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\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **O.M.P.(EFA)(COMM.) 2/2017**

SWISS SINGAPORE OVERSEAS ENTERPRISES  
PTE LTD

..... Petitioner

Through: Mr S.N. Mitra and Ms Ekta  
Bhasin, Advocates.

versus

SARA INTERNATIONAL PVT. LTD

.....Respondent

Through: Mr Virender Ganda, Senior  
Advocate with Mr Vipul Ganda, Mr Raghav  
Kakkar and Ms Shreya Jain, Advocates.

**CORAM:**

**HON'BLE MR. JUSTICE VIBHU BAKHRU**

**ORDER**

**% 07.03.2018**

**VIBHU BAKHRU, J**

1. M/s Swiss Singapore Overseas Enterprises Private Limited (hereafter 'SSOEPL'), a company registered under the laws of Singapore has filed the present petition for enforcement of a foreign award dated 16.10.2016 (hereafter 'the arbitral award') passed by the Arbitral Tribunal in respect of an arbitration conducted under the aegis of Singapore International Arbitration Centre (SIAC).

2. The respondent (hereafter 'SARA'), a company incorporated in India, has filed objections to the enforcement of the arbitral award under Section 48 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), which are considered by this Court hereunder.

3. The arbitral proceedings were commenced in the context of the disputes that had arisen between the parties in relation to a Sales

Contract dated 03.04.2014 (hereafter ‘the Agreement’), whereby SSOEPL agreed to sell South African Steam Coal to SARA.

4. Initially, the contract between the parties was for sale and purchase of 20,000 metric tonnes +/- 10% (at seller’s option) but the contract was subsequently amended by an addendum to the Agreement executed on 08.05.2014. In terms of the said addendum, the quantity to be supplied was increased by a further 25,000 metric tonnes +/- 10% (seller’s option).

5. Disputes arose between the parties in respect of the second shipment of 25,000 metric tonnes of Steam Coal that was loaded on board, the Vessel, MV TIAN BAO HAI (hereafter ‘the Vessel’). SARA raised certain claims for compensation, which was disputed by SSOEPL.

6. In view of the disputes between the parties, SARA invoked the arbitration clause and issued a notice dated 15.09.2014 to SSOEPL in accordance with Clause 17 of the Agreement (the Arbitration Clause). The said clause is set out below:-

**“17. Commercial law and Arbitration:**

a) This contract shall be governed and construed in accordance with Commercial Law of Singapore subject to clause (b) below, courts in Singapore shall have exclusive jurisdiction.

b) Any disputes, claims or controversy between the parties including without limitation any breach or non-performance or alleged breach or non-performance of this agreement or the validity or existence of this Agreement or any part thereof, arising out of or in

connection with or relating to this agreement shall be resolved by binding arbitration in Singapore, in accordance with the Arbitration Rules of Singapore International Arbitration Centre (SIAC Rules) and any amendments thereof.”

7. SARA filed a statement of claims on 20.09.2014 along with notice of arbitration. On 28.10.2014, SSOEPL submitted a response to the notice of arbitration evincing its intention to prefer a counterclaim. Since, the parties did not arrive at an agreement on the nomination of the sole arbitrator, the President of the Court of Arbitration of SIAC appointed Mr Simon Milnes as the Sole Arbitrator in terms of the SIAC Rules, 2013.

8. On 04.03.2015, SSOEPL filed its statement of defence and counterclaims. SARA submitted its statement of reply and defence to counterclaim on 18.04.2015.

9. SARA claimed that SSOEPL had breached the Agreement by (a) omitting to give notice of the Vessel’s estimated time of arrival seven days prior to arrival at the load port; (b) omitting to transmit (by e-mail) a non-negotiable set of copy of documents within ten working days of the date of bills of lading; (c) sending an incomplete discrepant unusable set of documents (which was sent belatedly); and (d) tendering documents under the L/C, which were discrepant with the L/C.

10. SSOEPL contested the aforesaid claims and also preferred a counterclaim alleging that SARA had breached the Agreement. SARA’s claim did not meet with any success. The counterclaim

preferred by SSOEPL was also rejected. The controversy involved in the present case is in respect to the award relating to the apportionment of costs.

11. The Arbitral Tribunal noted that there was no dispute as to the principle that costs should “follow the event”. In this context, the Arbitral Tribunal held as under:-

“241 Subject to the possible effects of the settlement offers made by the Parties, which are addressed below:

- (1) The “event” which costs are to follow would be that the Claimant failed on the claim, and the Respondent failed on the counterclaim;
- (2) Hence, the Respondent would prima facie be entitled to recover its legal costs and a proportionate share of the costs of the arbitration to reflect its success in defeating the claim; while the Claimant would prima facie be entitled to recover its legal costs and a proportionate share of the costs of the arbitration to reflect its success in defeating the counterclaim.

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246. Given the outcome on the claim and the counterclaim, there has to be an apportionment to reflect the Parties’ respective partial success and failure. The Parties did not put forward costs figures that distinguished between costs of the claim and of the counterclaim. This is understandable, as there was some degree of overlap. The counterclaim was a small aspect of the proceedings. It took up at most approximately 10-15% of the Parties’ and their counsels’ efforts

in the pleadings, written statements, oral examination and submissions at the hearing. It follows that even after being credited for its costs recovery on the counterclaim, the Claimant will still be the net paying party by a significant margin. The Claimant will therefore be credited for its costs recovery by way of a set-off against the costs awarded to the Respondent. For this reason, the net costs awarded to the Respondent will be:

- (1) 85% of the Respondent's legal costs and disbursements, less 15% of the Claimant's legal costs and disbursements; and
- (2) 70% of the costs of the arbitration, with the Respondent to bear the remaining 30%. (NB that 70% is arrived at by awarding the Respondent 85%, less a notional recovery by the Claimant of 15%)."

12. The Arbitral Tribunal examined the costs statement computed by the parties and apportioned the same on the basis of the principle as set out above. Resultantly, SARA was directed to pay SGD 164,294.40 being a part of SSOEPL's legal costs and disbursement. SARA was also directed to bear 70% of the costs of arbitration. In addition, SARA was also held liable to pay simple interest at the rate of 5.33% per annum from the date of the award till the date of final payment.

### ***Submission***

13. Mr Virender Ganda, learned Senior Counsel appearing on

behalf of SARA contended that the enforcement of the arbitral award ought to be declined in terms of Section 48(2)(b) of the Act as being contrary to the public policy of India.

14. He submitted that in terms of Section 35 of the Code of Civil Procedure, 1908 only reasonable costs could be paid and it was not permissible that actual costs incurred be reimbursed. He also referred to Section 31A of the Act and submitted that only reasonable costs could be imposed. He submitted that in the present case, there was a wide difference between the legal costs incurred by SSOEPL and SARA. Whereas, the counsel engaged by SARA had charged a sum of ₹8,62,200/- (equivalent to SGD 17,933), SSOEPL had claimed counsel fee of SGD 187,610.50, which is more than tenfold the actual fee paid by the SARA. He submitted that in the given circumstances, the apportionment of costs as directed by the Arbitral Tribunal would be unreasonable and impermissible under Indian Law. He also referred to the decision of the Supreme Court in *Sanjeev Kumar Jain v. Raghubir Saran Charitable Trust an Ors.: (2012) 1 SCC 455* in support of his contention.

#### ***Reasoning and Conclusion***

15. SARA has placed its case for resisting the enforcement of the Arbitral Award, under Section 48(2)(b) of the Act. Thus, at the outset, it would be relevant to refer to Section 48(2) of the Act, which is set out below:-

**“48. Conditions for enforcement of foreign awards.—**

(1) xxxx xxxx xxxx

(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 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.]”

16. It is not SARA’s case that the making of the Arbitral Award was induced or effected by fraud or corruption or is in violation of Section 75 or Section 81 of the Act. It is also not SARA’s case that the Arbitral Award is in conflict with the most basic notions of morality or justice. Thus, the only question that falls for consideration of this Court is whether the Arbitral Award is in contravention with the fundamental policy of Indian law.

17. Explanation 2 to Section 48(2)(b) of the Act clarifies that the question whether the award is in contravention of the fundamental policy of Indian law would not entail a review on the merits of the dispute.

18. The expression “public policy” is very wide. In *Renusagar Power Co. Ltd. v. General Electric Co.: 1994 Supp. (1) SCC 644*, the Supreme Court had observed that the term “*public policy is somewhat*

*open textured and flexible*". In *Central Inland Water Transport Corporation Ltd. & Anr v. Brojo Nath Ganguly & Anr: 1986 3 SCC 156*, the Supreme Court had further observed that the expressions "public policy", "opposed to public policy" or "contrary to public policy" are incapable of precise definition.

19. It is now well settled that in the context of enforcement of a foreign award, the expression "public policy" must be interpreted in a narrow sense. In *Renusagar Power Co. Ltd. (supra)*, the Supreme Court 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. The above position in law was reiterated by the Supreme Court in a later decision in *Shri Lal Mahal Ltd. v. Progetto Grano SPA: (2014) 2 SCC 433* wherein the Supreme Court held as under:-

"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 a (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* is not applicable where objection is raised to the enforcement of the foreign award under Section 48(2)(b)."

20. SARA's challenge to the enforcement of the arbitral award must be decided on the anvil of the aforesaid principles. In the present case, the Arbitral Tribunal had examined the statement of costs

submitted by SSOEPL and found that the same was reasonable. The arbitral proceedings were commenced at the instance of SARA. While, SARA had technically established minor breaches on the part of SSOEPL, SSOEPL was also successful in technically establishing that SARA had breached the Agreement. None of the parties had prevailed in their claims.

21. The Arbitral Tribunal concluded that the counterclaim was only a small aspect of the proceedings and at the most it took up only 10 to 15% of the parties and their counsels' efforts in the pleadings, written statements, oral examination and submissions at the hearing. Thus, the Arbitral Tribunal allocated only 15% of the legal costs to SSOEPL and the remaining 85% to SARA. Plainly, the same does not offend the fundamental policy of Indian law. It is well settled that the expression "fundamental policy of Indian Law" is not synonymous with provisions of Indian enactments. The expression "fundamental policy of Indian Law" denotes the fundamental principles on which the Indian law is founded.

22. The contention that the arbitral award cannot be enforced as it is contrary to Section 35 of the Code of Civil Procedure or Section 31A of the Act is unmerited. First of all, it is difficult to accept that the costs imposed under the arbitral award are unreasonable. However, even if it is accepted (which this Court does not) that such costs could not be imposed under Section 31A of the Act, the same is not material. This is so because in terms of Clause 17 of the Agreement, the parties had agreed that the Agreement would be governed and construed in accordance with the commercial law of Singapore. It is not SARA's

case that costs awarded are contrary to the commercial law of Singapore. In any view, SARA has not produced any material which would even remotely suggest so.

23. In view of the above, the objection raised by SARA that the arbitral award contravenes the public policy of India is unmerited. The said objections are, accordingly, rejected.

24. In view of the above, the SARA is directed to deposit the awarded amount with the Registrar General of this Court within a period of three weeks from today.

25. List on 10.04.2018.

**MARCH 07, 2018**  
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**VIBHU BAKHRU, J**

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