IN THE HIGH COURT OF SINDH AT KARACHI
(Original Civil Jurisdiction)

Suit No.466 of 2023

CNERGYICO PK LIMITED v. TRAFIGURA PTE LIMITED

Plaintiff	:	CYNERGYICO PK LIMITED through its duly authorized representative Mr Samay Shams, through Mr Abdul Ahad, Mr Ammar Suria and Ms. Hareem Godil, Advocates
Defendant	:	TRAFIGURA PTE LIMITED through its duly authorized attorney Mr Sheikh Muhammad Aleem, through Mr Jahanzeb Awan and Mr Rashid Khan Mehar, Advocates
Dates of Hearing	**:**	20.09.2023
Date of Decision	**:**	18.12.2023

J U D G M E N T

Jawad Akbar Sarwana, J.: This suit picks up on a yet-to-be-decided issue from a seminal case on the *Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act*, 2011 (Act No.XVII of 2011) ("REA, 2011"), and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (commonly referred to as "the New York Convention**"**) authored by his lordship, Mr Justice Munib Akhtar as a Judge of the High Court of Sindh at Karachi (currently a sitting Judge of the Supreme Court of Pakistan) in *Abdullah v. Messrs. CNAN Group SPA through Chief Executive/Managing Director and Another*, PLD 2014 Sindh 349 (hereinafter referred to as the "*CNAN Group SpA*").

2. The *CNAN Group SpA* case conclusively settled the following question in the negative, *albeit* under Article V(1) of the New York Convention: "Can an award-debtor bring a suit for declaration and

injunctive relief against the recognition and/or enforcement of a New York Convention award?" This bench will decide the same question, albeit under Article V(2) of the New York Convention, i.e. whether the Suit as filed is maintainable under Article V(2) of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act (XVII) 2011? Essentially, determine if the same question as applied to Plaintiff's claim setting up a defence on the grounds of public policy will result in the same negative answer to the same question raised by Justice Munib Akhtar in the *CNAN Group SpA* pertaining to claim(s) under Article V(1) of the New York Convention.

3. This is a Suit for Declaration and Permanent Injunction filed by CNERGYICO PK LIMITED (formerly Byco Petroleum Pakistan Limited) ("the Plaintiff") against TRAFIGURA PTE LTD. (the "Defendant"). The Plaintiff has prayed for the following reliefs:

I. Declare that the Award dated 22.02.2023 is unenforceable under Section 7 of the Recognition and Enforcement (Arbitration Agreement and Foreign Arbitral Awards) Act, 2011, read with Article V of the Schedule thereof and is liable to be set aside;

II. Issue a permanent injunction restraining the Defendant, its employees, officers and agents from seeking enforcement and recognition of the Award dated 22.02.2023 and causing any hinderances in the business activities of the Plaintiff;

III. Grant any further relief in which the Plaintiff is found entitled to by this Hon'ble Court

4. The brief facts of the case are that the Plaintiff by this Suit No.466/2023 filed on 28.03.2023 has impugned the Foreign Arbitral Award dated 22.02.2023 ("Award") passed by the Arbitral Tribunal constituted by the Dubai Financial International Centre-London Court of International Arbitration ("DIFC-LCIA"), whereby the Defendant was awarded an amount of approx. USD 36,985,850/- under various heads payable by the Plaintiff, and Plaintiff's counter-claim for damages against Defendant was dismissed. The Plaintiff has primarily sought a negative declaration against the enforceability of the Award on the

grounds enumerated under Article V (2) of the NY Convention read with Section 7 of REA, 2011. For ease of reference, it is clarified that the NY Convention is a part of REA, 2011, and is annexed as a "Schedule" of REA, 2011.

5. According to the Plaint, the Plaintiff and the Defendant entered into various agreements with each other over the last few years which included:

(i) Term Contract for Supply of Crude Oil dated 01.02.2019 for the sale and purchase of crude oil cargo of 519,217 barrels (2019 Supply Contract);

(ii) Term Contract for Supply of Crude Oil dated 24.01.2020 (2020 Supply Contract) for the sale and purchase of crude oil cargo of 750,000 barrels; and,

(iii) Settlement and Amendment Agreement dated 08.04.2020 for the payment of US$15.3 million based on a schedule of repayments.

5(a) According to the Plaint, the Plaintiff claims that the Arbitral Tribunal has arbitrarily rendered findings in ignorance of the mandatory requirements of import documents laid down by the State Bank of Pakistan and the legal framework governing foreign remittances against imports. The Plaintiff alleges that the subject matter of the (issue(s) in) dispute, in effect, could not be addressed and adjudicated upon in the arbitration proceedings by the Tribunal. Plaintiff contends that the primary dispute between the parties was the inability of Plaintiff to continue to make payments to Defendant as it had failed to provide the Plaintiff (and its bank) with the original bills of lading required under the corresponding letters of credit and the letters of indemnity for the payments made under the 2019 Supply Contract. This requirement was imposed by the State Bank of Pakistan directives read with Chapter 13 of the Foreign Exchange Manual and other enabling law provisions.

Therefore, the recognition of the Award itself would be detrimental to Pakistan's public policy and will also have economically disastrous repercussions on the Plaintiff and the national exchequer.

6. The Defendant, TRAFIGURA Pte. Ltd., filed its Written Statement on 08.08.2023, whereafter the Additional Registrar (O.S.) listed the matter in Court for Settlement of Issues on 31.08.2023. On the said date, the learned Counsels for the Plaintiff and the Defendant conceded that the relief sought in the Suit was “legal” on “points of law”, and a full-blown trial on allegations of fact was unnecessary. It was common ground between the Counsels that there was a valid Arbitration Agreement between the parties, and a dispute had ensued, culminating in the Award. However, there was a divergence whether the dispute between the parties was arbitrable. The Learned Counsel for the Defendant contended that the Arbitral Tribunal decided the Award in accordance with contract, the challenge could not be raised in the proceedings initiated by the Award-Creditor (Defendant) before the High Court, and the issue of maintainability of this lis stood decided in the negative by this Court in *CNAN Group SpA*. The learned Counsel for the Plaintiff submitted that the judgment in the said case was distinguishable as the judgment did not discuss the impact of public policy grounds raised by the Award-Debtor. Grounds raised in this lis under Article V(2) are not discussed in *CNAN Group SpA*. Public policy grounds, and the dispute was not arbitrable in light of Article V(2) of the New York Convention. They both agreed that no evidence was required to prove the case, as clarified in *CNAN Group SpA*. Finally, both wished to avoid going into the merits of the case particularly after the filing of this Suit as the Defendant had initiated proceedings for enforcement of the Award in a separate suit filed in this (High) Court. The learned Counsels requested the bench to decide the point of law only without referencing the factual background. Thus, this bench, with the consent of the learned Counsels without further or any detailed discussion of the factual background of the dispute(s) leading to any definitive finding on “public policy” in the context of Article V(2) settled the following legal issues:

(i) *Whether the Suit as filed is maintainable under the* Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act (XVII) 2011*?*

(ii) *What should the decree be?*

7. The learned Counsel for the Plaintiff submitted that the Plaintiff has only sought a preventative declaratory decree under Art V (2) of the New York Convention, which is a separate and distinct remedy from Article V (1) of the New York Convention. He further submitted that Article V (1) states that "*recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked,*" and the alpha numeric (a) to (e) used in Article V(1) are missing from the language used in Article V (2). He elaborated that Article V (1) laid down five grounds, which are different from the two grounds that may be specified under Article V (2) for refusing the recognition and enforcement of a foreign arbitral award. He contended that this difference in the phrasing of both these subsections indicates that the drafters of the New York Convention did not intend for Articles V (1) and V (2) to be read conjunctively, rather disjunctively since they embody completely different sets of reasons for refusal of recognition and enforcement of a foreign arbitral award. He further contended that Article V (2) does not include the specific phrase "*at the request of the party against whom it is invoked*", thereby permitting the Award-Debtor to bring a suit for a preventative declaration against the arbitral award, provided such challenge was restricted to the grounds raised therein. He further contended that a reading of Section 6(2) of REA, 2011 also pointed towards the ability of the judgement debtor to challenge the Award through a pre-emptive declaration, albeit only on the grounds contained in Article V (2). Additionally, he contended that Section 6 (2) of REA, 2011 stated that: "*a foreign arbitral award which is enforceable under this Act, [...] may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in Pakistan.*" He argued that that the use of the words "or otherwise" in Section 6(2) substantiated that REA, 2011 envisaged an action by the Award-Debtor against a foreign arbitral award besides by way of

defence or set off. Finally, relying on paragraph 6 of the CNAN Group SPA case, he argued that it was stated that "*For present purposes, section 7 of the 2011 Act is the key provision. It is clear from the section that if at all a suit can be brought by an award-debtor for a preventative declaratory judgment, he must show that the ground(s) taken by him come within the scope of Article V of the Convention*", and in paragraph 11 wherein it was stated "*I am of the view that, as a general principle, a suit such as the present, whereby the plaintiff as award-debtor seeks declaratory and injunctive relief against a Convention Award, ought to be regarded as maintainable but whether it can, in law, actually be instituted depends on exact terms of the law in force for the time being in the lex fori, here Pakistan.*" Thus, the grounds pleaded in *CNAN Group SPA* were covered under Article V (1) and the decision regarding non-maintainability did not apply to the instant case. Consequently, he prayed that this bench declare that the Foreign Award dated 22.02.2023 is unenforceable under REA, 2011, liable to be set aside and grant a permanent injunction restraining the Defendant, its employees, officers and agents from seeking enforcement and recognition of the said Award.

8. The learned Counsel for the Defendant vehemently opposed the above contentions raised by the Plaintiff's Counsel. He submitted that the Plaintiff had preferred the titled suit for "Declaration and Permanent Injunction" without appreciating the fact that foreign arbitral awards specifically fall under the ambit of REA, 2011, and an injunctive suit is not maintainable against the same. He further submitted that a detailed perusal of the two instruments, i.e. REA, 2011 and the New York Convention, confirm that neither of the two instruments provides for filing a "pre-emptive or an anticipatory" suit for declaration and/or injunction against a foreign arbitral award. The learned Counsel further argued that the above-mentioned two instruments allow the Award-Debtor to seek refusal of the recognition and enforcement of a foreign arbitral award only after the Award-Creditor has invoked the jurisdiction of a court of competent jurisdiction for recognition and enforcement of a foreign arbitral award. Furthermore, the said recourse for seeking refusal of recognition and enforcement can only be resorted to by the

Award-Debtor from the Court in which the Award-Creditor has filed the Award under REA, 2011, and not from any other court in the form of a declaratory and injunctive suit. The Counsel further contended that the principle of judicial restraint in cases on the recognition and enforcement of foreign arbitral awards is not only being followed in Pakistan but is the consistent practice in other jurisdictions, such as the USA, France, Italy, etc. In support of his contentions, the learned Counsel for the Defendant relied on several case laws from the aforementioned foreign jurisdictions. The learned Counsel submitted that in the case titled *Auteurs Acteurs Associes v. Hemdale Film Corporation* (XVI YCA 543 (1991), the French Court dismissed the suit for declaration against an award rendered in London. The French Court, while dismissing the suit filed by the Award-Debtor observed as follows:

> "Further, by the amendment to the law on arbitration of 21 May 1981, the law makers clearly wanted to reduce the number of possible means of recourse. They also aimed at simplifying and unifying them under the five grounds for attacking the award or exequatur (Art. 1502 New CCP).
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> "In view of this lex specials, admitting the present petition would mean granting the party against which enforcement is sought the option of a main action which is not provided by Art. 1498 New CCP and which could paralyze the res judicata effect of the arbitral decision. . . ." (pp 544-5)

8(a) In another case of the Supreme Court of Cassation (Italy) titled *Lanifico Mario Zegna SpA v. Emernegildo Zegna Corporation and another* (XXXI YCA 798 (2006) wherein the Award-Creditor sought recognition and enforcement (in Italy) of an award made in Paris and the Award-Debtor instead of filing objections against the enforcement of the foreign arbitral award filed a suit for declaration against the same, while dismissing the appeal held as follows:

> "The court notes that. . . the lower court followed the jurisprudence of the Supreme Court that an action seeking a negative declaration is an atypical instrument that [is inadmissible] where a typical instrument [is available] and where such [a typical action] if granted would lead to circumventing the specific criteria for a judgment imposed by law.

> In the case at issue the Court of appeal – which was the court having jurisdiction on the issue of whether the conditions for recognizing the foreign award in Italy were met, in the context of typical enforcement proceedings – correctly held that [Mario Zegna's] action was inadmissible as it would have prevented [Ermenegildo Zegna] from using the instruments made available in Arts.839 and 840 CCP. The court of appeal thus prevented frustration of a typical instrument which guarantees [the possibility] to attack [an award] on limited grounds …" (pp 800-01)

8(b) Finally, the learned Counsel for the Defendant relied on the judgment of the United States Court of Appeal for the Seventh Circuit in the case titled, "Mary D. Slaney v. International Amateur Athletic Federation (244 F.3D 580 (2001), XXVI YCA 1091 (2001) wherein the Award-Debtor filed a suit seeking declatory and other relief against a decision made by the Respondent Federation, which was treated as an Award. The Court dismissed the action, inter alia, on the ground that the New York Convention barred such an action, The appeal against the decision also failed.

8(c) The learned Counsel for the Defendant further submitted that the Defendant (being the Award-Creditor) has subsequently invoked the jurisdiction of the High Court of Sindh at Karachi under Sections 3 and 6 of REA, 2011 for the recognition and enforcement of the Award vide Suit titled, "Trafigura PTE Limited v. Cnergyico PK Limited" bearing docket Suit No.855/2023 ("Enforcement Suit") and the Plaintiff herein has been arrayed as the Defendant. Thus, if the Plaintiff has any objections to the recognition and enforcement of the Award, it may raise the same in the Enforcement Suit as the instant suit of the Plaintiff seeking declaration and permanent injunctions of the Award is not maintainable in light of REA, 2011, the New York Convention and the reported case law on the subject, i.e. *CNAN Group SpA* and foreign judgments interpreting the very same provisions of the New York Convention. Thus, the question relating to the maintainability of the "Suit for Declaration and Permanent Injunction" is a question of law and

must be dealt with first before delineating the questions of merits of the case.[1]

9. I have heard the learned Counsels for the parties, checked the law, and considered the matter. My findings on the above two legal issues and reasons therefore appear herein below.

10. REA, 2011 is a special law on the subject of foreign arbitral awards and matters in relation thereto. The preamble of REA, 2011, states that it is an Act to provide for the **recognition and enforcement of arbitration agreements and foreign arbitral awards**.

11. The present proceedings have ostensibly been brought in terms of section 3 of REA, 2011. Section 3 states as follows:

> "**3. Jurisdiction of Court.**—— (1) Notwithstanding anything contained in any other law for the time being in force, the Court shall exercise exclusive jurisdiction to adjudicate and settle matters related to or arising from this Act.
>
> (2) An application to stay legal proceedings pursuant to the provisions of Article II of the Convention may be filed in the Court, in which the legal proceedings are pending.
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> (3) In the exercise of its jurisdiction, the Court shall,——
>
> > (a) follow the procedure as nearly as may be provided for the Code of Civil Procedure, 1908 (Act V of 1908); and
> >
> > (b) have all the powers vested in a civil court under the Code of Civil Procedure, 1908 (Act V of 1908)."

12. Furthermore, **section 6** of REA, 2011 covers the enforcement of foreign arbitral awards and states that **unless** the Court, **pursuant to section 7, refuses** the application seeking recognition and enforcement of foreign arbitral award, **the Court shall recognize and enforce the award** in the same manner as the judgment or order of a court in Pakistan. Sections 6 and 7 state as follows:

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[1] PLD 2014 Sindh 349, Paragraph 2

> "6. **Enforcement of foreign arbitral award.- -** (1) Unless the Court pursuant to section 7, refuses the application seeking recognition and enforcement of a foreign arbitral award, the Court shall recognise and enforce the award in the same manner as a judgment or order of a court in Pakistan.
>
> (2) A foreign arbitral award which is enforceable under this Act, shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in Pakistan."
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> "**7. Unenforceable foreign arbitral awards.——** The recognition and enforcement of a foreign arbitral award shall not be refused except in accordance with Article V of the Convention (underlining added)."

13. **Section 7** of REA, 2011 covers unenforceable foreign arbitral awards and states that recognition and enforcement of a foreign arbitral award **shall not** be refused ***except*** in accordance with **Article V** of the New York Convention. **Article V** states as follows:

> "1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought. Proof that: ——
>
> (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
>
> (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
>
> (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on mailers submitted

to arbitration, can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority If the country in which, or under the law of which, that award was made.

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:--

(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."

14. A bare perusal of REA, 2011 exhibits that recognition and enforcement are two critical elements that must be satisfied in light of the New York Convention. Article V (1), which deals with the grounds for refusal of recognition and enforcement, reads as follows:

"Recognition and enforcement of the award may be refused at the request of the party against whom it is invoked only if that party furnishes to the competent authority <u>where the recognition and enforcement is sought</u>, proof that:"

(underlining added)

15. Article V (2) of the convention provides that:

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

(underlining added)

16. **Articles V (1) and V (2)** of the New York Convention and Section 7 of REA 2011 stipulates that the conditions precedent for the **refusal** to recognise and enforce the award are:

i. there is a foreign arbitral award;
ii. its recognition and enforcement is sought from a competent authority by the Award-Holder; and
iii. then that authority can refuse to recognize and enforce the Award which is filed before it for recognition and enforcement.

17. The above-mentioned selection implies that **unless** the Award-Creditor **seeks** the recognition and enforcement of an Award from a competent authority, i.e., a High Court pursuant to REA, 2011, a Suit filed by the Award-Debtor is not maintainable on the subject. The keywords (read: mantra) which find frequent repetition in the New York Convention are **“recognition”**, **“enforcement”**, **“sought”,** and **“where”**. This reinforces the view that an award needs to be recognized first before it can be challenged.

18. As mentioned above, a conclusive judgment on this particular subject has been authored in *CNAN Group SpA* by Mr Justice Munib Akhtar before his Lordship’s elevation to the Supreme Court from this Court. The relevant paragraph of the judgment, which is paragraph 12, reads as follows:

> “12. Section 7 provides emphatically that recognition and enforcement of a Convention award **"shall not"** be refused **"except in accordance with Article V of the Convention"**. The crucial question in my view is the meaning to be ascribed to the words "in accordance with". The reason why this is so becomes clear when Article V is examined. **It comprises of two paragraphs**. The **first** contains five grounds on which recognition and enforcement may be refused, and the

second an additional two. The plaintiffs averred case of course comes within ground (a) of paragraph 1. Now, there is an important difference between the two paragraphs. Paragraph 1 provides that recognition and enforcement of the "award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that ...." These words are not used in paragraph 2. It would therefore seem that for paragraph 1 to apply, two antecedent conditions must be met: (a) **the award must have been "invoked" against the award-debtor, and (b) the relevant ground must be shown to exist to the "competent authority" (in this country, the High Court) where the recognition and enforcement is "sought"**. In my view, these conditions clearly contemplate the objection(s) being taken in an action brought by the award-creditor for the recognition and enforcement of the award, and not otherwise. Since section 7 expressly provides that the refusal (if such is to be the case) must be "in accordance with" Article V, in my view this indicates that any action in which the question of a refusal to recognize or enforce a Convention award is raised must conform both substantively and procedurally with the requirements of Article V. This means that a ground in paragraph I, of Article V can only be taken in enforcement proceedings brought by the award-creditor and not otherwise. **Action to be initiated by the award-debtor is precluded in such a situation, on account of the language used in section 7 read with Article V**. Put differently, at least insofar as paragraph 1 of Article V is concerned, section 7 only operates as a shield and cannot be used as a sword."

(Highlight added for emphasis)

19. His Lordship Mr Justice Munib Akhtar settled the issue of interpretation of Article V (1) of the New York Convention, except that he has not discussed the implication of Article V (2) wherein the Award-Debtor brings a challenge to the Award under the said Article V (2).[2]

20. The wording of Paras (1) and (2) of Article V are similar, and both these paragraphs qualify the wordings with the phrase **"where the recognition and enforcement is sought"**. The only difference between the two paragraphs is that in the case of Para (1) the Award-Debtor (against whom the enforcement is sought) has to **"prove"** the grounds; whereas Para (2) is only applicable where the **competent forum** (this Court) **finds** violation of the grounds enshrined therein.

21. In *CNAN Group SpA*, Mr Justice Munib Akhtar abundantly clarified that the question relating to the maintainability of the "Suit for Declaration and Permanent Injunction" is a question of law, and it must be dealt with before delineating the questions on merits of the case. [Para 2 of PLD 2014 Sindh 349].

22. It is worth mentioning there is a distinction between the enforcement of foreign arbitral awards and domestic arbitral awards. In the case of a domestic award under the Pakistan Arbitration Act of 1940, either the Award-Creditor or the Award-Debtor can initiate proceedings for the enforcement of the Award to make it a rule of the court. This is clear from the language of the Pakistan Arbitration Act of 1940. However, in the case of a foreign arbitral award, as per Article V of the NY Convention, **only** an Award-Creditor can file the enforcement proceedings, and the Award-Debtor has no such right to initiate proceedings. Additionally, the rationale behind this difference between international and domestic law may be that in the case of a foreign

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[2] Weightage of Judgments by a Single Bench of the High Courts. Cases decided by High Court Judges who were subsequently elevated to the Supreme Court, which was neither approved nor disapproved by the Supreme Court, were entitled to the highest consideration and respect as and when such cases come up for consideration before the Supreme Court. *Agricultural Workers Union v. The Registrar of Trade Unions*, 1997 SCMR 66, 81

arbitral award, the aggrieved party, i.e., the Award-Debtor, has a right to appeal the Award in the supervisory jurisdiction in the country in which the Award is rendered. However, in the case of a domestic award there is no concept of supervisory jurisdiction, thus, the Award-Debtor can also file it before the court.

23. In paragraph 4 of *CNAN Group SpA*, the learned Single Judge has discussed the several resources available on the New York Convention, including online and public hardcopy resources, recommending that Counsels should review case laws from other jurisdictions before proceeding to rely on any particular interpretation of the New York Convention. The learned Single Judge also discussed the efficacy of striving for uniformity in interpreting an international treaty which a Member State, such as Pakistan, has unconditionally ratified. Therefore, the case law developed in other jurisdictions on the New York Convention can and should be considered by the Courts of the States party to it. Thus, this bench now turns to the case law from the Indian jurisdiction on Article V(2) of the New York Convention as a point of reference for interpretation of Article V(2).

24. Currently, the primary legislation on the subject of arbitration in India is the Arbitration and Conciliation Act, 1996 ('*1996 Act*'). Prior to the enactment of the 1996 Act, the enforcement of domestic arbitral awards was governed under the Arbitration Act, 1940, and the enforcement of foreign arbitral awards pursuant to the NY Convention was carried out under the Foreign Awards (Recognition and Enforcement) Act, 1961, and the foreign awards pursuant to Geneva Convention were enforced under the Arbitral (Protocol and Convention) Act, 1937. However, all of these three acts have been repealed under the 1996 Act.

25. In particular, Part II of the 1996 Act caters to the enforcement of foreign arbitral awards. Section 48 of the 1996 Act lays down the essential conditions for enforcing foreign arbitral awards (these conditions are more or less the same as provided in Article V of the New York Convention). However, a close analysis of the wordings of section

48 makes it abundantly clear that the scope of this provision is slightly more restrictive than Article V of the New York Convention (which applies to foreign arbitral awards in Pakistan by virtue of section 7 of the 2011 Act). Article V of the New York Convention specifically uses the words “where the recognition and enforcement is sought”. Whereas, Article V as well as Section 48 both use the word: "invoked". The difference between Article V and Section 48 is that the phrase "where the recognition and enforcement is sought" is not used in S. 48. This is presumably because under the Indian Arbitration Act, 1996 it is known that enforcement will be in India, as opposed to the NY Convention which is international in scope. The relevant portion of Section 48 is as reproduced hereinbelow, and a comparative table of the relevant Articles from the New York Convention (Schedule to REA, 2011) in juxtaposition to Section 48 of the 1996 Act is annexed as Annexure “A” at the end of the Judgment:

> “***48. Conditions for enforcement of foreign awards.—*** *(1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that—*
>
> (a) . . .
> (b) . . .
> . . .
>
> (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 of justice.
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> 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.
>
> (3) . . . ."

26. In *Vikrant Tyres Ltd. and Anr. v. Techno Export Foreign Trade Company Ltd.*, ILR 2005 Kar 4738 (MANU/KA/0347/2005), the Karnataka High Court observed as follows in paragraph 40 of the said Judgment:

> "However, from the scheme of Section 48 it could be said that no application as a pre-emptive step could be filed to resist execution even before any such application for execution of the award is made in that behalf. Therefore, the application filed by the plaintiff under Section 48 is premature and not maintainable."

27. In *Jindal Drugs Ltd v. Noy Vallesina Engineering SpA and others, 2002 (3) BomCR 554 (*MANU/MH/0208/2002),[3] the Single Judge of the Bombay High Court made the following observations:

> ". . .Insofar as the challenge to a foreign award is concerned, the Scheme of the Act appears to be that the remedy that is available to a person against whom that award has been made is to wait till the person in whose favour the award is made moves under **Section 48** of the Act for enforcement of the award and it is then that such a person can challenge the validity of the award on the grounds which are mentioned in Section 48 of the Act. . .(Paragraph 8)."
>
> ". . .It is thus clear that the need of the petitioner to challenge the award would arise in case the respondent No. 1 takes steps to enforce the award. In case, the respondent. No. 1 decides to enforce the award in India, it will have to make an application under Section 48 of the Act, and in that event, the petitioner can appear before the Court, and request the Court to refuse to enforce the Award against it. . . (Paragraph 10)."

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[3] This was taken in Appeal on a separate issue in 2008 SCC Online Bom 1694 to the Bombay High Court Division Bench. The Single Judge decision was set aside. However, that too was challenged before the Supreme Court which set aside the Division Bench judgment. The issue before the DB and SC was whether the arbitral award in question could be challenged under S. 34 of the 1996 Act. Nevertheless, these observations have been cited in subsequent judgments.

> ". . .Whereas, insofar as a foreign award is concerned, it is not enforceable in India unless the Court finds that it is enforceable. For that purpose, the party which seeks its enforcement has to make an application to the Court and has to satisfy the Court about its enforceability (Section 49). It is only after the party satisfies the Court that a foreign award becomes enforceable as a decree passed by a Civil Court (Section 49). The Act, provides different remedies to persons, against whom domestic award is made and person against whom foreign award is made. . .[A] person against whom a foreign award has been made, is not required to challenge the same, because it cannot be executed against him in India unless the Court finds that it is enforceable. He can wait till the person in whose favour the foreign 20-09-2023 (Page 2 of 12) www.manupatra.com Jahangir Ansari award has been made, makes an application before the Court (Section 47). . .(Paragraph 10)."
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> (underlining added)

28. In yet another Judgment, *Goldcrest Exports v. Swissgen N.V. and Anr, 2005 (4) BomCR 225* (MANU/MH/0414/2005), a Division Bench of the Bombay High Court observed:

> "19. . . .We proceed therefore at this stage on the basis that under Part II a party aggrieved by a foreign award is not entitled to maintain an application for the challenge to a foreign award before or in the absence of an application for the enforcement thereof. *Part II in any event provides an opportunity for a party aggrieved by a foreign award to oppose the enforcement thereof*. It however restricts the circumstances in which such right can be exercised. The scheme of the Act indicates clearly the intent of the legislature to provide a party with a right to challenge a foreign award only in certain circumstances. By necessary implication it excludes the right of a party to challenge a foreign award except in cases where the enforcement thereof is sought. . . (Paragraph 19)."
>
> ". . .[A] foreign award is not enforceable without the parry in whose favour it is made applying for the enforcement thereof. Further it is only upon the satisfaction of the Court that the foreign award is enforceable under the said chapter that the award shall be deemed to be a decree of that Court. In other words a foreign award cannot be executed as a decree unless and until an application for enforcement thereof is made and the Court is satisfied that the foreign award is enforceable. . .(Paragraph 27)."
>
> (underlining added)

29. In *Bulk Trading SA v. Dalmia Cement (Bharat Ltd), 2006 (1) ARBLR 38 Delh*i (MANU/DE/2945/2005), the learned Single Judge of the Delhi Hig*h Court,* while approvingly citing the above-referred observations made in the *Jindal Drugs Limited* (ibid.) observed as follows:

> "6… But in the case of a foreign award as defined in Section 44 of the said Act, there is no provision for moving an application for setting aside a foreign award. On the contrary, Section 48 provides for conditions for enforcement of foreign award. The scheme, therefore, appears to be that while a domestic award made under Part I (see Section 2(7) of the said Act) may be set aside pursuant to an application under Section 34, there is no provision for such an application in respect of a foreign award falling under Part II of the said Act. A party objecting to the enforceability of a foreign award may do so only when an application for enforcing the same is moved by the other party. At that stage, the enforcement of the foreign award may be refused by the Court at the request of the party against whom it is invoked on the conditions set out in Section 48 of the said Act. . .(Paragraph 6)."
>
> (underlining added)

30. Further, in *Hindustan Petroleum Cor. Ltd v. M/s Videocon Ltd and Ors,* 2012 (3) ARBLR194(Delhi)(MANU/DE/3196/2012),*another learned Single Judge of the Delhi High Court made the following observations:*

> "Therefore, Section 48 in itself contemplates the initiation of independent proceedings for assailing the foreign award before the competent Court/authority of the country where the award was made, or under the law of which, the award was made. A proceeding under **Section 48** of the Act cannot be converted into one to assail the foreign award, i.e. to seek the setting aside of the foreign award. . .(Paragraph 47).
>
> "I see no reason to disagree with the view taken by a co-ordinate Bench of this Court in Bulk Trading SA (supra), the Bombay High Court in Jindal Drugs Ltd.(supra), and by the Karnataka High Court in Vikrant Tyres Ltd. (supra) in so far as they hold that an independent proceeding under **Section 48** of the Act cannot be maintained, unless the foreign award is sought to be enforced in legal proceedings. . . (Paragraph 51)."

31. Finally, in in the case of *Shriram EPC Limited v. Rioglass Solar SA*, Civil Appeal No.9515 of 2018 (arising out of SLP (Civil) No.13913 of 2018), Justice R.F. Nariman of the the Supreme Court of India at paragraph 19 of the judgment went so far as to observe as follows:

> *"*…We cannot forget that there is no challenge stage so far as a foreign award is concerned – so long as none of the grounds in Section 48 are attracted, the award becomes enforceable as a decree…*"*

32. In view of the foregoing discussion, I would answer the question of law posed at the beginning of this judgment in the negative in respect of the grounds set up under Article V(2) of the New York Convention taken by the Plaintiff, which include its' defence of public policy. From a procedural law perspective, be it Article V (1) or V (2), it follows that there now appears to be no possibility for the Award-Debtor against whom the Award has been made to seek declaratory relief concerning the invalidity of the Award by filing a Suit for Declaration and Permanent Injunction even under Article V (2) alleging/raising grounds of the award being contrary to public policy. The pro-enforcement bias of the Convention discussed in the *CNAN Group SpA* remains in place in relation to Article V (2) of the New York Convention. There has to be an action by the Defendant, the Award-Creditor, first, in whose favour the Award has been made, seeking recognition and enforcement of the said Award. There is clearly no strategic advantage for the Award-Debtor to initiate legal proceedings in the territorial jurisdiction where the award is likely to be enforced by the Award-Creditor against the Award-Debtor. From a substantive law perspective, the legal challenge to the Award raised by the Plaintiff, including in terms of Article V (2) of the New York Convention, has to be in separate proceedings, and not under the Award-Debtor's Suit. This aspect was appreciated by the Plaintiff's (Award-Debtor's) Counsel, who did not wish to make any submissions to this bench on the factual plane. He avoided touching upon the merits of the case and taking steps that could later prejudice his defence in Plaintiff's Suit No.855/2023. The Plaintiff's Counsel appeared to be strategically saving his attack on the Award under Article V to plead in

the Defendant's (Award-Creditor's) suit. The Defendant's (Award-Creditor's) Counsel also avoided discussion on merits for the same reason. He did not wish to commit himself and face its consequences in Suit No.855/2023 seeking the recognition and enforcement of the Award. The Counsels did not wish to draw themselves into any discussion about whether the Award was contrary to public policy. Or, what constitutes "public policy" under Article V of the New York Convention? The upshot of this hesitant approach on the part of the Plaintiff is that he could not prove his case; whereas it made it difficult based on facts and law for this bench to find any violation of the grounds enshrined under Article V (2) of the New York Convention.

33. **Thus, the first issue framed by the Court is decided in the negative, i.e. the suit as filed is not maintainable under the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011. Consequently, the suit is dismissed. The cost(s) of the suit shall be borne by the parties.**

34. It is clarified that the observations made herein pertain to the disposal of this suit are confined to provide a background to decide the enforcement proceedings filed by an Award-Debtor, i.e. the Plaintiff, and are without prejudice to the parties' claims as set out in the Defendant's (Award-Creditor's) enforcement proceedings in Suit No.855/2023.

35. The suit is decreed as above.

36. This Court acknowledges the able assistance rendered by both the learned Counsels in the suit.

Annexure "A" referred to in Judgment, follows herein below.

J U D G E

Announced by me on 18.12.2023.

J U D G E

Annexure “A”

PAKISTAN	INDIA
RECOGNITION AND ENFORCEMENT (ARBITRATION AGREEMENT AND FOREIGN ARBITRAL AWARDS) ACT, 2001	ARBITRATION AND COMMERCIAL ACT, 1996
SECTION 6 6. **Enforcement of foreign arbitral award.- -** (1) Unless the Court pursuant to section 7, refuses the application seeking recognition and enforcement of a foreign arbitral award, the Court shall recognise and enforce the award in the same manner as a judgment or order of a court in Pakistan. (2) A foreign arbitral award which is enforceable under this Act, shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in Pakistan.	**SECTION 48** **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—
SECTION 7 **7. Unenforceable foreign arbitral awards.——** The recognition and enforcement of a foreign arbitral award shall not be refused except in accordance with Article V of the Convention.	(a) the parties to the agreement referred to in section 44 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
ARTICLE V OF NEW YORK CONVENTION 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought. Proof that: —— (a) The parties to the agreement referred to in article II were, under the law	(b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or (c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the

applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on mailers submitted to arbitration, can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority If the country in which, or under the law of which, that award was made. 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is	award which contains decisions on matters submitted to arbitration may be enforced; or (d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place ; or (e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made. (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 <u>(b) the enforcement of the award would be contrary to the public policy of India.</u> [1][*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

sought finds that:- (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.	of Indian law shall not entail a review on the merits of the dispute.] (3) If an application for the setting aside or suspension of the award has been made to a competent authority referred to in clause *(e)* of sub-section *(1)* the Court may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.