IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
ARBITRATION PETITION NO. 833 OF 2015

HSBC PI Holdings (Mauritius) Limited
(previously named HPEIF Holdings 1 Limited) … Petitioner

vs.

Avitel Post Studioz Limited and others … Respondents

WITH
NOTICE OF MOTION NO. 2475 OF 2016

Mr. Darius Khambata, Senior Advocate, a/w. Mr. Nikhil Sakhardande, Senior counsel, a/w. Mr. Aditya Mehta, Mr. Rohan Rajadhyaksha, i/by. Rajendra Barot, Ms. Priyanka Shetty, Sherna Doongaji, Mr. Dhaval Vora, Shanay Shroff of AZB & Partners for petitioner.

Mr. Haresh Jagtiani, Senior Advocate, a/w. Mr. Suprabh Jain, Mr. Pushpvijay Kanoji, Mr. Sumeet Nankani, Mr. Faran Khan, Mr. Sanjay Agrawal, Mr. H. K. Sudhakara, Ms. Aishwarya Kantawala and Ms. Diya Jayan, i/by. Prompt Legal for respondent No.1.

Mr. Sharan Jagtiani, Senior Advocate, a/w. Mr. Sumeet Nankani, Mr. Faran Khan, Mr. Sanjay Agrawal, Mr. H. K. Sudhakara, Ms. Aishwarya Kantawala and Ms. Diya Jayan i/by. Prompt Legal for respondent Nos.2 to 4.

CORAM : MANISH PITALE, J
RESERVED ON : 2nd FEBRUARY, 2023
PRONOUNCED ON : 25th APRIL, 2023

JUDGMENT

. The respondents herein have launched a trenchant attack on the enforcement of a foreign arbitral award on the sole ground that it stands vitiated due to bias attributable to the Chairman of the arbitral tribunal, on account of his failure to disclose relevant information indicating identity of interests with the petitioner. It is specifically contended that by failing to disclose such information, the award is rendered incapable of enforcement, as it is contrary to the public policy of India. The respondents submitted that

the likelihood of bias on the part of the Chairman of the arbitral tribunal, in the facts and circumstances of the present case, was of such a high degree that the failure to disclose in itself is a sufficient ground to decline enforcement of the arbitral award. It is claimed that the conditions necessary to demonstrate that the award is contrary to the public policy of India, under Section 48(2)(b) of the Arbitration and Conciliation Act, 1996 (Arbitration Act), are fully satisfied and that therefore, the present petition ought to be dismissed.

BRIEF FACTS:

2. The petitioner HSBC PI Holdings (Mauritius) Limited is a company incorporated under the laws of Mauritius. Respondent No.1 Avitel Post Studioz Limited is a company incorporated under the laws of India and it is the parent company of Avitel Group. It holds entire issued share capital of Avitel Holdings Limited, which in turn, holds entire issued share capital of Avitel Post Studioz FZ LLC. Respondent No.2 is the founder of Avitel Post Studioz Limited, being its Chairman and Director, while respondent Nos.3 and 4 are his sons, who are directors of respondent No.1.

3. A Share Subscription Agreement dated 21st April 2011, was executed between the petitioner and respondent No.1, whereby the petitioner made an equity investment of about US$ 60 million in exchange of 7.8% shareholding in respondent No.1. The agreement was completed on 6th May, 2011 and an amended/re-stated shareholders' agreement, also dated 6th May, 2011, was executed as a condition of completion.

4. It is the case of the petitioner that during initiation, leading upto the said agreement, the respondent made certain representations to the

petitioner, by stating that the investment made by the petitioner was required to service a significant contract which the respondent No.1 was close to concluding with the British Broadcasting Corporation (BBC) of United Kingdom, further claiming that upon its conclusion, the contract would be serviced by Avitel Post Studioz FZ LLC. The total value of the contract with BBC was estimated to be US$ 1 to 1.3 billion. The petitioner further claims that it relied upon the representations, warranties and undertakings given by the respondent No.1, while entering into the said agreement and invested about US$ 60 million. It was claimed that the respondents engaged in dishonest conduct, in order to induce the petitioner to make such investment. This included arranging a meeting between representative of the petitioner and a person, falsely held out by the respondents to be the Chief Technical Officer of the BBC, who in turn, falsely corroborated the misrepresentations of the respondents.

5. According to the petitioner, the respondents ceased to provide any information as regards the contract with BBC, post the investment made by the petitioner, despite numerous follow up attempts. It was learnt that Price Waterhouse Cooper had resigned as auditor of the Avitel Post Studioz FZ LLC on 8th February, 2012. At this stage, the petitioner engaged its own independent investigation agency, which gave rise to serious concern with regard to the legitimacy of the Avitel Post Studioz FZ LLC and its management. It was found that the said Avitel Post Studioz FZ LLC had shut down and it was not operating. It was further found that there was no relationship with BBC, leave alone any contract with it and that the monies invested by the petitioner were siphoned out of the Avitel Group by respondent No.1 through payments made to fake suppliers and/or service suppliers, allegedly owned by the said respondent. In this backdrop,

obviously, disputes arose between the parties, which led to initiation of arbitration proceedings.

6. The arbitration agreement between the parties provided that the law governing the contract would be Indian law and that the jurisdiction would be that of Singapore. The arbitration was to be conducted in accordance with the rules of Singapore International Arbitration Centre (SIAC) Rules and Part 1 of the Arbitration Act was excluded, except Section 9 thereof. On 11th May, 2012, the petitioner invoked the arbitration clause under the said agreement, under the SIAC Rules and claimed damages of US$ 60 million from the respondents. The petitioner filed an Emergency Application before an emergency arbitrator Mr. Thio Shen Yi. On 28th May, 2012, the emergency arbitrator passed an interim order, *inter alia,* directing the respondents to refrain from disposing of/diminishing the value of their assets upto US$ 50 million.

7. The arbitration proceedings were conducted at Singapore, wherein the respondents participated. According to the petitioner, the respondents made several attempts to delay and frustrate the proceedings. The arbitral tribunal consisted of three members. Mr. Christopher Lau, SC, was the Chairman, while Justice F. I. Rebello (retired) and Dr. Michael Pryles were members of the arbitral tribunal. On 27th September, 2014, the tribunal rendered its final award and directed the respondents to pay to the petitioner amount of US$ 60 million as damages for fraudulent misrepresentations and other adverse findings against the respondents.

8. The petitioner had initiated proceedings under Section 9 of the Arbitration Act before this Court. A direction was issued to the respondents

to deposit US$ 60 million for the purpose of enforcement of the award. Aggrieved by the same, the respondents filed Special Leave Petition before the Supreme Court, which was rejected on 19th August, 2020 and the Supreme Court directed the respondents to deposit the said amount in their account in the Corporation Bank. This was during the pendency of the present petition filed by the petitioner under Section 48 of the Arbitration Act for enforcement of the said foreign arbitral award.

9. Since the respondents failed to abide by the direction given by the Supreme Court to deposit the amount, a contempt proceeding was initiated against them. On 11th July, 2022, the Supreme Court found that the respondents had deliberately and willfully disobeyed its order and hence, the respondents were directed to remain present before the Supreme Court. The respondent Nos.2 to 4 went abroad defying the direction given by the Supreme Court, as a result of which, warrants were issued and look-out notices were also issued, with a direction to the Ministry of External Affairs and Central Bureau of Investigation for issuance of Red-corner notice. Ultimately, respondent Nos.2 to 4 surrendered and despite tendering an unconditional apology, the Supreme Court refused to accept the same and for their conduct, respondent Nos.2 to 4 were sentenced to imprisonment. It is in this backdrop that the present petition has come up for consideration. On 9th September, 2022, the Supreme Court expedited the hearing of the present petition.

SUBMISSIONS OF PARTIES:

10. In ordinary course, this Court would have first recorded the contentions raised on behalf of the petitioner, seeking enforcement of the foreign award, under Section 48 of the Arbitration Act. But, since the

petitioner has raised contentions before this Court, in the context of the objections raised for enforcement of the said award, this Court is inclined to first record the contentions raised on behalf of respondents. This is also because elaborate submissions were made on behalf of the rival parties, in the light of the sole ground of bias, raised on behalf of the respondents, while resisting enforcement of the foreign award.

(a) Mr. Haresh Jagtiani, learned senior counsel appearing for respondent No.1, submitted that although a number of grounds have been raised on behalf of the said respondent, while resisting enforcement of the foreign award, the only ground being pressed into service, is that of bias. It is alleged that in the facts and circumstances of the present case, the failure on the part of the chairman of the arbitral tribunal, Mr. Lau, as also the failure on the part of the emergency arbitrator, Mr. Thio, in disclosing vital connections and identity of interests with the petitioner, completely vitiated the enforcement of the foreign award. It is submitted that in the facts and circumstances of the present case, there was a duty on the part of the said arbitrators to disclose, alongwith which, they could have given their explanations, upon which the respondent No.1 would have had the opportunity to decide, as to whether it wanted to continue with the said arbitrators, during the process of resolution of disputes between the parties. According to the learned senior counsel for respondent No.1, there was every likelihood of bias on the part of the said arbitrators, in facts of the present case, which went to the very root of the matter and satisfied the requirements of Section 48(2)(b) of the Arbitration Act, demonstrating that the foreign award was rendered contrary to the public policy of India.

(b) The learned senior counsel for respondent No.1 relied upon the objections placed before this Court in the reply affidavit and to assist this Court, placed certain charts to claim that there was thick business relationship between Mr. Lau i.e. the chairman of the arbitral tribunal and the petitioner HSBC PI Holdings (Mauritius) Limited. It was submitted that the said Mr.Lau was a director of Wing Tai Holdings Limited (Wing Tai). Although he was an independent non-executive director of Wing Tai since 20th October, 2013, he was chairman of the audit and risk committee of the said company and he was a member of nominating committee also, thereby indicating active involvement of Mr.Lau in the affairs of Wing Tai. It was further submitted that Wing Tai was closely associated with HSBC Holdings PLC (United Kingdom) i.e. the ultimate holding company of which, the petitioner is a subsidiary, indicating that there was identity of interests between Wing Tai on the one hand, in which Mr.Lau had an active and decisive role to play, and the petitioner on the other hand.

(c) In order to elaborate the same, the learned senior counsel referred to the chart and submitted that, as much as the petitioner was a subsidiary of the holding company HSBC Holdings PLC (United Kingdom), HSBC Limited was also a subsidiary, which had been a sole book-runner as also lead arranger and trustee of Wing Tai, raising funds to the tune of approximately Rs.12,000 crores. It was further submitted that a 100% subsidiary of HSBC Limited i.e. HSBC (Singapore) PTE was among the top 10 shareholders of Wing Tai.

(d) It was emphasized that in the arbitration proceedings, the witnesses were employees of HSBC Limited and/or other affiliates of the

petitioner and that the legal fees for arbitration was also paid by HSBC Limited. On this basis, it was submitted that since Mr.Lau held a pivotal position and received remuneration as independent non-executive director of Wing Tai, there was material to indicate thick business relationship between Mr. Lau and the petitioner as also its affiliates, which fact ought to have been disclosed by the said Mr. Lau (chairman of the arbitral tribunal). It was emphasized that Mr. Lau attended almost all the meetings of the Board of Directors of Wing Tai and that out of 10 directors of Wing Tai, 7 were non-executive directors like Mr. Lau. On this basis, it was submitted that since Mr. Lau had the authority to influence Wing Tai and its association with the affiliates of the petitioner, this fact ought to have been disclosed to the parties to the arbitration.

(e) Similarly, in the case of a company called Neptune Orient Lines (Neptune), the learned senior counsel presented a chart, on the basis of the contentions raised in the reply affidavit, claiming that even in respect of Neptune, the said Mr. Lau had an active role to play, as he was one of the independent non-executive directors of Neptune. It was emphasized that out of the 12 directors of Neptune, 11 were non-executive directors like Mr. Lau. Much emphasis was placed on the fact that Mr. Lau was chairman of the audit committee of Neptune and member of risk management committee also, thereby indicating that he was part of the key managerial personnel of Neptune, as he was of Wing Tai.

(f) It was emphasized that, as in the case of Wing Tai, HSBC Limited was a fund arranger, underwriter, joint lead manager and book-runner of

Neptune, when funds worth about Rs.15,000 crores were raised for Neptune. It was stated that HSBC Limited is a subsidiary of the holding company HSBC Holdings PLC (United Kingdom), as is the petitioner before this Court, further emphasizing that HSBC (Singapore) Nominees Pte. Ltd., a 100% subsidiary of HSBC Limited, is also among top 10 shareholders of Neptune. It was reiterated that the witnesses were employees of HSBC Limited and/or other affiliates of the petitioner and that the legal fees for arbitration was also paid by HSBC Limited, thereby indicating that the affiliates of the petitioner had a thick business relationship with Neptune and that Mr. Lau had an important and influential role as a non-executive director of Neptune.

(g) It was further submitted that one Mr. Cheng Wai Keung was chairman and non-executive director of both Wing Tai and Neptune. Mr. Lau, also being a non-executive director on both Wing Tai and Neptune, obviously had close relations with the said Mr. Cheng Wai Keung. It was further submitted that the brother of Mr. Cheng Wai Keung also had substantial shareholding in Wing Tai. Another brother i.e. Mr. Christopher Cheng Wai Chee, also a substantial shareholder of Wing Tai, was an independent non-executive director of HSBC Limited and member of its risk committee since 1st May, 2013. It was reiterated that HSBC (Singapore) Nominees Pte. Ltd., a wholly owned subsidiary of HSBC Limited itself, held 6.29% shares in Wing Tai at the relevant time. According to the learned senior counsel appearing for the respondent No.1, these relations of Cheng brothers and close association of Mr. Lau (chairman of the arbitral tribunal) with them, by virtue of having influential positions in Wing Tai and Neptune, sufficiently indicated likelihood of bias in favour of the plaintiff, which is admittedly an

affiliate of HSBC Holdings PLC (United Kingdom).

(h) As regards the emergency arbitrator Mr. Thio, learned senior counsel for respondent No.1 again referred to detailed charts prepared on the basis of the material on record, to claim that there was identity of interest between the petitioner and the said Mr. Thio, which was not disclosed. It was emphasized that Mr. Thio was a non-executive director of Keppel Infra Fund Management Private Limited (KIFM), as also chairman/member of its remuneration/conflict resolution committee. He also held shares in Keppel Infra Trusts and Keppel Corporation Limited.

(i) The learned senior counsel then submitted that HSBC Limited, which is an affiliate of the petitioner, had acted as the issue manager in respect of specific units of Keppel Infra Trusts and that HSBC (Singapore) Nominees Pte. Ltd., a wholly owned subsidiary of HSBC Ltd., was the fifth largest shareholder of Keppel Infra Trusts and Keppel Corporation Limited. On this basis, it was submitted that there was thick business relationship between Mr. Thio and an affiliate of the petitioner, which ought to have been disclosed.

(j) It was further submitted that the wife of Mr. Thio i.e. Mrs. Stefanie Thio, held 50,000 units in Cache Logistics Trust and she was also an independent director and member of audit committee of M/s. ARA-CTW Trust Management (Cache) Limited, the activities of which, were monitored by HSBC Institutional Trust Services (Singapore) Limited. It was emphasized that the said HSBC Institutional Trust Services (Singapore) Limited was a wholly owned subsidiary of HSBC Limited,

which is an affiliate of the petitioner. This further demonstrated thick business relationship, not only between Mr. Thio i.e. the emergency arbitrator, but also of his wife, with the petitioner. Much emphasis was placed on the contents of the charts to show how it could be derived that Mr. Lau (chairman of the arbitral tribunal), as also Mr. Thio (emergency arbitrator) and even the wife of the emergency arbitrator, had thick business relationship with an affiliate of the petitioner, thereby giving rise to likelihood of bias of the said arbitrators in favour of the petitioner. It was submitted that the facts so brought to light by the respondent No.1, were not denied by the petitioner and in such circumstances, non-disclosure on the part of the said arbitrators was absolutely fatal to enforcement of the said foreign award.

(k) After having placed the aforesaid material before this Court, the learned senior counsel for respondent No.1 referred to guidelines issued by the International Bar Association (IBA) on Conflicts of Interest in International Arbitration (hereinafter referred to as 'IBA guidelines'). It was submitted that the IBA guidelines, which had received statutory recognition in India, by incorporation in the Vth and VIIth Schedule to the Arbitration Act, sufficiently demonstrated their significance and the necessity to adhere to such guidelines.

(l) The learned senior counsel appearing for respondent No.1 submitted that the IBA guidelines themselves specify that such guidelines, by their very nature, could not be exhaustive, for the reason that individual cases would throw up myriad facts. By referring to clauses 2(c) and (d), it was emphasized that the question as to whether there were justifiable doubts about independence and impartiality of an arbitrator, would

have to be decided from the stand point of a reasonable and informed third party. This included the question of identity between the party and the arbitrator. By relying upon the explanation given to clause 3 of the said IBA guidelines, it was submitted that a subjective approach for disclosure was recommended. It was submitted that under clause 3(c), if there was any doubt, as to whether an arbitrator should disclose certain facts and circumstances, it ought to be resolved in favour of disclosure.

(m) The learned senior counsel then referred to other clauses of the guidelines, which indicate as to the duties of the arbitrator as well as parties, with particular emphasis on three lists forming part of practical application of the said guidelines. Reference was made to the non-waivable red list, waivable red list, orange list and green list with foot notes, explaining as to who could be said to be "a close family member" or "an affiliate". By referring to such material, it was submitted that adopting a commonsensical approach, in the facts of the present case, Mr. Lau (chairman of the arbitral tribunal) and Mr. Thio (emergency arbitrator), were both mandatorily required to disclose their relationship with the petitioner, details of which have been given hereinabove. It was submitted that since the material referred to hereinabove clearly raises a serious doubt, it could be resolved only in favour of the disclosure by the said arbitrators. Since the arbitrators failed to make such disclosures, the entire arbitral award was vitiated by the vice of bias and hence, it deserved to be set aside.

(n) The learned senior counsel for respondent No.1 relied upon the judgment of Supreme Court of United Kingdom, in the case of

Halliburton Company v/s. Chubb Bermuda Insurance Limited [**(2020) UKSC 48**]. It was submitted that the aspect of disclosure and the role of such disclosure in ensuring impartiality, was discussed in detail in the said judgment and it was laid down that there was a legal duty under the IBA guidelines, for the arbitrator to disclose such identity of interest with the party. It was submitted that when an arbitrator fails to disclose such material, which is required to be disclosed, it has the potential of being detrimental to a party to the arbitration proceeding, thereby indicating that the impartiality of the process stands adversely affected.

(o) Learned senior counsel also relied upon judgment of the Supreme Court, in the case of *HRD Corporation v/s. GAIL (India) Limited* [**(2018) 12 SCC 471**], to demonstrate how the clauses in the Vth and VIIth schedule of the Arbitration Act, were directly relatable to the corresponding clauses of the IBA guidelines. This indicated that under the Indian law, which is subsumed under the public policy of India, such disclosure was mandated and failure to disclose on the part of the arbitrators rendered the foreign award in the present case, unenforceable.

(p) Learned senior counsel further referred to judgment of the Supreme Court, in the case of *Jaipur Zila v/s. Ajay Sales and Suppliers* (**2021 SCC Online SC 730**), to contend that in the said case, the Supreme Court did not limit the aspect of ineligibility of an arbitrator to the specific terms, mentioned in the VIIth schedule of the Arbitration Act, but found, as a matter of fact, that even an elected chairman of the Sangh was ineligible to act as an arbitrator. This was submitted to buttress the contention that the ineligibility of an arbitrator cannot be

restricted only to situations contemplated under the IBA guidelines, but a reasonable approach is expected to deal with fact specific situation, arising in an individual case.

(q) Reference was made to certain communications exchanged between Mr. Lau (chairman of the arbitral tribunal) and Clifford Chance, solicitor of the petitioner. Mr. Lau claimed in such communication that he was only an independent non-executive director of Wing Tai and Neptune, that he was not key managerial personnel and that he had never actively participated in the decision-making process at Wing Tai and Neptune. But, when he was later confronted with the fact that under the law of Singapore, an independent non-executive director is also a part of key managerial personnel, Mr. Lau had no explanation other than stating that since he was only an independent non-executive director, having no active participation or role in the decision-making process at Wing Tai and Neptune, he had stated that he was not key managerial personnel. It was submitted that all such explanations can be of no consequence, for the reason that such explanation could have been appended to a proper disclosure on the part of Mr. Lau, when he gave his consent for acting as chairman of the arbitral tribunal. On this basis, it was submitted that such an explanation cannot be even looked at by this Court, when enforcement of the foreign award is being resisted by the respondent No.1. The learned senior counsel submitted that therefore, the petition deserved to be dismissed.

(r) The learned counsel for respondent no.1 further submitted that the arbitral tribunal erred in properly considering a report of the Economic Offences Wing (EOW), as it had the effect of giving a clean chit to the

respondents. It was claimed that this rendered the award unenforceable.

11. Mr. Sharan Jagtiani, learned senior counsel appearing for respondent Nos.2 to 4, supported the contentions raised on behalf of respondent No.1 and supplemented the same by referring to the provisions of the Arbitration Act, particularly Section 12 read with Vth and VIIth schedule thereof. The learned senior counsel also referred to the IBA guidelines and elaborated upon the applicability of the same to the facts of the present case, to indicate that both Mr. Lau (chairman of the arbitral tribunal) and Mr. Thio (emergency arbitrator) were mandatorily required to disclose the aforesaid relationship with the petitioner. Having failed to do so, the aspect of bias was evident, necessitating dismissal of the present petition. The learned senior counsel for respondent Nos.2 to 4 specifically submitted as follows:

(a) The details of the identity of interests and relationship of the two arbitrators with the petitioner, through Wing Tai and Neptune, were reiterated. It was submitted that the charts placed before this Court sufficiently indicated thick business relationship between the arbitrators and the petitioner. On this basis, it was submitted that the likelihood of bias was evident and the same could not be ignored in the facts of the present case. The learned senior counsel relied upon the judgment of the Supreme Court, in the case of *Ranjit Thakur v/s. Union of India and others* [(1987) 4 SC 611], in support of the said contention, emphasizing that the test of real likelihood of bias, was as to whether a reasonable person in possession of relevant information, would have thought that the arbitrators in the present case, would be biased in favour of the petitioner and against the respondents. According to the

learned senior counsel for respondent Nos.2 to 4, the said question had to be answered in the affirmative in the present case.

(b) The learned senior counsel for respondent Nos.2 to 4 took this Court through the contents of Section 12 read with Vth and VIIth schedule, as also Section 48 of the Arbitration Act. He referred to judgment of the Supreme Court in the case of *Vijay Karia & others v/s. Prysmian Cavi E Sistemi SRL & others* [**(2020) 11 SCC 1**] and *Renusagar Power Co. Ltd. v/s. General Electric Co.* [**1994 Supp. (1) SCC 644**], to contend that the core values of public policy of India, not only find expression in its statutes, but also in time honoured hallowed principles followed by the Courts. It was submitted that in the present case, there was sufficient material to show an obvious likelihood of bias, which mandated the arbitrators to disclose, which they failed to do.

(c) Reliance was also placed on **HRD Corporation v/s. GAIL (India) Limited** (*supra*) to emphasize upon the fact that the IBA guidelines were eventually incorporated in the Vth and VIIth schedule of the Arbitration Act and that the aspect of bias was necessarily to be examined from the point of view of the party alleging bias and that a subjective approach was mandated. Reference was also made to the judgments of the Supreme Court, in the case of *TRF Limited v/s. Energo Engineering Projects Limited* [**(2017) 8 SCC 377**], *Bharat Broadband Network Limited v/s. United Telecoms Limited* [**(2019 5 SCC 755**], *Voestalpine Schienen GmbH v/s. Delhi Metro Rail Corporation Limited* [**(2017) 4 SCC 665**] and **Jaipur Zila v/s. Ajay Sales and Suppliers** (*supra*).

(d) The learned senior counsel took this Court through each of the clauses of the IBA guidelines, to emphasize that proper application of the same indicated that there was indeed identity between the petitioner and the said arbitrators and even adopting a pragmatic and commonsensical approach, the arbitrators were dutybound to disclose, which they failed to do, thereby vitiating the entire award as being contrary to public policy of India. The contentions raised on behalf of the respondent No.1 in respect of relationship between the arbitrators and the affiliates of the petitioner, were reiterated. Much emphasis was placed on the observations made in the judgment of the Supreme Court in the case of **Voestalpine Schienen GmbH v/s. Delhi Metro Rail Corporation Limited** (*supra*) in the context of Section 12 of the Arbitration Act read with the Vth schedule thereof and the need for neutrality and impartiality of the arbitrators.

12. On the other hand, Mr. Darius Khambata, learned senior counsel appearing for the petitioner, refuted the contentions raised on behalf of the respondents for resisting enforcement of the foreign award. The learned senior counsel for the petitioner dealt with the allegations made on behalf of the respondents regarding alleged identity of interest between the petitioner and Mr. Lau (chairman of the arbitral tribunal) and Mr. Thio (emergency arbitrator), by dealing with all the charts placed before this Court. Each and every contention of the respondents, was dealt with. The learned senior counsel referred to the IBA guidelines and submitted that if the situation, presented by an individual case, was covered by the various clauses of the IBA guidelines, there was no question of entertaining the contentions on the aspect of bias, beyond the scope and ambit of the IBA guidelines. The learned senior counsel also referred to judgments of the Supreme Court to emphasize upon the narrow scope available to the Court, while entertaining

objections to enforcement of a foreign award, under Section 48 of the Arbitration Act. Learned senior counsel appearing for the petitioner specifically submitted as follows:

(a) Reference was made to the judgment of the Supreme Court, in the case of **Renusagar Power Co. Ltd. v/s. General Electric Co.** (*supra*), *Shri Lal Mahal Limited v/s. Progetto Grano Spa* [**(2014) 2 SCC 433**], **Vijay Karia & others v/s. Prysmian Cavi E Sistemi SRL & others** (*supra*) and *Gemini Bay Transcription (P) Ltd. v/s. Integrated Sales Service Ltd.* [**(2022) 1 SCC 753**], to claim that the extremely narrow scope available for denying enforcement of a foreign award, under Section 48 of the Arbitration Act, when applied to the facts of the present case, would show that the objections raised by the respondents need to be rejected and the foreign award ought to be enforced in the interest of justice.

(b) It was submitted that the drift of the said judgments of the Supreme Court, clearly indicated that there is a "pro-enforcement bias", which is traceable to the Convention on the Recognition and Enforcement of the Foreign Arbitral awards, 1958 (hereinafter referred to as the "New York Convention"). On this basis, it was submitted that frivolous objections to enforcement, ought not to be entertained and enforcement of the foreign award has to be the rule, while denying the enforcement, a rare exception.

(c) Having emphasized upon the narrow scope of jurisdiction available to this Court under Section 48 of the Arbitration Act, limited to denying enforcement when the foreign award is found to be contrary to public policy of India, it was claimed that the material relied upon by the

respondents, while alleging likelihood of bias against the said arbitrators, was far-fetched and the apprehension was wholly imaginary. Before dealing with the material relied upon by the respondents, the learned senior counsel for the petitioner referred to the IBA guidelines.

(d) The learned senior counsel for the petitioner submitted that although the IBA guidelines and the incorporation of the same in the Vth and VIIth schedule to the Arbitration Act, would obviously not deal with all possible fact situations that may arise in individual cases, considering the fact that the said guidelines are extremely exhaustive, once it is found that an individual case does fall in the contingencies provided for in the guidelines, the Court ought to apply the same and not permit the parties to raise imaginary and frivolous objections. By referring to the explanation to clause 3 of the IBA guidelines, which deals with disclosure by an arbitrator, the learned senior counsel submitted that clause 2(b) emphasized upon an objective test, while examining the question of conflict of interest from the stand point of a reasonable third person. It was submitted that the said objective test was not completely given up, merely because the working group of the IBA had, in principle, accepted a subjective approach for disclosure. It was submitted that in the explanation to clause 3 of the IBA guidelines, the limitation of the subjective test was referred to and the green list specifically came into picture.

(e) It was submitted that when the footnotes to the practical application of the IBA guidelines defining “affiliate” and “close family member” are appreciated, it becomes clear that even if the allegations made by the respondents were to be considered, the instant case would be covered

under the green list, not requiring any form of disclosure on the part of the arbitrators. Even if the practical application of the guidelines read with flow chart mentioned with specific circumstances are taken into account, the facts of an individual case would always prevail and applying the guidelines in the proper perspective to the present case, it would be evident that there was no duty of disclosure cast upon the arbitrators in the present case.

(f) It was submitted that if the contentions of the respondents were to be accepted, the ground of likelihood of bias could be raised in any and every individual case, thereby rendering it impossible to give consent for arbitration. It was brought to the notice of this Court that explanation to clause 3 of the IBA guidelines, pertaining to disclosure by the arbitrator itself recorded that excessive disclosure necessarily undermines the confidence of the parties in the process of arbitration. It was submitted that outlandish allegations in the present case, were made only with the purpose to somehow wriggle out of the respective obligations cast upon the respondents, under the foreign award in question.

(g) The learned senior counsel for the petitioner then dealt with material relied upon by the learned senior counsel appearing for the respondents. He took up each of the charts relied upon by the respondents and submitted that there was no admission at any stage on the part of the petitioner about assertions made in the charts and the material relied upon by the respondents.

(h) On the aspect of HSBC Limited, an affiliate of the petitioner, being the "sole book-runner and lead arranger" for Wing Tai, in the year 2014, it was submitted that in the said endeavour, alongwith the said HSBC Limited, the participants were Bank of China, CIMB Bank, CTDC Bank, Chang Hwa Commercial Bank, First Commercial Bank, Hang Seng Bank, ICBC, Mizuho and RHB Bank. It was submitted that therefore, the aforesaid assertion on the part of the respondents, was not only incorrect, but it was false. As regards HSBC (Singapore) Nominees Pte. Ltd., a wholly owned subsidiary of HSBC Limited, being one of the top shareholders of Wing Tai, it was submitted that at the relevant time, HSBC (Singapore) Nominees Pte. Ltd. held only 5.29% of shares of Wing Tai. In September, 2014, it was 6.29%. It was emphasized that Mr. Lau was an independent non-executive director and that while HSBC Limited (Singapore) had acted as an independent financial advisor to the independent directors of Wing Tai, it did not include Mr. Lau.

(i) Similarly, insofar as Neptune was concerned, it was pointed out that the allegations that HSBC Limited was a key arranger and dealer for Neptune, was false, for the reason that DBS Bank Limited and Standard Chartered Bank, were appointed jointly as book-runners alongwith HSBC Limited for Neptune. In fact, DBS Bank limited was also appointed as a Global Coordinator. As regards the shareholding of HSBC (Singapore) Nominees Pte. Ltd., it was submitted that the shareholding was between 3.93% in 2012 and 13.59% in 2013. Further details of such shareholding were given to indicate that all such allegations were irresponsibly made by the respondents.

(j) It was submitted that in any case, Wing Tai and Neptune were not "affiliates" of the petitioner by any stretch of imagination. It was submitted that the holding company HSBC Holdings PLC (United Kingdom) alongwith its group of companies, conducts business globally in the financial world and interaction with various entities takes place as a matter of normal business practice. It would be impossible for an arbitrator to take up assignments, if such outlandish connections were to be covered under the concept of identity between party and the arbitrator. On this basis, it was submitted that the contentions raised on behalf of the respondents, on facts, did not show that there was any duty to disclose on the part of the said arbitrators in the present case.

(k) The learned senior counsel referred to the judgment of the Supreme Court, in the case of **HRD Corporation v/s. GAIL (India) Limited** (*supra*), to contend that a broad commonsensical approach was necessary, while applying the IBA guidelines to the facts of an individual case. It was submitted that the said guidelines stood incorporated in the Vth and VIIth schedule to the Arbitration Act and even if they were to be included under the concept of public policy of India, a pragmatic approach would show that the allegations made in the present case, are wholly unsustainable and the present petition deserves to be allowed. Reliance was placed on the judgment and order of this Court in the case of *Saurabh Kalani v/s. Tata Finance Limited* [**2003 (5) Mh.L.J. 217**], where this Court emphasized upon applying the test of a fair-minded and informed observer, reaching the conclusion that there was possibility of bias. It was submitted that the said judgment of the learned Single Judge of this Court, was upheld by the Division Bench.

(l) Insofar as the reliance placed by the respondents on the judgment of the Supreme Court of United Kingdom, in the case of **Halliburton Company v/s. Chubb Bermuda Insurance Limited** (*supra*), it was submitted that it was not a case, which arose under the IBA guidelines in the first place and that even if the reasoning in the said case was to be perused, it would become abundantly clear that the objective test was to be applied, while reaching the conclusion that there was likelihood of bias. On this basis, it was submitted that the present petition deserves to be allowed.

(m) It was further submitted that the respondents are not justified in claiming that the findings rendered by the arbitral tribunal in the context of the EOW report are erroneous, for the reason that the same amounts to inviting this Court to render findings on the merits of the award, which is impermissible.

CONSIDERATION & ANALYSIS:

13. Having heard the elaborate submissions made on behalf of the parties and the material relied upon, which included material pertaining to the facts of the case, as also material pertaining to the position of law, this Court is of the opinion that before examining the assertions made on facts, it would be appropriate to refer to the position of law and the guiding principles, when enforcement of foreign award is sought under Section 48 of the Arbitration Act.

14. In the case of **Shri Lal Mahal Limited v/s. Progetto Grano Spa** (*supra*), a bench of three Hon'ble Judges of the Supreme Court specifically over-ruled

an earlier judgment of a bench of two Hon'ble Judges of the Supreme Court, in the case of Phulchand Exports Limited v/s. OOO Patriot [**(2011) 10 SCC 300**]. It was held that when the Court is considering enforcement of a foreign award under Section 48(2)(b) of the Arbitration Act, the expression "public policy of India" must be given a narrow meaning. The Supreme Court specifically held that such a narrow meaning read into the said expression by the Supreme Court, in the case of **Renusagar Power Co. Ltd. v/s. General Electric Co.** (*supra*), was warranted on proper interpretation of Section 48(2)b) of the Arbitration Act. The wider meaning given to the expression "public policy of India", in the judgment of the Supreme Court, in the case of *Oil and Natural Gas Corporation Limited v/s. Saw Pipes Limited* [**(2003) 5 SCC 705**], could not be imported into Section 48(2)(b) of the Arbitration Act.

15. The said position of law was followed in the case of **Vijay Karia & others v/s. Prysmian Cavi E Sistemi SRL & others** (*supra*). It was emphasized that the ground specified in Section 48(2)(b) of the Arbitration Act for resisting enforcement of a foreign award, was watertight and that no ground outside the same could be even looked at. The Supreme Court specifically took note of the "pro-enforcement bias" in the New York Convention, which had been specifically adopted in Section 48 of the Arbitration Act.

16. In the case of **Gemini Bay Transcription (P) Ltd. v/s. Integrated Sales Service Ltd.** (*supra*), the said position of law was reiterated and it was further emphasized that only the ground of the foreign award being contrary to the public policy of India, was available and the same did not include within its scope, perversity of the award. The emphasis was on enforcement

of the foreign award, unless it was in the teeth of hallowed principles recognized by Courts, forming part of public policy of India. Thus, the position of law is very clear that enforcement of a foreign award is the rule, while denial of enforcement is an exception and that too, only on the ground of the foreign award being contrary to the public policy of India.

17. In the present case, the respondents raised various grounds, while resisting enforcement of the foreign award. But, the only ground pressed into service, was that of bias. It was emphasized that in the facts and circumstances of the present case, there was a duty of disclosure on the part of the said arbitrators about their alleged relationship with the petitioner and due to failure on their part to disclose, the foreign award was rendered unenforceable.

18. Although a feeble attempt was initially made on the part of the petitioner to contend that the argument of bias could not be raised under the concept of public policy of India, subsequently, forceful arguments were made on the part of the petitioner to demonstrate that even if the allegations made by the respondent were to be accepted for the sake of arguments, no case was made out for disclosure on the part of the arbitrators and that there was no question of any likelihood of bias in the present case.

19. Before examining the rival contentions on the facts and circumstances of the present case, in the backdrop of which the allegation of bias has been made, it would be appropriate to first refer to the IBA guidelines and the relevant provisions of the Arbitration Act, to examine as to what tests can be applied to the facts of the present case.

20. The IBA guidelines have been adopted in the Vth and VIIth schedules to the Arbitration Act. In the present case, the IBA guidelines of the year 2004 are relevant and hence, the learned senior counsel for the rival parties have specifically referred to the same. The said IBA guidelines pertain to conflict of interest in international arbitration and they were approved on 22nd May, 2004 by the Council of the International Bar Association.

21. The introduction to the said guidelines specifically states that the working group of the IBA had determined the standards/guidelines, because there was lack of sufficient clarity and uniformity of application. It was specified that red, orange and green lists appended to the guidelines were identified for greater consistency and fewer unnecessary challenges and arbitrator withdrawals and removals. It was emphasized that the situations warranting disclosures by the arbitrator, were also specified for the aforesaid reason.

22. For the purpose of the present case, the relevant clauses of the said IBA guidelines are quoted hereinbelow:

> (1) General Principle
>
> Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so during the entire arbitration proceeding until the final award has been rendered or the proceeding has otherwise finally terminated.
>
> (2) Conflicts of Interest
> (a) An arbitrator shall decline to accept an appointment or, if the arbitration has already been commenced, refuse to continue to act as an arbitrator if he or she has any doubts as to his or her ability to be impartial or independent.

(b) The same principle applies if facts or circumstances exist, or have arisen since the appointment, that, from a reasonable third person's point of view having knowledge of the relevant facts, give rise to justifiable doubts as to the arbitrator's impartiality or independence, unless the parties have accepted the arbitrator in accordance with the requirements set out in General Standard (4).

(c) Doubts are justifiable if a reasonable and informed third party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.

(d) Justifiable doubts necessarily exist as to the arbitrator's impartiality or independence if there is an identity between a party and the arbitrator, if the arbitrator is a legal representative of a legal entity that is a party in the arbitration, or if the arbitrator has a significant financial or personal interest in the matter at stake.

(3) Disclosure by the Arbitrator

(a) If facts or circumstances exist that may, in the eyes of the parties give rise to doubts as to the arbitrator's impartiality or independence, the arbitrator shall disclose such facts or circumstances to the parties, the arbitration institution or other appointing authority (if any, and if so required by the applicable institutional rules) and to the co-arbitrators, if any, prior to accepting his or her appointment or, if thereafter, as soon as he or she learns about them.

(b) It follows from General Standards 1 and 2(a) that an arbitrator who has made a disclosure considers himself or herself to be impartial and independent of the parties despite the disclosed facts and therefore capable of performing his or her duties as arbitrator. Otherwise, he or she would have declined the nomination or appointment at the outset or resigned.

(c) Any doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favour of disclosure.

(d) When considering whether or not facts or circumstances exist that should be disclosed, the arbitrator shall not take into account whether the arbitration proceeding is at the beginning or at a later stage.

4(c) A person should not serve as an arbitrator when a conflict of interest, such as those exemplified in the waivable Red List, exists. Nevertheless, such a person may accept appointment as arbitrator or continue to act as an arbitrator, if the following conditions are met:

(i) All parties, all arbitrators and the arbitration institution or other appointing authority (if any) must have full knowledge of the conflict of interest; and

(ii) All parties must expressly agree that such person may serve as arbitrator despite the conflict of interest.

6(c) If one of the parties is a legal entity, the managers, directors and members of a supervisory board of such legal entity and any person having a similar controlling influence on the legal entity shall be considered to be the equivalent of the legal entity.

(7) Duty of Arbitrator and Parties

(a) A party shall inform an arbitrator, the Arbitral Tribunal, the other parties and the arbitration institution or other appointing authority (if any) about any direct or indirect relationship between it (or another company of the same group of companies) and the arbitrator. The party shall do so on its own initiative before the beginning of the proceeding or as soon as it becomes aware of such relationship.

(b) In order to comply with General Standard 7(a), a party shall provide any information already available to it and shall perform a reasonable search of publicly available information.

(c) An arbitrator is under a duty to make reasonable enquiries to investigate any potential conflict of interest, as well as

any facts or circumstances that may cause his or her impartiality or independence to be questioned. Failure to disclose a potential conflict is not excused by lack of knowledge if the arbitrator makes no reasonable attempt to investigate.

23. Before analyzing and expounding upon the above-quoted clauses of IBA, since the parties have referred to and relied upon the lists appended to the guidelines, it would be appropriate to quote relevant entries to the lists, which read as follows:

1. Non-Waivable Red List

1.1. There is an identity between a party and the arbitrator, or the arbitrator is a legal representative of an entity that is a party in the arbitration.

1.2. The arbitrator is a manager, director or member of the supervisory board, or has a similar controlling influence in one of the parties.

1.3. The arbitrator has a significant financial interest in one of the parties or the outcome of the case.

1.4. The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom.

2. Waivable Red List

2.3.4. The arbitrator is a manager, director or member of the supervisory board, 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.

2.3.8 The arbitrator has a close family relationship with one of the parties or with a manager, director or member of the supervisory board or any person having a similar controlling influence in one of the parties or an affiliate

of one of the parties or with a counsel representing a party.

2.3.9 A close family member of the arbitrator has a significant financial interest in one of the parties or an affiliate of one of the parties.

3. Orange List

3.4.3. A close personal friendship exists between an arbitrator and a manager or director or a member of the supervisory board or any person having a similar controlling influence in one of the parties or an affiliate of one of the parties or a witness or expert, as demonstrated by the fact that the arbitrator and such director, manager, other person, witness or expert regularly spend considerable time together unrelated to professional work commitments or the activities of professional associations or social organizations.

3.5.4. The arbitrator is a manager, director or member of the supervisory board, or has a similar controlling influence, in an affiliate of one of the parties, where the affiliate is not directly involved in the matters in dispute in the arbitration.

4. Green List

4.5. Contacts between the arbitrator and one of the parties.

4.5.1 The arbitrator has had an initial contact with the appointing party or an affiliate of the appointing party (or the respective counsels) prior to appointment, if this contact is limited to the arbitrator's availability and qualifications to serve or to the names of possible candidates for a chairperson and did not address the merits or procedural aspects of the dispute.

4.5.2 The arbitrator holds an insignificant amount of shares in one of the parties or an affiliate of one of the parties, which is publicly listed.

4.5.3 The arbitrator and a manager, director or member of the supervisory board, or any person having a similar controlling influence, in one of the parties or an affiliate of one of the parties, have worked together as joint experts or in another professional capacity, including as arbitrators in the same case.

24. It is necessary for the present case to also refer to the relevant foot notes to the said lists, which are as follows:

4. Throughout the Application Lists, the term 'close family member' refers to a spouse, sibling, child, parent or life partner.
5. Throughout the Application Lists, the term 'affiliate' encompasses all companies in one group of companies including the parent company.

25. A perusal of the above-quoted clauses of the IBA guidelines, would show that the emphasis is upon the arbitrator being impartial and independent of the parties, while accepting appointment and also during the entire arbitration proceeding, till it terminates. The clauses pertaining to conflicts of interest and disclosure by the arbitrator, are explained in the guidelines themselves, by stating that an objective test for disqualification of an arbitrator needs to be deployed. It is further noted that the working group, in principle, accepted after much debate, subjective approach for disclosure. This has been relied upon by the respondents to claim that the question as to whether there has to be a disclosure by the arbitrator, must necessarily be seen from the point of view of the party alleging bias, in this case, the respondents. But, it is significant that in the explanation to clause 3 of the IBA guidelines, the working group itself has explained that the principle of subjective approach for disclosure should not be applied without limitations. It is then clarified that when the situation would not lead to disqualification under the objective test, such situation need not be disclosed,

regardless of the perspective of the parties. Such limitations to the subjective test are reflected in the green list, which lists some situations in which disclosure is not required.

26. It is further clarified in the explanation to clause 3 of the IBA guidelines, pertaining to disclosure by the arbitrator, that disclosure is not an admission of conflict of interest and it is further observed that excessive disclosure unnecessarily undermines the confidence of parties in the process of arbitration itself. Yet, it is clear from clause 3(c) of the IBA guidelines, quoted hereinabove, that if there is any doubt as to whether an arbitrator should disclose, it is to be resolved in favour of disclosure. In this backdrop, clause 6 of the IBA guidelines assumes significance, as it pertains to relationships that may lead to an apprehension about independence and impartiality of an arbitrator. This is in the backdrop of identity of interest that may arise between the arbitrator and a party. Clause 6(c) specifies that if one of the parties is a legal entity, then the manager, directors or members of the supervisory board of such legal entity and a person having a similar controlling influence on the legal entity, shall be considered to be equivalent to such legal entity. Clause 7 enjoins the arbitrator and the parties to disclose about the relationships that may concern conflict of interest and in that regard, the arbitrator is under a duty to make reasonable enquiry to investigate potential conflict of interest, the emphasis being upon independence and impartiality of the arbitrator. Hence, the IBA guidelines are to be construed in consonance with the said objective, although the duties imposed upon the arbitrator in the context of potential conflict of interest ought not to be stretched to unreasonable lengths.

27. When a party, after the arbitral award is rendered, claims that it ought to be held unenforceable, on the ground of likelihood of bias for the reason that there was conflict of interest, obviously it has an interest in resisting the enforcement of such an award. Thus, in such a situation, post rendering of the award, the principle of subjective approach for disclosure needs to be applied with caution. When a party alleges that the arbitrator was under a duty to disclose, on the basis of facts and circumstances put forth by such a party, it is necessary to first examine as to whether such facts and circumstances are covered under the red, orange or green list appended to the IBA guidelines. The clauses of the IBA guidelines need to be applied with the object of ascertaining the independence and impartiality of the arbitrator. If the situation is covered under any of the lists, the answer would be readily available. But, if the individual case that comes up for consideration before the Court, throws up a situation, which may not fit into the said lists, it would be appropriate to apply the test of a reasonable third person, as contemplated under Article 12(2) of the UNCITRAL Model Law. The party insisting upon such duty of disclosure in an individual case, cannot be permitted to submit that the fact situation may not be covered under any of the three lists and yet, the Court must adopt the subjective approach of disclosure. In such a situation, the Court will have to apply the reasonable third person test, to examine as to whether such duty of disclosure on the part of the arbitrator could be insisted upon, in the facts and circumstances of the case and in this regard, clause 2(b) of the IBA guidelines assumes significance. The said clause indicates that the Court must examine from the point of view of a reasonable third person, having knowledge of the relevant facts, as to whether justifiable doubts arise about impartiality or independence of the arbitrator.

28. It would now be appropriate to consider the facts and circumstances alleged by the respondents in the context of both Mr. Lau (chairman of the arbitral tribunal) and Mr. Thio (emergency arbitrator), to examine as to whether the duty of disclosure was cast upon them and as to whether any doubt arises, indicating that they should have disclosed such facts and circumstances, particularly because clause 3(c) of the IBA guidelines mandates that in case any doubt arises, it should be resolved in favour of disclosure.

29. This Court has recorded in detail, the submissions made on behalf of the respondents as to why they allege justifiable doubts about the impartiality of the said two arbitrators, emphasizing that the circumstances brought to the notice of this Court, show that there was indeed identity between the petitioner and the said arbitrators.

30. Much emphasis was placed by the respondents on the said Mr. Lau being a director of the two companies Wing Tai and Neptune. It was claimed that since he was a director in both the companies, thereby having considerable influence, the relationship was covered under clause 6(c) of the IBA guidelines. The allegation is that since one of the affiliates of the petitioner was holding large number of shares in the two companies i.e. Wing Tai and Neptune, and another affiliate was an underwriter, lead manager and book-runner for the companies when funds worth thousands of crores of rupees were raised for the two companies, the said Mr. Lau (chairman of the arbitral tribunal) was a director and a person having considerable influence in the companies, demonstrating that there was identity between him and the petitioner. It was alleged that there was an obvious likelihood of bias and that in any case, sufficient doubt was raised to

the effect that he ought to have disclosed the said relationship before taking up the assignment of arbitration or continuing with the same. Similar allegations have been made against Mr. Thio i.e. the emergency arbitrator, in respect of another set of companies and it is also alleged that Mr. Thio's wife was associated with the affiliates of the petitioner, indicating that the situation was covered under the red list.

31. In fact, the respondents have invoked the non-waivable red list as well as the waivable red list, as also the orange list to claim that the said arbitrators were under a duty of disclosure and having failed to disclose the circumstances, the likelihood of bias was very strong, vitiating the award sought to be enforced.

32. The respondents specifically sought to invoke clauses 1.1, 1.2, 2.3.4, 2.3.8, 2.3.9, 3.4.3 and 3.5.4 of the non-waivable red list, waivable red list and orange list appended to the IBA guidelines. The said clauses are quoted hereinabove. In order to invoke the said specific clauses, it would be necessary to refer to the above-quoted foot notes to the said lists, which define "close family members" and "an affiliate". The foot notes make it clear that close family members include a spouse, sibling, child, parent or life partner and the term affiliate encompasses all companies in one group of companies, including the parent company.

33. Applying the said definitions to the circumstances alleged on behalf of the respondents, would show that the respondents are not justified in invoking the above-mentioned specific clauses of the non-waivable red list, waivable red list and orange list. A close scrutiny of the said lists and particularly, the specific entries referred to hereinabove, would show that a

duty to disclose would arise and likelihood of bias could be alleged, if there was a relationship or identity between the arbitrator and a "party" or an "affiliate" of the party and this would extend to a "close family member".

34. In the case of Mr. Lau (chairman of the arbitral tribunal), even if the circumstances alleged by the respondents are to be taken into consideration, the petitioner before this Court, being the party, or any of its affiliates including the holding company i.e. HSBC PLC (UK), cannot be said to be having an identity with Mr. Lau i.e. the arbitrator or demonstrating any situation of any conflict of interest. The elaborate charts placed before this Court on behalf of the respondents, show a business interaction of one of the group companies of the petitioner with independent private companies i.e. Wing Tai and Neptune. It is necessary to note that neither Wing Tai nor Neptune qualifies as an "affiliate" of the petitioner, by applying the definition of the said term given in the IBA guidelines, upon which the respondents have placed much emphasis. Wing Tai and Neptune are neither parties nor affiliates of the parties in the present case. Therefore, no reasonable third person, having knowledge of these facts, would conclude that justifiable doubts arise about impartiality or independence of the arbitrator, i.e. Mr. Lau in the present case. The allegations levelled by the respondents fail to pass the reasonable third person test contemplated in clause 2(b) of the IBA guidelines, pertaining to conflicts of interest and the explanation appended thereto.

35. Even if the subjective approach for disclosure is to be applied, meaning thereby that the requirement of disclosure is to be examined from the point of view of the respondents, limitations specified in the guidelines to the subjective approach for disclosure must apply. This would indicate that the

circumstances alleged by the respondents could be looked at from the point of view of the green list appended to the IBA guidelines. It is relevant that clause 4.5 of the green list, quoted hereinabove, refers to contacts between the arbitrators and one of the parties. Clause 4.5.3 thereof includes a situation where an arbitrator and a director or member of supervisory board or any person having similar controlling influence in one of the parties or affiliates of the parties, have worked together as joint experts or in another professional capacity. Even the said situation does not mandate disclosure of such relationship. As noted hereinabove, the circumstances alleged on behalf of the respondents do not even indicate that the arbitrator i.e. Mr. Lau, had any relationship with the petitioner or its affiliates. Merely because he was an independent non-executive director in Wing Tai and Neptune, cannot lead to a conclusion that he had an identity of interest with the petitioner or its affiliate. Therefore, the circumstances alleged by the respondents gave rise to a situation, at worst, covered under the green list, wherein there is no duty upon the arbitrator to disclose.

36. In this situation, the respondents claimed that the circumstances indicated in their case may not be specifically covered under the red lists or orange list, but they indicated a situation mandating duty of disclosure on the part of the arbitrator and that the green list did not apply. Assuming for the sake of argument that such a contention is to be considered, this Court is of the opinion that in such a situation, in order to examine whether conflict of interest has actually arisen, the reasonable third person test under clause 2(b) of the IBA guidelines must apply. The respondents, in such circumstances, are required to demonstrate that from the point of view of a reasonable third person, having knowledge of the relevant facts, justifiable doubt had arisen as to the impartiality or independence of the arbitrator.

This Court is of the opinion that applying the said reasonable third person test, the respondents have failed to demonstrate that the arbitrator, i.e. Mr. Lau in the present case, was under a duty of disclosure and having failed to do so, a likelihood of bias had arisen.

37. This is quite apart from the fact that the petitioner has placed on record sufficient material to indicate that the sweeping allegations made by the respondents about an affiliate of the petitioner i.e. HSBC Limited, being the lead manager and book-runner as also underwriter of Wing Tai and Neptune, for thousands of crores of rupees, is not borne out by the material on record, as there were other participants i.e. Bank of China, CIMB Bank, CTDC Bank, Chang Hwa Commercial Bank, First Commercial Bank, Hang Seng Bank, ICBC, Mizuho and RHB Bank, in so far as Wing Tai is concerned. As regards Neptune the other participants were DBS Bank and Standard Chartered Bank. Similarly, the allegation that wholly owned subsidiary of the affiliate of the petitioner, was a major shareholder in Wing Tai and Neptune, is also not supported by the material available on record. It is found that the affiliate of the petitioner was indeed a book-runner, but it was one amongst many, who were part of the exercise of raising funds for Wing Tai and Neptune and that the wholly owned subsidiary of the affiliate of the petitioner had shares ranging between 3 to 4% and 13 to 14% at different points of time in Wing Tai and Neptune. There is substance in the contention raised on behalf of the petitioner that such shares were held in trust during the course of business of the affiliate of the petitioner.

38. It is relevant to note that HSBC and its group of companies, being global players in the financial world, would obviously be having business interactions with different entities and it would be a mis-application of the

concept of conflict of interest, if the contentions raised on behalf of the respondents, were to be accepted. As noted hereinabove, in any case, the allegations made by the respondents, do not pass the reasonable third person test.

39. Insofar as the allegations pertaining to "Cheng brothers" are concerned, this Court finds them too far-fetched and outlandish for any serious consideration. Applying the concepts of "close family member" and "affiliate" envisaged in the IBA Guidelines, this Court finds that the said allegations pertaining to "Cheng brothers" do not deserve consideration.

40. As regards similar allegations made against Mr. Thio (emergency arbitrator), it is again found that the respondents have failed to show any identity and conflict of interest, for the reason that there is no relationship pointed out between the said arbitrator and the petitioner or any of the affiliates of the petitioner. The allegations made against the said arbitrator, by referring to Keppel Infra Fund Management Private Limited (KIFM) and other entities of the Kepple Group, are also found to be wholly deficient in raising the contention pertaining to mandatory duty of disclosure on the part of the said arbitrator. In the context of the said allegation also, it is found that involvement of the said arbitrator as an independent non-executive director of KIFM, could hardly be a ground to show that there was any identity between him and the petitioner or any of its affiliates. The elaborate charts placed before this Court to allege such relationship or to invoke conflict of interest, failed to indicate any such circumstances, warranting a duty of disclosure on the part of the arbitrator. This Court is of the opinion that such a situation does not mandate disclosure on the part of the arbitrator. In the case of both the arbitrators, the respondents have failed to

raise any doubts as contemplated under clause 3(c) of the IBA guidelines for resolving the situation in favour of disclosure.

41. Although the stand taken on behalf of the respondents in the submissions referred to alleged relationship of Mr. Thio (emergency arbitrator) with a company OUE Realty Pte Limited, at the time of arguments and submitting detailed charts, the learned senior counsel for the respondents, did not specifically urge any contentions in that regard. Therefore, this Court has not dealt with such allegations. But, a bare perusal of the allegations, would show that they are similar/identical to the allegations made against the emergency arbitrator and his wife, in the context of KIFM. Therefore, for the reasons stated hereinabove for rejecting the said contentions in the context of KIFM, this Court holds that there is also no substance in the contentions raised with respect to the company OUE Realty Pte. Limited.

42. Even otherwise, this Court finds that the allegations against Mr. Thio (emergency arbitrator) did not warrant examination for the reason that the petition seeks enforcement of the final foreign award. The contention raised on behalf of the respondents that since the final award refers to and includes certain aspects of the emergency award, the role of the emergency arbitrator also needs to be examined, is without any substance. Yet, this Court examined the allegations made against the emergency arbitrator also.

43. Once it is found that the facts and circumstances on which the respondents have placed much emphasis, did not give rise to any requirement on the part of the said arbitrators for disclosure, the question of bias or likelihood of bias, does not arise at all. There can be no doubt about

the fact that if the respondents would have been able to demonstrate duty to disclose on the part of the said arbitrators, a likelihood of bias may have arisen and the award could have been set aside on the ground of it being contrary to the public policy of India. But the respondents have failed to demonstrate any such circumstance and therefore, they cannot claim that public policy of India has been violated, thereby rendering the award unenforceable.

44. As noted hereinabove, the series of judgments of the Supreme Court, starting from **Renusagar Power Co. Ltd. v/s. General Electric Co.** (*supra*), have indicated the narrow scope under the concept of public policy of India for denying enforcement of a foreign award. The respondents have failed to demonstrate any ground for invoking the narrow scope of jurisdiction available to this Court for denying enforcement of a foreign award.

45. As regards reliance place on the judgment of the Supreme Court of United Kingdom, in the case of **Halliburton Company v/s. Chubb Bermuda Insurance Limited** (*supra*), this Court is of the opinion that the said judgment applies tests of English Law to the aspect of bias and duty of disclosure. Although reference is made to the IBA guidelines, there is nothing to indicate in the said judgment that in the facts and circumstances of the present case, the ratio of the said judgment could be of any assistance to the respondents. Much emphasis was placed on the observation made in the said judgment that there was a legal obligation on the arbitrator to disclose. But, this Court is of the opinion that such a legal obligation would flow from the facts and circumstances of the individual case. As noted in the explanation given to clause 3 of the IBA guidelines, pertaining to disclosure by arbitrator, excessive disclosures unnecessarily undermine the confidence of parties in

the very process of arbitration and hence, they need to be eschewed. This Court is of the opinion that the respondents cannot simply rely upon the judgment of the Supreme Court, in the case of **Halliburton Company v/s. Chubb Bermuda Insurance Limited** (*supra*), to claim that the foreign award in the present case, cannot be enforced.

46. Reliance placed in the case of **Ranjit Thakur v/s. Union of India** (*supra*) can also be of no avail to the respondents, for the reason that the test of likelihood of bias in the context of a reasonable third person, is already referred to and applied by this Court hereinabove, as per the reasonable third person test indicated in clause 2(b) of the IBA guidelines.

47. Reliance placed on the judgment of **HRD Corporation v/s. GAIL (India) Limited** (*supra*) on behalf of the respondents cannot take their case any further, for the reason that there cannot be any quarrel with the finding in the said judgment, about the Vth and VIIth schedules of the Arbitration Act, incorporating clauses that have almost identical corresponding clauses in the IBA guidelines. There can also be no quarrel with the proposition that such incorporation in the Vth and VIIth schedules, would show that adherence to the IBA guidelines can be said to be part of the public policy of India. But, this Court finds that applying the said IBA guidelines, the respondents have not succeeded in demonstrating that the foreign award in the present case, can be said to be unenforceable.

48. The emphasis placed on the communications exchanged between Mr. Lau (chairman of the arbitral tribunal) and Clifford Chance (solicitor), only indicate that Mr. Lau had explained about his role as an independent non-executive director of Wing Tai and Neptune. Even if such directors, under

the law applicable in Singapore, are classified as key managerial personnel and Mr. Lau, in one of his communications, claimed that he was not covered under such classification, the same cannot be held against Mr. Lau. The explanation given in the communication that he claimed not to be key managerial personnel because of the nature of his role as an independent non-executive director, appears to be reasonable.

49. There can also be no assistance to the respondents from the judgment in the case of **Voestalpine Schienen GmbH v/s. Delhi Metro Rail Corporation Limited** (*supra*), as the concept of neutrality of arbitrators expounded therein, with reference to Vth and VIIth schedules of the Arbitration Act, does not indicate that in the facts of the present case, any likelihood of bias could be alleged against the said arbitrators. The learned counsel for the parties referred to American judgments. But, this Court is not discussing the same, for the reason that the issues arising for consideration in the present petition have been discussed in detail, in the backdrop of the IBA guidelines and their incorporation in Vth and VIIth schedules of the Arbitration Act and the relevant judgments in that context.

50. The contention raised on behalf of the respondents, in the context of the report of EOW is also without any substance, simply for the reason that the arbitrators in the arbitral award, have referred to the said report. The contentions raised on behalf of the respondents, by relying upon the said report of EOW, have been recorded and dealt with by the arbitrators. Any further enquiry or comment upon the same would amount to this Court entering into the merits of the matter, which is a completely prohibited area, while exercising jurisdiction under Section 48 (2)(b) of the Arbitration Act. The law laid down by the Supreme Court, starting from **Renusagar Power Co.**

Ltd. v/s. General Electric Co. (*supra*) upto **Gemini Bay Transcription (P) Ltd. v/s. Integrated Sales Service Ltd.** (*supra*) shows that there is no question of this Court examining the alleged errors or perversity of the findings rendered in the award on the aspect of consideration of EOW report. Hence, there is no substance in the said contention raised on behalf of the respondents.

51. This Court cannot be unmindful of the approach adopted in the New York Convention, which is manifested in Section 48 of the Arbitration Act and so recognized in the judgments of the Supreme Court, including the judgment in the case of **Vijay Karia & others v/s. Prysmian Cavi E Sistemi SRL & others** (*supra*), which demonstrates a pro-enforcement bias in such cases. While examining allegations of bias, conflict of interest and duty of disclosure, the Court is expected to adopt a pragmatic and commonsensical approach. Applying the said position of law to the present case, this Court is convinced that the petitioner is entitled to enforce the foreign award and that the objections raised thereto, on behalf of the respondents, deserve to be rejected.

52. The learned counsel for the petitioner is justified in relying upon observations made by the Supreme Court, in the case of **Vijay Karia & others v/s. Prysmian Cavi E Sistemi SRL & others** (*supra*), as regards the tendency on the part of award debtors, to indulge in speculative litigation, while resisting enforcement of such foreign awards. The respondents in the present case, have also indulged in such speculative litigation with the hope that some of the mud they have flung on the foreign arbitral award, would stick. This Court is of the opinion that the position of law, in the backdrop of the IBA guidelines, is crystal clear and there is no question of any mud sticking to the foreign award in the present case. It deserves to be enforced.

ORDER

53. In view of the above, the objections raised on behalf of the respondents are rejected and the petition is allowed in terms of prayer clause (a), which reads as follows:

> "(a) That this Hon'ble Court be pleased to enforce Arbitration Award in SIAC Arbitration No.088 of 2012 dated 27th September, 2014 as a decree of this Hon'ble Court."

54. It is held that the award dated 27th September, 2014 is enforceable against the respondents. The petitioner shall now proceed to take all necessary steps for enforcement/execution of the said foreign award.

55. Pending applications, if any, also stand disposed of.

(MANISH PITALE, J)

Priya Kambli