Ion Exchange. The termination by Trading and Agency was held to be valid and legitimate. Trading and Agency was awarded damages amounting to USD 349,972.82 along with simple interest at the rate of 5% per annum from 9 April 2020 until the date of the Award; legal costs of the arbitration in the sum of USD 312,107.25; and costs and expenses of USD 271,562.92. In the aggregate, Ion Exchange has been directed to pay to Trading and Agency, an amount of USD 978,300.48 along with interest at the rate of 5% per annum, compounded annually from November 26, 2022 until actual payment.

7. The parties appear to have attempted to resolve their differences by way of without-prejudice settlement discussions but the same failed and thereafter, this Petition has been filed.

Contentions of the Parties:

8. I have heard Mr. Sharan Jagtiani, Learned Senior Advocate on behalf of Trading and Agency, and Mr. S. U. Kamdar, Learned Senior

Advocate on behalf of Ion Exchange. With their assistance, I have examined the material on record and have assessed the grounds of objection raised on behalf of Ion Exchange against the grant of recognition and enforcement of the Subject Award.

9. Admittedly, the provisions of Part II cover the assessment of the Subject Award for purposes of recognition and enforcement.

10. While the Affidavit in Reply to the Petition contains myriad objections to the recognition of the Subject Award, Mr. Kamdar formulated his objections within the framework of the contours of Section 48 of the Act in the following manner:

a) The Subject Award has granted unliquidated damages and also granted liquidated damages despite Trading and Agency not having suffered any real loss. Therefore, it falls foul of not only Qatari law, which requires damages to be proved to award liquidated damages, but also Indian law because the Subject Award grants both liquidated as well as unliquidated damages for the same breach of contract. Therefore, the Subject Award falls foul of *Section 48(2)(b)* of the Act being contrary to the public policy of India owing to contravention of the fundamental policy

of Indian law and being against most basic notions of morality and justice; and

b) The Subject Award falls foul of *Section 48(1)(b)* of the Act since it has been passed in breach of natural justice as Ion Exchange was unable to present its case effectively owing to the Learned Arbitral Tribunal's refusal to accommodate a request for rescheduling of a hearing;

11. At the threshold, the relevant provisions of Section 48 of the Act sought to be relied upon for resisting enforcement of the Subject Award would bear reproduction and is extracted below:

> *48. Conditions for enforcement of foreign awards.—*
>
> *(1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that—*
>
> *(a)* *********
>
> *(b)* ***the party against whom the award is invoked*** *was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or* ***was otherwise unable to present his case****; or*
>
> *(c) to (e)* *********
>
> *(2)* ***Enforcement of an arbitral award may also be refused if the Court finds that****—*

(a) *****

(b) ***the enforcement of the award would be contrary to the public policy of India***.

Explanation 1.— For the avoidance of any doubt, it is clarified that ***an award is in conflict with the public policy of India, only if***,—

(i) ***the making of the award was induced or affected by fraud*** *or corruption or was in violation of section 75 or section 81; or*

(ii) ***it is in contravention with the fundamental policy of Indian law***; *or*

(iii) ***it is in conflict with the most basic notions of morality or justice***.

Explanation 2.— For the avoidance of doubt, ***the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute***.

[Emphasis Supplied]

Award of Liquidated and Unliquidated Damages :

12. Mr. Kamdar would submit that Subject Award permits profiteering inasmuch as Trading and Agency has chosen to fully and finally settle all disputes with the Main Clients, and yet has raised claims against Ion Exchange, thereby being awarded damages without having actually suffered damages. This, he would submit, constitutes unjust enrichment and also is a position alien to the fundamental policy

of Indian Law, namely, that only reasonable damages can be granted, and without suffering real loss or damages, no damages can be granted.

13. Mr. Kamdar would submit that where liquidated damages are awarded, the assessment of unliquidated damages over and above the liquidated damages cannot be granted. Therefore, the Subject Award does not deserve recognition being completely contrary to the most basic principles of Indian law on damages. He would submit that the very foundation of liquidated damages provisions under Indian law is the parties' contractually agreed perceived inability or difficulty in arriving at a reasonable assessment of damages. Therefore, one cannot agree to liquidated damages indicating that it is not possible to quantify damages, award the same, and also proceed to grant unliquidated damages.

14. Mr. Kamdar would submit that Trading and Agency had claimed an amount of QAR 7 million as the settlement amount paid by it to the Main Clients owing to termination of the contracts with them. Yet, an amount of USD 618,885.88 has also been claimed as liquidated damages under Article 3.7.1 contained in the four Sub-Contracts with Ion Exchange.

15. These were counterclaims mounted by Trading and Agency in response to the claims made by Ion Exchange. Ion Exchange had contended that there was no evidence whatsoever for the grant of the amount QAR 7 million claimed by Trading and Agency. Mr. Kamdar would submit that the principal objection to recognition of the Arbitral Award is that a Qatari Riyal equivalent of USD 1.24 million had been awarded to Trading and Agency, towards part reimbursement of its payments to the Main Clients under a Settlement Agreement between them, in addition to liquidated damages being awarded in the sum of USD 615,385.88 under the liquidated damages clauses in the respective contracts. Such grant of both liquidated as well as unliquidated damages, Mr. Kamdar would submit, is completely contrary to the most basic principles of the Indian Contract Act, 1872 (***"Contract Act"***) and thereby contrary to the fundamental principles of Indian law.

16. The Learned Arbitral Tribunal has come to the view and has recorded that the reimbursement towards the settlement amount is an independent indemnity claim distinct and separate from liquidated damages and that the claim for liquidated damages was valid and enforceable under Qatari Law. However, Mr. Kamdar would contest this proposition by relying on the Qatar Civil Code, which provides that if the obligor proves that the obligee has suffered no damage, no pre-

agreed indemnity shall be payable. That apart, the Court may decrease the pre-agreed indemnity amount if the obligor proves that the calculation is exaggerated or that the obligation has been performed in part.

17. Therefore, it is submitted that the award of liquidated damages is totally irrational and contrary to the most basic notions of Indian Law and indeed even in conflict with the Qatari Civil Code. Towards this end, he would submit that even the invocation of the performance bank guarantee amount is invalid because even if liquidated damages were to be awarded over and above the unliquidated damages, the performance bank guarantee amount was far in excess of the liquidated damages amount and therefore the ruling that the invocation was legitimate further contributes to the Subject Award being contrary to fundamental policy of Indian Law.

18. The Learned Arbitral Tribunal held that the parties had an explicit agreement in Article 3.7.1 in the four Sub-Contracts, and that the parties had made a conscious choice. The Learned Arbitral Tribunal found that the breaches by Ion Exchange significantly contributed to poor quality and delay, which directly caused the termination by the Main Clients. The settlement amount paid by Trading and Agency to the Main Clients, the Learned Arbitral Tribunal held, is a distinct legal

matter that would not impede the entitlement to liquidated damages against Ion Exchange. It is in this light that the Learned Arbitral Tribunal directed the payments awarded and referred to hereinabove.

19. Mr. Kamdar would submit that Article 5.1 in the Sub-Contracts deals with indemnification in respect of third-party claims and not claims between the parties. Likewise, Mr. Kamdar would contend that Article 3.7.1, in each of the liquidated damages clauses, would apply upon failure to mobilize, or in relation to delay in work completion, non-availability of personnel or equipment or removal of personnel without written consent. It is in these specific situations that liquidated damages at the rate of 1% up to a maximum of 5% of the total subcontract value, as stated in the price schedule would be payable for each week of delay beyond the agreed completion schedule.

20. Mr. Kamdar would also submit that in the absence of any proceedings in which either Trading and Agency or the Main Clients were involved, the obligation to indemnify under Article 5.1 could not even be attracted. Likewise, for award of liquidated damages, Mr. Kamdar would submit, Trading and Agency ought to first prove that actual losses were suffered and that it attempted to mitigate the losses and it is only thereafter that liquidated damages would become payable. It is on this ground that he would submit that the award of

liquidated damages is contrary to both Indian law as well as Qatari Law.

21. Mr. Jagtiani, on behalf of Trading and Agency, would submit that the view taken by the Learned Arbitral Tribunal that Ion Exchange was liable to honour the liquidated damages obligation is entirely justified and defensible. He would submit that the reliance on the Qatari Civil Code is of no use to Ion Exchange, since the provisions are clear about the burden of proof – they require the obligor (Ion Exchange) to prove that the obligee (Trading and Agency) has not suffered any damage. Even going by Mr. Kamdar's submissions in relation to the Qatari Civil Code, he would submit that the onus and burden of proving that no damage has been suffered lies on the indemnifier and not on the party that has to be indemnified.

Analysis and Findings on Damages:

22. At the threshold, the provisions of Article 266 of the Qatari Civil Code and the relevant provisions in the sub-contracts may be noticed:

> *Article 266*
>
> *No agreed indemnity shall be payable if the obligor proves that the obligee has suffered no damages. The court may decrease the agreed amount of indemnity if the obligor proves that the calculation is exaggerated or if the*

obligation has been performed in part. Any agreement to the contrary shall be invalid.

[Emphasis Supplied]

Article 3.7.1.:

Liquidated Damages shall apply upon failure to mobilize, Work Completion Delay, unavailability of Personal/Equipment or removal of personnel without written consent of the Client at the rate of one percent (1%) up to maximum of five percent (5%) of this total subcontract value as stated in the Price Schedule for each week of delay beyond the agreed completion schedule shall apply.

[Emphasis Supplied]

Article 5.1

The SUB-CONTRACTOR shall indemnify the Contractor and the Client against each and every liability which the Contractor or the Client may incur to any other person whatsoever and against the adverse effects of all claims, including claims by third parties, to the extent that the same arise as a result of the SUB-CONTRACTOR's breach of Clause 3. SUB-CONTRACTOR has to sign the Mutual Indemnity and Waiver of Recourse Agreement (Version for CONTRACTOR'S SUBCONTRACTORS) as per Appendix F.

[Emphasis Supplied]

Article 5.4

The indemnity undertaken by the SUB-CONTRACTOR or the Contractor in respect of the other, and of the SUB-CONTRACTOR to the Client, under

> ***Clause 5.1 or Clause 5.2 above, shall apply in matters whereof the one Party has issued proceedings against the other Party*** *before the party of the relevant period stated in Schedule 1, or such earlier date as may be prescribed by law, after which any claim pursuant to this indemnity shall be absolutely barred.*
>
> ***[Emphasis Supplied]***

23. It will be seen that the Article 266 indeed places the burden of proving the absence of damages on the obligor – in this case, Ion Exchange, which indeed is the claimant and did its best to present its point of view. What is evident is that upon appreciation of evidence, the Learned Arbitral Tribunal has come to a view that Trading and Agency indeed had to settle with the Main Clients and mitigated its losses by settling with them. It is the delay and only part completion on the part of Ion Exchange that caused the termination of the contract with the Main Clients and thereby the termination of the four Sub-Contracts.

24. Therefore, the Learned Arbitral Tribunal found that a case for compensation of Trading and Agency for the settlement with the Main Clients was made out. The Learned Arbitral Tribunal has apportioned and assessed the unliquidated damages and applied the liquidated damages provisions. Delay is indeed the ground of the edifice falling down, with the Main Clients terminating the contract with Trading and Agency, which in turn terminated the Sub-Contracts. This indeed

triggered the indemnity provision in Clause 5.1 and the liquidated damages provisions in Clause 3.7.1.

25. The Learned Arbitral Tribunal is the best judge of the quality and quantity of evidence. Multiple grounds on appreciation of evidence have been drafted into the grounds in the Affidavit in Reply but the real ground that was solely pressed on merits is the legal test articulated above. In any case, the Part II Court cannot sit in judgement and re-examine merits. The legislation has taken care to provide for the Explanation 2 in Section 48(2) of the Act to prohibit a review of the merits. I am afraid what this Court is being called upon to do in the instant case is to examine the merits. Indeed, the grounds drafted into the Petition were not pressed at the hearing, but they are entirely a prayer for a full-blown review of merits. Ion Exchange indeed has had to jettison such grounds and focus on the legal ground of a seemingly double-assessment of damages.

26. However, I find that the unliquidated damages relate to the settlement that Trading and Agency has had to pay for to the Main Clients. The unliquidated damages are the bargain struck between the parties on how to treat a situation where a third party claim is to be indemnified and how liquidated damages would be payable. Ion Exchange did not discharge the burden of proof that Trading and

Agency suffered no damage at all – it did, as even in its settlement it had paid the settlement amount. The liquidated damages would cover all losses arising out of the default found against Ion Exchange. While Indian law principles can be sought to be imported on what was a Qatari-law governed contract, it would not be possible to simply apply Indian law as if the parties' conscious choice of law is to be ignored, just when it comes to enforcement of the Subject Award.

27. On an examination of the Subject Award, it is apparent that the Learned Arbitral Tribunal being the master of the evidence, has returned findings on questions of fact and applied the provisions of the contract. Once Trading and Agency has proved that it has been forced to settle with the Main Clients, it would demonstrate that Trading and Agency in fact went out of pocket by incurring a liability by the payments made to the Main Clients. This led to a valid indemnification trigger since, on merits, the Learned Arbitral Tribunal, being the master of the evidence, has recorded clear findings that the breaches on the part of Ion Exchange had caused quality problems and delays of a significant nature, which led to the termination.

28. The Learned Arbitral Tribunal has held that these were not the only issues that led to dissatisfaction, and the Learned Arbitral Tribunal took note of the fact that since Trading and Agency had

negotiated a settlement with the Main Clients and also waived the right to receive payment of a substantial invoice in order to achieve their *inter se* settlement, factoring in Trading and Agency's responsibility for performance losses, the quantum payable by Ion Exchange to Trading and Agency was reduced to QAR 4.5 million from Trading and Agency's claim of QAR 7 million. It would not be possible or legitimate for this Court to second-guess the adjudication of the Learned Arbitral Tribunal. There is no fundamental conflict with Indian public policy as contended by Ion Exchange.

29. In furtherance of his submissions, Mr. Kamdar would rely on the judgement of the Supreme Court in ***Chunilal Mehta***[1]**,** and in particular paragraph 13 thereof which is extracted below-

> *"... Clause 14 as it stands deals with one subject only and that is compensation. It does not expressly or by necessary implication keep alive the right to claim damages under the general law. By providing for compensation in express terms the right to claim damages under the general law is necessarily excluded and, therefore, in the face of that clause it is not open to the appellant to contend that that right is left unaffected. There is thus no substance in the alternative contention put forward by the learned counsel."*
>
> ***[Emphasis Supplied]***

1 *Chunilal V. Mehta And Sons Ltd. v. Century Spinning and Manufacturing Co. Ltd.* – *1962 SCC OnLine SC 57*

30. Mr. Kamdar would also rely on the judgment of the Supreme Court in ***Fateh Chand***[2] in which a Five Judge Bench of the Supreme Court held that Section 74 of the Indian Contract Act is an attempt to eliminate elaborate refinements under English Common Law to distinguish between stipulations for payment of liquidated damages and stipulations in the nature of penalty. A genuine pre-estimate of damages by mutual consent is regarded as an identification of liquidated damages that binds the parties. Paragraph 15 of ***Fateh Chand*** which reads thus :

> *"15. Section 74 declares the law as to liability upon breach contract where compensation is by agreement of the parties pre- determined, or where there is a stipulation by way of penalty. But the application of the enactment is not restricted to cases where the aggrieved party claims relief as a plaintiff. The section does not confer a special benefit upon any party, it merely declares the law that notwithstanding any term in thé contract predetermining damages or providing for forfeiture of any property by way of penalty, the court will award to the party aggrieved only reasonable compensation not exceeding the amount named or penalty stipulated. The jurisdiction of the court is not determined by the accidental circumstance of the party in default being a plaintiff or a defendant in a suit. Use of the expression "to receive from the party who has broken the contract" does not predicate that the jurisdiction of the court to adjust amounts which have been paid by the party in default cannot be exercised in dealing with the claim of the party complaining of breach of contract. The court has to adjudge in every case reasonable compensation to which the plaintiff is entitled from the defendant*

2 *Fateh Chand v. Balkishan Dass – 1963 SCC OnLine SC 49*

on breach of the contract. Such compensation has to be ascertained having regard to the conditions existing on the date of the breach."

[Emphasis Supplied]

31. In ***Maula Bux***[3]**,** a three-judge Bench of the Supreme Court held that in every case of breach of contract the person aggrieved need not prove the actual loss or damage suffered before claiming a decree. The Court must apply the principle that the phrase "*whether or not actual damage or loss is proved*" is intended to cover varying types of contracts that may come before Courts for enforcement. Mr. Kamdar would submit that where the Court is unable to assess the compensation, the sum named by the parties, if regarded as a genuine pre-estimate, may be taken into consideration as a measure of reasonable compensation. But the Court may not do so if the sum named is in the nature of the penalty. The upshot of the submission is that the Subject Award enforces a penalty.

32. In any case, when loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by such party. Mr. Kamdar would submit that the analysis in ***Fateh Chand*** and ***Maula Bux*** were reiterated by the Supreme Court more recently

3 *Maula Bux v. Union of India – (1969) 2 SCC 554*

in the case of ***Kailash Nath***[4], which summarized the law in the following terms :-

> *"43. On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows:*
>
> *43.1.* ***Where a sum is named in a contract as a liquidated amount Payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the court****. In other cases,* ***where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated****. Similarly, in cases where the amount fixed is in the nature of penalty,* ***only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation****.*
>
> *43.2. Reasonable compensation will be fixed on* ***well-known principles that are applicable to the law of contract****, which are to be found inter alia in Section 73 of the Contract Act.*
>
> *43.3. Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the section.*
>
> *43.4. The section applies whether a person is a plaintiff or a defendant in a suit.*
>
> *43.5. The sum spoken of may already be paid or be payable in future.*
>
> *43.6.* ***The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage***

4 *Kailash Nath Associates v. Delhi Development Authority And Anr. – (2015) 4 SCC 136*

> ***or loss, such proof is not dispensed with****. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.*
>
> *43.7. Section 74 will apply to cases of forfeiture of earnest money under conditions of a public auction before agreement is reached, Section 74 would hae no application.*
>
> ***[Emphasis Supplied]***

33. While the aforesaid extracts are indeed clear declarations of Indian law, one cannot lose sight of the fact that the four Sub-Contracts containing the arbitration agreement were not governed by Indian law. One has to see if the outcome in the Subject Award is fundamentally in conflict with Indian public policy to bring it within the scope of a valid objection under Section 48(2)(b) of the Act.

34. The scope of jurisdiction of the Court when presented with a petition under Part II of the Act is spelt out in a number of judgements including ***Renusagar***[5]; ***Shri Lal Mahal***[6] and ***Vijay Karia***[7] to cite just three. The limited scope for denial of enforcement of a foreign arbitral award is set out to indicate that the expression "public policy of India" is to be construed in a narrow fashion. Indeed, it cannot be given

5 *Renusagar Power Company Limited v. General Electric Company* – 1994 Supp (1) SCC 644
6 *Shri Lal Mahal Limited v. Progetto Grano SpA* – (2014) 2 SCC 433
7 *Vijay Karia and others v. Prysmian Cavi E Sistemi SRL and others* – (2020) 11 SCC 1

an interpretation so wide as to treat a contract consciously governed by Qatari law as if it were an Indian law-governed contract.

35. Enforcement of a foreign award is as much a facet of public policy, much as Mr. Kamdar would contend that the Subject Award itself is against public policy. In ***Vijay Karia***, the Supreme Court cited with endorsement the view expressed by a Learned Single Judge of the Delhi High Court in ***Cruz City 1***[8], which reads thus:

> *37. The grounds as set out in Section 48 of the Act for refusing enforcement of the award encompass a wide spectrum of acts and factors as they are set in broad terms.* ***While in some cases, it may be imperative to refuse the enforcement of the award while in some other, it may be manifestly unjust to do so****. Section 48 is enacted to give effect to Article V of the New York Convention, which enables member States to retain some sovereign control over enforcement of foreign awards in their territory.* ***The ground that enforcement of an award opposed to the national public policy would be declined perhaps provides the strongest expression of a Sovereign's reservation that its executive power shall not be used to enforce a foreign award which is in conflict with its policy****. The other grounds mainly relate to the structural integrity of the arbitral process with focus on inter party rights.*
>
> *39.* ***Even where public policy considerations are to be weighed, it is not difficult to visualise a situation where both permitting as well as declining enforcement would fall foul of the public policy****. Thus,* ***even in cases where it is found that the enforcement of the award may not conform to public policy, the courts may evaluate and strike a balance whether it would be more offensive to public policy to refuse enforcement of the foreign award — considering that the parties ought to be held bound by the decision of the***

8 *Cruz City 1 Mauritius Holdings v. Unitech Ltd. – 2017 SCC OnLine Del 7810*

> ***forum chosen by them and there is finality to the litigation — or to enforce the same****; whether declining to enforce a foreign award would be more debilitating to the cause of justice, than to enforce it. In such cases,* ***the court would be compelled to evaluate the nature, extent and other nuances of the public policy involved and adopt a course which is less pernicious.***
>
> ***[Emphasis Supplied]***

36. In ***Shri Lal Mahal***, the three-judge bench of the Supreme Court has held thus:

> *45.* ***Moreover, Section 48 of the 1996 Act does not give an opportunity to have a "second look" at the foreign award in the award enforcement stage. The scope of inquiry under Section 48 does not permit review of the foreign award on merits****. Procedural defects (like taking into consideration inadmissible evidence or ignoring/rejecting the evidence which may be of binding nature) in the course of foreign arbitration do not lead necessarily to excuse an award from enforcement on the ground of public policy.*
>
> ***[Emphasis Supplied]***

37. Under Qatari law, which governed the four Sub-Contracts, the onus was on Ion Exchange to prove that no loss was suffered by Trading and Agency or that the losses were exaggerated. Indeed, the termination led to losses and this has been adjudicated with the evidence led by the parties. I am afraid one cannot seek to convert a contract governed by Qatari law to be treated as a contract governed by Indian law when enforcement of a commercially-reasonable foreign award is brought to India for recognition and enforcement.

38. I also note that separately, Trading and Agency had indeed claimed unliquidated damages for loss of profits as well, and the Tribunal has in fact rejected such claim. The Learned Arbitral Tribunal having consciously adjudicated the matter with appreciation of evidence, and the grounds on how evidence appreciation fell short not being pressed, in my opinion, there is no scope for interference with the Subject Award. The limited scope of review by this Court cannot lead to interference with the Subject Award.

39. Therefore, in my view, the objections raised by Ion Exchange, although thought-provoking at first blush, are not of a nature that would lead to recognition and enforcement of the Subject Award being denied.

Natural Justice:

40. Finally, Ion Exchange also contends that it was not able to present its case on merits because of the Learned Arbitral Tribunal not accommodating a request to postpone a hearing scheduled for the period between July 27, 2021 and July 30, 2021 to a later date. The adjournment was sought as early as on April 19, 2021, in view of the nationwide COVID-19 pandemic lockdown restrictions imposed in India.

41. Three months in advance, Ion Exchange requested that the hearing scheduled for July 2021 be postponed to October 2021 or November 2021. Trading and Agency opposed this request, requesting that a virtual hearing be conducted. Ion Exchange reiterated the need for postponing the hearing scheduled for July 2021 with evidence of newspaper reports worldwide and in India, and orders of Indian Courts in connection with the COVID-19 pandemic.

42. However, the Learned Arbitral Tribunal confirmed that the hearing would indeed proceed virtually between July 27, 2021 and July 30, 2021, which Ion Exchange contends, significantly hindered its ability to prepare for the hearing. For this reason, it is submitted that Ion Exchange was forced to proceed by video without witnesses which severely impaired its ability to effectively prosecute its claim and defend against Trading and Agency's counterclaim.

43. Mr. Jagtiani on behalf of Trading and Agency would submit that the contention that the principles of natural justice principles have been violated owing to the conduct of a merits hearing in July 2021, has been squarely and appropriately dealt with in Procedural Order No. VII, which would indicate that there has been no breach of principles of natural justice . The Learned Arbitral Tribunal had taken a view that a virtual hearing as scheduled in July 2021 would afford both parties

with a reasonable opportunity to present their case which would be consistent with Article 22(3) of the ICC Rules. No fault can be found, he would submit, with the Learned Arbitral Tribunal's view that the extent of documentation or the complexity of the matter did not warrant a view that conducting the hearing online would impact the arbitral proceedings.

44. Mr. Jagtiani submits that the Learned Arbitral Tribunal was entirely reasonable in expressing the view that the adjournment of the hearing scheduled in July 2021 was being sought as early as April 2021, even if Ion Exchange would have preferred a physical hearing.

45. Having examined the matter, in my view, the Learned Arbitral Tribunal was not at all wrong in accepting the view expressed by Trading and Agency that there could be no guarantee that in October 2021 or November 2021 the situation would have improved rather than deteriorated. In any case, after the decision not to adjourn was taken, Ion Exchange actively engaged with the Learned Arbitral Tribunal to relay the parties' consent on several modalities for the conduct of the merits hearing on a virtual basis.

46. That apart, Ion Exchange indeed participated in the hearing all along until the outcome. There is nothing to point to its ability to

participate being so badly hampered that it would lead to a denial of natural justice of the nature envisaged in Part II of the Act.

47. In ***Vijay Karia***, the Supreme Court articulated the following:

> *62. This Court's judgment in Sohan Lal Gupta v. Asha Devi Gupta [Sohan Lal Gupta v. Asha Devi Gupta, (2003) 7 SCC 492] , lays down the ingredients of a fair hearing as follows: (SCC pp. 504-05, para 23)*
>
> > *"23. For constituting a reasonable opportunity, the following conditions are required to be observed:*
> >
> > *1.* ***Each party must have notice*** *that the hearing is to take place.*
> >
> > *2.* ***Each party must have a reasonable opportunity to be present*** *at the hearing, together with his advisers and witnesses.*
> >
> > *3.* ***Each party must have the opportunity to be present throughout the hearing.***
> >
> > *4.* ***Each party must have a reasonable opportunity to present evidence and argument in support of his own case.***
> >
> > *5.* ***Each party must have a reasonable opportunity to test his opponent's case*** *by cross-examining his witnesses, presenting rebutting evidence and addressing oral argument.*
> >
> > *6.* ***The hearing must, unless the contrary is expressly agreed, be the occasion on which the parties present the whole of their evidence and argument."***
>
> *81.* ***Given the fact that the object of Section 48 is to enforce foreign awards subject to certain well-defined narrow exceptions, the expression "was otherwise unable to present his case" occurring in Section 48(1)(b) cannot be given an expansive meaning and would have to be read in the context and colour of the words preceding the said phrase****. In short, this expression would be* ***a facet of natural justice, which would be breached only if a fair hearing was not given by the arbitrator to the parties****. Read along*

> *with the first part of Section 48(1)(b), it is clear that this expression would apply at the hearing stage and not after the award has been delivered, as has been held in Ssangyong [Ssangyong Engg. & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131 : (2020) 2 SCC (Civ) 213]. **A good working test for determining whether a party has been unable to present his case is to see whether factors outside the party's control have combined to deny the party a fair hearing. Thus, where no opportunity was given to deal with an argument which goes to the root of the case or findings based on evidence which go behind the back of the party and which results in a denial of justice to the prejudice of the party; or additional or new evidence is taken which forms the basis of the award on which a party has been given no opportunity of rebuttal, would, on the facts of a given case, render a foreign award liable to be set aside on the ground that a party has been unable to present his case**. This must, of course, be with the caveat that such breach be clearly made out on the facts of a given case, and that **awards must always be read supportively with an inclination to uphold rather than destroy, given the minimal interference possible with foreign awards under Section 48**.*
>
> ***[Emphasis Supplied]***

48. Seen in this light, it cannot be said that Ion Exchange was unable to present its case. It indeed presented its case. Its request three months in advance for an adjournment not having been granted; the hearing in fact being well participated in; and there being no logical or reasonable link between the Covid 19-based request for adjournment and the findings in the Subject Award in any cogent manner, this ground too does not lend itself for acceptance.

49. In the result, I am satisfied that the Subject Award is enforceable for purposes of Section 49 of the Act. The Subject Award lends itself for recognition and for treatment as if it were a decree of this Court.

50. The Subject Award is recognized by allowing prayer clause (a), which reads thus:

> *That this Hon'ble Court be pleased to recognise the Award dated 27 October 2022 (Exhibit "A") as a foreign award, enforceable and executable under the Arbitration and Conciliation Act, 1996.*

51. In view of disposal of this Petition, Interim Application (L) No. 20707 of 2024 also stands ***disposed of***.

52. All actions required to be taken pursuant to this order shall be taken upon receipt of a downloaded copy as available on this Court's website.

[SOMASEKHAR SUNDARESAN, J.]