2024 INSC 242

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 3835 – 3836 OF 2024
(ARISING OUT OF SLP (CIVIL) NOS. 5741 – 5742 OF 2024)
[DIARY NO. 26172 OF 2023]

AVITEL POST STUDIOZ LIMITED & ORS. **Appellant(s)**

VERSUS

HSBC PI HOLDINGS (MAURITIUS) LIMITED **Respondent(s)**
(PREVIOUSLY NAMED HPEIF HOLDINGS 1 LIMITED)

O R D E R

1. Delay condoned.

2. Leave granted.

3. Heard Mr. Mukul Rohatgi and Mr. Vikram Nankani, learned senior counsel appearing for the appellants (Award Debtors). Also heard Mr. Neeraj Kishan Kaul and Mr. Darius Khambata, learned senior counsel appearing for the respondent (Award Holder).

4. The challenge in these appeals is to the order dated 25.04.2023 in the Arbitration Petition No. 833 of 2015 and Notice of Motion No. 2475 of 2016 respectively whereunder, the High Court has facilitated the enforcement of the final Award dated 27.09.2014 issued in the SIAC Arbitration No. 088 of 2012. The appellants' objection to enforcement of the foreign Award, in terms of Section 48 of the Arbitration and Conciliation Act, 1996 (for short "Indian Arbitration Act")was rejected and the High Court also directed that the order of attachment against the Award Debtors shall continue to

operate during the execution proceedings to be undertaken by the respondent. Accordingly, the Award Debtors were called upon to place on record disclosure affidavits as regards their properties.

Facts

5. This case has a chequered history and it is essential to note the background facts for the present challenge.

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

5.2. On 21.4.2011, a Share Subscription Agreement was entered between HSBC & Avitel India whereby HSBC made an investment in the equity capital of Avitel India for a consideration of US 60 million dollars to acquire 7.8% of its paid-up capital. This agreement contained an arbitration clause which provided that the disputes shall be finally resolved at the Singapore International Arbitration Centre (SIAC). Singapore was designated as the seat of arbitration and Part I of the *Indian Arbitration Act* was excluded, except Section 9 thereof. Thereafter, the parties also entered into

a Shareholders' Agreement(6.5.2011) which defined the relationship between the parties and contained an identical arbitration clause.

5.3. It is the case of HSBC(Award Holder) that the appellants at a very advanced stage made certain representations to HSBC stating that the investment of US$ 60 Million was required to service a significant contract with the British Broadcasting Corporation (BBC).

5.4. Following the investment, according to HSBC, the appellants ceased to provide any information regarding the contract with BBC, despite numerous follow-up attempts. At this stage, HSBC engaged their independent investigation agency, where it was discovered that the purported BBC Contract was non-existent and the invested amount was siphoned off to different Companies.

5.5. On 11.05.2012, HSBC invoked the arbitration clause under the SIAC Rules and claimed damages of US$ 60 million from the appellants. On 14.5.2012, SIAC Appointed Mr. Thio Shen Yi, SC as an Emergency Arbitrator. On 17.5.2012, the appellants' challenge to the appointment of the Emergency Arbitrator was considered by SIAC & Rejected. On 28.05.2012 and 29.5.2012, the emergency arbitrator passed two interim Awards, in favour of HSBC *inter alia*, directing the appellants to refrain from disposing of/diminishing the value of their assets upto US$ 50 million. On 27.7.2012, the Emergency Arbitrator made an amendment to Interim Awards granting further relief to HSBC by rejecting to desist investigations against Avitel Dubai and Avitel Mauritius.

5.6. According to HSBC, the appellants made several attempts to delay and frustrate the proceedings. The arbitral tribunal consisted of three members. Mr. Christopher Lau, SC, was the Chairman, while Justice F.I. Rebello (retired) and Dr. Michael Pryles were members of the arbitral tribunal. On 27.09.2014, the tribunal rendered its final award and directed the appellants to pay US$ 60 million as damages for fraudulent misrepresentations.

5.7. The respondent had initiated proceedings under Section 9 of the Indian Arbitration Act before the Bombay High Court. A direction was issued to the appellants to deposit US$ 60 million for the purpose of enforcement of the Award. Aggrieved by the same, the appellants filed a Special Leave Petition before this Court where it was contended, inter alia, that the dispute is non-arbitrable under Indian law as it involved allegations of fraud which included serious criminal offenses such as forgery and impersonation. Settling the law on the arbitrability of fraud, this Court in the earlier round in *Avitel Post Studioz v HSBC PI Holdings*[1], held that the dispute was arbitrable and that HSBC had a strong *prima facie* case in the enforcement proceedings, in the context of Section 9 proceedings in which HSBC had sought maintenance of the entire claim amount in Avitel's bank account.

5.8. Since the appellants failed to abide by the direction given by this Court to deposit the amount, a contempt proceeding was initiated against them. On 11.07.2022, this Court found that Avitel had deliberately and willfully disobeyed its order and hence, the

1 **(2021) 4 SCC 713**

appellants were directed to remain present before this Court. The Appellant Nos.2 to 4 however went abroad defying the direction given by this Court, as a result of which, warrants and look-out notices were also issued, with a further direction to the Ministry of External Affairs and Central Bureau of Investigation for issuance of Red-Corner Notice. Ultimately, appellant Nos.2 to 4 surrendered and despite tendering an unconditional apology, this Court refused to accept the same and for their conduct, appellant Nos. 2 to 4 were sentenced to imprisonment.

Submissions

6. According to the appellants, the Presiding Arbitrator, Mr. Christopher Lau of the three-member Arbitral Tribunal, had failed to make a full and frank disclosure of material facts and circumstances concerning conflict of interest and therefore the Award rendered by the Tribunal presided by Mr. Lau cannot be enforced as it is against public policy in terms of Section 48(2)(b)of the Indian Arbitration Act.

7. The counsel for the appellants refers to the IBA Guidelines on Conflict of Interest in International Arbitration, 2004 ("IBA Guidelines") along with the Red, Orange and Green lists appended thereto covering matters concerning disclosure and conflict of interest to argue that the High Court ought to have refused enforcement of the Award. The specific contention is that the Presiding Arbitrator failed to disclose his conflict of interest to adjudicate the dispute. According to the Award Debtors the

independence and impartiality of the Presiding Arbitrator was compromised, as per General Standard 3 of the IBA Guidelines.

8. On the other hand, learned counsel for the respondent (Award Holder) would submit that the concerned party here is HSBC PI Holdings (Mauritius) Limited, which is a subsidiary of HSBC Holdings PLC (United Kingdom). The other subsidiary is HSBC (Singapore) Nominees Pte Ltd. which is alleged to have a contractual association with Wing Tai. The HSBC (Singapore) held 6.29% of Wing Tai's equity capital on a trustee/nominee basis, as of 15.09.2014. But the said Wing Tai has no relationship with the Award Holder and is not part of the HSBC Group.

9. Insofar as the Presiding Arbitrator Mr. Christopher Lau is concerned, the respondent submits that he has been an independent non-executive Director of Wing Tai since 28.10.2013 and also the Chairman of the Audit and the Risk Committee of Wing Tai. But Mr. Lau is not an employee of Wing Tai and therefore it is contended that it is wrong to say that he cannot discharge responsibility as an independent arbitrator or was incapacitated in any manner, in rendering the final Award dated 27.09.2014.

10. Initially, the Award Holders argued before the High Court that bias could not be raised under the concept of "public policy of India". However, later on, submissions were made to demonstrate that even if it is accepted for the sake of argument that the issue could be raised at the stage of enforcement, no disclosure was required on the part of the arbitrator.

11. Before this Court, the appellants attempted to raise an additional challenge to the award under Section 48(1)(b) of the Indian Arbitration Act on account of 'inability to present their case'.

12. Another ground mentioned in the SLP was to consider the effect of the dictum of the five-judge bench of this Court in *NN Global Mercantile Private Ltd. v M/s Indo Unique Flame Ltd*[2] *(for short "NN Global")* delivered on 25.04.2023 as per which the Share Subscription Agreement being insufficiently stamped would be unenforceable in India. However, during the pendency of the present proceedings, the Supreme Court in *In Re: Interplay Between Arbitration Agreements under the Arbitration and Conciliation Act,1996 and the Indian Stamp Act,1899*[3] delivered on 13.12.2023 has overruled the decision in *NN Global(supra*). The 7-judge bench had noted, *inter alia*, that the purpose of the *Stamp Act,1899* is to protect the interests of revenue and not arm litigants with a weapon of technicality by which they delay the adjudication of the lis. This may be the reason why the Counsel chose not to orally argue on this point.

13. The two grounds noted above, need not detain us as the fundamental issue that requires determination is whether enforcement can be refused on the ground of bias. In these proceedings, challenging the High Court's judgment, the appellants reiterate their contention that the enforcement of the award is

2 **(2023) 7 SCC 1**
3 **2023 INSC 1066**

impermissible on the ground of arbitral bias and is contrary to the "public policy of India" as per Section 48(2)(b) of the Indian Arbitration Act.

Discussion

14. Against this background, the consideration to be made in these matters is whether the High Court was correct in its decision to reject the objection under Section 48(2)(b) of Indian Arbitration Act against enforcement of the foreign Award on the grounds of arbitral bias and violation of public policy. This raises a further question as to whether the ground of bias could be raised at the enforcement stage under Section 48(2)(b) for being violative of the "public policy of India" and the "most basic notions of morality or justice"?

15. India was one of the earliest signatories to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958* (for short "New York Convention")[4]. The New York Convention superseded the Geneva Convention of 1927 to facilitate the enforcement of foreign Arbitral Awards[5]. Article V(2) of the New York Convention reads as under:

> **"2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:**

4 **Ratified on 13.7.1960**

5 **Travaux Préparatoires, Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) Commission on International Trade Law' (United Nations)**

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country."

16. The precursors to the New York Convention on the contrary provided for an expansive scope for invoking the public policy ground based on the violation of the "fundamental principles of the law". Although the notion that 'public policy' is 'a very unruly horse' has gained traction over the years[6], one would also do well to remember the words of Lord Denning who said that, "With a good man in the saddle, the unruly horse can be kept in control."[7] This would suggest that a proper understanding of this branch of law by the horse rider would be necessary. In that context, one of the earliest cases that dealt with the aspect of "public policy" and the general pro-enforcement bias of the New York Convention was the decision in *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier*,[8] where the United States Court of Appeals, Second Circuit noted:

> **"8. …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… Additionally, considerations of reciprocity — considerations given express recognition in the Convention itself— counsel courts to invoke the public policy defense with caution lest**

6 **J. Burrough, Richardson v. Mellish, (1824) 2 Bing. 229 at 252.**

7 **Enderby Town Football Club Ltd. v. The Football Association Ltd., [1971] Ch 591.**

8 **508 F.2d 969 (1974)**

foreign courts frequently accept it as a defense to enforcement of arbitral awards rendered in the United States.

9. 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."

17. The above decision has been followed in various jurisdictions including the Supreme Court of India in *Renusagar Power Co. Ltd. v. General Electric Co*[9]. The articulation of the "forum State's most basic notions of morality and justice" has been legislatively adopted in the Indian *Arbitration Act,1996*. The legal framework concerning enforcement of certain foreign awards in International Commercial Arbitration is contained in Part II of the said Act. In this jurisdiction, we must underscore that minimal judicial intervention to a foreign award is the norm and interference can only be based on the exhaustive grounds mentioned under Section 48.[10] A review on the merits of the dispute is impermissible[11]. This Court in *Vijay Karia v. Prysmian Cavi E. Sistemi SRL*,[12] had noted that Section 50 of the *Indian Arbitration Act,1996* does not provide an appeal against a foreign award enforced by a judgment of a learned Single Judge of a High Court and therefore the Supreme Court should only entertain the appeal with a view to settle the law. It was noted that the party resisting enforcement can only have "one bite at the cherry" and when it loses in the High Court,

9 **1994 Supp (1) SCC 644**
10 **Union of India v. Vedanta, (2020) 10 SCC 1**
11 **Shri Lal Mahal Ltd. v Progetto Grano SpA (2014) 2 SCC 433**
12 **(2020) 11 SCC 1**

the limited scope for interference could be merited only in exceptional cases of "blatant disregard of Section 48". This principle of pro-enforcement bias was further entrenched by the Supreme Court in *Union of India v Vedanta*[13].

18. At this point, we may also note that Courts in some countries have recognized that when applying their own public policy to Convention Awards, they should give it an international and not a domestic dimension[14]. The Arbitration legislation in France[15], for instance, makes an explicit distinction between national and international public policy, limiting refusal of enforcement only to the latter ground. Scholars have noted that the New York Convention's structure and objectives argue strongly against the notion that reliance should be placed on local public policies without international limitations.[16] The objective behind such a distinction is to make it less difficult to allow enforcement on public policy grounds. Most Courts have interpreted the public policy exception extremely narrowly[17].

19. The Indian Supreme Court in *Renusagar (supra)* had noted that there is no workable definition of international public policy, and "public policy" should thus be construed to be the "public policy

13 **(2020) 10 SCC 1**

14 **Nigel Blackaby KC, and others, *Redfern and Hunter on International Arbitration* (7th Edn, OUP 2022), 594**

15 **Article 1514 of French Code of Civil Procedure 1981**

16 **Gary Born, International Commercial Arbitration(3rd ed,2021) 2838; Robert Briner, Philosophy and Objectives of the Convention' in *Enforcing Arbitration Awards under the New York Convention. Experience and Prospects* (United Nations 1999).**

17 **George A Bermann, 'Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts' in George A. Bermann(ed) *Recognition and Enforcement of Foreign Arbitral Awards* (Springer 2018) 60**

of India" by giving it a narrower meaning. Later on, in *Shri Lal Mahal Ltd. v Progetto Grano SpA*[18], the Supreme Court held that the wider meaning given to 'public policy of India' in the domestic sphere under Section 34(2)(b)(ii) would not apply where objection is raised to the enforcement of the Award under Section 48(2)(b) of the Indian Arbitration Act. This would indicate that the grounds for resisting enforcement of a foreign award are much narrower than the grounds available for challenging a domestic award under Section 34 of the Indian Arbitration Act.

20. At this point, we may also benefit by noting that the International Law Association issued recommendations[19] at a conference held in New Delhi in 2002 on international commercial arbitration and advocated using only narrow and international standards, while dealing with "public policy". The recommendations have been regarded as reflective of best international practices. The ILA also defined international public policy as follows:

> **"(i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned;**
>
> **(ii) rules designed to serve the essential political, social or economic interests of the State, these being known as 'lois de police' or 'public policy rules'; and**
>
> **(iii.) the duty of the State to respect its obligations towards other States or international organizations."**

18 **(2014) 2 SCC 433**

19 **Committee On International Commercial Arbitration, 'Application Of Public Policy As A Ground For Refusing Recognition Or Enforcement Of International Arbitral Awards' In International Law Association Report Of The Seventieth Conference(New Delhi 2000)**

21. Being a signatory to the New York Convention, we must therefore adopt an internationalist approach[20]. What follows from the above is that there is a clear distinction between the standards of public policy applicable for domestic arbitration and international commercial arbitration. Proceeding with the aforedeclared proposition to have a narrow meaning to the doctrine of public policy and applying an international outlook, let us now hark back to whether a foreign Award can be refused enforcement on the ground of bias.

22. Even though the New York Convention does not explicitly mention "bias", the possible grounds for refusing recognition of a foreign award are contained in Article V(1)(d)(irregular composition of arbitral tribunal), Article V(1)(b) (due process) and the public policy defence under Article V(2)(b). Courts across the world have applied a higher threshold of bias to prevent enforcement of an Award than the standards set for ordinary judicial review[21]. Therefore, Arbitral awards are seldom refused recognition and enforcement, considering the existence of a heightened standard of proof for non – recognition and enforcement of an award, based on alleged partiality[22]. It invokes a higher threshold than is applicable in cases of removal of the

20 **Fali Nariman and others, 'The India Resolutions for the 1958 Convention on the Recognition and Enforcement of Foreign Awards' in Dushyant Dave and others(ed) *Arbitration in India* (Kluwer 2021)**

21 **Reinmar Wolff (ed), *A Review of New York Convention: Article-by-Article Commentary* (2nd edn Beck/Hart, 2019) 352**

22 **Stavroula Angoura, 'Arbitrator's Impartiality Under Article V(1)(d) of the New York Convention' (2019) 15 (1) AIAJ 29**

arbitrator.[23] This is for the reasons that, greater risk, efforts, time, and expenses are involved in the non-recognition of an award as against the removal of an arbitrator during the arbitral proceedings.

23. What is also essential to note is that Courts across the world do not adopt a uniform test while dealing with allegations of bias[24]. The standards for determining bias vary across different legal systems and jurisdictions[25]. English Courts[26], for instance, adopt the "informed or fair minded" observer test to conclude whether there is a "real possibility of bias". Australia[27] adopts the "real danger of bias" test and Singapore[28] prefers the standard of "reasonable suspicion" rejecting the "real danger of bias" test. Therefore, the outcome of a challenge on the ground of bias would vary, depending on domestic standards.

24. Cautioning against applying domestic standards at the enforcement stage, Gary Born[29] emphasizing on the adherence to international standards, makes the following observation:

> **"In light of developing sources of international standards with regard to arbitrators' conflict of interest, it should be possible to identify and apply international minimum standards of impartiality and independence...**

23 **Gary Born(n 12)3937**

24 **William W. Park, 'Arbitrator Bias' (2015) TDM 12; Sumeet Kachwaha,'The Rule Against Bias and the Jurisprudence of Arbitrator's Independence and Impartiality'(2021) 17(2) AIAJ 104**

25 **Vibhu Bakhru J, 'Impartiality and Independence of the Arbitral Tribunal' in Shashank Garg(ed),*Arbitrator's Handbook* (Lexis Nexis 2022)**

26 **Halliburton Co. v Chhub Bermuda Insurance Ltd [2020] UKSC 48**

27 **Hancock v Hancock Prospecting Pty Ltd [2022] NSWSC 724**

28 **Re Shankar Alan s/o Anant Kulkarni [2007] 1 SLR(R) 85 at [75]–[76]**

29 **Gary Born (n 12) 3946**

> **More generally, in considering whether to deny recognition of an award under Article V, national courts should not apply domestic standards of independence and impartiality without regard to their international context. Although national standards of independence and impartiality may be relevant to identifying international standards, just as domestic standards of procedural fairness can be relevant under Article V(1)(b), these standards should be considered with caution in international contexts. ….Only in rare cases should domestic standards of independence or impartiality be relied upon to produce a different result from that required by international standards".**

25. Embracing international standards in arbitration would foster trust, certainty, and effectiveness in the resolution of disputes on a global scale. The above discussion would persuade us to say that in India, we must adopt an internationally recognized narrow standard of public policy, when dealing with the aspect of bias. It is only when the most basic notions of morality or justice are violated that this ground can be attracted. This Court in *Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India (NHAI)*[30] had noted that the ground of most basic notions of morality or justice can only be invoked when the conscience of the Court is shocked by infraction of fundamental notions or principles of justice.

26. In view of the above discussion, there can be no difficulty in holding that the most basic notions of morality and justice under the concept of 'public policy' would include bias. However, Courts must endeavor to adopt international best practices instead of

30 (**2019) 15 SCC 131**

domestic standards, while determining bias. It is only in exceptional circumstances that enforcement should be refused on the ground of bias.

27. Let us now turn to the present facts. The Award in this matter was passed in Singapore, a New York Convention Country and notified[31] as a reciprocating territory by India. Chapter 1 Part II of the *Indian Arbitration Act* is applicable in the present case. The parties had expressly chosen Singapore as the seat of Arbitration. It is the seat court which has exclusive supervisory jurisdiction to determine claims for a remedy relating to the existence or scope of arbitrator's jurisdiction or the allegation of bias[32]. A contrary approach would go against the scheme of the New York Convention which has been incorporated in India. The jurisdiction was therefore chosen based on the perceived neutrality by the parties aligning with the principle of party autonomy. Interestingly in the present case, no setting aside challenge based on bias was raised before the Singapore Courts by the appellants within the limitation period. In this context, the Bombay High Court in a judgment in *Perma Container(UK) Line Limited v Perma Container Line(India) Ltd*[33] had noted that since the objection of bias was not raised in appropriate proceedings under the *English Arbitration Act,1996*, it could not be raised at the post-award Stage. Similarly, this Court in *Vijay Karia(supra*) had noted that no challenge was made to the foreign award under the English

31 **Gazette Notification S.O.542(E) dated 06.7.1999**

32 **AV Dicey and L. Collins, *Dicey, Morris & Collins on the Conflict of laws*(15th edn, Sweet and Maxwell 2018) [16-36]**

33 **2014 SCC OnLine Bom 575**

Arbitration Law, even though the remedy was available. Rejecting the challenge to the award on the ground of bias, the Court in *Vijay Karia(supra*) remarked that the Award Debtors were indulging in "speculative litigation with the fond hope that by flinging mud on a foreign arbitral award, some of the mud so flung would stick". Similar view has also been taken by the German Supreme Court in *Shipowner (Netherlands) v Cattle and Meat Dealer(Germany*)[34], where it was held that the objection of bias must be first raised in the Country of origin of the Award and only if the objection was rejected or was impossible to raise, could it be raised at the time of enforcement.

28. In the present case also, the Award Holders had challenged the appointment of Mr. Christopher Lau SC and Dr Pryles before SIAC only on the ground that the Tribunal had intentionally fixed November 2013 for hearing knowing that it coincided with the Diwali vacation and that the Indian counsel would therefore not be available. This challenge was dismissed by the SIAC Committee of the Court of Arbitration in its decision dated September 13, 2014. Therefore, none of the other grounds now being pressed were raised during the arbitration or in the time period available to the appellants to apply, to set aside the Award in Singapore.

29. It needs emphasizing that bonafide challenges to arbitral appointments have to be made in a timely fashion and should not be used strategically to delay the enforcement process. In other

34***Dutch Shipowner v. German Cattle and Meat Dealer***, **Bundesgerichtshof, Germany, 1 February 2001, XXIX Y.B.Com. Arb. 700 (2004)**

words, the Award Debtors should have applied for setting aside of the Award before the Singapore Courts at the earliest point of time.

Implications of the IBA Guidelines

30. The High Court in this case applied the reasonable third-person test contained in the IBA Guidelines to conclude that there is no requirement of disclosure and bias. The IBA Guidelines are a collective effort of the arbitration community to define as to what constitutes bias. However, bias has to be determined on a case-to-basis but Courts should attempt to apply international standards, while dealing with challenges at the enforcement stage.

31. The implications of the IBA Guidelines and their application will now have to be considered.

32. The IBA Guidelines have also been adopted in the V and VII Schedule to the Indian Arbitration Act and since the Award here is dated 27.09.2014, the IBA Guidelines of the year 2004 would be relevant and applicable. The working group of the IBA had determined the standards/guidelines to bring about clarity and uniformity of application and accordingly, the Red, Orange and Green lists were appended to the Guidelines, to ensure consistency and to avoid unnecessary challenges and withdrawals and removals of arbitrators. The IBA Guidelines require an arbitrator to refuse appointment in case of any doubts as to impartiality or independence. The Arbitrator is also expected to disclose such facts or circumstances to the parties which might compromise the

arbitrator's impartiality or independence. In the event of any doubt on whether an arbitrator should disclose certain facts or circumstances, the issue should be resolved in favour of disclosure. This is because an arbitrator is not expected to serve in a situation of conflict of interest. An arbitrator is also under a duty to make reasonable enquiry to investigate any potential conflict of interest.

33. The relevant entries in the non-waivable Red list, the waivable Red list, the Orange list and the Green list would suggest that those were intended to ensure the fairness of the process and also make certain that the arbitrator is impartial and also independent of the parties. Such position of the arbitrator vis-à-vis the dispute should exist not only while accepting the appointment but must continue throughout the entire arbitration proceeding until it terminates.

34. In the impugned judgment, the High Court adverted to the IBA Guidelines in some detail and noticed that Mr. Christopher Lau (Chairman of the Arbitral Tribunal) was an independent non-executive Director of two companies – Wing Tai and Neptune. The learned judge then considered whether he ought to have disclosed such relationship before taking up the assignment of arbitration. The Court noticed that the Award Debtors raised an omnibus objection and had invoked the non-waivable Red list as well as the waivable Red list as also the Orange list of the IBA Guidelines to claim that the arbitrators were under a duty of disclosure. With such broad-based contentions, the appellants urged that Mr. Lau

having failed to disclose the circumstances, the likelihood of bias was very strong and this would vitiate the foreign Award, sought to be enforced in India.

35. Adverting to the specific entries in the IBA Guidelines, pertaining to the alleged bias of Mr. Christopher Lau (the Chairman of the Arbitral Tribunal), the High Court reached the following conclusion:

35.1. The circumstance alleged by the award debtor for arbitral bias is the business interaction between one of the group companies of the award holder with independent private companies i.e., Wing Tai and Neptune wherein Mr. Lau was an independent non-executive director. However, neither Wing Tai or Neptune fall within the definition of "affiliate" of the award holder as per the IBA Guidelines. It was therefore concluded that no reasonable third person would conclude that justifiable doubts arise about impartiality or independence of Mr. Lau. Thus, there exists no identity or conflict of interest between Mr. Lau and the award holder, or any of its affiliates including its holding company i.e. HSBC PLC (UK).

35.2. While the award debtors' suggest their case implies a need for disclosure beyond the 'Red' or 'Orange' lists, and the inapplicability of the 'Green list, the 'reasonable third person' test is the measure for assessing conflict of interest. The High Court concluded that the award debtors have not established that an impartial observer, aware of all facts, would doubt Mr. Lau's impartiality or independence and consequently, the likelihood of bias of the arbitrator is not discernible.

35.3. The award holder provided ample evidence countering the award

debtors' claims about its affiliate's roles as book-runners and underwriters with Wing Tai and Neptune, by showing joint participation of various other banks. The allegation of a significant shareholding by a wholly-owned subsidiary of the award holder's affiliate in Wing Tai and Neptune was found unsupported by evidence. The affiliate was one amongst many in the fund-raising and held the shares in trust during the course of business.

35.4 Even upon applying the subjective approach for disclosure, wherein the disclosure requirement is viewed from the Award Debtors' point of view, certain limitations apply, as per the Green list of the IBA Guidelines. Placing reliance upon Clauses, 4.5 and 4.53 of the Green list, the learned Judge of the High Court found no conflict of interest between the arbitrator and the award holder or its affiliates. In case, the circumstances alleged fall under the green list, no duty of disclosure is owed by the arbitrator.

36. The above discussion in the impugned judgment in our assessment correctly suggests that Mr. Christopher Lau neither had a duty to disclose nor did he fail to discharge his legal duty of disclosure in accepting the assignment as the Presiding Arbitrator. In the circumstances here, we cannot infer bias or likelihood of bias of the Presiding Arbitrator. Award Debtors therefore cannot claim that there is any violation of the public policy, which would render the foreign award unenforceable in India.

37. Nevertheless, it would also be appropriate to address one specific contention raised by the Award Debtors on the communication addressed by Mr. Christopher Lau to an enquiry made on 03.02.2016, by one Ms. Pauline. In his response, Mr. Lau refused

to accept the suggested assignment stating that there is conflict of interest in his taking action against HSBC. The circumstances under which the above communication was addressed by Mr. Lau are explained in detail in Mr. Lau's letter dated 26.04.2016. A reading of the response would show the reason for the response to Ms. Pauline. It would also additionally confirm that Mr. Christopher Lau during the phase when he acted as the Presiding Arbitrator between the appellants and the respondent, was not subject to any conflict of interest. He is held to have duly complied with the disclosure obligation and no bias or improper conduct can be attributed to rendition of the Award dated 27.09.2014 by Mr. Lau, as the President of the Arbitral Tribunal.

38. Another point on the above aspect i.e. the timing of the communication would also need our attention. The communication by Ms. Pauline was made in the year 2016, much after the final Award was rendered on 27.09.2014. When the explanation of Mr. Christopher Lau in his communication dated 26.04.2016 is examined in the context of the roving query made by the third party, well beyond the Award, we have no hesitation to hold that there was no disability on the part of Mr. Lau to conduct the arbitral proceedings between the appellants and the respondent.

39. We, therefore, conclude that there is no bias factor operating against Mr. Lau that would violate the most basic notions of morality and justice or shock the conscience of the Court.

Onerous Travails

40. This case has unfortunately seen a protracted and arduous battle to enforce an award for over 10 long years, with multiple phases of litigation. The arbitration itself commenced in Singapore on 11.05.2012, when notice of arbitration was issued by the respondent. Then the SIAC Emergency Awards were rendered on 28.05.2012 and 29.05.2012. Proceedings were then initiated by the award holder under S. 9 of Indian Arbitration Act at the Bombay High Court, seeking deposit of security amount to the extent of their claims. In the meanwhile, the award debtors' objections on the grounds of jurisdiction were dismissed by the arbitral tribunal through a Final Partial Award on 17.12.2012. In the Section 9 proceedings, the appellants were directed to deposit a certain sum for enforcement of the award. The award debtor challenged the same before the Supreme Court, which was subsequently dismissed and culminated in an order to maintain the specified amount in the award debtor's account. However, the award debtors' failure to maintain their account to the ordered extent, led to the contempt proceedings before the Supreme Court, which were disposed of vide orders dated 02.09.2022 & 09.09.2022.

41. Meanwhile, the Final Award was issued on 27.09.2014, which was sought to be set aside by the award-debtor through an application under 34 of the Indian Arbitration Act before the High Court. The same was dismissed as not maintainable on 28.09.2015. An appeal against the same was filed & dismissed subsequently. Simultaneously the award holder sought to enforce the award through an Arbitration Petition before the High Court. As a result, the enforcement

proceedings culminated in the impugned orders dated 25.04.2023 of the High Court whereby the final award was rendered enforceable.

42. This long list of events points to a saga of the award-holder's protracted and arduous struggle to gather the fruits of the Award. The Award Debtors raised multiple challenges and also defied the Court's order. They had to serve jail time for such contemptuous actions. In this backdrop, the travails of Award holders suggest a Pyrrhic victory. It is not unlike the situation articulated by the playwright & author Oscar Wilde who commented - "*In this world, there are only two tragedies. One is not getting what one wants, and the other is getting it*."[35] As can be noticed, in this case, despite the award being in their favour, the award-holders found themselves embroiled in multiple litigations in different forums by the concerted and unmerited action of the appellants. It will bear mention here, that in every forum the award debtors have lost and Courts' verdicts are in the favour of the award holders. Despite this, the benefit of the foreign award is still to reach the respondents. This sort of challenge where arbitral bias is raised at the enforcement stage, must be discouraged by our Courts to send out a clear message to the stakeholders that Indian Courts would ensure enforcement of a foreign Award unless it is demonstrable that there is a clear violation of morality and justice. The determination of bias should only be done by applying international standards. Refusal of enforcement of foreign award should only be in a rare case where,

35 **Oscar Wilde, Act III, Lady Windermere's Fan, 1893**

non- adherence to International Standards is clearly demonstrable.

43. The High Court in this matter has rightly held that the award-debtors have failed to substantiate their allegation of bias, conflict of interest or the failure by the Presiding Arbitrator to render disclosure to the parties, as an objection to the enforcement of the award. The award debtors have failed to meet the high threshold for refusal of enforcement of a foreign award under Section 48 of the Indian Arbitration Act. Accordingly, the decision given by the High Court for enforcement/execution of the foreign award stands approved. The appeals are found devoid of merit.

44. Even as the appeals filed by the award debtors are dismissed, the respondents, notwithstanding their victory in all the legal battles until now, must not be allowed to feel that theirs is a case of winning the battle but losing the war. In the circumstances, we emphasize the need for early enforcement of the foreign award by the competent forum, without showing any further indulgence to the award debtors. It is ordered accordingly. The appeals stand dismissed on these terms.

45. Pending application(s), if any, shall stand closed.

.....J.
(HRISHIKESH ROY)

.....J.
(PRASHANT KUMAR MISHRA)

NEW DELHI;
MARCH 04, 2024.