

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NO. 1544 OF 2020
(ARISING OUT OF SLP (CIVIL) NO.8304 OF 2019)

VIJAY KARIA & ORS.

...Appellants

Versus

PRYSMIAN CAVI E SISTEMI SRL & ORS.

...Respondents

WITH
CIVIL APPEAL NO. 1545 OF 2020
(ARISING OUT OF SLP (CIVIL) NO.8435 OF 2019)

J U D G M E N T

R.F. Nariman, J.

1. Leave granted.

2. The present appeals are filed against the judgment of a Single Judge of the Bombay High Court dated 07.01.2019, by which four final awards made by a sole arbitrator in London under the London Court of International Arbitration Rules (2014) (hereinafter referred to as the “LCIA Rules”) were held to be enforceable against the Appellants in India.

3. The brief facts of this case are as follows. The Appellants, i.e. Appellant No.1 Shri Vijay Karia, and Appellants No.2 to 39 (who are represented by Appellant No.1) are individual, non-corporate shareholders of Ravin Cables Limited (hereinafter referred to as "Ravin"). On 19.01.2010, the Appellants and Ravin entered into a Joint Venture Agreement (hereinafter referred to as "JVA") with Respondent No.1, i.e. Prysmian Cavi E Sistemi SRL – a company registered under the laws of Italy. By this JVA, Respondent No.1 acquired a majority shareholding (51%) of Ravin's share capital. The material clauses of the JVA are set out hereinbelow:

"8. Purpose and Objectives

8.1 Purpose of the Company and Scope of the Agreement

Subsequent to Closing, the Company shall be a joint venture between Prysmian and the Existing Shareholders for the purposes of undertaking and conducting the business of the company, or for such other activities as may be determined by the Shareholders from time to time, subject to the applicable law. The business of the company shall be conducted in the best interests of the Company, and in accordance with sound professional and commercial principles."

"12.6. Chairman and Managing Director

12.6.1 Mr. Karia shall be the Chairman of the Board as well as the Managing Director of the Company until:

- (i) Expiry of seven (7) years from the Agreement Date;
- or

(ii) The date of which the Existing Shareholders cease to hold in the aggregate at least ten percent (10%) of the share capital of the Company:

Whichever occurs earlier.

It is hereby agreed that Mr. Karia shall not, during such term, be entitled to be removed as a Chairman and Managing Director by the passing of an ordinary resolution at a general meeting of the Company...”

“12.6.4. Without prejudice to the aforesaid clause 12.6.3, the Managing Director shall continue to remain responsible for the day to day management of the Company in accordance with the Interim Period Policy adopted by the Board on the Closing Date, until the appointment of the CEO of the Company (“Interim Period”)

“12.6.5 As soon as practicable after the efflux of the Interim Period, a Board shall be convened to resolve upon a new policy, applicable for a period of 6 (six) months thereafter (the “**Integration Period**”), for the delegation of the powers to the managers of the Company (the “**Delegation of Powers Policy**”) all powers not delegated to the managers of the Company pursuant to such Delegation of Powers Policy, shall be delegated jointly to the CEO and the Managing Director...”

“12.6.6 Provided however, that subject to the overall supervision of the Board, after the efflux of the Integration Period, the Managing Director shall be directly responsible solely for managing the internal audit as well as the strategy and business development of the Company and present to the Board his findings and analysis for final determination by the Board. Accordingly all the powers which are not delegated to the managers of the Company pursuant to the Delegation of Powers Policy, as may be amended by the Board from time to time, shall be delegated to the Managing Director to the extent such powers fall within his duties as aforesaid.

12.6.7 After the Integration Period, the Managing Director may appoint an internal auditor to assist the Managing Director in his responsibility towards the internal audit of the company. This internal auditor shall report directly to the Managing Director and functionally report to the internal audit department of Prysmian S.P.A.”

“12.7 Chief Executive Officer

12.7.1 The CEO shall be appointed by and shall directly report to the Board.

12.7.2 Without prejudice to the aforesaid Clause 12.7.1, the CEO shall from the date of its appointment till the efflux of the Integration Period, be responsible for the day to day management of the Company jointly with the Managing Director.

12.7.3 Provided however, that subject to the overall supervision of the Board, after the efflux of the Integration Period, the CEO shall be responsible for the day to day management of the Company excluding solely the internal audit and the strategy and business development of the Company for which the Managing Director shall be responsible. Accordingly all the powers which are not delegated to the managers of the Company pursuant to the Delegation of Powers Policy, as may be amended by the Board from time to time, shall be delegated to the CEO to the extent such powers fall within his duties as aforesaid.”

“17. PROCEDURE FOR FAIR MARKET VALUATION

17.1 Notwithstanding anything contained in this Agreement, all references in this Agreement to Fair Market Value shall be the fair market value as determined, applying the definition of EBITDA, Net Financial Indebtedness (NFI) and Net Working Capital (NWC) set forth under Schedule X, by any one of the following four accounting firms settled in India:

(a) KPMG

(b) Ernst & Young;

(c) PriceWaterhouseCoopers;

(d) Deloitte

17.2 The accounting firm shall be chosen from among those indicated under clause 17.1 above by the Party that, according to clauses 23 and 24, is called by the other Party to sell, in whole or in part its share participation in the Company to the other Party; or by the Party that, according to Clauses 11.5 (iv), 16 and 23, calls the other Party to buy, in whole or in part, its share participation in the Company (in either case the “Exiting Party”). If the Exiting Party fails to choose the accounting firm within thirty (30) calendar days from (i) the receipt of the notice by which the other Party has intimated it to sell, in whole or in part, its share participation in the Company to the other Party; or (ii) from the serving of notice to the other Party to buy, in whole or in part, its share participation in the Company, then the accounting firm shall be chosen by the Party (the “Non-Exiting Party”) that called the other Party to sell, in whole or in part, its share participation in the Company to the other Party or was called by the Exiting Party to buy, in whole or in part, the Exiting Party’s share participation in the Company.”

“20. Mutual Covenants and Undertakings

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20.1.2 The Parties further agree to cooperate and act in good faith, fairness and equity as between themselves.”

“21. Business in India

21.1 The Parties agree that neither Prysmian nor Mr. Karia, whether directly or through their Affiliates, shall invest, acquire or participate in the Cable Business in India, save and except through the Company in accordance with this agreement.”

“21.5 Further, it is agreed that, within March 31,2011, the Promoters shall either stop or cease to have any interest in any activity they are currently or will be conducting in India, directly or indirectly through any

Affiliates, which is in competition with the business of the Company. Such ceased activities shall then not be offered by Mr. Karia to the Company, pursuant to Clause 21.2 for a period of three years from the date of such cessation.

For the sake of clarity, it is agreed that this Clause 21.4 shall apply, without being limited, to the activities carried out by (i) Vijay Industrial Electricals, a company incorporated under the laws of India and having its registered office at 302, Akruti Trade Centre, Third Floor, Road n. 7, MIDC, Marol, Andheri(east) Mumbai-400093 (ii) Special Cable Industries, a company incorporated under the laws of India and having its registered office at A-1/404 GIDC Estate, Ankleshwar 393002.”

“23. Event of Default

23.1 If any party(“ Defaulting Party”) is in material breach of any provisions, obligations, covenants, conditions and undertakings under this Agreement , or in the event of insolvency or bankruptcy of the Defaulting Party or if the substantial undertaking or assets of the Defaulting Party is under receivership or any other equivalent status, it shall be considered as an event of default (“Event of Default”).

23.2 In such an event, the other party (“Non Defaulting Party”) may give notice of the same (“Determination Notice”) to the Defaulting Party.

23.3 The Defaulting Party shall have a period of 60(sixty) calendar days from the receipt of the Determination Notice (or Such further period as the Non Defaulting Party may agree in writing) to rectify the Event of Default(“ Rectification Period”). It is hereby clarified that this clause 23.3 is not applicable if the Event of Default is represented by the insolvency or bankruptcy of the defaulting Party in which case the Non Defaulting Party may forthwith serve the EOD Notice to the Defaulting Party.

23.4 If upon expiry of the Rectification Period, the Event of Default has not been so rectified the Non

Defaulting Party may require the Defaulting Party by written notice("EOD Notice") to either (i) sell to the Non Defaulting Party or such other Person as may be nominated by the Non Defaulting Party, all , but not less than all, the Shares held by the Defaulting Party ("Defaulting Party Shares") at the 10% (ten percent) discount to the Fair Market Value(" Discounted Price") or (ii) buy from the Non Defaulting Party all, but not less than all, the Shares held by the Non Defaulting Party at 10% (ten percent) over the Fair Market Value("Premium Price"). The Defaulting Party shall be then under the obligation to either (I) sell all, but not less than all, its Shares in the Company within 30 (thirty) calendar days of the EOD Notice or (II) buy all, but not less than all, the Non Defaulting Party Shares in the Company within 30(thirty) calendar days of the EOD Notice, as the case may be.

23.5 It is hereby agreed that:

23.5.1 If Prysmian is the Defaulting Party, then Mr. Karia only(and not the Existing Shareholders) will be entitled to either(a) buy all(but not less than all) Prysmian Shares at the Discounted Price or (b) sell to Prysmian all (but not less than all its own shares) and those of the Existing Shareholders at the Premium Price.

23.5.2 If Mr. Karia or any of the Existing Shareholders is the Defaulting Party, then Prysmian will be entitled to either (a) buy all (but not less than all) the Shares held by Mr. Karia and Existing Shareholders at the Discounted Price or (b) sell to Mr. Karia all (but not less than all) its own shares at the Premium Price.

For sake of clarity, the Parties agree that for the purpose of this Clause 23.5 any reference to Mr. Karia Shares, Prysmian Shares and Existing Shareholders Share shall be deemed to include any Shares transferred to any or their respective Affiliates pursuant to the provisions of Clause 10.4 above."

"27. ARBITRATION

27.1 Dispute Resolution

27.1.1 The Parties agree to use all reasonable efforts to resolve any dispute under, or in relation to this Agreement quickly and amicably to achieve timely and full performance of the terms of this Agreement.

27.1.2 Any dispute, controversy or claim arising out of or relating to or in connection with this Agreement including a dispute as to the validity or existence of the Agreement or the arbitration agreement, or any breach or alleged breach thereof, shall be settled exclusively by arbitration under the Rules of Arbitration of the London Court of International Arbitration (“**LCIA**”) as amended from time to time.

27.1.3 The arbitral tribunal (“Tribunal”) shall consist of one (1) arbitrator, to be appointed by the LCIA. The arbitrator shall be from a neutral nationality, i.e. from a nationality and origin other than any of the Parties.

27.1.4 The seat of the arbitration shall be London, United Kingdom.

27.1.5 The language to be used in the arbitration shall be English.

27.1.6 The law applicable and governing the arbitration agreement (proper law of the arbitration agreement) and in all respects including the conduct of the proceedings shall be English Law. If the Institution above named ceases to exist or is unable for any reason to administer the arbitration proceedings then the arbitration shall be conducted in accordance with the (English) Arbitration ACT 1996 as amended from time to time or any statute that may replace the said Act.

27.1.7 Parties expressly agree that Part I of the (Indian) Arbitration and Conciliation Act, 1996 (as amended from time to time and any statutory enactment thereof) shall have no application to the arbitration agreement or the conduct of arbitration or to the setting aside of any award made there under, and the provisions of Part I) including the provisions of section 9 of the Arbitration and Conciliation Act, 1996 is hereby expressly excluded....

27.1.9 The arbitration award (the "Award") shall be final and binding on the Parties.

27.1.10 The courts of London (United Kingdom) shall have exclusive jurisdiction in respect of all matters arising in connection with the arbitration and Existing Shareholders submits to the jurisdiction of the said courts. Provided however that the Award may be enforced in any appropriate jurisdiction. If to be enforced in India the Award shall be a foreign award to which the legislative provisions incorporated in the applicable Indian Act to give effect to the New York Convention on foreign arbitral awards 1958 (the New York Convention) shall apply(currently Part II of the (Indian) Arbitration and Conciliation Act 1996)..."

4. By a separate 'Control Premium Agreement' of the same date, Respondent No.1 paid €5 million to the Appellants as 'control premium' for the acquisition of the share capital of Ravin.
5. On 10.08.2010, pursuant to clause 12 of the JVA - as the interim period of six months under the JVA had come to an end - one Mr. Luigi Sarogni was appointed as CEO of Ravin by Respondent No.1. Until the expiry of the 'integration period', Ravin was to be jointly managed by the said CEO and the Managing Director for another period of six months. Factually, however, we are informed that the said 'integration period' carried on beyond December 2010 and continued until September 2011.
6. In April 2011, Mr. Giancarlo Esposito was designated by Respondent No.1 as the H.R. Director of Ravin. On 15.09.2011, the Board of Directors of Ravin conferred exclusive powers of the day to day management of the company on the CEO so appointed by

Respondent No.1. It is the case of Respondent No.1 that the appointed CEO was thwarted in jointly managing the company during this 'integration period', as a result of which, in November 2011, one Ms. Cinzia Farise was appointed as CEO in the place of Mr. Sarogni by the Board of Directors. Since the Board Resolution of 01.11.2011 conferred on Ms. Farise the power to employ and lay-off permanent staff, she imposed a temporary freeze and check on new hiring without her approval, which was alleged to be breached by the Appellants. Later, from December 2011 till February 2012, Ms. Farise sought to convene a board-meeting to finalise one Mr. Brunetti's appointment as CFO of Ravin, which was assented to by the Respondent's Directors, but not signed by the Appellant's Directors. Things reached a head on 31.01.2012 when the employees of the company went on a strike at Ravin's Akruti office. By February 2012, the Appellants and Respondent No.1 were at loggerheads, as a result of which Respondent No.1 issued a request for arbitration in terms of clause 27 of the JVA, claiming that the Appellants had committed 'material breaches' of the JVA, *inter alia*, by ousting Respondent No.1 from the control of Ravin altogether. On 26.03.2012, the Appellants responded to the request for arbitration and included several counter claims. Each party claimed that the other had committed material breaches, as a result of which the successful party in the arbitration would be entitled

under the JVA to buy out the other party at a 10% premium or discount (as the case may be). Given the fact that the JVA required service of a 'Determination Notice' which alleged material breaches, such notice was served by Respondent No.1 on the Appellants on 26.03.2012. Sixty days from this date, called a 'Rectification Period' under the JVA, notice was given by the Respondent No.1 to the Appellants to remedy/rectify the alleged breaches. Further time even beyond the sixty days, i.e. until 06.07.2012 was given, but according to Respondent No.1, none of the breaches were remedied. As a result, on 06.06.2012, the LCIA appointed a sole arbitrator - one Mr. David Joseph QC - to adjudicate the dispute between the parties.

7. An early skirmish was contained in a letter dated 07.06.2012, alleging that the learned arbitrator was conflicted, as he had been engaged as counsel by Respondent's advocates, Bharucha and Partners, in another unconnected matter. However, on 08.06.2012, Bharucha and Partners wrote a letter making it clear there was no such conflict. The sole arbitrator also denied any such conflict. The LCIA Registry informed the Appellants that they could challenge the appointment of the sole arbitrator under the LCIA Rules if they so desired. The Appellants, however, gave up the right to any such challenge. As a result, on 04.07.2012, Respondent No.1 filed its Statement of Claim before the learned sole arbitrator. On 09.09.2012, the Appellants then

filed their statement of defence and counter claims. On 28.09.2012, Respondent No.1 filed its rejoinder and opposition to the counter claim.

8. Meanwhile, various procedural orders were passed by the learned arbitrator for production of documents etc. A hearing then took place in December 2012 on questions relating to the construction of various clauses of the JVA and jurisdictional issues raised by Respondent No.1 in respect of certain counter claims of the Appellants. Deciding these issues, by what was called the 'First Partial Final Award' dated 15.02.2013, the sole arbitrator delineated the scope of the first award stating that it was restricted only to issues of interpretation of the JVA and questions of jurisdiction, and not to the merits of either the claims or counter claims made. In particular, the sole arbitrator construed clause 21.1 of the JVA as follows:

“82. This then brings directly into question the scope and meaning of the words used in Clause 21.1 when each of the Claimant and the First Respondent agreed that it would not directly or through its Affiliates “invest, acquire or participate in the Cable Business in India save through the Company in accordance with this Agreement”.

83. The Tribunal concludes that these words themselves do not prohibit the Claimant from selling cables directly in India. Such direct sales might still amount to a breach of Clause 8 or indeed Clause 20 of the JVA, but direct sales as a stand-alone activity is not an investment, acquisition or participation in the Cable Business in India.

84. It seems to the Tribunal that each of these expressions connotes different forms of long term engagement, arrangement or commitment involving either an injection or exchange of capital or know how on the part of the investor, acquirer or participator in the sphere of the activities identified by the compendious definition of Cable Business in India.

85. A person who concludes a contract of sale of goods to another counter-party is not in accordance with ordinary parlance investing, acquiring or participating in the Cable Business in India.

86. Therefore, the Tribunal concludes that on a true construction of the JVA simply by applying the ordinary meaning of the words deployed together with the contractual definition, the Respondents do not succeed in their primary submission namely that the conclusion of one or more contracts of sales of cables directly in India by the Claimant itself or through its subsidiaries constituted the investment, acquisition or participation in the Cable Business in India contrary to the terms of Clause 21.1 of the JVA.

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93. In summary therefore contracts of sale for cables within the definition of Cable Business concluded directly by the Claimant or its affiliates and otherwise than through Ravin do not of itself constitute a breach of Clause 21.1.

94. The conclusion of a series of such contracts might, however, depending on the facts, constitute a breach of Clause 8 or Clause 20 of the JVA. Yet further, the Tribunal does not rule out the possibility of the Respondents alleging and proving some kind of investment or participation which consist of some kind of long term contractual arrangement itself involving sale, export, import or distribution. Nothing stated herein, however, in any way decides or considers the materiality of any such allegation or the consequences of any such breach even if proven.”

9. Insofar as the parent company of Respondent No.1 (one Prysmian SA) had made a global acquisition of the 'Draka Group' in February/March 2011, which included - as one out of 60 companies belonging to the Draka Group - one 'Associated Cables Private Limited' (hereinafter referred to as "ACPL"), which was an Indian Company doing business in India, the learned arbitrator held:

"108. The Tribunal is once more careful to make it clear that these pleaded allegations have not been proved yet. The proof of these allegations is left to be explored at the substantive merits hearing. Nevertheless, on the basis of the parties' respective pleaded cases, the Tribunal concludes that on a true construction of Clause 21, the wider acquisition by Prysmian Spa of Draka, which in turn holds a 60% shareholding in ACPL, is capable of amounting to an acquisition in the Cable Business in India through an Affiliate of the Claimant in circumstances where it is not disputed that Prysmian Spa is another person which Controls the Claimant. Equally, the continued carrying on of business in India through ACPL is capable of amounting to the participation in the Cable Business in India through an Affiliate of the Claimant; namely through another person, ACPL. Although there has not been any proof of this question, there would at least appear to be some evidence on which the Respondents might contend that ACPL is Controlled by the same person, namely Prysmian Spa, who directly or indirectly Controls the Claimant so as to come within the parameters of sub-paragraph (c) of the definition of Affiliate."

10. The learned arbitrator then construed clause 23, which speaks of 'material breaches' by the parties, as follows:

"132. The Tribunal's conclusions are as follows:

- 1) Clauses 23.1 and 23.2 do require the giving of a Determination Notice of an Event of Default by the Non Defaulting Party, if indeed the Non Defaulting Party wishes to make complaint, and if, ultimately, the Non Defaulting Party wishes to invoke the provisions of Clauses 23.4 and 23.7, even in circumstances where the Non Defaulting Party contends that the material breach is irremediable;
- 2) Clause 23.3 does require the Non Defaulting Party to give the Defaulting Party a period of 60 days, the Rectification Period, to rectify the Event of Default even in a case where the Non Defaulting Party alleges that the Event of Default is irremediable. The only exception to this in Clause 23.3 is with respect to what might be called events of insolvency, which amount to Events of Default;
- 3) Excluding the cases of insolvency events, which are expressly exempted, the service of a written EOD Notice pursuant to Clause 23.4 must be upon the expiry of the Rectification Period;
- 4) Adapting one of the principal hypothetical examples given by the Claimant's counsel in the course of its submissions, if a Non Defaulting Party gives a Determination Notice to the Defaulting Party identifying material breach (1) but the Defaulting Party has in fact concealed material breach (2) and in any event does not rectify one or both, then the Non Defaulting Party when it gives its EOD Notice under Clause 23.4 and then subsequently seeks to justify its EOD Notice in arbitration can rely upon both the unrectified material breach (i) and/or material breach (2) if it is subsequently discovered.

This is because a concealed, but subsequently discovered, Event of Default which has not been rectified at the end of the Rectification Period is

still an un-rectified Event of Default for the purpose of Clause 23.4;

- 5) Equally, if a Defaulting Party has not rectified a concealed Event of Default at the end of a Rectification Period, then, it is a matter which can be relied upon by the Non Defaulting Party under Clause 23.7, so to give rise to the deprivation or alteration of rights set out therein;
- 6) An Event of Default is defined as a material breach of any provisions, obligations, covenants, conditions, and undertakings. The definition of an Event of Default is not conditional upon the giving of a Determination Notice. The consequences, however, under Clause 23 do depend upon the giving of a Determination Notice and expiry of a Rectification Period;
- 7) Notwithstanding the provisions of Clause 23 and Clause 23.4, in particular with regard to Events of Default and Determination Notice, the Non Defaulting Party in addition possesses all the rights to damages and performance expressed in Clause 23.6;
- 8) It remains open for argument, and the Tribunal makes no decisions as to whether a party can give a Determination Notice to the other party, if in fact at the time of the giving of the notice, the party giving the notice is itself in material breach. This question was raised by the Tribunal in the course of oral submissions, but has not been fully addressed by the parties, and, indeed, is probably best addressed at the full merits hearing.”

11. Insofar as the arbitrator’s ruling on jurisdiction was concerned, it was held that a dispute regarding the right to register the ‘Ravin’ trademark falls outside the scope of the arbitration clause under the JVA. He further held that the trademark licence agreements contained

arbitration clauses which provided for disputes to be referred to arbitration in Milan, Italy under Italian law, and this being the case, any dispute in relation to these agreements would be outside the ken of the arbitration clause contained in the JVA.

12. The 'Second Partial Final Award' dated 19.12.2013 then dealt with which of the parties materially breached the terms and conditions of the JVA. The claims, in this respect, made by Respondent No.1, were disposed of as follows:

"199. The Tribunal's findings and conclusions in relation to the particulars of the Claimant's allegations of material breach are set out below. The Tribunal finds that:

- 1) The Respondents interfered with the proper and effective functioning of the CEO by refusing to implement and/or by preventing the implementation of the Board of Directors' resolution empowering the CEO to operate Ravin's bank accounts in material breach of JVA Clauses 12 and/or 8 and/or 20.1.2;
- 2) in refusing to pass resolutions, whether at a Board meeting or by circulation, to appoint the Claimant's nominee as the CFO of Ravin the Respondents were not in material breach of the JVA;
- 3) the Respondents employed Ms. Mathure and created a false record with regard thereto in material breach of JVA Clauses 12 and /or 8 and/or 20.1.2;
- 4) the Respondents denied the HR Director and the CEO full and unconditional access to the HR and payroll data systems of Ravin in material breach of JVA Clauses 12 and/or 8 and/or 20.1.2;

- 5) the Respondents refused to report to the or attend management meetings convened by the CEO in material breach of JVA Clauses 12 and /or 8 and/or 20.1.2;
- 6) when the incidents of 12 and 13 January 2012 and 4 February 2012 are considered in isolation there is insufficient evidence to conclude that there has been a material breach by the Respondents. When the incidents are considered together and set in their proper context the Tribunal concludes that they form part of a pattern of the Respondent's conduct which constituted a material breach of the JVA. As such, there is a material breach in relation to the Claimant's combined allegations that the Respondents incited staff to surround, sequester, heckle, humiliate and threaten Mr Esposito and Mr Kamdar on those dates;
- 7) the Respondents encouraged and failed to prevent Company employees from going on strike on 31 January 2012 and the Respondents encouraged and incited indiscipline and breach of Company policies and procedures by supporting Mr Dhall in his insubordination and defiance of direct orders of Mr Esposito and Ms Farise in material breach of JVA Clauses 12 and/or 8 and/or 20.1.2;
- 8) see (7) above;
- 9) the Respondents were not in breach of the JVA by refusing to convene a Board meeting at short notice;
- 10) Mr Karia's letters to the FRRO were hand-delivered on 29 February 2012 and therefore cannot be considered in relation to the events constituting material breach as alleged in the Request dated 27 February 2012. Nevertheless, the Tribunal finds that the letters to the FRRO are consistent with Mr Karia's modus operandi and support the Tribunal's other findings of material breach.

(4) Rectification of the Events of Default found to have been committed by the Respondents

200. The Claimant submits that none of the alleged material breaches were rectifiable and, in any event, by the end of the Rectification Period, i.e. 27 April 2012, and by the end of the extended period for rectification, i.e. 6 July 2012, the Respondents had not rectified any of their breaches. On the contrary, the Claimant submits that during the period between 28 February 2012 and 6 July 2012, the Respondents continued to breach the JVA by conduct which was calculated to destroy the relationship of trust and confidence between the parties and completely remove or render redundant any element of Claimant control over Ravin. As stated above, however, these post-Request breaches are not the subject of this Award (see, inter alia, Claimant's CS §§730-737).

201. The Respondents do not contend that they rectified any of the alleged breaches of the JVA by 6 July 2012.

202. The Tribunal concludes that, in relation to the material breaches committed by the Respondents, the Respondents failed to rectify those breaches within the extended period for rectification, i.e. by 6 July 2012."

13. So far as the counter claims of the Appellants were concerned, the arbitrator dealt with the effect of Prysmian SA acquiring ACPL, which was a competing business of Ravin [through Prysmian's acquisition of the Draka group, of which ACPL was a subsidiary]. The sole arbitrator first dealt with the reaction of Shri Karia on the Draka takeover together with Shri Karia's evidence as follows:

"233. The Tribunal finds the many changes to the story of Mr Karia in this regard to be of considerable significance. In truth, Mr Karia did know as long back as July 2009 of the ACPL/Draka connection. When the

merger between Draka and Prysmian was announced Mr Karia did understand that Prysmian had acquired a controlling stake in ACPL as he fully accepted in cross examination. Mr Karia had that knowledge in November 2010. Nevertheless, Mr Karia did not complain of any material breach to the JVA under Clause 21. The Tribunal further accepts the truth of the evidence given by Ms Farise that first of all when Mr Karia heard of her appointment to the ACPL Board some time in late 2011 possibly December, Mr Karia did not complain but congratulated her (§18,EI/5/28). This fits in with his earlier congratulatory email to Mr Battista. Nevertheless by the time one gets to February 2012 Mr Karia had completely changed his tune and saw Ms Farise's appointment to the ACPL as a device, an excuse, to try to derail her carrying on as CEO on the Ravin Board and thus further his campaign not to cede day to day control of Ravin to the Claimant. The Tribunal accepts the evidence given by the Claimant witnesses on this. Mr Karia has changed his tune. The Tribunal rejects the veracity of the story originally being told by Mr Karia as not only inconsistent with the documents before the Tribunal but also mutually inconsistent with his evidence in cross-examination.

234. The Tribunal has spent some time analysing this material because Mr Karia's contemporaneous reaction is highly instructive in determining whether this is really to be analysed as a serious or material breach with serious adverse effect or rather as a pretext, an excuse. The Tribunal concludes it is the latter not the former. The Respondents somewhat bravely in their Closing Submissions assert that the Tribunal is not allowed to have regard to this material because the Claimant has not pleaded waiver or affirmation. This submission is completely rejected. As is clear from the authorities referred to above whether a breach is material or not is determined by reference to all the relevant facts and this will include a parties' reaction to the events at the time.

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237. The Tribunal ultimately concluded that the Respondent did not adduce any credible evidence of actual serious adverse impact.

238. It is true that there was some evidence (albeit mainly dating back to 2008-2009) of occasional instances of both companies tendering for the same business. Yet there was no reliable evidence that business had been lost from Ravin to ACPL post the Draka acquisition, or that there had been any diversion of business from Ravin to ACPL or that there had been any targeting of Ravin's business by ACPL or indeed vice versa.

239. In the end the two companies operate in a very different space. ACPL is a small specialist cable business with a turnover of € 7-7.5m per annum. This is approximately 10% of that of Ravin. ACPL operates principally in the area of instrumentation cables. Ravin operates principally in the area of power and control cables. Yet further, a large part of the small turnover of ACPL constitutes exports from ACPL to its Omani shareholder. This renders the notion of serious adverse harm by reference to ACPL's turnover even more remote.

240. The contemporaneous management documents at Ravin did not show that Ravin considered ACPL as one of its competitors or indeed operating in the same space. When Mr. Karia was asked about this in cross examination, he said that when a company examines its competitors it does not make a list down to the 50th or 60th competitor (Day 9, p.82). This gives an eloquent indication of how far down the list Ravin would have considered ACPL.

241. Equally, the fact that a list of company names was identified and relied upon by the respondent to show that Ravin and ACPL sell cables to some of the same companies is stretching a point beyond where it can naturally go. This does not yield an answer of material breach. The evidence adduced by the Respondents is not of a quality which would enable

the Tribunal to conclude that a breach had been committed with serious adverse effect.

242. The Tribunal further makes mention of the assistance it received from two distinguished experts of long standing participation in the market; Messrs Honavar and Hargopal. The Tribunal did get some benefit from this evidence in the clear explanation of different types of cables together with samples and this explanation was also helpfully provided in part by Mr. Karia himself. Nevertheless, once more this evidence somewhat missed the point. It is not enough to establish material breach to identify certain types of cables produced and sold by each company. There was no reliable analysis advanced by the Respondents' evidence of serious adverse effect either on Ravin today or likely in the future.

243. Finally, the Tribunal for completeness makes it clear that it completely rejects the further allegation that ACPL had been acquired in bad faith by the Claimant with a view to destroying value in Ravin or that it has since pursued the operations of ACPL with that aim in view.

244. There is quite simply no credible evidence to support such an allegation and indeed the Tribunal is of the view that it is an allegation which should not have been advanced.”

14. So far as the counter claim dealing with direct sales in India which competed with the business of Ravin, and agency/distribution agreements, the arbitrator held as follows:

“252. Essentially the Respondents have not established that the Agency Agreements on which they place reliance, involved such an arrangement, commitment or engagement as stated in the First Partial Award. Indeed the Respondents have not even addressed the requirement identified in paragraph 84 of the First Partial Final Award but instead focused on the length or duration of the relationship and whether

or not each relationship was exclusive or non-exclusive. This is not sufficient. For the avoidance of doubt the Tribunal concludes that there was no satisfactory basis on which it could be concluded that these Agency Agreements involved an injection or exchange of capital or know how on the part of the investor, acquirer or participator. They are best analysed as classic sales distribution/agency agreements pursuant to which an agent receives a sales commission in return for the promotion and conclusion of identified types of sales in India.

xxx xxx xxx

273. Making every conceivable allowance in favour of the Respondents, the Tribunal concludes that the Respondents (perhaps for understandable reasons following the First Partial Final Award) have tried to alter their case and now advance a case that the fact of direct sales amounts to a material breach of Clauses 8 and 20 of the JVA. That was not advanced in the Determination Notice or in its pleaded case and is not open to the respondents.

(I) No material breach in any event.

274. Yet further, even ignoring the limitations of the Determination Notice and pleadings, the Tribunal yet further concludes that the Respondents have not in any event succeeded in showing material breach of Clauses 8 or 20 on the facts of the case.

275. The Tribunal concludes that the Respondents' analysis is too simplistic to be of any real utility in analysing the issue.

276. The Respondents start by referring to a total 644m of sales which were made directly into India by various Prysmian affiliates.

277. Those sales, however, were for all practical purposes made up of sales of telecom cables, industrial special cables, automotive cables, network and component and services. Ravin did not manufacture those types of cables. Indeed over 85% of the sales came from two affiliates manufacturing

telecom cables, which Ravin did not manufacture and had no experience in selling either. Indeed the Tribunal accepts the evidence of Ms Farise and Mr. Koch and Mr. Karve on this issue (see, inter alia, §§5-8, E(I)/10/56-57, §23, E(I)/26/206, §23, E(I)/26/207, §§18-32. E(I)/23/184-186, 11 December 2012 hearing, pp. 134-140, §46, E(I)/17/92, Day 2, pp. 83-86, §18 of, E(I)/24/189). This renders the whole argument of diversion of sales or breach of good faith by virtue of these direct sales somewhat academic.

278. Indeed these figures illustrate exactly why the Respondents placed so much emphasis on their argument that the mere fact of sales was a breach irrespective of anything else. This was once more how it was put by Mr. Salve SC in his oral closing argument (Day 10, pp. 183-185) the Tribunal has, however, found against the Respondents on this point.

279. The Tribunal concludes that the Respondents have not shown any material breach on the part of the Claimant in the development of Ravin's business in accordance with clause 8 or any breach of the good faith obligations under Clause 20 with respect to direct sales."

15. So far as the breach of confidentiality by Respondent No.1 was concerned, the counter claim of the Appellants was rejected thus:

"284. Ms. Farise was quite clear in her First Witness Statement of 20 July 2012 (E(I)/5/29) at paragraph 22 (j) – (l) that she was a non-executive director at ACPL, that she was quite aware of her responsibilities to both companies and did not at any time pass on confidential or other information to ACPL from Ravin or from ACPL to Ravin.

285. The Respondents did not cross examine Ms Farise on this important evidence. It is accepted by the Tribunal.

286. The Respondents instead in their Closing Submissions do not address the question of evidence of actual breach but instead try to build up a case of

surmise or inference. The Respondents rely upon the fact that Prysmian referred to ACPL and Ravin as part of “Prysmian India”. They also rely upon the fact that they contend that the appointment of Ms Farise to ACPL was covertly carried out. The first point leads nowhere. It is not evidence of breach of the JVA. The second point is in any event rejected by the Tribunal. As has been referred to above in the context of the analysis of the Claimant’s allegations of material breach, the Tribunal finds that Ms. Farise did inform Mr. Karia of her appointment at ACPL. In the first instance Mr. Karia congratulated her and only objected later as the power struggle grew and this was used as a weapon in order to try to have Ms. Farise excluded from the Ravin Board.”

16. So far as multiple acts of alleged mismanagement by Respondent No.1 in breach of clauses 8 and 20 of the JVA were concerned, the learned sole arbitrator dealt with this as follows:

“290. The remaining allegations can be seen as essentially the flip side of the Claimant’s allegations of material breach directed at the Respondents. Three examples will suffice for present purposes:

- i. the strike orchestrated by the Respondents in response to the suspension of Mr. Dhall;
- ii. the attendance or non-attendance of Claimant nominees at the Akruiti offices;
- iii. the circumstances surrounding the appointment of the CEO and CFO of Ravin.

291. Given the findings made by the Tribunal in favour of the claimant’s allegations of material breach it naturally follows that the Respondents do not succeed in these allegations of mismanagement.

292. The Respondents were themselves in material breach with regard to the whole conduct surrounding Mr. Dhall’s appointment of Ms. Mathure and the so called authorisation form. The Claimant was not in

material breach in suspending Mr. Dhall. Far from it. The Respondents, however, were plainly in material breach by their reaction to this suspension effectively leading to a one day strike.

293. The question of the attendance of Claimant nominees at the Akruiti office is another chapter of the saga in which the Respondents do not emerge without serious criticism. As is clear from this Award the Respondents engendered a toxic atmosphere at Akruiti in January 2012 (even in its fire stricken state) and such was the situation at the ground that it was not really possible for Claimant nominees to attend without fear of their own safety.

294. Lastly, the circumstances surrounding the appointment of the CEO and CFO does not give rise to any conceivable material breach on the part of the Claimant. The claimant was entitled to nominate a CFO and the CEO. They did so. The Respondents did not oppose the appointment of Ms Farise. Nevertheless they did obstruct her at every turn once she was appointed because it became apparent that she intended pursuant to the JVA to take day to day control of Ravin and the Respondents did not wish this to happen. As regards Mr. Brunetti, the CFO, the Respondents did veto his appointment. This was not a material breach on their part as it was their right to do so under Schedule IX to the JVA. Nevertheless it cannot be said to be a material breach by the Claimant. That is unsustainable.”

17. Holding thus, the learned sole arbitrator concluded that none of the counter claims were made out, as a result of which they were all dismissed.

18. The Third Partial Final Award was delivered on 14.01.2015. Prior to this award, on 23.06.2014, the Karias, through their legal counsel, informed the tribunal that they would no longer be represented by M/s

Nishith Desai Associates. This was the prelude to Shri Vijay Karia writing to the LCIA Court on 28.09.2014, a few days before the hearing fixed before the arbitrator, seeking revocation of the appointment of the arbitrator, on the ground of alleged lack of impartiality or independence. At the hearing fixed on 1st-2nd October 2014, Shri Vijay Karia did not appear. On 10.10.2014, the LCIA Court communicated to the tribunal that it had dismissed the challenge made to the arbitrator on the ground that the said application was made out of time under the provisions of the LCIA Rules. The award then went on to address some of the written submissions dated 02.06.2014 of Shri Vijay Karia. The learned arbitrator explained how he was not 'functus officio' with respect to the relief sought. He further went on to state that he could not now review the Second Partial Final Award as he had no jurisdiction to do so, and made it clear that he did not go beyond the claims submitted by the claimant to him, or beyond the scope of the JVA. The award also recorded the fact that the present Appellants did not take the necessary steps to appoint a valuer, as a result of which KPMG refused to go ahead with the valuation. As Deloitte was the only other valuer, Deloitte was then requested to go ahead with the valuation. The Third Partial Final Award then declared as follows:

“1. The Respondents are the Defaulting Party under clause 23.7 of the JVA;

2. All rights of whatsoever nature conferred on the Respondents and specifically Mr. Karia under the JVA have ceased to be effective;

3. Any reference in the JVA to any rights of the Respondents and specifically Mr. Karia including the requirement of consent or approval of Respondents and specifically Mr. Karia stand omitted;

4. The Respondents are prohibited from exercising or attempting to exercise any rights under the JVA including in particular any representation on the Board of the Company;

5. The date for the assessment of the Discounted Price be 30 September 2014 and that this date be substituted for the finding in paragraph 335(4) of the Second Partial Final Award, which date and finding the parties agreed would be remitted back to the Tribunal for further consideration;

6. The Tribunal reserves the matters set out in paragraph 31 above, which includes the costs of the arbitration.

7. Notwithstanding paragraph 6 above, the Tribunal records the further costs of the arbitration (other than the legal or other costs incurred by the parties themselves and other than those costs recorded in the Second Partial Final Award) up to the date of this Award, which have been determined by the LCIA Court, pursuant to Article 28.1 of the applicable (1998) Rules, to be as follows:

LCIA'S administration charge	£6,353.33
Tribunal's fees	£29,800.00
Total further costs of the arbitration	£36,153.33

8. The Tribunal's previous Procedural Orders and Interim Relief as amended by Procedural Order No.12 are to continue in effect until further Order."

19. By the Final Award dated 11.04.2017, the learned sole arbitrator dealt with why and how Deloitte was appointed as the valuer of the shares;

why Ravin's 49% stake in 'Power Plus' was excluded for purposes of valuation as clause 17.1 of the JVA and the formula stated in Schedule X would have to be strictly followed; and as to what then is the fair market value of the shares of the Appellants in Ravin that was to be bought out by the Respondent No. 1.

20. Ultimately, the final relief granted by the said award was as follows:

"FINDS, HOLDS, ORDERS AND DECLARES as follows:

- 1) The Respondents do transfer to the Claimant 10,252,275 shares held by them to the Claimant the Discounted Price of INR 63.9 per share aggregating to INR 655,200,000.
- 2) The Third Respondent, Mr. Karia (who holds Power of Attorney executed by each Existing shareholder) do forthwith and without delay execute the requisite transfer forms for transfer of 10,252,275 shares in favour of the Claimant.
- 3) The Third Respondent and the Twelfth Respondent, Mr. Piyush Karia, who purport to be and continue to act as director of the Company, do forthwith and without delay:
 - a) Convene and hold a meeting of the Board of Directors of the Company not later than 21 days after the date of this Final Award limited to noting and registering the transfer of 10,252,275 shares from the Respondents in favour of the Claimant;
 - b) Table before that meeting the executed transfer forms;
 - c) Vote in favour of the resolution / motion to register the transfer of the 10,252,275

shares in favour and in the name of the Claimant; and

- d) On registration of the transfer of the shares as aforesaid to resign from the Board of the Company as Chairman and Managing Director and as Executive Director of the Company respectively.
- 4) Each of the Respondents and particularly the Third and Twelfth Respondents, Mr. Karia and Mr. Piyush Karia, are restrained from acting themselves or through servants or agents, from:
- a) Claiming or attempting to exercise or exercising any rights whatsoever under the JVA in relation to the Company including but not limited to representation on the Board of the Company or their consent or approval being required in any matter relating to the Company whether at the Board of the Company or at meetings of the shareholders of the Company.
 - b) Claiming or attempting to claim, or representing or attempting to represent, the Company in any matter and in any manner whatsoever.
 - c) Using or attempting to use any assets, properties or facilities of the Company including but not limited to the Company's offices and communication facilities.
- 5) The third and Twelfth Respondents, Mr. Karia and Mr. Piyush Karia, themselves or through servants or agents are restrained from acting, or claiming or holding themselves out to be the Chairman or Managing Director and as Executive Director, respectively, or directors of the Company (except for the limited purpose as set out in (3)(above)).
- 6) The Respondents jointly and severally do pay to the Claimant the legal and sundry disbursements

costs of and relating to this Arbitration in the sum of US\$2,317,199.82.

7) The Respondents are to bear and, insofar as not already paid, to reimburse the Claimant the total costs of the Arbitration as determined by the LCIA Court pursuant to Article 28.1 of the LCIA Rules, which are £ 283,043.71.

8) All other claims of the Claimant and Respondents are dismissed.”

21. It is important to note that no challenge was made to the aforesaid award under the English Arbitration Law, though available. It is only when the aforesaid award was brought to India for recognition and enforcement that objections to the said award were made under Section 48 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the “Arbitration Act”).

22. The learned single Judge, in the impugned judgment, recorded the arguments of both parties, dealt with the allegation of bias against the arbitrator and all other objections raised by the Appellants to the award, but finally found that the award must be recognised and enforced as the objections do not fall within any of the neat legal pigeonholes contained in Section 48 of the Arbitration Act.

23. As Section 50 of the Arbitration Act does not provide an appeal when a foreign award is recognised and enforced by a judgment of a learned Single Judge of a High Court, the Appellants have appealed against the said judgment under Article 136 of the Constitution of India.

24. Before referring to the wide ranging arguments on both sides, it is important to emphasise that, unlike Section 37 of the Arbitration Act, which is contained in Part I of the said Act, and which provides an appeal against either *setting aside* or *refusing to set aside* a 'domestic' arbitration award, the legislative policy so far as recognition and enforcement of foreign awards is that an appeal is provided against a judgment refusing to recognise and enforce a foreign award but not the other way around (i.e. an order recognising and enforcing an award). This is because the policy of the legislature is that there ought to be only one bite at the cherry in a case where objections are made to the foreign award on the extremely narrow grounds contained in Section 48 of the Act and which have been rejected. This is in consonance with the fact that India is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (hereinafter referred to as "New York Convention") and intends - through this legislation - to ensure that a person who belongs to a Convention country, and who, in most cases, has gone through a challenge procedure to the said award in the country of its origin, must then be able to get such award recognised and enforced in India as soon as possible. This is so that such person may enjoy the fruits of an award which has been challenged and which challenge has been turned down in the country of its origin, subject to grounds to resist

enforcement being made out under Section 48 of the Arbitration Act. Bearing this in mind, it is important to remember that the Supreme Court's jurisdiction under Article 136 should not be used to circumvent the legislative policy so contained. We are saying this because this matter has been argued for several days before us as if it was a first appeal from a judgment recognising and enforcing a foreign award. Given the restricted parameters of Article 136, it is important to note that in cases like the present - where no appeal is granted against a judgment which recognises and enforces a foreign award - this Court should be very slow in interfering with such judgments, and should entertain an appeal only with a view to settle the law if some new or unique point is raised which has not been answered by the Supreme Court before, so that the Supreme Court judgment may then be used to guide the course of future litigation in this regard. Also, it would only be in a very exceptional case of a blatant disregard of Section 48 of the Arbitration Act that the Supreme Court would interfere with a judgment which recognises and enforces a foreign award however inelegantly drafted the judgment may be. With these prefatory remarks we may now go on to the submissions of counsel.

25. Dr. Abhishek Manu Singhvi, Senior Advocate, led the charge so far as the Appellants are concerned. Aply assisted by Shri Nakul Dewan on the law, the learned Senior Advocates argued a large number of points

which they sought to put into three legal pigeonholes, namely, the pigeonhole contained in Section 48(1)(b) of the Arbitration Act, and that the foreign award would be contrary to the 'public policy of India' [as under Section 48(2)(b) of the Arbitration Act] in two respects: (1) that it would be in contravention of the fundamental policy of Indian law; and (2) that in several respects it would violate the most basic notions of justice.

26. Dr. Singhvi's arguments were as follows:

(1) That the arbitral tribunal entirely failed to deal with the Appellants' counter claim pertaining to the incorporation of one Jaguar Communication Consultancy Services Private Limited (hereinafter referred to as "Jaguar"), which would show that, in material breach of the non-compete provisions of the JVA, this company was set up in India by Respondent No.1 to do business in the manufacture and sale of cables, in competition with the joint venture company, i.e. Ravin.

(2) That the tribunal failed to make a determination on the Appellants' counter claim that Respondent No.1's efforts to oust the Appellant No.1 and his family from Ravin amounted to a breach of the JVA.

(3) That the tribunal failed to make any determination on the Appellants' counter claim that Respondent No.1 made a surreptitious attempt to register the Ravin trademark in its own

- name, which would be a breach of the material clauses of the JVA.
- (4) That the tribunal has acted contrary to the admissions made by expert witnesses of both parties, both of whom stated that ACPL - a company acquired by the parent of Respondent No.1 - was in competition with Ravin, and that this would therefore vitiate the award. In addition, since the most material evidence with regard to the acquisition of ACPL was ignored by the tribunal, this would also vitiate the award. Insofar as ACPL was concerned, Respondent No.1's failure to produce documents that were with ACPL ought to have led to an adverse inference being drawn against Respondent No.1, which was not done by the learned arbitrator.
- (5) The tribunal was perverse in considering the issue of material breach in that it applied the maxim *de minimus non curat lex* to ACPL, being a small specialist cable business.
- (6) That a perverse interpretation of the JVA was given by the learned arbitrator in the First Partial Final Award of clause 21.1, stating that it only prohibited long-term arrangements and engagements, which was a condition added by the arbitrator himself into the said clause.
- (7) So far as direct sales of Respondent No.1 in India were concerned, the tribunal ignored material evidence and admissions of Respondent No.1.

(8) That the tribunal's analysis of the contemporaneous conduct of the parties was both selective and perverse, that the consideration of the evidence of key witnesses was also selective and perverse.

(9) That Deloitte was a conflicted valuer and should not have been appointed at all. The valuer adopted a course for valuation that is contrary to both parties' position, in that, Ravin's 49% shareholding in Power Plus which had been valued by another valuer 'BDO' at INR 563 crores was completely ignored. What is very important is that the tribunal had acted contrary to the parties' submissions in arriving at the valuation date, as the said date should have been the date closest to the date of the actual sale of shares, instead of which, a 2017 award took a date of September 2014 which date in any case expired by the end of December 2014.

(10) That the ruling contained in the First and Second Partial Final Awards regarding interpretation of clause 21 of the JVA were inconsistent and irreconcilable.

(11) That a private communication had been made of the outcome of the arbitration by the tribunal two months prior to the award, published through an agent of Respondent No.1, one M/s Gilbert Tweed Associates, which would show that Respondent No.1 knew that the Second Partial Final Award would be in its

favour. The mere undertaking to terminate the engagement of M/s Key2People as the agent, who in turn had employed M/s Gilbert Tweed Associates, and an apology made by Respondent's counsel, ought not to have been held to have been sufficient to condone this lapse by the learned sole arbitrator.

(12) That the award is in contravention of the Foreign Exchange Management Act, 1999 (hereinafter referred to as "FEMA") in that it directed the sale of shares of Ravin at a 10% discount, which would be in the teeth of rule 21(2)(b)(iii) of the Foreign Exchange Management (Non-Debt Instrument) Rules, 2019 (hereinafter referred to as "the Non-Debt Instrument Rules").

27. Shri Nakul Dewan cited a large number of judgments largely from Singapore, Hong Kong and the U.K. to buttress his submission that an award which fails to deal with or make any determination on the claim of a party ought to be set aside on the ground contained in Section 48(2)(b) of the Arbitration Act, as it would be in breach of the *audi alteram partem* principle, and also on the ground that it would shock the conscience of the court, being contrary to a basic notion of justice in this country. He also argued that where an award is directly contrary to admitted facts, it would be perverse, and hence liable to be set aside. Also, where a party is unable to present its case on account of the opposite party's wilful failure to produce documents ordered, and the

tribunal's failure to draw an adverse inference therefrom, on most material aspects of the case, would render such award unenforceable.

28. He also cited judgments on awards which treat parties unequally in that they adopt disparate thresholds for determining material breach, as a result of which an award read as a whole would be vulnerable on account of egregious bias. Also, a private communication of the outcome of the arbitration by the tribunal to one party to the exclusion of another would fatally undermine the independence and impartiality of the arbitration process, rendering the award vulnerable on the ground of bias.

29. Both Dr. Singhvi and Mr. Nakul Dewan, after setting out all the aforesaid grounds and case law supporting such grounds, have attacked the impugned High Court judgment, stating that a large number of these points were not answered by the High Court at all, and when answered would show that even where there was bias, perversity and breach of natural justice, all these grounds were merely brushed aside, and therefore no real determination of all the points argued before the High Court was at all undertaken by the learned Single Judge. As a 'without prejudice' argument, Dr. Singhvi exhorted us to modify the impugned award, in case he were to fail on all other arguments, to state that the valuation date of 30.09.2014 ought at least to be the date of the judgment delivered in this case, as otherwise the sale of the Karia block of shares in Ravin would be at a

tremendous undervalue. This he exhorted us to do under Article 142 of the Constitution of India.

30. Shri Kapil Sibal, learned senior advocate appearing on behalf of the Respondent No.1, read to us in copious detail each of the four awards delivered by the arbitral tribunal. He argued that each and every aspect of the matter that was argued on both sides was considered in detail in each of the said awards. He stressed the fact that though available, no challenge was ever made in the courts in England to the four awards. He defended the judgment of the learned Single Judge of the High Court and said that if the awards were read, it would be clear that the arbitrator adopted an extremely balanced approach, despite extreme provocation from Shri Vijay Karia, who only started alleging bias when he realized that the 'Second Partial Final Award' relating to who was in material breach, would be decided against him. Despite this, the learned arbitrator dispassionately considered every single claim and counter-claim made by the parties. This being the case, none of the grounds mentioned in Section 48 of the Arbitration Act would be available in the form of objections to such well-reasoned and balanced awards. In particular, Shri Sibal stressed that since the decision of this Court in **Renusagar Power Plant Co. Ltd. v. General Electric Co.** (1994) Supp (1) SCC 644, any interference on the merits of the decision of the arbitral tribunal would be outside the ken of

Section 48 of the Arbitration Act. Shri Sibal stressed the fact that Dr. Singhvi had argued this matter as if it was a first appeal on merits, and that each and every ground taken, if properly viewed, was really to invite this Court to interfere on the merits of the awards, which would be clearly outside the grounds contained in Section 48 of the Arbitration Act.

31. Shri Sibal stressed the fact that the central point of this case was as to who was in material breach of the provisions of the JVA. Once the learned arbitrator held that it was the Appellants and not the Respondent No.1 who materially breached the terms of the JVA, in that post the integration period, the appointed CEO, who was to be in-charge of the day to day affairs of Ravin, was never allowed to take over such charge, would make it clear that this most material breach committed by the Appellants on facts, as held by the learned arbitrator, could not be interfered with given the parameters of the Court's jurisdiction under Section 48 of the Arbitration Act. Once this was so, everything else followed, as a result of which it was the Respondent No.1 who was to buy-out the Appellants' 49% stake in Ravin at a price arrived at by a well-known independent valuer, Deloitte, at a date that was correctly fixed by the arbitral tribunal. This being the heart of the case, all the contentions of Dr. Singhvi raising objections to the four awards in question must fall, as every argument, though dressed up

as arguments falling within three grounds under Section 48, are really arguments addressing the merits of the case. Without prejudice to this central argument, Shri Sibal took up every single point that was argued and answered each point. So far as the Jaguar Communication Consultancy Services Private Limited point was concerned, Shri Sibal stated that at no point did the Appellant amend its counter-claim to include such argument, which was in fact raised orally as an afterthought at the fag end of the proceedings. Secondly, as Shri Sibal's case of ouster was accepted by the arbitral tribunal, the claim of the Appellants that it was really the other way around was specifically addressed by the learned arbitrator and dismissed, inter alia on the ground that ouster was not at all pleaded by the Appellants. So far as the Ravin trademark is concerned, it is clear that the Appellant's own counsel made it clear that he would not be pressing the point – the point being as to whether it was at all open to go into registration of trademark of Ravin under separate license agreements which had separate arbitration clauses for arbitration in Italy. This was argued by both sides and dealt with by the arbitrator as a jurisdictional issue which was turned down by the arbitrator stating that the registration of the Ravin trademark was an issue which would be outside the JVA and hence not arbitrable. So far as ACPL was concerned, the learned arbitrator made it clear that Shri Vijay Karia

knew all along that ACPL would come to Respondent No.1 as a result of the 'Draka acquisition' and never objected, but in fact congratulated the Respondent No.1 on making such acquisition. That ACPL was in a competing business was taken much later as an afterthought, Shri Vijay Karia admitting in cross-examination that ACPL's business was so small that it could be disregarded altogether. Also, Shri Sibal adverted to a Procedural Order made by the learned arbitrator, in which it was stated that since ACPL was not a party to the arbitration, the Appellants could approach the Court in England to get a direction that ACPL produce the documents asked for by them. This was never done. Further, Shri Sibal made it clear that ACPL was not a subsidiary of Respondent No.1, but was an indirect subsidiary of Respondent No.1's parent company, consequent upon the 'Draka acquisition', with a separate Board of Directors; and being a different person in law and fact, who is not a party to the arbitral proceedings, the learned arbitrator's Procedural Order, which was never challenged and never followed, was a complete answer to the contention that an adverse inference ought to be drawn. So far as the interpretation of the JVA was concerned, Shri Sibal made it clear that it was interpreted fairly, given the fact that there was no challenge to any part of the First Partial Final Award, except the interpretation given to Clause 21.1, which was an interpretation given by the learned arbitrator keeping in

mind the commercial background and commercial efficacy doctrine. According to Shri Sibal, not only was it a possible interpretation, it was also a correct interpretation. So far as the direct sales of Respondent No.1 in India were concerned, the tribunal took into account all the material evidence and dismissed, after a full hearing, the counter-claim of the Appellants in this behalf. When it came to the Final Award, Shri Sibal pointed out that on facts Deloitte was appointed by consent long after the valuer that was chosen by lots finally stated its inability to conduct the valuation due to the Appellants dragging their feet in this behalf. Secondly, such valuation was conducted strictly as per the formula contained in the JVA, which was Clause 17.1 read with Schedule X of the JVA. He was at pains to point out that though Power Plus Company LLC (hereinafter referred to as "Power Plus") was mentioned specifically in the JVA, yet nothing about Power Plus was mentioned in the formula for valuation. Shri Sibal also refuted any so called inconsistencies in the awards, stating that given the interpretation of the JVA by the arbitrator in the First Partial Final Award, all the awards that followed were in accord with the interpretation so given. He also stated that the arbitrator considered material breach with an even hand and arrived at the obvious conclusion on facts that since the CEO was never allowed to function, it was the Appellants and not the Respondent No.1 who had materially

breached the terms of the JVA. Shri Sibal then went into the bogey raised re M/s Gilbert Tweed Associates. He maintained that the Respondent No.1 had no idea as to who M/s Gilbert Tweed Associates was and came to know that the agent, M/s Key2People, who was employed by the Respondent No.1, had in turn employed M/s Gilbert Tweed Associates, who published an advertisement to employ certain persons. From this, to jump to and try to make out a ground that the arbitrator was biased is a huge leap not warranted either in fact or law. Shri Sibal then argued that the award, in that it directed a sale of shares at a 10% discount, did not in any manner contravene the Foreign Exchange Management Act, 1999 and Rules thereunder. He took us through the relevant Rules and argued that unlike the Foreign Exchange Regulation Act, 1973 (hereinafter referred to as "FERA"), FEMA did not contain Section 47 of FERA which voided agreements that were made contrary to FERA. According to him, the FEMA regime is a permissive regime and any violation of the Rules could be monitored by the Reserve Bank of India by way of a direction of the sale of the shares without the discount, if at all. In any case, the Appellants would be estopped from taking this plea, having entered into a solemn agreement with the Respondent No.1 which they cannot go against. In any case, at worst, a violation of the Rules made under FEMA, by which shares would be sold not at market price but at

something lower, contrary to the Rules, would also amount to a mere violation of law, which is far removed from a violation of any fundamental policy of Indian law, as foreign exchange is coming into the country and not going out therefrom.

32. Shri K.V. Viswanathan, learned senior advocate appearing on behalf of the Respondent No. 1, also supported the submissions made by Shri Sibal. In particular, he dealt with the judgments cited by Shri Nakul Dewan and cited judgments of his own to show that the parameters contained in Section 48 of the Arbitration Act for resisting enforcement of foreign awards are extremely narrow, and the Court can in no circumstance go into the merits of a foreign award. He was at pains to point out that as a full hearing had been given and every opportunity extended by the learned arbitrator to both parties, no ground relatable to breach of natural justice or any prejudice as a result was made out on the facts. He then made it clear that public policy must be understood in the narrow sense as understood and expounded by **Renusagar** (supra) and the later decisions of this Court. There was also nothing in the awards that would shock the conscience of the Court to attract the most basic notions of justice exception contained in Section 48.

Enforcement of Foreign Awards under Section 48

33. Having heard learned counsel on both sides, it is important to first set out the relevant parts of Section 48 of the Arbitration Act. Section 48 reads as follows:

“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 —

xxx xxx xxx

(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;

xxx xxx xxx

(2) Enforcement of an arbitral award may also be refused if the court finds that—

(a) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or

(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.”

34. One of the first judgments which construed *pari materia* provisions in the Foreign Awards Act, 1961 was the celebrated judgment in **Renusagar** (supra). This judgment was given pride of place in the recent judgment of **Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India (NHAI)** Civil Appeal No. 4779 of 2019, in which this court referred to **Renusagar** (supra) as follows:

“33. In **Renusagar** (supra), this Court dealt with a challenge to a foreign award under Section 7 of the Foreign Awards (Recognition and Enforcement) Act, 1961 [**Foreign Awards Act**]. The Foreign Awards Act has since been repealed by the 1996 Act. However, considering that Section 7 of the Foreign Awards Act contained grounds which were borrowed from Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 [**New York Convention**], which is almost in the same terms as Sections 34 and 48 of the 1996 Act, the said judgment is of great importance in understanding the parameters of judicial review when it comes to either foreign awards or international commercial arbitrations being held in India, the grounds for challenge/refusal of enforcement under Sections 34 and 48, respectively, being the same. After referring to the New York Convention, this Court delineated the scope of enquiry of grounds under Sections 34/48 (equivalent to the grounds under Section 7 of the Foreign Awards Act, which was considered by the Court), and held:

“34. Under the Geneva Convention of 1927, in order to obtain recognition or enforcement of a foreign arbitral award, the requirements of clauses (a) to (e) of Article I had to be fulfilled and in Article II, it was prescribed that even if the conditions laid down in Article I were fulfilled recognition and enforcement of the award

would be refused if the Court was satisfied in respect of matters mentioned in clauses (a), (b) and (c). The principles which apply to recognition and enforcement of foreign awards are in substance, similar to those adopted by the English courts at common law. (See: Dicey & Morris, *The Conflict of Laws*, 11th Edn., Vol. I, p. 578). It was, however, felt that the Geneva Convention suffered from certain defects which hampered the speedy settlement of disputes through arbitration. The New York Convention seeks to remedy the said defects by providing for a much more simple and effective method of obtaining recognition and enforcement of foreign awards. Under the New York Convention the party against whom the award is sought to be enforced can object to recognition and enforcement of the foreign award on grounds set out in sub-clauses (a) to (e) of clause (1) of Article V and the court can, on its own motion, refuse recognition and enforcement of a foreign award for two additional reasons set out in sub-clauses (a) and (b) of clause (2) of Article V. None of the grounds set out in sub-clauses (a) to (e) of clause (1) and sub- clauses (a) and (b) of clause (2) of Article V postulates a challenge to the award on merits.

35. Albert Jan van den Berg in his treatise *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation*, has expressed the view:

“It is a generally accepted interpretation of the Convention that the court before which the enforcement of the foreign award is sought may not review the merits of the award. The main reason is that the exhaustive list of grounds for refusal of enforcement enumerated in Article V does not include a mistake in fact or law by the arbitrator. Furthermore, under the Convention the task of the enforcement judge is a limited one. The control exercised by him is limited to

verifying whether an objection of a respondent on the basis of the grounds for refusal of Article V(1) is justified and whether the enforcement of the award would violate the public policy of the law of his country. This limitation must be seen in the light of the principle of international commercial arbitration that a national court should not interfere with the substance of the arbitration.” (p. 269)

36. Similarly Alan Redfern and Martin Hunter have said:

“The New York Convention does not permit any review on the merits of an award to which the Convention applies and, in this respect, therefore, differs from the provisions of some systems of national law governing the challenge of an award, where an appeal to the courts on points of law may be permitted.” (Redfern & Hunter, *Law and Practice of International Commercial Arbitration*, 2nd Edn., p. 461.)

37. In our opinion, therefore, in proceedings for enforcement of a foreign award under the Foreign Awards Act, 1961, the scope of enquiry before the court in which award is sought to be enforced is limited to grounds mentioned in Section 7 of the Act and does not enable a party to the said proceedings to impeach the award on merits.

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65. This would imply that the defence of public policy which is permissible under Section 7(1)(b)(ii) should be construed narrowly. In this context, it would also be of relevance to mention that under Article I(e) of the Geneva Convention Act of 1927, it is permissible to raise objection to the enforcement of arbitral award on the ground that the recognition or enforcement of the award is contrary to the public policy or to the principles of the law of

the country in which it is sought to be relied upon. To the same effect is the provision in Section 7(1) of the Protocol & Convention Act of 1837 which requires that the enforcement of the foreign award must not be contrary to the public policy or the law of India. Since the expression “public policy” covers the field not covered by the words “and the law of India” which follow the said expression, contravention of law alone will not attract the bar of public policy and something more than contravention of law is required.

66. Article V(2)(b) of the New York Convention of 1958 and Section 7(1)(b)(ii) of the Foreign Awards Act do not postulate refusal of recognition and enforcement of a foreign award on the ground that it is contrary to the law of the country of enforcement and the ground of challenge is confined to the recognition and enforcement being contrary to the public policy of the country in which the award is set to be enforced. There is nothing to indicate that the expression “public policy” in Article V(2) (b) of the New York Convention and Section 7(1)(b) (ii) of the Foreign Awards Act is not used in the same sense in which it was used in Article I(c) of the Geneva Convention of 1927 and Section 7(1) of the Protocol and Convention Act of 1937. This would mean that “public policy” in Section 7(1)(b)(ii) has been used in a narrower sense and in order to attract the bar of public policy the enforcement of the award must invoke something more than the violation of the law of India. Since the Foreign Awards Act is concerned with recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression “public policy” in Section 7(1)(b)(ii) of the Foreign Awards Act must necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law. Applying the said criteria, it

must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality.”

(emphasis supplied)

35. The judgment of **Shri Lal Mahal Ltd. v. Progetto Grano SPA** (2014) 2

SCC 433 is important in that it made it clear that the **Renusagar** (supra) position would continue to apply to cases which arose under Section 48(2)(b), the wider meaning given “to public policy of India” in the domestic sphere not being applicable. In doing so it overruled the judgment in **Phulchand Exports Ltd. v. O.O.O Patriot** (2011) 10 SCC 300 as follows:

“**28.** We are not persuaded to accept the submission of Mr Rohinton F. Nariman that the expression “public policy of India” in Section 48(2)(b) is an expression of wider import than the “public policy” in Section 7(1)(b) (ii) of the Foreign Awards Act. We have no hesitation in holding that *Renusagar* [*Renusagar Power Co. Ltd. v. General Electric Co.*, 1994 Supp (1) SCC 644] must apply for the purposes of Section 48(2)(b) of the 1996 Act. Insofar as the proceeding for setting aside an award under Section 34 is concerned, the principles laid down in *Saw Pipes* [*ONGC Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705] would govern the scope of such proceedings.

29. We accordingly hold that enforcement of foreign award would be refused under Section 48(2)(b) only if such enforcement would be contrary to (1) fundamental policy of Indian law; or (2) the interests of India; or (3) justice or morality. The wider meaning

given to the expression “public policy of India” occurring in Section 34(2)(b)(ii) in *Saw Pipes [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705]* is not applicable where objection is raised to the enforcement of the foreign award under Section 48(2)(b).

30. It is true that in *Phulchand Exports [Phulchand Exports Ltd. v. O.O.O. Patriot, (2011) 10 SCC 300 : (2012) 1 SCC (Civ) 131]* a two-Judge Bench of this Court speaking through one of us (R.M. Lodha, J.) accepted the submission made on behalf of the appellant therein that the meaning given to the expression “public policy of India” in Section 34 in *Saw Pipes [ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705]* must be applied to the same expression occurring in Section 48(2)(b) of the 1996 Act. However, in what we have discussed above it must be held that the statement in para 16 of the Report that the expression “public policy of India used in Section 48(2)(b) has to be given a wider meaning and the award could be set aside, if it is patently illegal” does not lay down correct law and is overruled.

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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.

46. In what we have discussed above, even if it be assumed that the Board of Appeal erred in relying upon the report obtained by the buyers from Crepin which was inconsistent with the terms on which the parties had contracted in the contract dated 12-5-1994 and wrongly rejected the report of the contractual

agency, in our view, such errors would not bar the enforceability of the appeal awards passed by the Board of Appeal.”

36. In **LMJ International Ltd. v. Sleepwell Industries** (2019) 5 SCC 302, an ex-parte award was passed in London which was sought to be executed by the Respondents in the High Court of Calcutta. The learned Single Judge of the High Court passed a common order in the execution cases rejecting objections taken regarding the maintainability of the applications. Against this, a review petition was rejected by the High Court and so were Special Leave Petitions before this Court. What was argued before this Court was that grounds as to maintainability had been taken, as a result of which grounds under Section 48 of the Arbitration Act were not actually argued as objections before the Single Judge. This plea of the appellant was rejected by this Court, given the object of Section 48 of the Act. Since the appellant “might and “ought” to have taken these grounds, before the learned Single Judge these grounds were barred by an application of doctrine of constructive *res judicata* as follows:

“**17.** Be that as it may, the grounds urged by the petitioner in the earlier round regarding the maintainability of the execution case could not have been considered in isolation and *dehors* the issue of enforceability of the subject foreign awards. For, the same was intrinsically linked to the question of enforceability of the subject foreign awards. In any case, all contentions available to the petitioner in that

regard could and ought to have been raised specifically and, if raised, could have been examined by the Court at that stage itself. We are of the considered opinion that the scheme of Section 48 of the Act does not envisage piecemeal consideration of the issue of maintainability of the execution case concerning the foreign awards, in the first place; and then the issue of enforceability thereof. Whereas, keeping in mind the legislative intent of speedy disposal of arbitration proceedings and limited interference by the courts, the Court is expected to consider both these aspects simultaneously at the threshold. Taking any other view would result in encouraging successive and multiple round of proceedings for the execution of foreign awards. We cannot countenance such a situation keeping in mind the avowed object of the Arbitration and Conciliation Act, 1996, in particular, while dealing with the enforcement of foreign awards. For, the scope of interference has been consciously constricted by the legislature in relation to the execution of foreign awards. Therefore, the subject application filed by the petitioner deserves to be rejected, being barred by constructive res judicata, as has been justly observed by the High Court in the impugned judgment.

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20. Suffice it to observe that the Arbitral Tribunal has considered all aspects of the matter and even if it has committed any error, the same could, at best, be a matter for correction by way of appeal to be resorted to on grounds as may be permissible under the English law, by which the subject arbitration proceedings are governed. We may not be understood to have expressed any opinion on the correctness of those issues.”

37. At this stage it is important to advert to amendments that were made by the Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter referred to as the “2015 Amendment Act”). Section 48 was amended to

delete the ground of “contrary to the interest of India”. Also, what was important was to reiterate the **Renusagar** (supra) position, that 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 (*vide* Explanation 2 to Section 48(2)).

38. It will be noticed that in the context of challenge to domestic awards, Section 34 of the Arbitration Act differentiates between international commercial arbitrations held in India and other arbitrations held in India. So far as “the public policy of India” ground is concerned, both Sections 34 and 48 are now identical, so that in an international commercial arbitration conducted in India, the ground of challenge relating to “public policy of India” would be the same as the ground of resisting enforcement of a foreign award in India. Why it is important to advert to this feature of the 2015 Amendment Act is that all grounds relating to patent illegality appearing on the face of the award are outside the scope of interference with international commercial arbitration awards made in India and foreign awards whose enforcement is resisted in India. In this respect, it is important to advert to paragraphs 30 and 43 of **Ssangyong** (supra) as follows:

“**30.** What is important to note is that a decision which is perverse, as understood in paragraphs 31 and 32 of *Associate Builders* (supra), while no longer being a ground for challenge under “public policy of India”, would certainly amount to a patent illegality appearing

on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.

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43. We therefore hold, following the aforesaid authorities, that in the guise of misinterpretation of the contract, and consequent “errors of jurisdiction”, it is not possible to state that the arbitral award would be beyond the scope of submission to arbitration if otherwise the aforesaid misinterpretation (which would include going beyond the terms of the contract), could be said to have been fairly comprehended as “disputes” within the arbitration agreement, or which were referred to the decision of the arbitrators as understood by the authorities above. If an arbitrator is alleged to have wandered outside the contract and dealt with matters not allotted to him, this would be a jurisdictional error which could be corrected on the ground of “patent illegality”, which, as we have seen, would not apply to international commercial arbitrations that are decided under Part II of the 1996 Act. To bring in by the backdoor grounds relating to Section 28(3) of the 1996 Act to be matters beyond the scope of submission to arbitration under Section 34(2) (a)(iv) would not be permissible as this ground must be construed narrowly and so construed, must refer only to matters which are beyond the arbitration agreement or beyond the reference to the arbitral tribunal.”

This statement of the law applies equally to Section 48 of the Arbitration Act.

39. Indeed, this approach has commended itself in other jurisdictions as well. Thus, in **Sui Southern Gas Co. Ltd. v. Habibullah Coastal Power Co.** (2010) SGHC 62, the Singapore High Court, after setting out the legislative policy of the Model Law that the ‘public policy’ exception is to be narrowly viewed and that an arbitral award that shocks the conscience alone would be set aside, went on to hold:

“48. It is clear, therefore, that in order for SSGC to have succeeded on the public policy argument, it had to cross a very high threshold and demonstrate egregious circumstances such as corruption, bribery or fraud, which would violate the most basic notions of morality and justice. Nothing of the sort had been pleaded or proved by SSGC, and its ambiguous contention that the Award was “perverse” or “irrational” could not, of itself, amount to a breach of public policy.”

General approach to enforcement and recognition of Foreign Awards

40. The USA was a late signatory to the New York Convention, acceding to the Convention only in 1970. However, in an early judgment of the U.S Court of Appeals, Second Circuit, namely **Parsons & Whittemore Overseas Co. v. Societe Generale De L’Industrie Du Papier** 508 F.2d 969 (1974), the Court in a succinct paragraph pointed out the change made by the New York Convention when compared with the older Geneva Convention of 1927 as follows:

“In 1958 the Convention was adopted by 26 of the 45 states participating in the United Nations Conference on Commercial Arbitration held in New York. For the signatory state, the New York Convention superseded the Geneva Convention of 1927, 92 League of Nations

Treaty Ser. 302. The 1958 Convention's basic thrust was to liberalize procedures for enforcing foreign arbitral awards: While the Geneva Convention placed the burden of proof on the party seeking enforcement of a foreign arbitral award and did not circumscribe the range of available defences to those enumerated in the convention, the 1958 Convention clearly shifted the burden of proof to the party defending against enforcement and limited his defenses to seven set forth in Article V. See Contini, *International Commercial Arbitration*, 8 *Am.J.Comp.L.* 283, 299 (1959). Not a signatory to any prior multilateral agreement on enforcement of arbitral awards, the United States declined to sign the 1958 Convention at the outset. The United States ultimately acceded to the Convention, however, in 1970, (1970) 3 *U.S.T.* 2517, *T.I.A.S.* No. 6997, and implemented its accession with 9 *U.S.C.* 201-208. Under 9 *U.S.C.* 208, the existing Federal Arbitration Act, 9 *U.S.C.* 1-14, applies to the enforcement of foreign awards except to the extent to which the latter may conflict with the Convention. See generally, Comment, *International Commercial Arbitration under the United Nations Convention and the Amended Federal Arbitration Statute*, 47 *Wash.L.Rev.* 441 (1972)."

The Court then went on to hold:

"Perhaps more probative, however, are the inferences to be drawn from the history of the Convention as a whole. The general pro-enforcement bias informing the Convention and explaining its supersession of the Geneva Convention points toward a narrow reading of the public policy defense. An expansive construction of this defense would vitiate the Convention's basic effort to remove preexisting obstacles to enforcement. See Straus, *Arbitration of Disputes between Multinational Corporations*, in *New Strategies for Peaceful Resolution of International Business Disputes* 114-15 (1971); *Digest of Proceedings of International Business Disputes Conference*, April 14, 1971, in *id.* at 191 (remarks of Professor W. Reese). Additionally,

considerations of reciprocity— considerations given express recognition in the Convention itself — counsel courts to invoke the public policy defense with caution lest foreign courts frequently accept it as a defense to enforcement of arbitral awards rendered in the United States.

We conclude, therefore, that the Convention’s public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state’s most basic notions of morality and justice.

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Although the Convention recognizes that an award may not be enforced where predicated on a subject matter outside the arbitrator’s jurisdiction, it does not sanction second-guessing the arbitrator’s construction of the parties’ agreement. The appellant’s attempt to invoke this defense, however, calls upon the court to ignore this limitation on its decision-making powers and usurp the arbitrator’s role. The district court took a proper view of its own jurisdiction in refusing to grant relief on this ground.”

(emphasis supplied)

41. This judgment was followed in **Compagnie des Bauxites de Guinee**

v. Hammermills Inc. (1992) WL 122712 where the US District Court,

District of Colombia followed **Parsons** (supra) as follows:

“The principal purpose of the Convention and its implementation by Congress was to “remove pre-existing obstacles to enforcement” of foreign arbitration awards. *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier*, 508 F.2d 969, 973 (2d Cir.1974). To facilitate this policy, which applies with special force in the field of

international commerce, see *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 625 (1985), the courts have developed a “general pro-enforcement bias,” *Parsons & Whittemore Overseas Co.*, 508 F.2d at 973, under which the burden of proof rests on the party challenging the arbitration award, *Dworkin Cosell Interair Courier Servs., Inc. v. Avraham*, 728 F.Supp. 156, 158 (S.D.N.Y.1989); *Overseas Private Invest. Corp. v. Anaconda Co.*, 418 F.Supp. 107, 110 (D.D.C.1976), and the grounds for refusing to recognize arbitral awards are narrowly construed, *Parsons & Whittemore Overseas Co.*, 508 F.2d at 976–77.

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The few courts to address this provision of the Convention have concluded that the provision “essentially sanctions the application of the forum state's standards of due process.” See *Parsons & Whittemore Overseas Co.*, 508 F.2d at 975; *Geotech Lizenz AG v. Evergreen Systems, Inc.*, 697 F.Supp. 1248, 1263 (E.D.N.Y.1988) (citing *Parsons & Whittemore Overseas Co.*). Due process requires notice “reasonably calculated, under all the circumstances, to apprise interested persons of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).”

42. In *Certain Underwriters at Lloyd’s London v. BCS Ins. Co.* 239

F.Supp.2d 812 (2003), the US District Court, N.D Illinois referred to the Federal Arbitration Act and went on to hold that the review of a panel decision is “grudgingly narrow”. (See paragraphs 2 and 3).

43. In *Karaha Bodas Co., L.L.C v. Perusahaan Pertambangan Minyak*

364 F.3d 274 (2004), the United States Court of Appeals for the 5th

Circuit analysed the New York Convention thus:

“The New York Convention provides a carefully structured framework for the review and enforcement of international arbitral awards. Only a court in a country with primary jurisdiction over an arbitral award may annul that award. Courts in other countries have secondary jurisdiction; a court in a country with secondary jurisdiction is limited to deciding whether the award may be enforced in that country. The Convention “mandates very different regimes for the review of arbitral awards (1) in the countries in which, or under the law of which, the award was made, and (2) in other countries where recognition and enforcement are sought.” Under the Convention, “the country in which, or under the arbitration law of which, an award was made” is said to have primary jurisdiction over the arbitration award. All other signatory states are secondary jurisdictions, in which parties can only contest whether that state should enforce the arbitral award. It is clear that the district court had secondary jurisdiction and considered only whether to enforce the Award in the United States.

Article V enumerates specific grounds on which a court with secondary jurisdiction may refuse enforcement. In contrast to the limited authority of secondary-jurisdiction courts to review an arbitral award, courts of primary jurisdiction, usually the courts of the country of the arbitral situs, have much broader discretion to set aside an award. While courts of a primary jurisdiction country may apply their own domestic law in evaluating a request to annul or set aside an arbitral award, courts in countries of secondary jurisdiction may refuse enforcement only on the grounds specified in Article V.

The New York Convention and the implementing legislation, Chapter 2 of the Federal Arbitration Act (“FAA”), provide that a secondary jurisdiction court

must enforce an arbitration award unless it finds one of the grounds for refusal or deferral of recognition or enforcement specified in the Convention. The Court may not refuse to enforce an arbitral award solely on the ground that the arbitrator may have made a mistake of law or fact. “Absent extraordinary circumstances, a confirming court is not to reconsider an arbitrator’s findings.” The party defending against enforcement of the arbitral award bears the burden of proof. Defences to enforcement under the New York Convention are construed narrowly “to encourage the recognition and enforcement of commercial arbitration agreements in international contracts...”

(emphasis supplied)

44. Likewise, in **Admart AG v. Stephen and Mary Birch Foundation Inc.** 457 F.3d 302 (2006), the U.S Court of Appeals, 3rd Circuit, after setting out Article V of the New York Convention, held as follows:

“To carry out the policy favoring enforcement of foreign arbitral awards, courts have strictly applied the Article V defenses and generally view them narrowly. See *China Minmetals*, 334 F.3d at 283. In *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys “R” Us, Inc.*, 126 F.3d 15 (2d Cir.1997), the court emphasized the limited power of review granted to district courts under the Convention. The court examined the distinction between awards rendered in the same nation as the site of the arbitral proceeding and those rendered in a foreign country. The court concluded that more flexibility was available when the arbitration site and the site of the confirmation proceeding were within the same jurisdiction. *Id.* at 22–23. However, “the [C]onvention is equally clear that when an action for enforcement is brought in a foreign state, the state may refuse to enforce the award only on the grounds explicitly set forth in Article V of the Convention.” *Id.* at 23.

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In the same vein, in *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969 (2d Cir.1974), the Court of Appeals reviewed the grounds for refusal contained in the Convention and said that the public policy defense is available “only where enforcement would violate the forum state's most basic notions of morality and justice.” *Id.* at 974. Similarly, the court noted that an award cannot be enforced under the Convention where it is “predicated on a subject matter outside the arbitrator's jurisdiction,” but the Convention does not “sanction second-guessing the arbitrator's construction of the parties' agreement.” *Id.* at 977.”

45. The U.S cases show that given the “pro-enforcement bias” of the New York Convention, which has been adopted in Section 48 of the Arbitration Act, 1996 - the burden of proof on parties seeking enforcement has now been placed on parties objecting to enforcement and not the other way around; in the guise of public policy of the country involved, foreign awards cannot be set aside by second guessing the arbitrator’s interpretation of the agreement of the parties; the challenge procedure in the primary jurisdiction gives more leeway to Courts to interfere with an award than the narrow restrictive grounds contained in the New York Convention when a foreign award’s enforcement is resisted.

Discretion of the Court to Enforce Foreign Awards

46. Thus far, it is clear that enforcement of a foreign award may under Section 48 of the Arbitration Act be refused only if the party resisting

enforcement furnishes to the Court proof that any of the stated grounds has been made out to resist enforcement. The said grounds are watertight – no ground outside Section 48 can be looked at. Also, the expression used in Section 48 is “may”. Shri Viswanathan has argued that “may” would vest a discretion in a Court enforcing a foreign award to enforce such award *despite* the fact that one or more grounds may have been made out to resist enforcement. For this purpose, he relied upon Sections 45 to 47, which contain the word “shall” in contradistinction to the word “may”. He also relied upon Article V of the New York Convention which also uses the word “may”.

47. Gary Born in *International Commercial Arbitration*, Vol. II (2009) puts it thus:

“No Obligation under New York Convention to Deny Recognition of Awards

Nothing in the New York Convention *requires* a Contracting State ever to deny recognition to an arbitral award. The Convention requires only that Contracting States recognize awards (and arbitration agreements) in specified circumstances. Nothing in Article V, nor the basic structure and purpose of the Convention, imposes the opposite obligation *not* to recognize an award (or arbitration agreement).

Article III of the Convention requires Contracting States to recognize arbitral awards made abroad, subject to procedural requirements no more onerous than those for domestic awards, provided that the minimal proof requirements of Article IV are satisfied. Articles V(1) and V(2) then provide exceptions to this affirmative obligation, beginning with the prefatory

statement that “[r]ecognition and enforcement of the awards *may* be refused” in certain circumstances. The most significant aspect of this provision is its structure, which is to establish an affirmative obligation to recognize arbitral awards, subject to specified exceptions – but not to establish an affirmative obligation to deny recognition. Critically, the Article V(I) exceptions are just that: exceptions to an affirmative obligation, and not affirmative obligations in their own right.

Although the matter can be debated, the text of Article V supports this structural conclusion. The English language text of Article V is unmistakably permissive, providing that Contracting States “*may*” refuse recognition of an award; the Russian and Chinese versions of the Convention are identical in meaning. The Spanish version of Article V also indicates that recognition may be denied, without indicating that it must be. The only exception is the French text, which has been relied on by some authorities as supposedly establishing an obligation to deny recognition to awards that have been annulled in the arbitral seat. In fact, the better view appears to be that the French text is ambiguous, *assuming* that awards falling within one of Article V’s exceptions would not be enforced, but not affirmatively *requiring* this result.

This is also consistent with Article VII of the Convention, which provides that the Convention shall not “deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.” This provision expresses a fundamental objective of the Convention – which was to facilitate, not limit, the circumstances in which international arbitral awards could be recognized. Indeed, there is not a hint in the drafting history of the Convention of any intention to prevent Contracting States from recognizing foreign awards under provisions of local law that are more liberal than Article V.”

48. *Redfern and Hunter on International Arbitration*, 6th Edn. (2015) states:

“**11.59** Fourthly, even if grounds for refusal of recognition and enforcement of an award are proved to exist, the enforcing court is *not obliged* to refuse enforcement. The opening lines of Article V(1) and (2) of the Convention say that enforcement ‘may’ be refused; they do not say that it ‘must’ be refused. The language is permissive, not mandatory. The same is true of the Model Law.”

49. Likewise, Albert Jan van den Berg’s *The New York Arbitration*

Convention of 1958 (1981) states:

“It is to be noted that the opening lines of both the first and the second paragraph of Article V employ a permissive rather than mandatory language: enforcement “*may be*” refused. For the first paragraph it means that even if a party against whom the award is invoked proves the existence of one of the grounds for refusal of enforcement, the court still has a certain discretion to overrule the defence and to grant the enforcement of the award. Such overruling would be appropriate, for example, in the case where the respondent can be deemed to be estopped from invoking the ground for refusal.”

50. *Russel on Arbitration*, Sweet & Maxwell (24th Edn., 2015) states:

“8-033 Opposing enforcement of a New York Convention Award

As stated above, subject to production of the required documents the court has no discretion but to recognise

and enforce a New York Convention award unless the party opposing enforcement proves one or more of the grounds specified in s.103 of the Arbitration Act 1996. These grounds of refusal are exhaustive, and if none of the grounds is present the award will be enforced. Much has been written about these grounds and a detailed analysis of their international application is beyond the scope of this book but they will be treated summarily in this chapter. The onus of proving the existence of a ground rests upon the party opposing enforcement, but that may not be the end of the matter. There is an important public policy in the enforcement of awards and the courts should only refuse to enforce an award under s.103 in a clear case.

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8-035 Discretion

The court also has a discretion to allow enforcement even in circumstances where one or more of the grounds are made out. This discretion is not to be exercised arbitrarily however because the word “may” in s.103(2) is intended to refer to the corresponding word in the New York Convention. In any event the discretion is a very narrow one. If one or more of the grounds in s.103(2) is made out, the strong presumption is that the award will not be enforced. The discretion to enforce notwithstanding will not be exercised where the award in question was subject to a fundamental or structural defect. The discretion may however be available where

“despite the original existence of one or more of the listed circumstances, the right to rely on them had been lost by, for example, another agreement or estoppel”,

Or where there are circumstances

“which might on some recognisable legal principles affect the prima facie right to have an award set aside arising in cases listed in s.103(2).”

51. An interesting judgment of the U.K. Supreme Court is reported as **Dallah Real Estate and Tourism Holding Co. v. The Ministry of Religious Affairs, Government of Pakistan** (2010) UKSC 46. In this judgment - given the resistance to a foreign award in the U.K - the discretion of a Court to enforce such award, even if grounds to resist the award have been made out, was set out thus:

“Per Lord Mance:

Discretion

67. Dallah has a fall-back argument, which has also failed in both courts below. It is that s.103(2) of the 1996 Act and Article V(1) of the New York Convention state that “Recognition and enforcement of the award may be refused” if the person against whom such is sought proves (or furnishes proof of) one of the specified matters. So, Miss Heilbron submits, it is open to a court which finds that there was no agreement to arbitrate to hold that an award made in purported pursuance of the non-existent agreement should nonetheless be enforced. In *Dardana Ltd v Yukos Oil Company* [2002] 1 All ER (Comm) 819 I suggested that the word “may” could not have a purely discretionary force and must in this context have been designed to enable the court to consider other circumstances, which might on some recognisable legal principle affect the prima facie right to have enforcement or recognition refused (paras 8 and 18). I

also suggested as possible examples of such circumstances another agreement or estoppel.

68. S.103(2) and Article V in fact cover a wide spectrum of potential objections to enforcement or recognition, in relation to some of which it might be easier to invoke such discretion as the word “may” contains than it could be in any case where the objection is that there was never any applicable arbitration agreement between the parties to the award. Article II of the Convention and ss.100(2) and 102(1) of the 1996 Act serve to underline the (in any event obviously fundamental) requirement that there should be a valid and existing arbitration agreement behind an award sought to be enforced or recognised. Absent some fresh circumstance such as another agreement or an estoppel, it would be a remarkable state of affairs if the word “may” enabled a court to enforce or recognise an award which it found to have been made without jurisdiction, under whatever law it held ought to be recognised and applied to determine that issue.

69. The factors relied upon by Dallah in support of its suggestion that a discretion should be exercised to enforce the present award amount for the most part to repetition of Dallah’s arguments for saying that there was an arbitration agreement binding on the Government, or that an English court should do no more than consider whether there was a plausible or reasonably supportable basis for its case or for the tribunal’s conclusion that it had jurisdiction. But Dallah has lost on such points, and it is impossible to re-deploy them here. The application of s.103(2) and Article V(1) must be approached on the basis that there was no arbitration agreement binding on the Government and that the tribunal acted without jurisdiction. General complaints that the Government did not behave well, unrelated to any known legal principle, are equally unavailing in a context where the Government has proved that it was not party to any arbitration agreement. There is here no scope for reliance upon any discretion to refuse enforcement

which the word “may” may perhaps in some other contexts provide.

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Per Lord Collins:

Discretion

126. The court before which recognition or enforcement is sought has a discretion to recognise or enforce even if the party resisting recognition or enforcement has proved that there was no valid arbitration agreement. This is apparent from the difference in wording between the Geneva Convention on the Execution of Foreign Arbitral Awards 1927 and the New York Convention. The Geneva Convention provided (article 1) that, to obtain recognition or enforcement, it was necessary that the award had been made in pursuance of a submission to arbitration which was valid under the law applicable thereto, and contained (article 2) mandatory grounds (“shall be refused”) for refusal of recognition and enforcement, including the ground that it contained decisions on matters beyond the scope of the submission to arbitration. Article V(1)(a) of the New York Convention (and section 103(2)(b) of the 1996 Act) provides: “Recognition and enforcement of the award *may* be refused ...” See also van den Berg, p 265; Paulsson, *May or Must Under the New York Convention: An Exercise in Syntax and Linguistics* (1998) 14 Arb Int 227.

127. Since section 103(2)(b) gives effect to an international convention, the discretion should be applied in a way which gives effect to the principles behind the Convention. One example suggested by van den Berg, op cit, p 265, is where the party resisting enforcement is estopped from challenge, which was adopted by Mance LJ in *Dardana Ltd v Yukos Oil Co* [2002] 2 Lloyd’s Rep 326, para 8. But, as Mance LJ emphasised at para 18, there is no arbitrary discretion: the use of the word “may” was designed to enable the court to consider other circumstances, which might on some recognisable legal principle

affect the prima facie right to have an award set aside arising in the cases listed in section 103(2). See also *Kanoria v Guinness* [2006] 1 Lloyd's Rep 701, para 25 per Lord Phillips CJ. Another possible example would be where there has been no prejudice to the party resisting enforcement: *China Agribusiness Development Corp'n v Balli Trading* [1998] 2 Lloyd's Rep 76. But it is not easy to see how that could apply to a case where a party had not acceded to an arbitration agreement.

128. There may, of course, in theory be cases where the English court would refuse to apply a foreign law which makes the arbitration agreement invalid where the foreign law outrages its sense of justice or decency (Scarman J's phrase in *In the Estate of Fuld, decd* (No 3) [1968] P 675, 698), for example where it is discriminatory or arbitrary. The application of public policy in the New York Convention (article V(2)(b)) and the 1996 Act (section 103(3)) is limited to the non-recognition or enforcement of foreign awards. But the combination of (a) the use of public policy to refuse to recognise the application of the foreign law and (b) the discretion to recognise or enforce an award even if the arbitration agreement is invalid under the applicable law could be used to avoid the application of a foreign law which is contrary to the court's sense of justice.

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130. In the United States the courts have refused to enforce awards which have been set aside in the State in which the award was made, on the basis that the award does not exist to be enforced if it has been lawfully set aside by a competent authority in that State: *Baker Marine (Nigeria) Ltd v Chevron (Nigeria) Ltd*, 191 F 3d 194 (2d Cir 1999); *TermoRio SA ESP v Electranta SP*, 487 F 3d 928 (DC Cir 2007). But an Egyptian award which had been set aside by the Egyptian court was enforced because the parties had agreed that the award would not be the subject of recourse to the local courts: *Chromalloy Aeroservices v Arab Republic of Egypt*, 939 F Supp 907 (DDC 1996). That decision was based both on the discretion

in the New York Convention, article V(1) and on the power under article VII(1) (see *Karaha Bodas Co v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F 3d 357, 367 (5th Cir 2003)) and whether it was correctly decided was left open in *TermoRio SA ESP v Electranta SP*, ante, at p 937.

131. The power to enforce notwithstanding that the award has been set aside in the country of origin does not, of course, arise in this case. The only basis which Dallah puts forward for the exercise of discretion in its favour is the Government's failure to resort to the French court to set aside the award. But Moore-Bick LJ was plainly right in the present case (at para 61) to say that the failure by the resisting party to take steps to challenge the jurisdiction of the tribunal in the courts of the seat would rarely, if ever, be a ground for exercising the discretion in enforcing an award made without jurisdiction. There is certainly no basis for exercising the discretion in this case."

52.A learned single judge of the Delhi High Court in **Cruz City 1**

Mauritius Holdings v. Unitech Limited (2017) 239 DLT 649,

adverted to this issue and held:

28. Whilst this court accepts the contention that the use of the word "may" as used in the context of Section 48 of the Act does not confer an absolute discretion on the courts, it is not possible to accept that the word "may" should be read as "shall" and the court is compelled to refuse enforcement, if any of the grounds under Section 48 are established. First of all, the plain meaning of the word "may" is not "shall"; it is used to imply discretion and connote an option as opposed to compulsion.

29. In re, *Nichols v. Baker*: 59 LJ Ch 661, Cotton L.J. observed that "*May' can never mean must, so long as the English language retains its meaning; but it gives a power and then it may be a question, in what cases,*

when any authority or body has a power given it by the word 'may', it becomes its duty to exercise that power".

30. In *Official Liquidator v. Dharti Dhan (P) Ltd.:* (1977) 2 SCC 166 the Supreme Court had explained that in certain cases where the legal and factual context in which the discretionary power is to be exercised is specified, it is also annexed with a duty to exercise it in that manner. Keeping the aforesaid in mind, there can be no cavil that since Section 48 of the Act enables the court to refuse enforcement of a foreign award on certain grounds, this court would be required to do so; however, if there are good reasons founded on settled principles of law, the court is not precluded from declining the same. The word "may" in Section 48(1) and (2) of the Act must be interpreted as used in a sense so as not to fetter the courts to refuse enforcement of a foreign award even if the grounds as set out in Section 48 are established, provided there is sufficient reason to do so. Viewed from this perspective, the considerations that this court may bear while examining grounds as set out under Section 48(1) (enacted to give effect to Article V(1) of the New York convention) may be materially different from the consideration that this court may bear while examining the issue of declining enforcement of a foreign award on the ground of public policy (Section 48(2) of the Act). Whereas the grounds as set out under Section 48(1) essentially concern the structural integrity of the arbitral process and inter party rights therefore considerations such as the conduct of parties, balancing of the *inter se* rights etc are of material significance but such considerations may not be of any significant relevance in considering whether enforcing the award contravenes the public policy of India.

31. It is necessary to bear in mind that Section 48 of the Act is a statutory expression of Article V of the New York Convention and is similarly worded. The object of Article V of the New York Convention is to enable the signatory States to retain the discretion to refuse enforcement of a foreign award on specified grounds and none other; it does not compel the member States

to decline enforcement of foreign awards. Article V of the convention thus sets out the maximum leeway available to member States to refuse enforcement of a foreign award. This view has also been accepted by courts in the United States. In *Chromalloy Aeroservices. v. The Arab Republic of Egypt*: 939 F. Supp. 907 (DCD 1996), an Egyptian award, which was set aside by an Egyptian court, was enforced notwithstanding Article V(1)(e) of the New York Convention.

32. The principle that courts may enforce a foreign award notwithstanding that one or more of the specified grounds have been established, is also accepted in the United Kingdom. (See: *China Agribusiness Development Corporation v. Balli Trading*: [1998] 2 Lloyd's Rep 76).

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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.

38. In terms of Sub-section (1) of Section 48 of the Act, the Court can refuse enforcement of a foreign award only if the party resisting the enforcement furnishes proof to establish the grounds as set out in Section 48(1) of the Act. However, the court may refuse enforcement of a foreign award notwithstanding that a party resisting the enforcement has not provided

any/sufficient proof of contravention of public policy. In such cases, the Court is not precluded from examining the question of public policy *suo motu* and would refuse to enforce the foreign award that is found to offend the public policy of India. The approach of the court while examining whether to refuse enforcement of a foreign award would also depend on the nature of the defence established.

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 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.

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43. Thus, whilst there is no absolute or open discretion to reject the request for declining to enforce a foreign award, it cannot be accepted that it is totally absent. The width of the discretion is narrow and limited, but if sufficient grounds are established, the court is not precluded from rejecting the request for declining enforcement of a foreign award.”

53. When the grounds for resisting enforcement of a foreign award under Section 48 are seen, they may be classified into three groups – grounds which affect the jurisdiction of the arbitration proceedings;

grounds which affect party interest alone; and grounds which go to the public policy of India, as explained by Explanation 1 to Section 48(2). Where a ground to resist enforcement is made out, by which the very jurisdiction of the tribunal is questioned - such as the arbitration agreement itself not being valid under the law to which the parties have subjected it, or where the subject matter of difference is not capable of settlement by arbitration under the law of India, it is obvious that there can be no discretion in these matters. Enforcement of a foreign award made without jurisdiction cannot possibly be weighed in the scales for a discretion to be exercised to enforce such award if the scales are tilted in its favour.

54. On the other hand, where the grounds taken to resist enforcement can be said to be linked to party interest alone, for example, that a party has been unable to present its case before the arbitrator, and which ground is capable of waiver or abandonment, or, the ground being made out, no prejudice has been caused to the party on such ground being made out, a Court may well enforce a foreign award, even if such ground is made out. When it comes to the “public policy of India” ground, again, there would be no discretion in enforcing an award which is induced by fraud or corruption, or which violates the fundamental policy of Indian law, or is in conflict with the most basic

notions of morality or justice. It can thus be seen that the expression “may” in Section 48 can, depending upon the context, mean “shall” or as connoting that a residual discretion remains in the Court to enforce a foreign award, despite grounds for its resistance having been made out. What is clear is that the width of this discretion is limited to the circumstances pointed out hereinabove, in which case a balancing act may be performed by the Court enforcing a foreign award.

The Natural Justice Ground under Section 48

55. Shri Sibal has argued that the expression “or was otherwise unable to present his case” occurring in Section 48(1)(b) of the Act must be read along with the words preceding it *noscitur a sociis*, and, given the fact that the grounds for resistance of enforcement have to be construed narrowly in the case of ambiguity, this expression cannot possibly go beyond the hearing before the arbitrator and to the award rendered by the arbitrator. Shri Nakul Dewan, on the other hand, argued that the expression “unable to present his case” was co-terminus with breach of natural justice which went to not only the hearing before the arbitrator, but also to the award, in that, if the arbitrator were not to give a finding on a material issue or were not to decide a claim or counter-claim, this would breach the broader requirements of the *audi alteram partem* rule of natural justice and would, therefore, be covered by Section 48(1)(b) of the Act.

56. This Court in **Ssangyong** (supra) has dealt with this aspect of Section 48 as follows:

“37. Under the rubric of a party being otherwise unable to present its case, the standard textbooks on the subject have stated that where materials are taken behind the back of the parties by the Tribunal, on which the parties have had no opportunity to comment, the ground under Section 34(2)(a)(iii) would be made out. In *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Commentary*, edited by Dr. Reinmar Wolff (C.H. Beck, Hart, Nomos Publishing, 2012), it is stated:

“4. Right to Comment

According to the principle of due process, the tribunal must grant the parties an opportunity to comment on all factual and legal circumstances that may be relevant to the arbitrators’ decision-making.

a) Right to Comment on Evidence and Arguments Submitted by the Other Party

As part of their right to comment, the parties must be given an opportunity to opine on the evidence and arguments introduced in the proceedings by the other party. The right to comment on the counterparty’s submissions is regarded as a fundamental tenet of adversarial proceedings. However, in accordance with the general requirement of causality, the denial of an opportunity to comment on a particular piece of evidence or argument is not prejudicial, unless the tribunal relied on this piece of evidence or argument in making its decision.

In order to ensure that the parties can exercise their right to comment effectively, the arbitral tribunal must grant them **access to the evidence and arguments**

submitted by the other side. Affording a party the opportunity to make submissions or to give its view without also informing it of the opposing side's claims and arguments typically constitutes a violation of due process, unless specific non-disclosure rules apply (e.g., such disclosure would constitute a violation of trade secrets or applicable legal privileges).

In practice, national courts have afforded arbitral tribunals considerable leeway in setting and adjusting the procedures by which parties respond to one another's submissions and evidence, reasoning that there were "several ways of conducting arbitral proceedings." Accordingly, absent any specific agreement by the parties, the arbitral tribunal has wide discretion in arranging the parties' right to comment, permitting or excluding the introduction of new claims, and determining which party may have the final word.

b) Right to Comment on Evidence Known to or Determined by the Tribunal

The parties' right to comment also extends to facts that have not been introduced in the proceedings by the parties, but that the tribunal has raised *sua sponte*, provided it was entitled to do so. For instance, if the tribunal gained "**out of court knowledge**" of circumstances (e.g., through its own investigations), it may only rest its decision on those circumstances if it informed both parties in advance and afforded them the opportunity to comment thereon. The same rule applies to cases where an arbitrator intends to base the award on his or her own **expert knowledge**, unless the arbitrator was appointed for his or her special expertise or knowledge (e.g., in quality arbitration). Similarly, a tribunal must give the parties an opportunity to comment on **facts of common knowledge** if it intends to base its decision on those facts, unless the parties should have known that those

facts could be decisive for the final award.”(emphasis in original)

In *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International, 1999) [“Fouchard”] it is stated:

“In some rare cases, recognition or enforcement of an award has been refused on the grounds of a breach of due process. One example is the award made in a quality arbitration where the defendant was never informed of the identity of the arbitrators hearing the dispute [*Danish buyer v German (F.R.) seller*, IV Y.B. Comm. Arb. 258 (1979) (Oberlandesgericht Cologne)]. It also occurred in a case where various documents were submitted by one party to the arbitral tribunal but not to the other party [*G.W.I. Kersten & Co. B.V. v. Société Commerciale Raoul Duval et Co.*, XIX Y.B. Comm. Arb. 708 (Amsterdam Court of Appeals) (1992)], in another case where the defendant was not given the opportunity to comment on the report produced by the expert appointed by the tribunal [*Paklito Inv. Ltd. v. Klockner East Asia Ltd.*, XIX Y.B. Comm. Arb. 664, 671 (Supreme Court of Hong Kong) (1994)], and again where the arbitral tribunal criticized a party for having employed a method of presenting evidence which the tribunal itself had suggested [*Iran Aircraft Indus. v Avco Corp.*, 980 F.2d 141 (2nd Cir. 1992)].”(at p. 987)

Gary Born (supra) states:

“German courts have adopted similar reasoning, holding that the right to be heard entails two related sets of rights: (a) a party is entitled to present its position on disputed issues of fact and law, to be informed about the position of the other parties and to a decision based on evidence or materials known to the parties [See, e.g., Judgment of 5 July 2011, 34

SCH 09/11, II(5)(c)(bb) (Oberlandesgericht Munchen)]; and (b) a party is entitled to a decision by the arbitral tribunal that takes its position into account insofar as relevant [See, e.g., Judgment of 5 October 2009, 34 Sch 12/09 (Oberlandesgericht Munchen)]. Other authorities provide comparable formulations of the content of the right to be heard [See, e.g., *Slaney v. Int'l Amateur Athletic Foundation*, 244 F.3d 580, 592 (7th Cir. 2001) (at p. 3225)]

Similarly, in *Redfern and Hunter* (supra):

“11.73. The national court at the place of enforcement thus has a limited role. Its function is not to decide whether or not the award is correct, as a matter of fact and law. Its function is simply to decide whether there has been a fair hearing. One mistake in the course of the proceedings may be sufficient to lead the court to conclude that there was a denial of justice. For example, in a case to which reference has already been made, a US corporation, which had been told that there was no need to submit detailed invoices, had its claim rejected by the Iran-US Claims Tribunal, for failure to submit detailed invoices! The US court, rightly it is suggested, refused to enforce the award against the US company [*Iran Aircraft Ind v Avco Corp.* 980 F.2d. 141 (2nd Cir. 1992)]. In different circumstances, a German court held that an award that was motivated by arguments that had not been raised by the parties or the tribunal during the arbitral proceedings, and thus on which the parties had not had an opportunity to comment, violated due process and the right to be heard [See the decision of the Stuttgart Court of Appeal dated 6 October 2001 referred to in Liebscher, *The Healthy Award, Challenge in International Commercial Arbitration* (Kluwer law International, 2003), 406]. Similarly, in *Kanoria v Guinness*, [2006] EWCA Civ. 222, the

English Court of Appeal decided that the respondent had not been afforded the chance to present its case when critical legal arguments were made by the claimant at the hearing, which the respondent could not attend due to a serious illness. In the circumstances, the court decided that 'this is an extreme case of potential injustice' and resolved not to enforce the arbitral award.

11.74. Examples of unsuccessful 'due process' defences to enforcement are, however, more numerous. In *Minmetals Germany v Ferco Steel*, [1999] CLC 647, the losing respondent in an arbitration in China opposed enforcement in England on the grounds that the award was founded on evidence that the arbitral tribunal had obtained through its own investigation. An English court rejected this defence on the basis that the respondent was eventually given an opportunity to ask for the disclosure of evidence at issue and comment on it, but declined to do so. The court held that the due process defence to enforcement was not intended to accommodate circumstances in which a party had failed to take advantage of an opportunity duly accorded to it."

57. This Court's judgment in **Sohan Lal Gupta v. Asha Devi Gupta**

(2003) 7 SCC 492, lays down the ingredients of a fair hearing as

follows:

"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.”

58. A recent Delhi High Court judgment in **Glencore International AG v.**

Dalmia Cement (Bharat) Limited 2017 SCC OnLine Del 8932 puts it

thus:

“**25.** The inability to present a case as contemplated under section 48(1)(b) of the Act (which is *pari materia* to Article V(I)(b) of the New York Convention) must be such so as to render the proceedings violative of the due process and principles of natural justice. It is rudimentary that for a fair decision each party must have full and equal opportunity to present their respective cases and this includes due notice of proceedings. In the event a party opposing the enforcement of a foreign award is able to present sufficient proof of such infirmity in the arbitral proceedings, the courts may decline to enforce the foreign award.

26. A clear distinction needs to be drawn between cases where a party is unable to present its case, rendering the arbitral award susceptible to challenge as falling foul of the minimal standards of due process/natural justice and cases where the arbitral tribunal does not accept the case sought to be set up by a party. The latter case, obviously, does not give

rise to a ground as mentioned in section 48(1)(b) of the Act, even if the decision of the arbitral tribunal is erroneous.”

59. The English judgments advocate applying the test of a person being prevented from presenting its case by matters outside his control. This was done in **Minmetals Germany GmbH v. Ferco Steel Ltd.** (1999) C.L.C. 647 as follows:

“In my judgment, the inability to present a case to arbitrators within s.103(2)(c) contemplates at least that the enforcer has been prevented from presenting his case by matters outside his control. This will normally cover the case where the procedure adopted has been operated in a manner contrary to the rules of natural justice. Where, however, the enforcer has, due to matters within his control, not provided himself with the means of taking advantage of an opportunity given to him to present his case, he does not in my judgment, bring himself within that exception to enforcement under the convention. In the present case that is what has happened”

60. Likewise, in **Ajay Kanoria v. Tony Guinness** (2006) EWCA Civ 222 the Court of Appeal in England referred to **Minmetals** (supra) with approval as follows:

“**23.** There is not much authority on the meaning of section 103(2)(c) of the 1996 Act. In *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 All ER (Comm) 315 , 326, Colman J observed:

“In my judgment, the inability to present a case to arbitrators within section 103(2)(c) contemplates at

least that the enforcer has been prevented from presenting his case by matters outside his control. This will normally cover the case where the procedure adopted has been operated in a manner contrary to the rules of natural justice.””

61. An application of this test is found in **Jorf Lasfar Energy Co. v. AMCI Export Corp.** 2008 WL 1228930, where the U.S District Court, W.D. Pennsylvania decided that if a party fails to obey procedural orders given by the arbitrator, it must suffer the consequences. If evidence is excluded because it is not submitted in accordance with a procedural order, a party cannot purposefully ignore the procedural directives of the decision-making body and then successfully claim that the procedures were unfair or violative of due process. Likewise, in **Dongwoo Mann+Hummel Co. Ltd. v. Mann+Hummel GmbH** (2008) SGHC 275, the Singapore High Court held:

“**145.** A deliberate refusal to comply with a discovery order is not per se a contravention of public policy because the adversarial procedure in arbitration admits of the possible sanction of an adverse inference being drawn against the party that does not produce the document in question in compliance with an order. The tribunal will of course consider all the relevant facts and circumstances, and the submissions by the parties before the tribunal decides whether or not to draw an adverse inference for the non-production. Dongwoo also had the liberty to apply to the High Court to compel production of the documents under s 13 and 14 of the IAA, if it was not content with merely arguing on the question of adverse inference and if it desperately needed the production by M+H of

those documents for its inspection so that it could properly argue the point on drawing an adverse inference. However, Dongwoo chose not to do so.

146. Further, the present case was not one where a party hides even the existence of the damning document and then dishonestly denies its very existence so that the opposing party does not even have the chance to submit that an adverse inference ought to be drawn for non-production. M+H in fact disclosed the existence of the documents but gave reasons why it could not disclose them. Here, Dongwoo had the full opportunity to submit that an adverse inference ought to be drawn, but it failed to persuade the tribunal to draw the adverse inference. The tribunal examined the other evidence before it, considered the submissions of the parties and rightfully exercised its fact finding and decision making powers not to draw the adverse inference as it was entitled to do so. It would appear to me that the tribunal was doing nothing more than exercising its normal fact finding powers to determine whether or not an adverse inference ought to be drawn.”

62. Other English judgments deal with the expression “unable to present his case” as a breach of a facet of natural justice at the hearing stage only. Thus, in **Gbangbola v. Smith and Sheriff** 1998 3 All ER 730, the Court held:

“A tribunal does not act fairly and impartially if it does not give a party an opportunity of dealing with arguments which have not been advanced by either party. It is not suggested by the claimant contractor that either of the two points mentioned in the arbitrator's letter was raised by it in the arbitration as being influential on the overall burden and determination of costs. Unless such an opportunity is given there is danger that the final result will not be determined fairly against the party who would be

ordered to pay the costs. That is indeed the position as regards both the first and second points.”

Likewise, in **Bahman Irvani v. Ali Irvani** 1999 WL 1142456,

the Court found:

“**181.** ...Nor was it satisfactory that Mr Amin's questions were only replied to with the award, instead of being dealt with in advance of the award so that comment could be advanced.”

63. Another facet of “unable to present his case” was stated in **Van Der**

Giessen-De-Noord Shipbuilding Division B.V. v. Imtech Marine &

Offshore B.V. (2008) EWHC 2904 (Comm). The UK Court held:

“In those circumstances it has breached its duty of fairness by ignoring the agreed position of the parties that a claim under this head should not include the cabling for the HVAC equipment. In “double-counting” in this respect, the Tribunal has awarded Imtech more than it asked for, or could reasonably ask for. GN submits that the double-counting is probably a very significant part of the €1,000,000 awarded, on the basis that the Tribunal had previously awarded a larger amount under the HVAC claim (Claim 1, VTC 1). Whatever the size of the double-counting may be, it is unlikely to be minimal. I am satisfied that GN has been caused substantial injustice by having, on the face of the Award, to pay more than it should to Imtech for extra work.”

This finding was given pursuant to Section 68 of the Arbitration Act, 1996 (U.K) by which a “serious irregularity” would lead to the award being set aside or remitted or being declared to be of no effect in whole or in part.

64. In Malicorp Limited v. Government of Arab Republic of Egypt

(2015) EWHC 361 (Comm), the U.K Court held that the Government of Egypt had no warning of the manner in which the award was made.

The Court held:

“41. In these circumstances I have no doubt whatsoever that the award of damages under article 142 must have been a complete surprise to Egypt. So, too, must have been the basis upon which such an award was made – apportioning to the Republic 10% responsibility for the relevant mistake, and allowing as the major part of the award a substantial sum for loss of profit. It would have been astonishing, if there had been any suggestion that this was in contemplation, that Egypt would fail to protest that the tribunal ought to make a finding on its case on fraud rather than allocate responsibility on the footing of a good faith mistake on the part of Malicorp. It would similarly have been astonishing, if there had been any suggestion that damages in place of reinstatement were contemplated, that Egypt would fail to protest that such damages could not properly incorporate an element for loss of profit. There were undoubtedly strong arguments for Egypt to advance in these respects among others. The notion that, in the absence of any mention of these matters, Egypt could and should have anticipated the basis of proceeding adopted in the Cairo award, is to my mind manifestly repugnant to elementary principles of fairness.

42. The failure of the tribunal to ensure that Egypt had warning of these matters can only constitute a serious breach of natural justice. In so far as I have any discretion to enforce the award despite that breach, I decline to do so: the breach is too serious, and the consequences for Egypt are too grave. It is suggested that the hearing be reconvened so that Mr Soliman can give evidence and be cross-examined. I decline to take this course: for the reasons given above, Mr Soliman's statement cannot assist Malicorp.”

65. The judgments from the Singapore Courts are also instructive. In **Soh Beng Tee & Co. v. Fairmount Development Pte Ltd.** (2007) SGCA 28, the Court fleshed out what was meant by “fair hearing” for the purposes of Section 48(1)(a)(vii) of the Arbitration Act, 2002 (Singapore) as follows:

“59. These cases must be read in the context of the current judicial climate which dictates that courts should not without good reason interfere with the arbitral process, whether domestic or international. It is incontrovertible that international practice has now radically shifted in favour of respecting and preserving the autonomy of the arbitral process in contrast to the earlier practice of enthusiastic curial intervention: see, for instance, *Arbitration Act 1996* ([27] supra) at p 1 on the English position; and Robert Morgan, *The Arbitration Ordinance of Hong Kong: A Commentary* (Butterworths Asia, 1997) on the position in Hong Kong, which also essentially reflects the English practice. As rightly observed in *Weldon Plant Ltd v The Commission for the New Towns* [2001] 1 All ER (Comm) 264 (“*Weldon*”) at [22], “[a]n award should be read supportively ... [and] given a reading which is likely to uphold it rather than to destroy it”. Similarly, in *Vee Networks Ltd v Econet Wireless International Ltd* [2005] 1 Lloyd’s Rep 192, the court, at [90], held: Above all it is not normally appropriate for the court to try the material issue in order to ascertain whether substantial injustice has been caused. To do so would be an entirely inappropriate inroad into the autonomy of the arbitral process.

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65. The foregoing survey of case law and principles may be further condensed into the following core principles:

(a) Parties to arbitration have, in general, a right to be heard effectively on every issue that may be relevant to the resolution of a dispute. The overriding concern, as Goff LJ aptly noted in *The Vimeira* ([45] supra), is fairness. The best rule of thumb to adopt is to treat the parties equally and allow them reasonable opportunities to present their cases as well as to respond. An arbitrator should not base his decision(s) on matters not submitted or argued before him. In other words, an arbitrator should not make bricks without straw. Arbitrators who exercise unreasonable initiative without the parties' involvement may attract serious and sustainable challenges.

(b) Fairness, however, is a multidimensional concept and it would also be unfair to the successful party if it were deprived of the fruits of its labour as a result of a dissatisfied party raising a multitude of arid technical challenges after an arbitral award has been made. The courts are not a stage where a dissatisfied party can have a second bite of the cherry.

(c) Indeed, the latter conception of fairness justifies a policy of minimal curial intervention, which has become common as a matter of international practice. To elaborate, minimal curial intervention is underpinned by two principal considerations. First, there is a need to recognise the autonomy of the arbitral process by encouraging finality, so that its advantage as an efficient alternative dispute resolution process is not undermined. Second, having opted for arbitration, parties must be taken to have acknowledged and accepted the attendant risks of having only a very limited right of recourse to the courts. It would be neither appropriate nor consonant for a dissatisfied party to seek the assistance of the court to intervene on the basis that the court is discharging an appellate function, save in the very limited circumstances that have been statutorily condoned. Generally speaking, a court will not intervene merely because it might have resolved the various controversies in play differently.

(d) The delicate balance between ensuring the integrity of the arbitral process and ensuring that the rules of natural justice are complied with in the arbitral process is preserved by strictly adhering to only the narrow scope and basis for challenging an arbitral award that has been expressly acknowledged under the Act and the IAA. In so far as the right to be heard is concerned, the failure of an arbitrator to refer every point for decision to the parties for submissions is not invariably a valid ground for challenge. Only in instances such as where the impugned decision reveals a dramatic departure from the submissions, or involves an arbitrator receiving extraneous evidence, or adopts a view wholly at odds with the established evidence adduced by the parties, or arrives at a conclusion unequivocally rejected by the parties as being trivial or irrelevant, might it be appropriate for a court to intervene. In short, there must be a real basis for alleging that the arbitrator has conducted the arbitral process either irrationally or capriciously. To echo the language employed in *Rotoaira* ([55] supra), the overriding burden on the applicant is to show that a reasonable litigant in his shoes could not have foreseen the possibility of reasoning of the type revealed in the award. It is only in these very limited circumstances that the arbitrator's decision might be considered unfair.

(e) It is almost invariably the case that parties propose diametrically opposite solutions to resolve a dispute. They may expect the arbitrator to select one of these alternative positions. The arbitrator, however, is not bound to adopt an either/or approach. He is perfectly entitled to embrace a middle path (even without apprising the parties of his provisional thinking or analysis) so long as it is based on evidence that is before him. Similarly, an arbitrator is entitled – indeed, it is his obligation – to come to his own conclusions or inferences from the primary facts placed before him. In this context, he is not expected to inexorably accept the conclusions being urged upon him by the parties. Neither is he expected to consult the parties on his thinking process before finalising his award unless it

involves a dramatic departure from what has been presented to him.

(f) Each case should be decided within its own factual matrix. It must always be borne in mind that it is not the function of the court to assiduously comb an arbitral award microscopically in attempting to determine if there was any blame or fault in the arbitral process; rather, an award should be read generously such that only meaningful breaches of the rules of natural justice that have actually caused prejudice are ultimately remedied.”

(emphasis supplied)

66. In *JVL Agro Industries Ltd v. Agritrade International Pte Ltd.*

(2016) SGHC 126, the Court held that the natural justice provision contained in Section 24(b) of the International Arbitration Act (Singapore) was breached when new points are taken up by the arbitrator, i.e. points not argued by either party, which formed the basis of the award. Since these new points were not put to the parties, natural justice was said to be breached in the facts of that case.

Likewise, in ***G.D. Midea Air Conditioning Equipment Co. v. Tornado Consumer Goods Ltd.*** (2017) SGHC 193, the Court found:

“**65.** A party seeking to set aside an arbitral award under Art 34(2)(a)(ii) of the Model Law or s 24(b) of the IAA must establish (a) which rule of natural justice was breached; (b) how that rule was breached; (c) in what way the breach was connected to the making of the award; and (d) how the breach prejudiced the party’s rights: *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 (“*Soh Beng Tee*”) at [29].

66. The crux of Midea's case was that the Tribunal's finding on cl 4.2 breached the fair hearing rule because Midea was denied a full opportunity to present its case. As stated earlier (see [62] above), the issue of a breach of cl 4.2 did not arise in the Arbitration; the Tribunal made its finding on cl 4.2 without giving notice to the parties. The Tribunal's breach was clearly connected to the making of the Award as its finding on cl 4.2 was the basis upon which the impugned findings in the Award (including the finding that Midea was not entitled to terminate the MBA) were made. I agreed with Midea that the Tribunal's finding on cl 4.2 was in breach of the rules of natural justice."

67.A Hong Kong Judgment reported as **Hebei Import & Export Corporation v. Polytek Engineering Company Ltd.** (1992) 2 HKC 205, found that the tribunal in the course of proceedings received communications from only one party, in the absence of the other, the other party being kept in the dark as to what those communications were. On this point, therefore it was held:

"On the other hand, we think it is quite clear that the defendant did not have the opportunity of hearing what was presented to the Chief Arbitrator by the plaintiff's employees during the inspection of the equipment and hence was not able to present its side of the case before the experts prepared their report. This was to some extent mitigated by the provision of a copy of the experts' report and the chance to comment on it. But neither the reply from the Tribunal or the report mentioned what transpired during the briefing session. In the peculiar circumstances of this case, we think that the Tribunal should have held further hearings with regard to the matters which had arisen from the inspection and the experts' report. There was no request or consent that an oral hearing could be omitted. In our view, the defendant has a legitimate

complaint that there was a breach of Art 32 of the Arbitration rules and Art 45 of the PRC Arbitration Law. It can be said that the defendant did not have a proper opportunity to present its case to the Tribunal after the inspection and the compilation of the experts' report.”

68. Shri Nakul Dewan, however, relied upon a number of judgments to buttress his submission that failure to deal with material issues would fall within Section 48(1)(b) of the Arbitration Act, as a result of which a foreign award could not be enforced. He cited **Ascot Commodities NV v. Olam International Ltd.** 2001 WL 1560709, for this proposition. This judgment was delivered keeping in mind Section 68 of the Arbitration Act, 1996 (U.K), which states as follows:

“68. Challenging the award: serious irregularity.

(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.

A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—

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(d) failure by the tribunal to deal with all the issues that were put to it;”

It was in this context that the Court held:

“Has the Board dealt with all essential issues? GAFTA findings are habitually brief. Many would regard that as a virtue. It is certainly not an irregularity. Nor is it incumbent on arbitrators to deal with every argument on every point raised. But an award should deal, however concisely, with all essential issues. One of the heads of serious irregularity recognised in section 68(2)(d) is “Failure by the tribunal to deal with all the issues that were put to it”. The central point raised by Ascot on its appeal was that if the bills of lading were pledged as security, as appears on the face of the October 1998 contract, Olam's loss was not to be approached in the same way as if they were beneficial owners of the cargo. The point has, with respect, not been addressed...Since the whole process of arbitration is intended as a way of determining points at issue, it is more likely to be a matter of serious irregularity if on a central matter a finding is made on a basis which does not reflect the case which the party complaining reasonably thought he was meeting, or a finding is ambiguous, or an important issue is not addressed, than if the complaints go simply to procedural matters. Mr Young submitted that Ascot's real complaint is that its arguments were not accepted and that this cannot be an irregularity. He noted that there has been no application for permission to appeal. He also submitted that if the terseness of the Board's findings made it legitimate for Ascot to have requested further reasons, they could have asked for them but have not done so.

On a fair reading of the award it seems to me that this is not case in which the tribunal has directed itself to, and rejected, the central issue argued by Ascot but has, in truth, missed it...But if an award, as delivered, fails to contain a finding on a central issue, it would be odd to ask for reasons for something which is not there.”

69. Likewise, in **Zebra Industries v. Wah Tong Paper Products Group Ltd.** (2012) HKCU 1308, the Hong Kong Statute, namely, Section

23(2) of Old Arbitration Ordinance (Cap 391), enabled an award to be set aside on the ground of error of law. In this context, it was held:

“44. In light of Zebra’s above submissions, the question of law that arises is whether the arbitrator was wrong in law in failing to take into account of the Venture Capital Clauses in determining Zebra’s claim for damages.

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47. In my view, properly looked at, a claim on damages for breach of the Agreement based on and by reference to the Venture Capital Clauses had been put forward by Zebra in the SD.

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49. In the circumstances, I think the arbitrator has also committed an error of law in failing to consider and address this part of Zebra’s claim for consequential damages, if any, for the loss of chance in securing a venture capital fund investment and the listing of the company.

50. I would therefore also remit this part of the Award to the arbitrator for his reconsideration. These issues for reconsideration are closely tied with the assessment of the relevant parts of the evidence on the alleged loss of chance, if any, and should best be dealt with by the arbitrator. In doing so, the arbitrator should take into account of the Venture Capital Clauses to consider and decide this part of Zebra’s claim for consequential damages as mentioned in paragraph 42 above.”

70. In **A v. B** (2015) 3 HKLRD 586, the Court held:

“33. It is fundamental to concepts of fairness, due process and justice, as recognized in Hong Kong, that key and material issues raised for determination, either by a court or the arbitral tribunal, should be considered

and dealt with fairly. An award should be reasoned, to the extent of being reasonably sufficient and understandable by the parties (ie within the confines set out in *R v F* [2012] 5 HKLRD 278). Under Article 33(2) of the Model Law, the award should state the reasons upon which it is based. Having carefully considered the Award, I have to agree that the parties are entitled to query whether the Limitation Defence had been considered at all by the Arbitrator, and if rejected by the Arbitrator after due consideration, why it was rejected. The process of arbitration is intended as a way of determining disputes and points at issue, and I agree with the sentiments expressed by the court in *Ascot Commodities NV v Olam International Ltd* [2002] CLC 277 and in *Van der Giessen-de Noord Shipbuilding Division BV v Imtech Marine and Off shore BV* [2009] 1 Lloyd's Rep 273 that it is a serious irregularity and a denial of due process which causes substantial injustice and unfairness to the parties, if an important issue, which the parties are entitled to expect to be addressed, is not in fact addressed.

34. Even if the Arbitrator finds in favor of B on all its claims of A's inability and failure to deliver the Products in compliance with the Relevant Standards and conforming to the contractual specifications, and A's failure to develop the Products pursuant to its contractual obligations, B's action against A and its claims for remedies in the Arbitration will fail, if the Limitation Defence succeeds. The Limitation Defence is a material point and issue which could have rendered the Award materially different, and the failure to consider it, or to explain the dismissal of the Limitation Defence, results in unfairness to A, as well as a real risk of injustice and prejudice to its case. Based on what was set out in the Reasons for the Award and the materials before the Tribunal, it cannot be said that it is plain and obvious, or beyond any doubt, that the Award would have been the same, if the Limitation Defence had been considered (*Brunswick Bowling & Billiards Corp v Shanghai Zhonglu Industrial Co Ltd* [2011] 1 HKLRD 707; *Paklito Investment Ltd v Kolckner East Asia Ltd* [1993] 2

HKLR 49). This is not a case in which different defences are raised, any one of which would have defeated the claims made, such that the failure to deal with any one of the other defences would not have made any difference to the award.

35. For the above reasons, I consider that there is sufficient injustice arising out of the Award, in its current form, which cannot be overlooked by the Court's conscience, and that enforcement of the Award would offend our notions of justice."

This finding was given under Article 34(2)(b) of the UNCITRAL Model Law on International Commercial Arbitration, 1985 which states as follows:

"Article 34. Application for setting aside as exclusive recourse against arbitral award

2. An arbitral award may be set aside by the court specified in article 6 only if:

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State."

71. Shri Dewan strongly relied upon judgments from Singapore in support of the proposition that non-consideration of material issues would amount to a breach of natural justice and, therefore, would fit within the ground mentioned in Section 48(1)(b). In **Front Row Investment Holdings v. Daimler South East Asia** (2010) SGHC 80, the Singapore High Court decided whether there was a breach of natural justice in connection with the making of the award by which

the rights of any party has been prejudiced under Section 48(1)(a)(vii) of the Arbitration Act, 2002 (Singapore). It referred to breach of natural justice if an award was set aside on a basis not raised or contemplated by the parties since the affected party would have been deprived of its opportunity to be heard. It then held that the corollary of this would be that an arbitral tribunal will be in the breach of natural justice if in the course of reaching its decision it disregarded the submissions and arguments made by the parties on the issues without considering the merits thereof. For this, it relied upon three Australian cases and an earlier judgment which considered these three cases. The Court then concluded:

“53. As I have concluded earlier, an arbitrator’s failure to consider material arguments or submissions is a breach of natural justice. In the present case, the Arbitrator had dismissed Front Row’s counterclaim without considering the grounds of its counterclaim in full because he was under the misapprehension that Front Row had abandoned its reliance on the Representation. Had he not been mistaken, he would have had to decide whether or not the Representation was false. A decision that there had been a misrepresentation in regard thereto would have resulted in an award in favour of Front Row, assuming the other ingredients for a successful claim (viz, “reliance” and “detriment”) were satisfied. It was not for me to delve further into the question whether Front Row’s reliance upon the Representation would have succeeded but for the arbitrator’s misrepresentation. It sufficed that the Arbitrator failed to consider such a material ground. That alone was sufficient prejudice to Front Row.

54. In the result, I allowed Front Row’s application and ordered that the part of the Award dealing with Front Row’s counterclaim and with costs of the Arbitration be set aside as a whole. I further ordered that the part of the Award so set aside be tried afresh by a newly appointed arbitrator. Finally, I also ordered that the costs of and incidental to Front Row’s application be paid by Daimler to Front Row.”

72. In TMM Division Maritime SA v. Pacific Richfield Marine Pte

Ltd. (2013) SGHC 186, the Singapore High Court referred to Section 24(b) of the International Arbitration Act (Singapore), which requires an award to be set aside if the rules of natural justice are breached. In arriving at its conclusion under the caption “General Principles of Curial Scrutiny”, the Court held “However, it does not follow, and neither do I accept, that this process always entails sifting through the entire record of the arbitral proceedings with a fine-tooth comb.” (See paragraph 42). The Court also held, “the Court should not nit-pick at the award. Infelicities are to be expected and are generally irrelevant to the merits of any challenges” (See paragraph 45). The Court went on to hold that the high standard of cogent reasons required by the judiciary should not be applied to arbitration awards (See paragraph 102). The Court then outlined what standards could be applied to arbitral awards as follows:

“103. The Singapore Court of Appeal’s decision in *Thong Ah Fat v Public Prosecutor* [2012] 1 SLR 676 (“Thong Ah Fat”) which sets out the scope and content

of the court's duty to give reasons offers, in my view, an instructive parallel. I note in passing that Professor Jeffrey Waincymer suggests that it is unhelpful to define the content of arbitrators' duty to give reasons by reference to judicial standards: Waincymer at para 16.9.3. In support of his view, he referred to the High Court of Australia decision of *Westport Insurance Corporation & Ors v Gordian Runoff Limited* [2011] HCA 37 where Kiefel J stated (at [168]–[169]) that there is nothing in the relevant Australian legislation, the Commercial Arbitration Act 1984, which stipulates that the *standard* for giving reasons in arbitration should be the same as the judicial standard. The same is true of the IAA but as the court in *Thong Ah Fat* held (at [19]), the general duty of a judicial body to explain its decision is ineluctably “a function of due process, and therefore of justice”. While there are structural differences between a court and an arbitral tribunal, it cannot be gainsaid that arbitrations are subject to the same ideals of due process and justice. It bears mentioning that Kiefel J concluded that the requirement to give a reasoned award cannot be devoid of content and for that reason, he was content to adopt Donaldson LJ's statement in *Bremer* (see [101] above).

104. Therefore, in my view, the standards applicable to judges are assistive indicia to arbitrators. While the rules of natural justice must be applied rigorously in arbitrations as they are in court litigation, the practical realities of the arbitral ecosystem such as promptness and price are also important (see *Soh Beng Tee* at [63]). On this note, the following are clear from *Thong Ah Fat*:

(a) The standard of explanation required in every case must correspond to the requirements of the case. Costs and delays are relevant factors to consider when determining the extent to which reasons and explanations are to be set out in detail: at [29]–[30].

(b) In “very clear cases” with specific and straightforward factual or legal issues, the court may even dispense with reasons. Its conclusion will be

sufficient because the reasons behind the conclusion are a matter of necessary inference: at [32].

(c) Decisions or findings which do not bear directly on the substance of the dispute or affect the final resolution of the parties' rights may not require detailed reasoning. As a rule of thumb, the more profound the consequences of a specific decision, the greater the necessity for detailed reasoning: at [33].

(d) There should be a summary of all the key relevant evidence but not all the detailed evidence needs to be referred to: at [34].

(e) The parties' opposing stance and the judge's findings of fact on the material issues should be set out. However, the judge does not have to make an explicit ruling on each and every factual issue: at [35]–[36].

(f) The decision should demonstrate an examination of the relevant evidence and the facts found with a view to explaining the final outcome on each material issue: at [36].”

73. In *AKN & Anr. v. ALC & Ors.* (2015) SGCA 18, the Singapore High Court, again in considering the natural justice requirement contained in Section 24(b) of the International Arbitration Act (Singapore), held as follows:

“38. In particular, there is no right of appeal from arbitral awards. That is not to say that the courts can never intervene. However, the grounds for curial intervention are narrowly circumscribed, and generally concern process failures that are unfair and prejudice the parties or instances where the arbitral tribunal has made a decision that is beyond the scope of the arbitration agreement. It follows that, from the courts' perspective, the parties to an arbitration do not have a right to a “correct” decision from the arbitral tribunal

that can be vindicated by the courts. Instead, they only have a right to a decision that is within the ambit of their consent to have their dispute arbitrated, and that is arrived at following a fair process.”

(emphasis supplied)

It then dealt with failure to consider important issues as follows:

“**46.** To fail to consider an important issue that has been pleaded in an arbitration is a breach of natural justice because in such a case, the arbitrator would not have brought his mind to bear on an important aspect of the dispute before him. Consideration of the pleaded issues is an essential feature of the rule of natural justice that is encapsulated in the Latin adage, *audi alteram partem* (see also *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 (“*Soh Beng Tee*”) at [43], citing *Gas & Fuel Corporation of Victoria v Wood Hall Ltd & Leonard Pipeline Contractors Ltd* [1978] VR 385 at 386). *Front Row* is useful in so far as it demonstrates what must be shown to make out a breach of natural justice on the basis that the arbitrator failed to consider an important pleaded issue. It will usually be a matter of inference rather than of explicit indication that the arbitrator wholly missed one or more important pleaded issues. However, the inference – that the arbitrator indeed failed to consider an important pleaded issue – if it is to be drawn at all, must be shown to be clear and virtually inescapable. If the facts are also consistent with the arbitrator simply having misunderstood the aggrieved party’s case, or having been mistaken as to the law, or having chosen not to deal with a point pleaded by the aggrieved party because he thought it unnecessary (notwithstanding that this view may have been formed based on a misunderstanding of the aggrieved party’s case), then the inference that the arbitrator did not apply his mind at all to the dispute before him (or to an important aspect of that dispute) and so acted in breach of natural justice should not be drawn.

47. Front Row was recently considered in *AQU v AQP* [2015] SGHC 26 (“*AQU*”), where the High Court judge distilled the very principles which we have just enunciated above (see *AQU* at [30]–[35]). The judge in *AQU* also considered the High Court decision of *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 (“*TMM*”), and reiterated the proposition that no party to an arbitration had a right to expect the arbitral tribunal to accept its arguments, regardless of how strong and credible it perceived those arguments to be (see *AQU* at [35], citing *TMM* at [94]). This principle is important because it points to an important distinction between, on the one hand, an arbitral tribunal’s decision to reject an argument (whether implicitly or otherwise, whether rightly or wrongly, and whether or not as a result of its failure to comprehend the argument and so to appreciate its merits), and, on the other hand, the arbitral tribunal’s failure to even consider that argument. Only the latter amounts to a breach of natural justice; the former is an error of law, not a breach of natural justice.

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59. With respect, poor reasoning on the part of an arbitral tribunal is not a ground to set aside an arbitral award; even a misunderstanding of the arguments put forward by a party is not such a ground. As noted by this court in *BLC* at [86], the court “is not required to carry out a hypercritical or excessively syntactical analysis of what the arbitrator has written” when considering whether an arbitral award should be set aside for breach of natural justice. Neither should it approach an arbitral award with a “meticulous legal eye endeavouring to pick holes, inconsistencies and faults ... with the objective of upsetting or frustrating the process of arbitration” (likewise at [86] of *BLC*). Taking these considerations into account, we find no breach of natural justice as there is no basis for concluding that the Tribunal did not consider the Liquidator’s Primary Argument. Accordingly, we answer Appeal Issue 1 affirmatively.”

(emphasis supplied)

74. In **BAZ v. BBA & Ors.** (2018) SGHC 275, again with reference to Section 24(b) of the International Arbitration Act (Singapore), the Court approached the issue of natural justice as follows:

133. It is well established that to succeed in a claim under s 24(b) of the IAA, the claimant needs to establish the following four elements (see *Soh Beng Tee* at [29]; *AKN v ALC* 2015 at [48]): (a) which rule of natural justice was breached; (b) how it was breached; (c) in what way the breach was connected to the making of the award; and (d) how the breach prejudiced its rights.

134. The failure to consider an important issue that has been pleaded in an arbitration is a breach of natural justice because in such a case, the arbitrator would not have brought his mind to bear on an important aspect of the dispute before him (*AKN v ALC* 2015 at [46]). It will usually be a matter of inference rather than of explicit indication that the arbitrator wholly missed one or more important pleaded issues. However, this inference must be shown to be “clear and virtually inescapable” (*AKN v ALC* 2015 at [46]). The Court of Appeal cautioned against arguments dressed up to appear as breaches of natural justice: if the facts are also consistent with the arbitrator simply having misunderstood the aggrieved party’s case, or having been mistaken as to the law, or having chosen not to deal with a point pleaded by the aggrieved party because he thought it unnecessary, then the inference that the arbitrator did not apply his mind at all to the dispute before him or to an important aspect of that dispute and so acted in breach of natural justice should not be drawn.

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141. Although the Majority did not comment on the legal basis for the application of a discount rate, it does not mean that it did not consider the issue. A tribunal does not have to give responses on all

submissions made (*SEF Construction Pte Ltd v Skoy Connected Pte Ltd* [2010] 1 SLR 733 at [60]).

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159. The legal area concerning the enforcement and setting aside of awards is governed by statute, namely the Arbitration Act (Cap 10, 2002 Rev Ed) and the IAA. As such, the conceptual framework outlined in UKM can be helpful to navigate public policy considerations in arbitration, even though the subject matter of the public policies that can be raised under Art 34(2)(b)(ii) of the Model Law and Art V(2)(b) of the New York Convention may include both socio-economic policies and legal policies. When a challenge on the ground of public policy is brought, the outline draws attention to the importance of conducting a forensic exercise to identify whether the alleged public policy exists, and the criteria influencing the identification as explained in UKM are applicable. The balancing exercise in the context of arbitration is between the policy of enforcing arbitral awards – as encapsulated in s 19B(1) of the IAA which states that awards are “final and binding on the parties” and the judicial policy of minimal curial intervention – and the alleged public policy which the award purportedly violates. This balance is generally in favour of the policy of enforcing arbitral awards, and only tilts in favour of the countervailing public policy where the violation of that policy would “shock the conscience” or would be contrary to “the forum’s most basic notion of morality and justice”. In determining whether the balance tilts towards the countervailing public policy, it is important to consider both the subject nature of the public policy, the degree of violation of that public policy and the consequences of the violation.”

75. In *Campos Brothers Farms v. Matru Bhumi Supply Chain Pvt. Ltd.*

(2019) 261 DLT 201, the Delhi High Court had to consider the enforcement of a foreign award. The arbitrator in the aforesaid case

did not give any finding on maintainability of the arbitration proceedings, which was argued before her. In this fact circumstance, the Delhi High Court held:

“55. In any case, the respondent nos. 1 and 2 had also made submissions on merit before the Arbitrator. Though the learned counsel for the petitioner submitted that the same were rightly excluded from consideration by the Arbitrator as the Arbitrator had never sought for the same, the Award does not reflect any such reason given by the Arbitrator for excluding them from consideration. The Arbitrator does not record a finding that she has intentionally ignored such submissions as they were filed belatedly or beyond what was permitted. In fact, as noted above, as per the Arbitrator no submission was filed by the respondents by 13.06.2016, which is factually incorrect.

56. In exercise of powers under Section 48 of the Act, this Court cannot consider the submissions made by the respondent nos. 1 and 2 in their e-mail dated 13.06.2016 on merit as if it is a Court of Original Jurisdiction and find out whether such submission of the respondent nos. 1 and 2 had any merit or not. Once it is found that the Arbitrator has ignored the submissions of a party in totality, whatever be the merit of the submissions, in my opinion, such Award cannot be enforced being in violation of the Principles of Natural Justice and contrary to the public policy of India as stated in sub-Section 2(b) read with Explanation 1(iii) of Section 48 of the Act.

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76. It may be correct that the Arbitrator, upon considering evidence led before it by the parties, comes to a conclusion that in the given facts the transaction, though under different Contracts, is one or that the corporate veil deserves to be lifted, however, for arriving at such a finding the Arbitrator has to give reasons for the same. This Court, in exercise of its power under Section 48 and 49 of the Act, cannot

supplant such reasons by considering the claims and defence of the parties on merit. Whether the request of the respondent no. 1 to the petitioner to make shipments in the name of respondent no. 2 under Contracts that had been executed between the petitioner and respondent no. 1, would entitle the petitioner to file a consolidated statement of claim against respondent nos. 1 and 2 or not, was an issue to be determined by the Arbitrator and reasons for such determination were to be given in the Award. From a reading of the Award it seems that the Arbitrator was neither alive to the issue whether such claims against different Contracts can be consolidated as one, nor was she alive to the fact that joint and several liability cannot be fastened on respondent nos. 1 and 2 without lifting the corporate veil and giving reasons for the same. The Award in question clearly qualifies as a non speaking Award.

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81. In any case, as noted above, if the arbitrator had considered this issue giving reasons therefore, this Court may not have the power under Section 48 of the Act to test the validity of such reasons, however, the present is the case where the arbitrator has not only not given any reasons for her conclusion but infact, the Award indicates that the Arbitrator is not even alive to such an issue.”

Thus, the ground on which the award was set aside for failure to consider a material issue relating to maintainability of the arbitral proceedings was pigeon-holed not under Section 48(1)(b), but under the “public policy of India” ground, stating that such a thing would violate the most basic notion of justice.

76. 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** (supra). 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.

77. All the cases cited by Mr. Nakul Dewan are judgments based on the language of the particular statute reflected in each of them – for example, Section 68 of the Arbitration Act, 1996 (U.K), Section 23(2) of the Hong Kong Old Arbitration Ordinance (Cap 391), Section 24(b) of the International Arbitration Act (Singapore) and Section 48(1)(a)(vii) of the Arbitration Act, 2002 (Singapore), all of which are differently worded from Section 48(1)(b). Each of these statutes deal with a breach of natural justice which, as we have seen, is a wider expression than the expression “unable to present his case”. Thus, it is not possible to hold that failure to consider a material issue would fall within the rubric of Section 48(1)(b).

78. Having said this, however, if a foreign award fails to determine a material issue which goes to the root of the matter or fails to decide a claim or counter-claim in its entirety, the award may shock the conscience of the Court and may be set aside, as was done by the Delhi High Court in **Campos** (supra) on the ground of violation of the public policy of India, in that it would then offend a most basic notion of justice in this country¹. It must always be remembered that poor

1 In **Ssangyong** (supra), this Court cautioned that this ground would only be attracted with the following caveat:

“48. However, when it comes to the public policy of India argument based upon “most basic notions of justice”, it is clear that this ground can be attracted only in very

reasoning, by which a material issue or claim is rejected, can never fall in this class of cases. Also, issues that the tribunal considered essential and has addressed must be given their due weight – it often happens that the tribunal considers a particular issue as essential and answers it, which by implication would mean that the other issue or issues raised have been implicitly rejected. For example, two parties may both allege that the other is in breach. A finding that one party is in breach, without expressly stating that the other party is not in breach, would amount to a decision on both a claim and a counter-claim, as to which party is in breach. Similarly, after hearing the parties, a certain sum may be awarded as damages and an issue as to interest may not be answered at all. This again may, on the facts of a given case, amount to an implied rejection of the claim for interest. The important point to be considered is that the foreign award must be read as a whole, fairly, and without nit-picking. If read as a whole, the said award has addressed the basic issues raised by the parties and has, in substance, decided the claims and counter-claims of the parties, enforcement must follow.

exceptional circumstances when the conscience of the Court is shocked by infraction of fundamental notions or principles of justice... However, we repeat that this ground is available only in very exceptional circumstances, such as the fact situation in the present case. Under no circumstance can any Court interfere with an arbitral award on the ground that justice has not been done in the opinion of the Court. That would be an entry into the merits of the dispute which, as we have seen, is contrary to the ethos of Section 34 of the 1996 Act, as has been noted earlier in this judgment.”

Violation of FEMA Rules

79. It has been argued by the Appellants, based on the Non-Debt Instrument Rules, that a foreign award by which shares have to be purchased at a discounted value, would violate the aforesaid Rules, and therefore, would amount to a violation of the fundamental policy of Indian law. Resultantly, the Appellants contended that as a result of this, the award in the present case would not be enforceable in India.

80. The relevant provisions of the aforesaid rules are set out hereinbelow:

“2. Definitions:

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(ac) “investment” means to subscribe, acquire, hold or transfer any security or unit issued by a person resident in India;

Explanation:-

(i) Investment shall include to acquire, hold or transfer depository receipts issued outside India, the underlying of which is a security issued by a person resident in India;

(ii) for the purpose of LLP, investment shall mean capital contribution or acquisition or transfer of profit shares;

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3. Restriction on investment in India by a person resident outside India.- Save as otherwise provided in the Act or rules or regulations made thereunder, no person resident outside India shall make any investment in India :

Provided that an investment made in accordance with the Act or the rules or the regulations made thereunder and held on the date of commencement of these rules shall be deemed to have been made under these rules and shall accordingly be governed by these rules:

Provided further that the Reserve Bank may, on an application made to it and for sufficient reasons and in consultation with the Central Government, permit a person resident outside India to make any investment in India subject to such conditions as may be considered necessary.

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9. Transfer of equity instruments of an Indian company by or to a person resident outside India.-

A person resident outside India holding equity instruments of an Indian company or units in accordance with these rules or a person resident in India, may transfer such equity instruments or units so held by him in compliance with the conditions, if any, specified in the Schedules of these rules and subject to the terms and conditions prescribed hereunder:

(3) A person resident in India holding equity instruments of an Indian company or units, may transfer the same to a person resident outside India by way of sale, subject to the adherence to entry routes, sectoral caps or investment limits, pricing guidelines and other attendant conditions as applicable for investment by a person resident outside India and documentation and reporting requirements for such transfers as may be specified by the Reserve Bank in consultation with the Central Government from time to time;

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21. Pricing guidelines –

(1) The pricing guidelines specified in these rules shall not be applicable for any transfer by way of sale done in accordance with Securities and Exchange Board of

India regulations where the pricing is specified by Securities and Exchange Board of India.

(2) Unless otherwise prescribed in these rules, the price of equity instruments of an Indian company, -

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(b) transferred from a person resident in India to a person resident outside India shall not be less than,-

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(iii) the valuation of equity instruments done as per any internationally accepted pricing methodology for valuation on an arm's length basis duly certified by a Chartered Accountant or a Merchant Banker registered with the Securities and Exchange Board of India or a practising Cost Accountant, in case of an unlisted Indian company.”

81. Based on the aforesaid Rules, the Appellants have argued that the transfer of shares from the Karias, who are persons resident in India, to the Respondent No.1, who is a person resident outside India, cannot be less than the valuation of such shares as done by a duly certified Chartered Accountant, Merchant Banker or Cost Accountant, and, as the sale of such shares at a discount of 10% would violate Rule 21(2)(b)(iii), the fundamental policy of Indian law contained in the aforesaid Rules would be breached; as a result of which the award cannot be enforced.

82. Before answering this question, it is important to first advert to the decision of the Delhi High Court in **Cruz** (supra). The learned Single Judge was faced with a similar problem of a foreign award violating the

provisions of FEMA. In an exhaustive analysis, the learned Single Judge referred to **Renusagar** (supra) and then held:

“97.It plainly follows from the above that a contravention of a provision of law is insufficient to invoke the defence of public policy when it comes to enforcement of a foreign award. Contravention of any provision of an enactment is not synonymous to contravention of fundamental policy of Indian law. The expression fundamental Policy of Indian law refers to the principles and the legislative policy on which Indian Statutes and laws are founded. The expression “fundamental policy” connotes the basic and substratal rationale, values and principles which form the bedrock of laws in our country.

98. It is necessary to bear in mind that a foreign award may be based on foreign law, which may be at variance with a corresponding Indian statute. And, if the expression “fundamental policy of Indian law” is considered as a reference to a provision of the Indian statute, as is sought to be contended on behalf of Unitech, the basic purpose of the New York Convention to enforce foreign awards would stand frustrated. One of the principal objective of the New York Convention is to ensure enforcement of awards notwithstanding that the awards are not rendered in conformity to the national laws. Thus, the objections to enforcement on the ground of public policy must be such that offend the core values of a member State's national policy and which it cannot be expected to compromise. The expression “fundamental policy of law” must be interpreted in that perspective and must mean only the fundamental and substratal legislative policy and not a provision of any enactment.

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102. Although, this contention appears attractive, however, fails to take into account that there has been a material change in the fundamental policy of exchange control as enacted under FERA and as now contemplated under FEMA. FERA was enacted at the

time when the India's economy was a closed economy and the accent was to conserve foreign exchange by effectively prohibiting transactions in foreign exchange unless permitted. As pointed out by the Supreme Court in *Life Insurance Corporation of India v. Escorts Ltd.* (supra), the object of FERA was to ensure that the nation does not lose foreign exchange essential for economic survival of the nation. With the liberalization and opening of India's economy it was felt that FERA must be repealed. FERA was enacted to replace the Foreign Exchange Regulation Act, 1947 which was originally enacted as a temporary measure. The Statement of Objects and Reasons of FERA indicate that FERA was enacted as the RBI had suggested and Government had agreed on the need for regulating, among other matters, the entry of foreign capital in the form of branches and concerns with substantial non-resident interest in them, the employment of foreigners in India etc.

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110. The contention that enforcement of the Award against Unitech must be refused on the ground that it violates any one or the other provision of FEMA, cannot be accepted; but, any remittance of the money recovered from Unitech in enforcement of the Award would necessarily require compliance of regulatory provisions and/or permissions.”

83. This reasoning commends itself to us. First and foremost, FEMA - unlike FERA - refers to the nation's policy of managing foreign exchange instead of policing foreign exchange, the policeman being the Reserve Bank of India under FERA. It is important to remember that Section 47 of FERA no longer exists in FEMA, so that transactions that violate FEMA cannot be held to be void. Also, if a particular act violates any provision of FEMA or the Rules framed thereunder,

permission of the Reserve Bank of India may be obtained *post-facto* if such violation can be condoned. Neither the award, nor the agreement being enforced by the award, can, therefore, be held to be of no effect in law. This being the case, a rectifiable breach under FEMA can never be held to be a violation of the fundamental policy of Indian law. Even assuming that Rule 21 of the Non-Debt Instrument Rules requires that shares be sold by a resident of India to a non-resident at a sum which shall not be less than the market value of the shares, and a foreign award directs that such shares be sold at a sum less than the market value, the Reserve Bank of India may choose to step in and direct that the aforesaid shares be sold only at the market value and not at the discounted value, or may choose to condone such breach. Further, even if the Reserve Bank of India were to take action under FEMA, the non-enforcement of a foreign award on the ground of violation of a FEMA Regulation or Rule would not arise as the award does not become void on that count. The fundamental policy of Indian law, as has been held in **Renusagar** (supra), must amount to a breach of some legal principle or legislation which is so basic to Indian law that it is not susceptible of being compromised. “Fundamental Policy” refers to the core values of India’s public policy as a nation, which may find expression not only in statutes but also time-honoured, hallowed principles which are followed by the Courts. Judged from this point of

view, it is clear that resistance to the enforcement of a foreign award cannot be made on this ground.

84. The Appellants, however, relied upon certain observations in **Dropti Devi v. Union of India** (2012) 7 SCC 499. In that case, a challenge was made to the constitutional validity of Section 3 of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter referred to as “COFEPOSA”), stating that by reason of the new legal regime articulated in FEMA, in replacement of FERA, the said provision has become unconstitutional in the changed situation.

This submission was repelled by this Court stating:

“66. It is true that provisions of FERA and FEMA differ in some respects, particularly in respect of penalties. It is also true that FEMA does not have provision for prosecution and punishment like Section 56 of FERA and its enforcement for default is through civil imprisonment. However, insofar as conservation and/or augmentation of foreign exchange is concerned, the restrictions in FEMA continue to be as rigorous as they were in FERA. FEMA continues with the regime of rigorous control of foreign exchange and dealing in the foreign exchange is permitted only through authorised person. While its aim is to promote the orderly development and maintenance of foreign exchange markets in India, the Government's control in matters of foreign exchange has not been diluted. The conservation and augmentation of foreign exchange continues to be as important as it was under FERA. The restrictions on the dealings in foreign exchange continue to be as rigorous in FEMA as they were in FERA and the control of the Government over foreign exchange continues to be as complete and full as it was in FERA.

67. The importance of foreign exchange in the development of a country needs no emphasis. FEMA regulates the foreign exchange. The conservation and augmentation of foreign exchange continue to be its important theme. Although contravention of its provisions is not regarded as a criminal offence, yet it is an illegal activity jeopardising the very economic fabric of the country. For violation of foreign exchange regulations, penalty can be levied and its non-compliance results in civil imprisonment of the defaulter. The whole intent and idea behind Cofeposa is to prevent violation of foreign exchange regulations or smuggling activities which have serious and deleterious effect on national economy.”

It is important to note that this Court recognized that FEMA, unlike FERA, does not have any provision for prosecution and punishment like that contained in Section 56 of FERA. The observations as to conservation and/or augmentation of foreign exchange, so far as FEMA is concerned, were made in the context of preventive detention of persons who violate foreign exchange regulations. The Court was careful to note that any illegal activity which jeopardises the economic fabric of the country, which includes smuggling activities relating to foreign exchange, are a serious menace to the nation and can be dealt with effectively, *inter alia*, through the mechanism of preventive detention. From this to contend that any violation of any FEMA Rule would make such violation an illegal activity does not follow. In fact, even if the reasoning contained in this judgment is torn out of its specific context and applied to this case, there being no alleged

smuggling activity which involves depletion of foreign exchange, as against foreign exchange coming into the country as a result of sale of shares in an Indian company to a foreign company, it does not follow that such violation, even if proved, would breach the fundamental policy of Indian law.

Challenge to Enforcement of the Foreign Award in this case on facts

85. Dr. Singhvi and Shri Dewan arguing for the Appellants have raised fourteen submissions, all of which fall under Section 48(1)(b) read with Explanation 1 (ii) and (iii) to Section 48(2)(b) of the Arbitration Act, taken either cumulatively as grounds of objection or separately, depending upon the nature of the ground argued. We now deal with each of these grounds *seriatim*.

I. The Tribunal failed to deal with the Appellants' counter-claim pertaining to the incorporation of Jaguar Communication Consultancy Services Private Limited.

86. According to the Appellants, this ground of objection – i.e. the incorporation of Jaguar - was pleaded by them as a “concealed breach”, which became known to them only at a much later stage of the arbitral proceedings. Despite the tribunal specifically ruling in the First Partial Final Award that a non-defaulting party could rely on a “concealed breach” and treat the same as an unrectified event of default under clause 23.4 of the JVA, the submission made by the

Appellant in this behalf was ignored in its entirety. This was countered by Respondent No.1 by stating that there was no “concealed breach” at all, inasmuch as, as early as 05.10.2012, the Appellant had filed a request calling upon the Respondent to produce documents which included the list of clients, employees and disclosure of business activities of Jaguar. These documents were called for in order to buttress the case of the Appellant that the Respondent was in breach of clause 21.1 of the JVA, and to ascertain whether the employees of Jaguar were passing on Ravin’s confidential information to Jaguar. In response to this request, on 12.10.2012, the Respondent stated that no case of breach of clause 21.1 of the JVA had been pleaded; that Jaguar does not have any business of producing cables; and that it had been set up for the sole purpose of hiring office premises. The Memorandum of Association and the Articles of Association of Jaguar were also handed over to the Appellants. What was stressed is that at no time after 12.10.2012 did the Appellants seek the leave of the tribunal to amend their counter-claim.

87. It must be remembered that the First Partial Final Award was made only on 15.02.2013. When the Respondent No.1 made its oral submissions and filed written closing submissions on 19.07.2013, the Appellants did not plead any case of breach due to Jaguar. It was only at the fag end, i.e. in the Appellants’ Responsive Closing Submissions,

filed on 20.08.2013, that the tribunal was invited to rule on this breach. Obviously, by this time, the Respondent did not have any opportunity to controvert this case put up for the first time by the Appellants. Since this case had been put up for the first time at the fag end of the proceedings, before passing of the Second Partial Final Award dated 19.12.2013, the arbitrator cannot be faulted for not dealing with this case. In the Second Partial Final Award, the tribunal also recorded that the Appellants' case on clause 21.1 was limited to the acquisition of ACPL and direct sales into India. The argument of the Appellant, made at the fag end of the proceedings, that since the Respondent held 99.99 % shares of Jaguar, which is in a similar cable business as Ravin, as evidenced by the Memorandum and Articles of Association of Jaguar, is a case that has never been pleaded. This being the case, it is obvious that the arbitrator was within his jurisdiction not to deal with this so-called counter-claim at all. This objection, therefore, does not fall within any of the grounds mentioned in Section 48 and must, therefore, be rejected.

II. The Tribunal failed to make a determination on the Appellants' counter-claim concerning ouster of the Appellants

88. According to the Appellants, the tribunal failed to make a determination on the Appellants' counter-claim that the Respondent's efforts to oust Appellant No.1 and his family from Ravin amounted to a

breach of the JVA. In answer to this submission, the tribunal, in the Second Partial Final Award, expressly set out the following:

“6. Further, the parties both identify different catalysts for the breakdown of the JVA relationship. In short, the Respondents submitted that, as far as they were concerned, during the tenure of Mr Sarogni their relationship with the Claimant was good and both parties were working together to make Ravin a more successful company. The swing point came and the trouble started brewing when Ms Farise was sent out to head the affairs of Ravin with the single agenda to take control of Ravin and oust the Karias. The Respondents' overall case theory therefore focuses on a clash of personalities combined with the acquisition of ACPL and the Claimant's overriding intention to create a situation where the Karias appeared to be in breach so that the Claimant could buy the Respondents out for a lower price.

7. The Claimant submitted that whilst relations had not been good from the time of the JVA onwards, matters took a turn for the worse after 15 September 2011, when the Integration Period came to an end. The Claimant contends that up until this point Mr Karia had been able to maintain a large degree of control over the Company, both because of the arrangements in the Integration Period and the fact that Mr Sarogni had been absent from India for long periods of time. The end of the Integration Period was followed shortly after by a change of CEO. Pursuant to the Board Resolution of 1 November 2011, Ms Farise was appointed CEO of Ravin (H16/3381) and came to India with the legitimate intent to actually take over the day to day management of Ravin. Indeed, the Claimant does not shy away from the fact that Ms Farise did intend to take control of Ravin, despite the Respondents' own particular interpretation of this event and motive. The Claimant's overall case theory therefore focuses not so much on any clash of personalities per se, but on the date when power and control under the terms of the JVA was to shift decisively away from Mr Karia. It

is the Claimant's case that Mr Karia was simply not willing to abide by such provisions and wished to remain in day to day control of Ravin and prevent the Claimant from exercising such control. In other words there is a straightforward division between the parties' rival position. Neither party suggested that both versions could in essence be correct. The Tribunal therefore has to make findings as to where the evidence lies and which version fits the facts as found."

This case was answered in great detail, finding that it was the Appellants and not the Respondent No.1 who materially breached the JVA. Given this position, the tribunal finally held:

"291. Given the findings made by the Tribunal in favour of the Claimant's allegations of material breach it naturally follows that the Respondents do not succeed in these allegations of mismanagement

292. The Respondents were themselves in material breach with regard to the whole conduct surrounding Mr Dhall's appointment of Ms Mathure and the so called authorisation form. The Claimant was not in material breach in suspending Mr Dhall. Far from it. The Respondents, however, were plainly in material breach by their reaction to this suspension effectively leading to a one day strike.

293. The question of the attendance of Claimant nominees at the Akruti office is another chapter of the saga in which the Respondents do not emerge without serious criticism. As is clear from this Award the Respondents engendered a toxic atmosphere at Akruti in January 2012 (even in its fire stricken state) and such was the situation at the ground that it was not really possible for Claimant nominees to attend without fear of their own safety.

294. Lastly, the circumstances surrounding the appointment of the CEO and CFO does not give rise to any conceivable material breach on the part of the

Claimant. The Claimant was entitled to nominate a CFO and the CEO. They did so. The Respondents did not oppose the appointment of Ms Farise. Nevertheless they did obstruct her at every turn once she was appointed because it became apparent that she intended pursuant to the JVA to take day to day control of Ravin and the Respondents did not wish this to happen. As regards Mr Brunetti, the CFO, the Respondents did veto his appointment. This was not a material breach on their part as it was their right to do so under Schedule IX to the JVA. Nevertheless it cannot be said to be a material breach by the Claimant. That is unsustainable.

CONCLUSION

295. The Respondents have not succeeded in establishing any material breach of the JVA committed by the Claimant.”

89.This being the case, it would be wholly incorrect to state that the tribunal has failed to make a determination on the Appellants’ counter-claim that the Respondent’s efforts to oust Appellant No. 1 and his family amounted to a breach of the JVA. While considering the case of the Appellants and the cross-case of the Respondent, the tribunal has adverted to pleadings, evidence and has given detailed findings as to why the Appellants are in material breach of the JVA, as a result of which the Respondent cannot be said to be in material breach of the JVA. This being the case, it cannot be said that this material issue has not been answered by the Second Partial Final Award. This ground, therefore, also does not fall within any of the stated pigeon-holes under Section 48.

III. The Tribunal failed to make a determination on the Appellants' counter-claim concerning registration of the Ravin Trademark

90. Dr. Singhvi then argued that the tribunal failed to make any determination on the Appellants' counter-claim that the Respondent No.1's surreptitious attempts to register the Ravin trademark in its own name was a material breach of the JVA. When the First Partial Final Award is perused, it becomes clear that what was argued before the arbitrator, and therefore answered by the arbitrator, is whether the tribunal had jurisdiction to go into the Trademark License Agreement.

The First Partial Final Award records:

"IX. Tribunal's ruling on jurisdiction

134. Finally, there were before the Tribunal three short points on the scope of the jurisdiction of the Tribunal under the arbitration agreement in the JVA.

135. Sensibly, the parties only made very brief submissions on these points. At one point, it seemed that the Respondents' accepted that the Tribunal did not have the jurisdiction which it contended for, but instead was inviting the Claimant to agree upon an expansion of the Tribunal's jurisdiction in order to avoid any possibility of multiplicity of proceedings under different agreements.

136. In the end, however, the Respondents' counsel did invite the Tribunal to rule upon these short points. The three points were as follows:

- 1) Whether under Clause 27.1 of the JVA the Tribunal has jurisdiction to decide who has the right to register the Ravin trademark.

2) Whether the Tribunal has jurisdiction to decide alleged breaches of the Trademark License Agreement.

3) Whether the Tribunal has jurisdiction to decide alleged breaches of the Technical Assistance Agreement.

137. The Tribunal concludes that it does not have jurisdiction in respect of any of these three matters.

138. The ownership of the Ravin trademark and the right to register the same is not a dispute arising out of, relating to, or in connection with the JVA. There is no provision in the JVA permitting the parties to the JVA to change the name of Ravin Cables to a new name incorporating the word Prysmian – see Clause 9. There is also a provision for Ravin to enter into a trademark licence agreement in the form of Schedule 5, but that agreement deals with the licence by Prysmian and not the Ravin trademark.

139. Quite simply a dispute regarding the right to register the Ravin trademark falls outside of the scope of the arbitration clause.

140. This makes it unnecessary for the Tribunal to consider further the interesting and difficult questions of the arbitrability of such disputes, even if they were held to fall within the scope of the arbitration agreement. The Tribunal makes no finding on this point, it not having been argued, but observes that it is by no means a foregone conclusion that such disputes would under English law be arbitrable.

141. Further, the disputes respectively under the Trademark License Agreement (in the form of Schedule 5) and the Technical Assistance Agreement (in the form of Schedule 6) fall outside the jurisdiction of the Tribunal.

142. It is common ground that the parties did enter into a Trademark License Agreement in the form of Schedule 5 and the Technical Assistance Agreement in the form of Schedule 6.

143. Equally, it is common ground that these agreements made provision for disputes to be referred to arbitration in Milan, Italy under Italian law. There is no warrant to construe the arbitration agreement in the JVA as somehow trespassing upon the arbitration agreement contained in two agreements, which the parties agreed to enter into and, in fact, did enter into with these separate dispute resolution provisions. Disputes under or concerning the Trademark License Agreement and Technical Assistance Agreement are to be resolved in accordance with the dispute resolution provisions under those agreements. The Tribunal observes that, if there had been a dispute under Clause 9 of the JVA as to whether in fact the covenant to enter into those two further agreements had been complied with, then this would be a dispute under the JVA agreement. Nevertheless, this is not the case being advanced by the Respondents in their pleaded case.”

91. We have gone through the transcript of the hearings on both 12th and 13th December, 2012 before the arbitrator which clearly show that no argument was ever made by the Appellants before the tribunal that the Respondent had surreptitiously attempted to register the Ravin Trademark in its own name, and therefore was in breach of the competition clauses of the JVA. We are thus satisfied that this argument again appears to be an afterthought which has no foundation in the submissions made before the learned arbitrator. This submission does not again fall within any of the grounds referred to under Section 48.

IV. The Tribunal acted contrary to the Parties’ expert witnesses and ignored critical evidence with regard to the acquisition of ACPL

92. Dr. Singhvi argued that the tribunal acted contrary to the admissions of the parties' expert witnesses and ignored critical evidence with regard to the acquisition of ACPL. Further, since the Respondent failed to produce the relevant documents regarding the competing business carried out by ACPL, an adverse inference ought to be drawn against the Respondent No.1, which the Appellants allege the learned arbitrator failed to do.

93. The learned arbitrator indicated his approach in the Second Partial Final Award as follows:

"23. Whilst therefore the parties' detailed submissions have set the parameters for the Tribunal's decisions and have assisted the Tribunal in reaching its conclusions on the individual particulars of alleged material breach, it has simply not been possible and nor is it desirable for the Tribunal to undertake an exhaustive analysis of each sub-argument and each piece of evidence referred to. Instead, in disposing of this dispute the Tribunal will focus, in large part, on the heart of the rival contentions with respect to the dispute as a whole and the individual allegations in the rival Determination Notices. This requires the detailed submissions to be substantially stripped back to reveal the essential complaint being made, which can then be assessed against the terms of the JVA and the rival theories.

24. In respect of the rival theories, the Tribunal has not lost sight of the broader case theories which frame the disputed events and allegations. The veracity of the individual and collective allegations arising from the crucial period between November 2011 and March 2012 can and indeed must be tested by reference to

the parties' rival theories and should not necessarily be isolated and examined in the abstract.”

94. The tribunal then went into the acquisition of ACPL in some detail, from paragraphs 216 to 244 of the Second Partial Final Award, and held that Mr. Karia's contemporaneous reaction to the acquisition of Draka, which led to an indirect acquisition of 60 subsidiaries, one of which was ACPL, was that he was very happy that the Respondent No. 1 had so expanded its business. Several congratulatory emails are referred to by the arbitrator. Further, the arbitrator found that Mr. Karia's statements in cross-examination showed that he had knowledge of this acquisition way back in November 2010 but never complained of material breach of the JVA. The arbitrator also examined evidence as to serious actual loss or harm, finding no such credible evidence, except occasional instances of both companies tendering for the same business. It was held that there was no reliable evidence that the Ravin's business had been lost post the 'Draka acquisition' or that there had been any diversion of business from Ravin to ACPL or *vice versa*. The arbitrator then held that ACPL is a small specialist cable business and operates principally in the area of instrumentation cables, which is not the area in which Ravin operates. The learned arbitrator also adverted to the evidence of the expert witnesses in arriving at this conclusion. It also made a reference to Mr.

Karia's cross-examination, stating that Mr. Karia himself considered ACPL to be the 50th or 60th competitor given its small business. The finding, therefore, was that the acquisition of ACPL did not in any manner amount to a serious material breach of the JVA.

95. Insofar as the failure to produce documents by Respondent No.1 with regard to its subsidiary ACPL is concerned, it must be remembered that ACPL is not a direct subsidiary of Respondent No. 1, being an indirect subsidiary of Respondent No.1's parent company consequent upon the acquisition of Draka. It has an independent Board of Directors. Above all, ACPL was not a party to these arbitral proceedings. The tribunal therefore made Procedural Order No. 5 dated 27.11.2012 in which it specifically recorded that if the Appellants wish to pursue their request for disclosure of further documents *qua* ACPL, they must approach the Courts to do so, as it was not within the arbitrator's power to direct a person who is not party to the proceedings to produce documents. At no stage did the Appellants act in compliance of this Procedural Order and approach an English Court to direct ACPL to produce documents within its possession. This being so, as has been held hereinabove, a party cannot complain of breach of natural justice when it was within the control of such party to approach a U.K Court for production of such documents. This not

having been done, it is clear that no adverse inference, as has been argued, could have been drawn by the learned arbitrator. This ground also, therefore, does not fall within any of the grounds argued before us under Section 48.

V. Perverse Interpretation of the JVA

96. According to Dr. Singhvi, the tribunal's interpretation of clause 21 of the JVA is perverse. As has been held, referring to some of the judgments quoted hereinabove, in particular **Shri Lal Mahal** (supra), the interpretation of an agreement by an arbitrator being perverse is not a ground that can be made out under any of the grounds contained in Section 48(1)(b). Without therefore getting into whether the tribunal's interpretation is balanced, correct or even plausible, this ground is rejected.

VI. The Tribunal ignored critical evidence with regard to the issue of agency agreements and Direct Sales

97. Dr. Singhvi argued that the tribunal ignored admissions of the Respondent and other critical evidence with regard to the issue of agency agreements and direct sales. The Second Partial Final Award deals with this issue and the issue regarding agreements with agents in great detail from paragraph 245 to paragraph 279. As many as five reasons are given, after examining the evidence, for rejecting the plea that agency or distribution agreements were entered into in violation of

the JVA. Further, so far as direct sales into India were concerned, after considering the pleadings and the evidence, the tribunal found that the Appellants altered their case from their pleaded case and now advanced a case that the fact of direct sales amounts to a material breach of clauses 8 and 20 of the JVA, contrary to what was stated in their determination notice. Even otherwise, the tribunal found that there was no material breach for the following reason:

“277. Those sales, however, were for all practical purposes made up of sales of telecom cables, industrial special cables, automotive cables, network and component and services. Ravin did not manufacture those types of cables. Indeed over 85% of the sales came from two affiliates manufacturing telecom cables, which Ravin did not manufacture and had no experience in selling either. Indeed the Tribunal accepts the evidence of Ms Farise and Mr Koch and Mr Karve on this issue (see, inter alia, §§5-8, E(I)/10/56-57, §23, E(I)/26/206, §23, E(I)/26/207, §§18- 32. E(I)/23/184-186, 11 December 2012 hearing, pp.134-140, §46, E(I)/17/92, Day 2, pp.83-86, §18 of, E(I)/24/189). This renders the whole argument of diversion of sales or breach of good faith by virtue of these direct sales somewhat academic.

278. Indeed these figures illustrate exactly why the Respondents placed so much emphasis on their argument that the mere fact of sales was a breach irrespective of anything else. This was once more how it was put by Mr Salve SC in his oral closing argument (Day 10, pp. 183-185) The Tribunal has, however, found against the Respondents on this point.”

98. Having perused the Award in this behalf, it cannot be said that the tribunal has in any manner ignored admissions or other critical

evidence with regard to the issue of direct sales. In any case, if at all, this ground goes to alleged perversity of the award, which as has been held by us hereinabove, is outside the ken of Section 48.

VII. The Tribunal adopted disparate thresholds in determining material breach

99. Dr. Singhvi has then argued that the tribunal adopted disparate thresholds for determining material breach between the Appellant and the Respondent. Again, all the allegations made under this ground go to perversity of the award, which is outside the ken of Section 48. That apart, the tribunal indicates in paragraphs 104 to 106 of the Second Partial Final Award, that no disparate thresholds in determining material breach was adopted as follows:

“(3) Tribunal's conclusions on the Events of Default relied upon by the Claimant

104. The Tribunal has in mind the test for establishment of material breach as identified in paragraphs 37-47 above. The Claimant has particularised a number of different aspects of the conduct of the Respondents concentrating on the time frame from November 2011 to February 2012. Each of the Claimant and the Respondents have advanced detailed evidence and submissions on each of these particulars as addressed above. Nevertheless the breaches cannot be treated in complete isolation. In many instance the breaches can be seen as forming part of a pattern of alleged conduct involving the same witnesses and questions of their credibility as regards the rival evidence and rival "case theories." This does not mean to say that the allegations all stand or fall together but a finding in relation to the credibility of the

story advanced by one side or other in relation to one allegation does impact on the credibility of other parts of the story.

105. Therefore before turning to the individual allegations it is necessary to say something about the chief witnesses on each side and their credibility and demeanour, having reviewed and considered carefully once more the evidence advanced.

106. The Tribunal has no hesitation in reaching the conclusion that the chief witnesses called by the Claimant were truthful, honest and whilst faced with a difficult and tense situation in India continued to try to resolve matters in accordance with the provisions of the JVA.”

VIII. The Tribunal’s selective consideration of contemporaneous evidence

100. Dr. Singhvi then argued that the tribunal’s analysis of contemporaneous conduct is selective and perverse. Without going into any further details in this ground, this argument must be rejected out of hand, as not falling within the parameters of Section 48. Equally, the tribunal’s consideration of evidence of key witnesses being selective and perverse, must be rejected on the same ground.

IX. The Tribunal appointed a conflicted valuer

101. Dr. Singhvi then contended that the tribunal appointed a conflicted valuer, which prevented the Appellants from participating in the valuation exercise. This has been dealt with in the Final Award dated 11.04.2017 by the learned arbitrator as follows:

“II. Deloitte Valuation Report and the Respondents' Challenge to Deloitte

4. It is important at this stage to record one specific matter here which is referred to and set out in the Claimant's submissions (see paragraph 24 and Annexure E thereto at pages 170-172) and not contradicted by the Respondents in its submissions. On 14 October 2014 (Annexure E p. 171), Mr Karia on behalf of the Respondents sent an email to the Claimant in response to the Claimant's request dated 14 October 2014 (Annexure E p.170) that the Respondents do cause the Company in a timely fashion to execute the Engagement letter for Deloitte. On 14 October 2014 (Annexure E p.171), Mr Karia for the Respondents objected to the engagement of Deloitte contending that they were conflicted out of acting as Valuer. This was a remarkable stance to take. On 30 April 2013 the Respondents, via an email sent by their solicitors, had confirmed that the Respondents were agreeable to Deloitte or KPMG acting as independent Valuers under the JVA. The Tribunal noted and recorded this in the Preamble to Procedural Order No 12, albeit referring to the date as 30 April 2014. There had been no material change in circumstance since April 2013 or Procedural Order No 12, to justify this change of position. The Tribunal concludes that the Respondents took this position in an attempt to hinder, delay and frustrate the valuation exercise and consequent transfer of shares. The Respondents advanced a series of points in their email. Each was answered in the Claimant's solicitors' email dated 15 October 2014 (see Annexure E p.170 to the Claimant's submissions). In summary, the Respondent was not in a position following Procedural Order No 12 and its prior agreement to Deloitte subsequently to withhold its agreement to or not to object to the appointment of Deloitte. It had been ordered following the Respondents' indication of agreement or non-objection to Deloitte.

5. The Respondents had not previously sought to identify any matters which disentitled Deloitte from acting but instead had agreed to their name being put

forward to the Tribunal for appointment. Furthermore, the matters identified did not in any event impugn Deloitte's independence or ability to act as Valuer in accordance with the provisions of the JVA. The fact that Deloitte had been approached by the Respondents to conduct an independent valuation but had declined to act because of the impending role for the Company as Valuer only serves to underline not undermine their independence. Also, the fact that the Respondents had asked Deloitte earlier in the arbitration to undertake some computer forensic exercise was not relied upon by the Respondents nor did it impugn their independence. Finally, the Respondents refer to Deloitte having acted as auditor of Power Plus Cable Company LLC ("Power Plus") a company incorporated in the UAE and based in Dubai in which Ravin holds a 49% shareholding, This is not the same entity as the Company, and did not impugn Deloitte's independence and did not prohibit them under the terms of Clause 17.3 of the JVA from being appointed. Clause 17.3 only applied to a prohibition on the statutory auditor of the Parties to the JVA acting as Valuer. It is not suggested that Deloitte was the statutory auditor of Ravin. Power Plus was not a Party to the JVA. Further, Clause 17.1 of the JVA expressly identified Deloitte as a suitable independent party to be appointed as Valuer. In any event, Deloitte's role as auditor of Power Plus was known to the Respondents and having agreed not to object to Deloitte in their 30 April 2013 email it was no longer open to the Respondents to advance this point. There was no breach of the JVA but even if there had been it was waived by the Respondents.

6. Thus following this exchange, Deloitte were in due course engaged albeit through the default mechanisms provided for in Procedural Order No 12."

We are satisfied that the learned arbitrator has considered this point in some detail and dismissed it. This objection again does not fall under any of the grounds mentioned in Section 48.

X. Valuation ignores Ravin's stake in Power Plus

102. Dr. Singhvi then argued that the valuation made by Deloitte ignored a stake of 49% of Ravin in a company called Power Plus, which stake has been valued by the Appellants' valuer (one BDO) at INR 563 crores. Considering that this aspect was not taken into account by Deloitte, the valuation report ought not to have been accepted by the learned arbitrator, also being contrary to the position taken by both parties. This submission was dealt with by the learned arbitrator in great detail in paragraph 19 of the Final Award dated 11.04.2017. Among other things, the learned arbitrator referred to clause 17 of the JVA and stated that the said clause together with the formula prescribed therein was followed by Deloitte. Since this was done, Deloitte cannot possibly be faulted and cannot further be asked to take into account the stake of Ravin in Power Plus, as that would go outside the JVA. This again is a matter for the arbitrator to determine. This again is a ground wholly outside grounds that can attract challenge to foreign awards under Section 48.

XI. Valuation Date

103. Dr. Singhvi then argued that the tribunal acted contrary to the parties' submissions in arriving at a valuation date of 30.09.2014, much later on the date of the Final Award which is 11.04.2017, as the

parties had agreed that this date ought to be the date closest to the date of actual sale of share and would be valid only until 31.12.2014.

The learned arbitrator dealt with this objection in the Final Award dated 11.04.2017 as follows:

“D. Valuation date

24. The Respondents also complain that whilst Procedural Order No 12 provided for a valuation date of 30 September 2014, Deloitte instead used data as at 31 July 2014. Respondents also complained that since the Report was only issued in November 2015, the valuation was out of date.

25. The Tribunal is unable to accept the validity of this criticism for the following reasons:

1) Deloitte records that it did request data from the Company up to 30 September 2014, but this data was not provided to Deloitte. The Tribunal has earlier in this Award recited the facts from which the Tribunal has reached the conclusion that the Company's lack of cooperation with Deloitte was effectively controlled and directed by the Respondent. This was most notably the case with regard to the Company's failure to issue the Engagement Letter to Deloitte following Procedural Order No 12. The Tribunal therefore concludes that it is not open to the Respondents to complain of the lack of further data being proved to Deloitte. It was the Respondents who were in control of the provision or non-provision of that data.

2) The Tribunal also concludes that the Respondents are not entitled to complain of the delay in the production of the Deloitte Valuation Report since that delay was materially contributed to by reason of the Respondents' complaint with regard to Deloitte's involvement which is made to the LCIA. It is notable that the Respondents have not in their submission denied that they made such a complaint to the LCIA and have not contradicted the Claimant's submission

that this complaint materially contributed to the delay in the production of the Deloitte Report.

3) Furthermore, the Respondents are not entitled to complain that Deloitte has used a valuation date of 30 September 2014. This was the valuation date agreed to and requested by the Respondents. Furthermore, as is recorded in the Recital to Procedural Order No 12 prior to the hearing in October 2014 leading to the making of the order of the valuation date, the Respondents expressly accepted that the question of the Valuation date was a matter properly within the jurisdiction of and for the determination of the Tribunal. The Tribunal then made an order for the valuation as requested by the Respondents.”

Having found that the delay in the valuation report was attributable largely to the Appellants and that therefore the agreed date of 30.09.2014 is the correct date, we find nothing in the award which can be said to even remotely shock our conscience. This ground is also therefore rejected. Dr. Singhvi’s fervent plea to exercise our power under Article 142 of the Constitution of India, so as to shift the valuation date from 30.09.2014 to the date of our judgment must also be rejected given the learned arbitrator’s finding. Quite apart from this, nothing in Section 48 of the Arbitration Act would permit an enforcing court to add to or subtract from a foreign award that must either be enforced or rejected by reason of any of the grounds under Section 48 being made out to resist enforcement of such foreign award. This Court’s power under Article 142 ought not to be used to circumvent the legislative policy contained in Section 48 of the Arbitration Act.

XII. Inconsistent Awards

104. Dr. Singhvi then argued that the tribunal's ruling in the First and Second Partial Final Award, with regard to the interpretation of clause 21, is inconsistent and irreconcilable. Apart from the fact that we do not find anything in the said two awards with regard to clause 21 being inconsistent and irreconcilable, this ground again does not, in any manner, shock our conscience and is therefore rejected.

XIII. Violation of FEMA and the Rules thereunder

105. Dr. Singhvi then argued that in ordering the sale of shares at a 10% discount of the fair market value arrived at by Deloitte, FEMA and the Rules made thereunder would be breached, resulting in the award being contrary to the public policy of India, in that it would be against the fundamental policy of the Indian law. As pointed out hereinabove, for the reasons given in paragraphs 79 to 84 of this judgment, this ground again is bereft of any merit. In fact, the learned arbitrator awarded INR 63.90 per share as per the Deloitte valuation, which was contractually binding under clause 17 of the JVA. Therefore, the lower valuation of INR 16.88 per share as in the M/s Kalyaniwalla & Mistry valuation report dated 04.03.2016 was not accepted.

XIV. Bias of the Tribunal

106. Lastly, Dr. Singhvi argued that the learned arbitrator was clearly biased in that the outcome of the Second Partial Final Award was clear to the Respondent No.1, inasmuch as its agent, one M/s Gilbert Tweed Associates, sent out an advertisement for recruiting employees for Ravin, two months before the Second Partial Final Award, thereby showing that this agent was clear as to the outcome of the proceedings. This was strongly refuted by the Respondent, stating that at no time had Gilbert Tweed Associates been retained by them. As a matter of fact, an agency called M/s Key2People was engaged by Respondent No.1 to identify potential candidates who could be recruited for the company in due course. M/s Key2People, in turn, appointed M/s Gilbert Tweed Associates. In any case, the Respondent undertook to terminate the engagement of M/s Key2People by its email of 28.10.2013. The allegation of bias thus made was clearly a desperate afterthought. The contention that the arbitrator was otherwise biased was dealt with in the Final Award as follows:

“16. The Respondents have also made a repeated reference to an allegation that the Tribunal lacked independence and that the Respondents have lost faith in the Tribunal continuing to give an impartial determination of the matters which remain in dispute.

17. These allegations have already been raised by the Respondents and rejected by the LCIA Court. Furthermore, the Respondents have not sought to invoke any procedure in the English Court, which is the court of the seat with supervisory jurisdiction. If the

Respondents wished to challenge the ruling of the LCIA Court and challenge the further involvement of the Tribunal in the process, the Respondents had to bring a challenge within the strict time limits provided for in the English Arbitration Act 1996, but they have not done so. It is regretted that the Respondents continued to advance this unfounded and unparticularised allegation. The Tribunal has in the past pointed out the distinction between independence and impartiality on the one hand and on the other the role of an arbitrator who has to decide between rival arguments, diametrically opposed and irreconcilable positions adopted before it and direct clash of evidence before it and then apply such findings to the disputes before it. It is an inherent and an inevitable part of the arbitral process that where parties, as indeed has been the case in this arbitration, have taken radically opposing positions on the evidence and the law that multiple decisions will have to be made that will ultimately disappoint one of the parties. This has been exactly such a dispute. It has, however, been a distinct feature of this process that the Respondents have not only voiced their disappointment but have not complied with the orders of the Tribunal to protect the Parties' rights during the course of the Arbitration and not complied with the terms of the JVA as has been found and determined by the Tribunal in its prior Awards. In a dispute such as the present where it has been necessary to render a series of Awards, it is necessary for the Tribunal to apply the prior findings in any subsequent Award.”

107. Having answered each of the submissions of Dr. Singhvi on behalf of the Appellants, we cannot help but be left with a feeling that the Appellants are indulging in a speculative litigation with the fond hope that by flinging mud on a foreign arbitral award, some of the mud so flung would stick. We have no doubt whatsoever that all the pleas

taken by the Appellants are, in reality, pleas going to the unfairness of the conclusions reached by the award, which is plainly a foray into the merits of the matter, and which is plainly proscribed by Section 48 of the Arbitration Act read with the New York Convention. We have read, in detail, the four awards passed by the learned sole arbitrator and are satisfied that he has exhaustively discussed the evidence and arrived at detailed findings for each of the issues, claims and counter-claims, and finally accepted the Respondent's case and rejected the Appellants'. Given the fact that our jurisdiction under Article 136 of the Constitution is itself limited, and given the fact that this Court's time has unnecessarily been taken by a case which has already been dealt with by four exhaustive awards on merits and also by the impugned judgment of the Bombay High Court, we dismiss these appeals with costs of INR 50 lakhs, to be paid by the Appellant to Respondent No.1 within 4 weeks from today.

.....J.
(R.F. Nariman)

.....J.
(Aniruddha Bose)

.....J.
(V. Ramasubramanian)

**New Delhi;
13 February, 2020.**