IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 11.04.2017

\+ **EX.P.132/2014 & EA(OS) Nos.316/2015, 1058/2015 & 151/2016 & 670/2016**

CRUZ CITY 1 MAURITIUS HOLDINGS ..... Decree Holder

versus

UNITECH LIMITED ..... Judgment Debtor

Advocates who appeared in this case:

For the Decree Holder: Mr Ciccu Mukhopadhaya, Senior Advocate with Mr Ritin Jai, Mr Rajeshkhar Rao, Mr Abhijeet Sinha, Ms Zehra Khan, Mr Varun Mishra, Ms Rashmi Gogoi and Mr Aabhas Khetrapal.

For the Judgment Debtor: Mr P. Chidambaram, Senior Advocate with Mr Rishi Agrawala, Mrs Misha R. Mohta and Mrs Aayushi S. Khazanchi.

Mr Jaswinder Singh for Ministry of Finance.

CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. Cruz City 1 Mauritius Holdings (hereafter 'Cruz City'), a company established under the laws of Mauritius, has filed the present petition for enforcement of a foreign award dated 06.07.2012 (hereafter 'the Award'). The Award was rendered by an Arbitral Tribunal constituted under the Arbitration Rules of the London Court of International Arbitration pursuant to a request for arbitration filed by Cruz City with the London Court of International Arbitration (LCIA) in respect of disputes arising out

of an agreement captioned as Keepwell Agreement dated 06.06.2008 (hereafter 'the Keepwell Agreement'). The Keepwell Agreement was entered into between Cruz City, Burley Holdings Ltd. (hereafter 'Burley'), a wholly owned subsidiary of Unitech Ltd., incorporated under the laws of Mauritius, and Unitech Ltd. (hereafter 'Unitech'), a public company incorporated in India.

2. Unitech has opposed the enforcement of the Award essentially on three grounds. First, it alleges that the Award includes a decision on matters beyond the scope of submission to arbitration; second, that Unitech did not have proper notice from either Cruz City or the Arbitral Tribunal for responding to the claim for payment against the purchase of shares; and third, that the enforcement of the Award would be contrary to the Public Policy of India as it violates the provisions of the Foreign Exchange Management Act, 1999 (FEMA).

Background

3. The aforesaid controversy arises in the context of the following facts:-

3.1 Cruz City entered into a Shareholders Agreement (hereafter 'SHA') dated 06.06.2008 with Arsanovia Ltd. (hereafter 'Arsanovia'), a company incorporated in Cyprus and Kerrush Investments Ltd. (hereafter 'Kerrush'), a company incorporated in Mauritius. In terms of the SHA, Cruz City and Arsanovia agreed to invest in Kerrush, which in turn was to invest, through downstream subsidiary(ies), into entities engaged in the establishment, development, construction, management and operation of real estate projects in India. Cruz City and Arsanovia agreed to jointly pursue a real

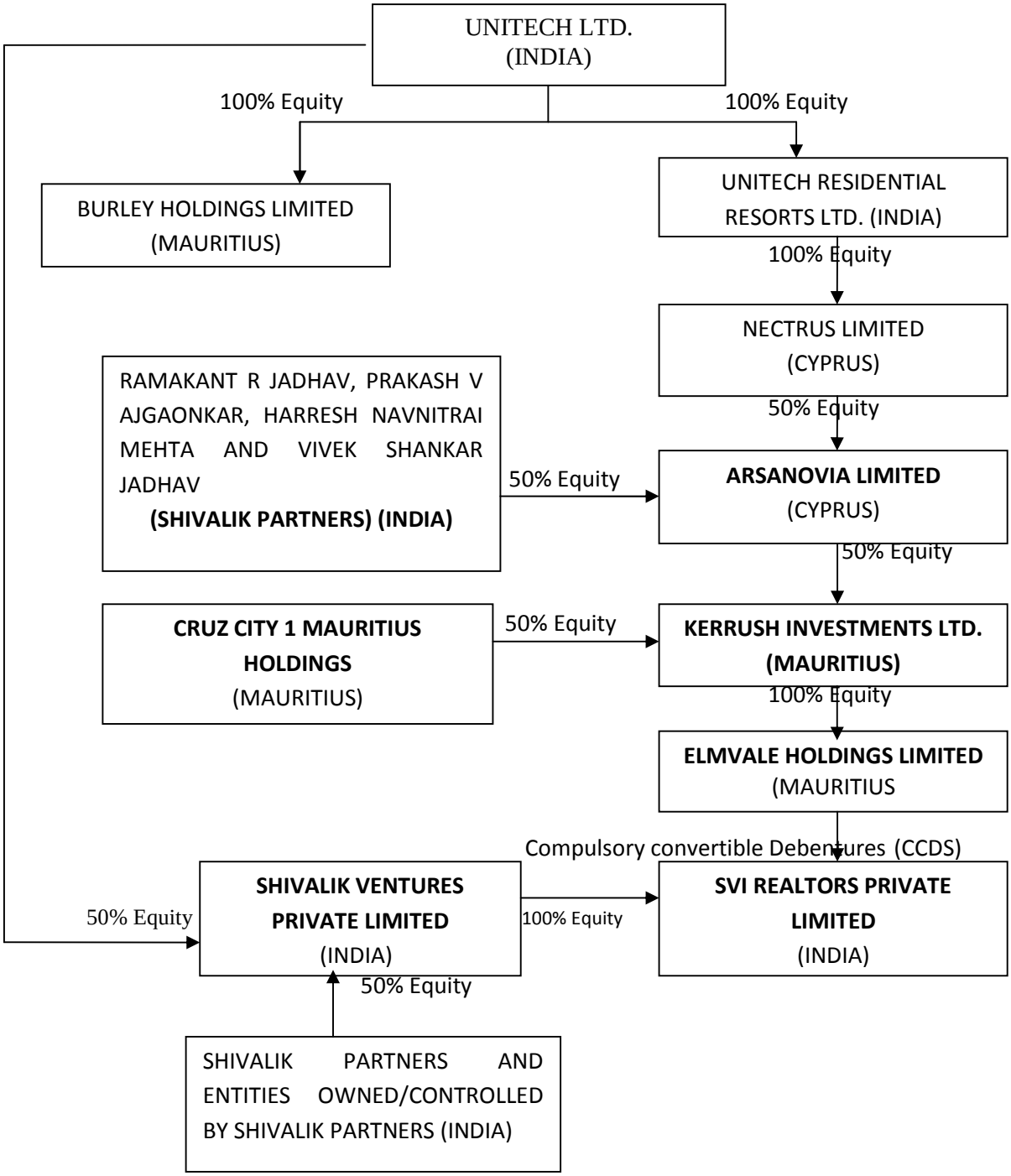
estate project captioned as ‘Santacruz Project’ through their joint venture company Kerrush. In terms of the SHA, Cruz City invested a sum of US $ 171,332,006.64 and was issued and allotted 50% of the share capital of Kerrush. The balance 50% of the issued share capital of Kerrush was subscribed by Arsanovia.

3.2 The SHA was to govern the *inter se* relationship between the shareholders of Kerrush. Burley and Unitech, although not parties to the SHA, signed the SHA in confirmation of certain obligations accepted by them.

3.3 Simultaneous to the execution of the SHA, Cruz City also entered into the Keepwell Agreement with Burley and Unitech. In terms of the Keepwell Agreement, Burley acknowledged its obligations to make payments in terms of the SHA.

3.4 Before proceeding further, it is necessary to note the relationship between various entities. Unitech, through its wholly owned subsidiary, Unitech Residential Resorts Ltd., had established a wholly owned subsidiary in Cyprus named Nectrus Limited; which in turn had subscribed to 50% equity share in Arsanovia. The balance 50% shares of Arsanovia were subscribed by various individuals (Shivalik Partners). Arsanovia along with Cruz City set up Kerrush, in which both Arsanovia and Cruz City subscribed to equity capital in equal proportion. Kerrush in turn had set up another wholly owned subsidiary in Mauritius, Elmvale Holdings Ltd., which in turn had invested in SVI Realtors Private Ltd., a company established in India. SVI Realtors Private Ltd. was to undertake the development of a real estate project referred to as the 'the Santacruz Project'. The entire equity capital of SVI Realtors Private Ltd. was held by another Indian company, Shivalik Ventures Private Ltd. and the share

capital of Shivalik Ventures Private Ltd. was held in equal proportions by Unitech and Shivalik Partners. The aforesaid relationship can be better understood by the following chart:



3.5 In terms of clause 3.9.2 of the SHA, Cruz City was entitled to exercise a 'put option' and call upon Arsanovia and Burley, to purchase all equity shares of Kerrush, issued and allotted to Cruz City, at a purchase price that yielded a post tax IRR of 15% on the capital contributions made by Cruz City in the event, commencement of construction of the Santacruz Project was delayed beyond the specified period. In terms of clause 15.3.4 of the SHA, Arsanovia and Burley, *inter alia*, agreed to pay Cruz City all amounts payable upon exercise of the put option by Cruz City as contemplated under clauses 3.9.2, 3.9.3, 3.9.4 and 3.9.5 of the SHA.

3.6 Burley and Unitech were not parties to the SHA, however, they also signed the SHA. Unitech agreed to be bound by certain clauses of the SHA. Similarly, Burley also signed the SHA confirming that it is bound "*by the direct obligations imposed upon them, under Clauses 3.9, 5.5.4, 5.6.2 and 15.3.4*" of the SHA.

3.7 There were delays in commencement of the construction of the Santacruz Project. Consequently, Cruz City exercised its put option by a notice dated 13.09.2010 calling upon Arsanovia and Burley to jointly and severally purchase the equity shares of Kerrush, issued and allotted to it. By the said notice, Cruz City also called upon Unitech to cause Burley to make the payments due, for purchase of the said shares. The said notice was not complied with and consequently, Cruz City filed two requests for arbitration: One, against Arsanovia and Burley in respect of the SHA (LCIA Arbitration Reference No. 111791); and Second, against Burley and Unitech in respect of the Keepwell Agreement (LCIA Arbitration Reference No. 111792).

3.8 Prior to Cruz City issuing the aforesaid notice, Arsanovia had issued a Buy Out Notice seeking to acquire Kerrush's shares held by Cruz City. The terms/price of purchase for the subject shares under the Buy Out Notice, was less favourable to Cruz City as compared to the price payable in terms of clause 3.9.2 of the SHA (the put option exercised by Cruz City).

3.9 Arsanovia also invoked the arbitration clause under the SHA against Cruz City claiming that it was entitled to purchase the shares held by Cruz City in Kerrush (LCIA Arbitration Reference No. 111809).

3.10 Before the Arbitral Tribunal, Unitech, Arsanovia and Burley filed a joint Statement of Defence. The said parties were represented by the same law firm and Senior Counsel. Arsanovia, Unitech and Burley resisted formal consolidation of the three arbitrations but with their consent, all the three arbitrations were heard together by the same arbitral tribunal.

3.11 The arbitration proceedings culminated in the Arbitral Tribunal publishing three separate awards including the Award, sought to be enforced in the present petition.

4. The operative part of the Award (rendered pursuant to LCIA Reference No. 111792) reads as under:-

> "6.1 The Tribunal makes the following partial, final award in this arbitration.
>
> 6.2 Against delivery of all of Cruz City's Equity Shares in Kurresh, free and clear of all liens and encumbrances, Unitech and Burley shall pay Cruz City USD 298,382,949.34 as the purchase price of those shares. In case of any dispute as to the mechanism for delivery of Cruz City's Equity

Shares in Kurresh, any party shall have the right to seek a further Award from this Tribunal resolving the dispute.

6.3 The costs of the arbitrations (other than the legal or other costs incurred by the parties themselves), to the date of this Award, have been determined by the LCIA Court, pursuant to Article 28.1 of the LCIA Rules, to be as follows:

Item	Amount
Registration fee	£ 4,500.00
LCIA's administrative charges	£ 27,146.32
Tribunal's fees and expenses	£ 275,909.39
Total costs of arbitration	£ 307,555.71

These costs are subject to VAT, as applicable.

6.4 The Unitech Parties will also bear the entire Costs of the Arbitrations and will pay Cruz City the net amount that it has contributed thereto, being £165,000 at the time of this Award, less any balance of funds which may be refunded to Cruz City by the LCIA.

6.5 Unitech and Burley shall pay Cruz City USD 2,900,000 in respect of its legal fees and other costs and expenses (other than the Costs of the Arbitration set forth in paragraph 6.3 above).

6.6 Unitech and Burley shall pay Cruz City interest on the amounts payable under paragraphs 6.2, 6.3 and 6.4 above commencing with the date of this Award at the rate of 8 per cent per annum, compounded quarterly, until and until such amounts are paid.

6.7 Unitech and Burley shall pay Cruz City any tax payable on the amounts received by Cruz City as provided in the SHA. In case of any dispute as to the amount of any such payment, any party shall have the right to seek a further Award from this Tribunal resolving that dispute.

> 6.8 All other claims and requests for relief by any party to this arbitration are dismissed."

5. A similar award was also made against Arsanovia and Burley pursuant to LCIA Reference No. 111791.

6. The third arbitration - the arbitration commenced pursuant to the request made by Arsanovia - resulted in an award in favour of Cruz City for £165,000 on account of costs of arbitration and USD 2,900,000 in respect of legal fees and other costs.

7. The arbitral awards rendered pursuant to the request made by Cruz City were subject matter of challenge before the High Court of Justice (Queen's Bench Division Commercial Court) on the ground that the Arbitral Tribunal did not have the substantive jurisdiction. In so far as the award pursuant to arbitration reference No. 111791 is concerned, the court held that the Arbitral Tribunal did not have the substantive jurisdiction and the said award was of no effect on merits. This decision was based on the finding that Burley was not a signatory to the arbitration clause under the SHA. However, in so far as the Award is concerned - which is the subject matter of the present petition - the challenge was rejected and the court held that the Arbitral Tribunal had the substantive jurisdiction to make the said award.

Submissions

8. Mr P. Chidambaram, learned Senior Counsel appearing for Unitech contended that the enforcement of the Award ought to be refused in terms of Section 48(1)(b), 48(1)(c) and 48 (2) (b) of the Act. He advanced contentions broadly on four fronts.

9. First, he submitted that in terms of the Keepwell Agreement, Unitech's obligations were limited to (i) causing Burley to pay the amount pursuant to the exercise of put option by Cruz City; and (ii) to make sufficient funds available to Burley. He submitted that there was no obligation on the part of Unitech to purchase the shares held by Cruz City. He contended that Cruz City had also not claimed any relief that Unitech purchase its shareholding in Kerrush; thus, the Award was beyond the relief claimed by Cruz City. He submitted that therefore, in terms of Section 48(1)(c) of the Act, recognition and enforcement of the Award ought to be declined.

10. Second, he submitted that in terms of the Keepwell Agreement, Unitech's obligation was limited to providing funds to Burley from time to time to enable Burley to meet the obligations undertaken by it. He submitted that in terms of the request for arbitration made by Cruz City, the relief sought against Unitech was for an award directing Unitech to take all steps to cause Burley to pay the put option amount to Cruz City. He submitted that a similar relief was sought by Cruz City in its Statement of Claims and the claim for damages was made in the alternative, which was neither pursued nor awarded. He contended that since Cruz City had neither made any claim nor sought any relief for Unitech to purchase the subject shares in Kerrush, Unitech had no opportunity to contest the same; accordingly, the recognition and enforcement of the Award ought to be refused under Section 48(1)(b) of the Act.

11. Third, he submitted that Unitech had no notice either from Cruz City or from the Arbitral Tribunal in respect of any claim calling upon Unitech to pay any amount to Cruz City against the purchase of shares. He also

referred to clause 10 and clause 2(b)(ii) of the Keepwell Agreement and contended that in terms of the said agreement, no notice was issued to Unitech to the effect that Burley had failed to perform its obligations and therefore, he contended that no claim could be made against Unitech.

12. Fourth, he contended that the enforcement of the Award would be contrary to the public policy of India as it contravenes the provisions of FEMA. He contended that any award which was contrary to any statutory provision of Indian law would be unenforceable. He submitted that the obligation under the Keepwell Agreement was in the nature of a guarantee issued by Unitech on behalf of Burley and the same was not permissible under the Foreign Exchange Management (Guarantees) Regulations, 2000. He drew the attention of this court to Regulation 3 of the said regulations, which proscribe any *person resident in India to "give a guarantee or surety in respect of, or undertake a transaction, by whatever name called, which has the effect of guaranteeing, a debt, obligation or other liability owned by a person resident in India to, or incurred by, a person resident outside India"*. He contended that Regulation 5(b)(i) of the said regulations was not applicable as Burley had no business and was merely a shell company. He further submitted that the guarantee obligations of Unitech had no connection with its business and therefore, undertaking such obligations was impermissible under the said regulations.

12.1 He further contended that the Award in as much as it directs Unitech to make payment against the delivery of shares of Kerrush, in effect, directs Unitech to make an investment in Kerrush, which was not permissible without the approval of the Reserve Bank of India (RBI). He referred to the Foreign Exchange Management (Transfer or Issue of any

Foreign Security) Regulations, 2004 and drew the attention of this court to Regulation 2(e), Regulation 5 and Regulation 6(6) of the said regulations. He submitted that in terms of Regulation 6(6), no investment by way of purchase of shares of a foreign entity could be made without valuation of the shares by Category-I Merchant Banker/Investment Banker.

12.2 He also referred to the Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000 and contended that although Regulation 3 of the said regulations permits capital account transactions falling under Schedule I, the same are subject to Regulation 3(2) of the said regulations and subject to the provisions of the Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004, which make it mandatory for the shares of a foreign entity to be valued before any investment in those shares can be made.

12.3 He further contended that FEMA proscribes Foreign Direct Investment (FDI) on an assured return basis and therefore, the agreements which were structured to ensure a predetermined return on equity, were illegal. Consequently, the Award enforcing such agreements was contrary to the public policy of India. He referred to circular dated 09.01.2014 (A.P. (DIR Series) Circular No.86) and circular dated 14.07.2014 (A.P. (DIR Series) Circular No.3) and contended that a foreign investor could exit the investment made in India only at a valuation as on the date of exit. He submitted that provisions to FEMA were mandatory and any violation of the said provisions would invite penalties and thus, any agreement contrary to the said regulations was void.

12.4 He referred to the decision of the Supreme Court in ***Renusagar Power Co. Ltd. v. General Electric Co*****: 1994 Supp (1) SCC 644** and

submitted that FEMA, being an enactment of Exchange Control Laws in replacement of the Foreign Exchange Regulation Act, 1973, would form a part of the Public Policy of India. He also referred to the decision of the Supreme Court in ***Life Insurance Corporation of India v. Escorts Ltd. and Ors.***: (**1986) 1 SCC 264** in support of his contention that Exchange Control Laws would form a part of the Public Policy of India. Reference was also made to the decisions of the Supreme Court in ***Associate Builders v. Delhi Development Authority***: (**2015) 3 SCC 49** and ***Shri Lal Mahal Ltd. v. Progetto Grano SPA*****: (2014) 2 SCC 433**.

13. Mr Mukhopadhaya, learned Senior Counsel appearing for Cruz City countered the submissions made on behalf of Unitech. At the outset, he contended that the objection raised by Unitech regarding its inability to present its case in respect of the relief granted, was without any merit. He further submitted that Unitech was precluded from raising any such contention in these proceedings on the principles of *res judicata*. He referred to Section 68 of the Arbitration Act, 1996 (the English Act) which permitted a party to assail the award on account of a serious irregularity. He submitted that, thus, it was open for Unitech to have raised the issue before the Court in the United Kingdom. Although Unitech had submitted its challenge under Section 68 of the English Act, it had subsequently abandoned the same. He earnestly contended that as Unitech had instituted a challenge to the Award in the United Kingdom, it was obligatory on the part of Unitech to take all available grounds and having failed to pursue its challenge, Unitech could not raise the same issues in these proceedings. He also referred to the decision of the Andhra Pradesh High Court in ***International Investor KCSC v. Sanghi Polyesters Ltd.***: **2002 SCC Online AP 822** in support of his contentions. He submitted that if Unitech

had prevailed in such challenge before the High Court of Justice, the error, if any, could have been corrected by remitting the matter back to the Arbitral Tribunal.

14. Mr Mukhopadhaya further contended that the Award did not require Unitech to purchase the shares of Kerrush as contended but only required Unitech to pay the purchase price, which was in conformity with Unitech's obligations under the Keepwell Agreement. He pointed out that the decision of the Arbitral Tribunal to direct payment of the purchase price matched by delivery of shares, was at the instance of the Unitech and the same was also noted by the Arbitral Tribunal in the Award. He referred to the notes to the financial statements forming a part of Unitech's Annual Report for the year ended 31st March, 2014, which also reflected the understanding that Unitech was required to make the payment on account of Burley.

15. Mr Mukhopadhaya contested the contention that the enforcement of the Award was liable to be declined in terms of Section 48(1)(c) of the Act as the Award was outside the scope of the reference. He submitted that Unitech's plea that Cruz City's claim in damages could not be allowed without Cruz City establishing the same, was made for the first time in its letter dated 16.03.2012 and, therefore, the Arbitral Tribunal did not permit Unitech to raise such pleadings at the belated stage. He also contested the suggestion that no notice had been issued to Unitech calling upon it to comply with the obligations under the Keepwell Agreement. He contended that no such objection had been raised by Unitech before the Arbitral Tribunal and, therefore, Unitech was precluded from raising any such plea on the principles of *res judicata*.

16. Insofar as the contention that the enforcement of the Award would contravene the provisions of FEMA is concerned, Mr Mukhopadhaya countered the same by contending that (a) violation of FEMA would not amount to violation of Public Policy under Section 48(2)(b) of the Act; (b) there was no violation of FEMA in entering into the Keepwell Agreement; (c) the question whether any permissions from RBI are required for remitting of the money recovered from Unitech in enforcement of the Award, would be a question to be addressed after the amount awarded had been recovered; and (d) that Unitech was precluded from raising any such plea as it had expressly represented to the contrary.

Reasoning and Conclusion

17. There is no dispute that the Award is a foreign award and Cruz City has provided the necessary evidence, as required under Section 47 of the Act.

18. The principal issue to be addressed in these proceedings is whether enforcement of the Award ought to be declined in terms of Section 48 of the Act (Section 48(1)(b), 48(1)(c) and 48(2)(b) in particular).

19. Section 48 the Act is set out below:

> "**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) 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

(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 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

(b) the enforcement of the award would be contrary to the public policy of India.

Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,—

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

(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."

20. It was contended by Mr Mukhopadhaya that Unitech was precluded from raising any plea that it was unable to present its case since no such challenge was pursued by Unitech to assail the Award before the High Court of Justice and, therefore, the said plea is barred by *res judicata*.

21. This Court does not find the aforesaid contention to be persuasive. The said pleas are not barred by *res judicata* principally for the reason that the cause for the present proceedings is materially different from the cause before the supervisory court for impeaching an arbitral award. Whereas proceedings for enforcement of a foreign award concern an action to enforce an award which has, *prima facie*, attained finality; the action before the supervisory court is for setting aside the award.

22. Undoubtedly, the decision of the arbitral tribunal or the Court where the award was assailed (in this case, the High Court of Justice), may have

persuasive value and there are other principles of law (including akin to *res judicata*) on which the enforcing court may refuse enforcement of a foreign award. However, it would not be correct to hold that the enforcing court is bound to do so and that an unsuccessful party is precluded, on the ground of *res judicata*, to furnish proof to establish the grounds set out in Section 48 of the Act - which are in terms of Article V of the New York Convention - to resist recognition and enforcement of a foreign award. It follows that this Court as an enforcing court, is required to examine whether Unitech has established any of the grounds as set out under Section 48 of the Act for declining the enforcement of the Award and if so, whether there are any reasons for rejecting the same.

23. Any decision with regard to enforcement of the award by this Court may not have any bearing on the validity of the award or its enforceability in other jurisdictions. However, the question whether the award will be recognised and enforced in India, cannot be adjudicated by the arbitral tribunal, the Courts in United Kingdom or for that matter any other country; only the courts in this country are competent to consider whether the award is to be recognised and enforced in this country. The principle of *res judicata* is applicable only where the issue/controversy is finally decided by a court/forum of competent jurisdiction and - although prior decision on the issue by a court in another country may be persuasive - neither the decision of the Arbitral Tribunal nor of the High Court of Justice regarding enforceability of the award, is binding on this court.

24. Recognition of a foreign award in the country where it is sought to be enforced, is a necessary pre-condition to enforcing the same; it is *sine qua non* to the same being accepted as binding by the enforcing court.

Thus, it naturally follows that recognition of a foreign award is also a necessary pre-condition to apply the principles of *res judicata*. Clearly, a decision on an issue contained in a foreign award will not preclude the party resisting its recognition and enforcement, to re-agitate the issue unless that award is recognised as binding by the enforcing court. Given this position, it can hardly be contended that a challenge to recognition and enforcement of a foreign award must be rejected on the ground that the award also adjudicates the issue on the ground of which its enforcement is resisted. This would also be equally true of the decision of the reviewing court exercising jurisdiction in the state of the seat of the arbitration.

25. Thus, notwithstanding that Unitech had not raised or having raised not pursued any of its contentions before the Arbitral Tribunal or before the High Court of Justice, it is entitled to raise contentions to resist the recognition and enforcement of the Award, subject to the same being within the scope of the grounds set out in Section 48 of the Act. However, this Court is not bound to decline the enforcement of the Award. The court while considering such pleas - which were unsuccessfully raised, or could have been raised but were not, before the arbitral tribunal or the supervisory court - would also take into account various factors including but not limited to (i) the nature of objections; (ii) the reasons for not pursuing the same before the arbitral tribunal or the supervisory court; and (iii) conduct of parties.

26. The opening lines of Section 48(1) and 48(2) of the Act use the word "may", thus enabling the enforcing court to refuse the request of the party resisting enforcement of a foreign award even if one or more of the grounds as set out in Section 48 are established. Of course, the discretion is

not subjective and must be exercised on settled principles of law. However, this does give a clear window for the courts to reject the party's request to decline the enforcement of the award on grounds akin to principles of issue estoppel and *res judicata*, even though these grounds are not *stricto sensu* applicable.

27. Mr Chidambaram had contended that the word "may" in Section 48(1) of the Act must be read as "shall" since both the opening lines of Sub-section 1 of Section 48 and Sub-section 2 of Section 48 uses the word "may". According to him, this court would have no discretion to deny the request of the party resisting enforcement of an arbitral award if it is finds that enforcement would be opposed to the public policy of India. He followed this up by contending that the word "may" as used in Section 48(1) of the Act could not be given the meaning different from the word "may" as used Section 48(2) of the Act and therefore, should be read as "must".

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

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

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

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

31. It is necessary to bear in mind that Section 48 of the Act is a statutory expression of Article V of the New York Convention and is similarly worded. The object of Article V of the New York Convention is to enable the signatory States to retain the discretion to refuse enforcement of a foreign award on specified grounds and none other; it does not compel the member States to decline enforcement of foreign awards. Article V of the convention thus sets out the maximum leeway available to member States to refuse enforcement of a foreign award. This view has also been accepted by courts in the United States. In ***Chromalloy Aeroservices. v. The Arab Republic of Egypt*****: 939 F. Supp. 907 (DDC 1996)**, an Egyptian award, which was set aside by an Egyptian court, was enforced notwithstanding Article V(1)(e) of the New York Convention.

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

33. In ***Yukos Oil Company v. Dardana Limited*****: [2002] EWCA Civ 543,** Lord Justice Mance, speaking for the Supreme Court of the United Kingdom, held as under**:-**

> "The use of the word "may" must have been intended to cater for the possibility that, despite the original existence of one or more of the listed circumstances, the right to rely on them had been lost, by for example another agreement or estoppel...
>
> ...The word "may" at the start of s.103(2) does not have the "permissive", purely discretionary, or I would say arbitrary, force that the submission suggested. S.103(2) is designed, as I have said in paragraph 8, to enable the court to consider other

> circumstances, which might on some recognisable legal principle affect the prima facie right to have an award set aside arising in the cases listed in s.103(2) ."

34. The said principle has been stated in ***Russell On Arbitration, Twenty Third Edition*** (at page No. 462) in the following words:

> "The onus of proving the existence of a ground rests upon the party opposing enforcement, but that may not be the end of the matter. The court also has a discretion to refuse enforcement where one or more of the grounds are made out. This discretion is not to be exercised arbitrarily however because the word "may" in s. 103 (2) is intended to refer to the corresponding word in the New York Convention. In any event the discretion is not open ended and should only be exercised where "despite the original existence of one or more of the listed circumstances, the right to rely on them had been lost by, for example, another agreement or estoppel", or where there are circumstances "which might on some recognisable legal principles affect the prima facie right to have an award set aside arising in cases listed in s. 103(2).""

35. In ***Redfern And Hunter on International Arbitration, Sixth Edition*** (at page No. 623), the author has stated the above principle as under:

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

36. In ***Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan***: **(2011) 1 AC 763**, the Supreme Court of United Kingdom observed that the use of the word "may" was intended to enable the Court to "*consider other circumstances, which might on some recognisable legal principle affect the prima facie*

right to have enforcement or recognition refused". Lord Justice Collins in his opinion observed as under:

> "126. The court before which recognition or enforcement is sought has a discretion to recognise or enforce even if the party resisting recognition or enforcement has proved that there was no valid arbitration agreement. This is apparent from the difference in wording between the Geneva Convention on the Execution of Foreign Arbitral Awards 1927 and the New York Convention. The Geneva Convention provided (article 1) that, to obtain recognition or enforcement, it was necessary that the award had been made in pursuance of a submission to arbitration which was valid under the law applicable thereto, and contained (article 2) mandatory grounds ("shall be refused") for refusal of recognition and enforcement, including the ground that it contained decisions on matters beyond the scope of the submission to arbitration. Article V(1)(a) of the New York Convention (and section 103(2)(b) of the 1996 Act) provides: "Recognition and enforcement of the award may be refused …" See also van den Berg, p 265; Paulsson, May or Must Under the New York Convention: An Exercise in Syntax and Linguistics (1998) 14 Arb Int 227.
>
> 127. Since section 103(2)(b) gives effect to an international convention, the discretion should be applied in a way which gives effect to the principles behind the Convention....."

37. The grounds as set out in Section 48 of the Act for refusing enforcement of the award encompass a wide spectrum of acts and factors as they are set in broad terms. While in some cases, it may be imperative to refuse the enforcement of the award while in some other, it may be manifestly unjust to do so. Section 48 is enacted to give effect to Article V of the New York Convention, which enables member States to retain some sovereign control over enforcement of foreign awards in their territory. The ground that enforcement of an award opposed to the national public policy

would be declined perhaps provides the strongest expression of a Sovereign's reservation that its executive power shall not be used to enforce a foreign award which is in conflict with its policy. The other grounds mainly relate to the structural integrity of the arbitral process with focus on *inter party* rights.

38. In terms of Sub-section (1) of Section 48 of the Act, the Court can refuse enforcement of a foreign award only if the party resisting the enforcement furnishes proof to establish the grounds as set out in Section 48(1) of the Act. However, the court may refuse enforcement of a foreign award notwithstanding that a party resisting the enforcement has not provided any/sufficient proof of contravention of public policy. In such cases, the Court is not precluded from examining the question of public policy *suo motu* and would refuse to enforce the foreign award that is found to offend the public policy of India. The approach of the court while examining whether to refuse enforcement of a foreign award would also depend on the nature of the defence established.

39. Even where public policy considerations are to be weighed, it is not difficult to visualise a situation where both permitting as well as declining enforcement would fall foul of the public policy. Thus, even in cases where it is found that the enforcement of the award may not conform to public policy, the courts may evaluate and strike a balance whether it would be more offensive to public policy to refuse enforcement of the foreign award - considering that the parties ought to be held bound by the decision of the forum chosen by them and there is finality to the litigation - or to enforce the same; whether declining to enforce a foreign award would be more debilitating to the cause of justice, than to enforce it. In such cases, the

court would be compelled to evaluate the nature, extent and other nuances of the public policy involved and adopt a course which is less pernicious.

40. Unitech had relied upon the decision in the case of ***Soleimany v. Soleimany***: **[1999] QB 785** in support of its contention that an award on an illegal contract would not be enforced. However, the said decision was considered in a later case in ***Westacre Investments Inc v. Jugoimport - SDRP Holding Company Ltd.***: **[1999] APP. L.R. 05/12** with slightly different result.

41. In Soleimany's case, a father and son entered into an illegal scheme to export Persian rugs out of Iran. Certain disputes arose between them in connection with the distribution of the sale proceeds. The law applicable for resolution of the disputes was Jewish law and apparently Jewish law on illegal contracts is materially different from English law. An award was rendered in favour of the son for a sum of £576,574 and an action for enforcement of this award was filed in English Court. The Court of Appeal declined to enforce the award on the ground that the contract between the father and son was illegal and enforcement of an illegal contract would fall foul of the English Public Policy. However, in the case of ***Westacre Investments Inc.*** (*supra*), the English Courts took a slightly different view.

42. In that case, Federal Directorate of Supply and Procurement of the Socialist Federal Republic of Yugoslavia (the Directorate) entered into a contract with Westacre Investments Inc, a Panamanian company, (Westacre) whereby the Directorate appointed Westacre as its consultant with respect to sale of military equipment in Kuwait. In terms of the contract, Westacre was to receive a substantial percentage of the value of the contracts entered into by the Directorate with the Kuwaiti Ministry of

Defence. The Udruzena Beogradska Banka (Bank) also stood as a surety for such payments. Disputes arose between the parties as the Directorate refused to pay the contracted sums to Westacre after it had secured the contract with the Kuwaiti Ministry of Defence. The disputes were referred to an arbitral tribunal appointed by International Chamber of Commerce Court of International Arbitration, which rendered an award in favour of Westacre. The Directorate and the Bank appealed before the Swiss Federal Court which upheld the award. The principal allegation was that one Mr Al-Otaibi, who was the Secretary General of the Council of Ministers of Kuwait had engineered a scheme whereby he was able to ensure that the military equipment of the Directorate would be preferred over other suppliers and Westacre would receive substantial sums. The suggestion was that "Westacre was a company behind which Al-Otaibi and his associates sheltered in order to maintain their anonymity". The court accepted that there was a difference between contracts related to terrorism, drug trafficking, prostitution, paedophilia and fraud in international commerce and other illegal commercial contracts. The view of the court was that if a balancing exercise as between public policy of enforcing awards and public policy of not enforcing illegal contracts was carried out, the balance was in favour of upholding the award since the offensiveness of illegality that was alleged was not of the highest level. The judgment of the UK Commercial Court was carried in appeal before the Court of Appeals. Although, the decision in the case of ***Soleimany v. Soleimany*** *(supra)* was cited, the Court of Appeals upheld the decision to enforce the foreign award. Thus, accepting that an award against public policy could be enforced if enforcing the same was the lesser of the two evils.

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

44. This brings this Court to the question as to what are the principles that must be followed by it in exercise of its discretion. It is not necessary to make an endeavour to exhaustively list out such principles assuming that the same is possible. However, clearly, principles akin to *res judicata* and issue of estoppel would be material. The Courts in United Kingdom have liberally imported the principles of *res judicata* and the doctrine of issue of estoppel while considering the question whether to enforce a foreign award. The rationale for importing such principles is compelling. Plainly, a party who has voluntary chosen a forum for its decision must be held bound by its decision. Thus, if a party has taken recourse to assail the award before the supervisory court, in normal circumstances, the said party ought not to be permitted to re-litigate the same issue unless the party is able to establish certain special circumstances or indicate good reasons.

45. It is also relevant to mention that the UNCITRAL Model Law provides for almost identical grounds for setting aside an award as for refusing the enforcement of a foreign award; the only additional ground being that the foreign award has not become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the laws of which, that award was made (Article V(1)(e) of the New York Convention/Section 48(1)(e) of the Act). Plainly, it would be highly unsatisfactory if a party is permitted to once again invite the

enforcing court to rule on questions that have been agitated before a court of competent jurisdiction where the seat of arbitration is located (the supervisory court). This does provide a substantial rationale for vesting the enforcing court with the discretion to consider whether to decline enforcement of a foreign award on certain principles akin to *res judicata* and issue of estoppel.

46. In the case of ***DSV Silo-und Verwaltungsgesellschaft mbH v. Owners of The Sennar (The Sennar)***: **[1985] 1 W.L.R. 490 (H.L.) (Eng.)**, the House of Lords held that an earlier decision of the Dutch Court holding that a bill of lading contained an exclusive jurisdiction clause vesting the jurisdiction with the Courts of Khartoum, would estop the parties from canvassing to the contrary. In ***Henderson v. Henderson***: **[1843] 3 Hare 100**, the Court did not permit a party to raise the issue which could have been raised in an earlier litigation in another State. In certain cases, the Courts have used the doctrine of abuse of process to prevent a litigant from re-agitating an issue that he could have raised in an earlier proceeding but did not.

47. In a recent decision, the Swiss Supreme Court ***(Decision 4A_374/2014)*** declined to set aside an award of Court of Arbitration for Sport on the ground of good faith principle. The good faith principle required a party to take a procedural plea immediately in the course of the arbitral proceedings. The court held that at the recognition stage, a party is precluded from relying on grounds if it did not raise those grounds in due time, in the course of the arbitration proceedings.

48. In the case of ***Minmetals Germany Gmbh v. Ferco Steel Ltd***: **[1999] 1 All ER (Comm) 315**, the foreign award was enforced as the Court found

that the defendant's conduct was unreasonable. In that case, the defendant requested the Court to decline enforcement of the award under Article V(1) of the New York Convention alleging that the award was in breach of the principles of natural justice and against the English public policy. Justice Colman set out the following to be relevant considerations for deciding the issue:-

> "(i) the nature of the procedural injustice; (ii) whether the enforcee has invoked the supervisory Jurisdiction of the seat of the arbitration; (iii) whether a remedy was available under that jurisdiction; (iv) whether the courts of that jurisdiction have conclusively determined the enforcee's complaint in favour of upholding the award; and (v) if the enforcee has failed to invoke that remedial jurisdiction, for what reason, and in particular whether he was acting unreasonably in failing to do so."

49. In ***Diag Human SE v. The Czech Republic*****: (2014) EWHC 1639 (Comm)**, the enforcement of a foreign arbitral award against the Czech Republic was sought in UK. Prior to the said occasion, the claimant had instituted proceedings before the Austrian Supreme Court for enforcement of the arbitral award, which was declined on the ground that under the Czech Law, a review of the arbitral tribunal's decision was permissible and such review was being undertaken. Before the English Commercial Court, the question arose whether the decision of the Austrian Supreme Court to refuse enforcement of the foreign award would serve as an estoppel. The Court accepted the said plea of estoppel and held that where issue between the two Courts was the same and the issue before the other Court had been considered and decided on merits, a plea of estoppel could be allowed.

50. It is, thus, seen that although *stricto sensu* principles of *res judicata* does not apply in proceedings to enforce an arbitral award, the courts have

exercised their discretion in favour of not permitting the parties to re-litigate the issue which had been considered by a Court of competent jurisdiction on merits or where the party raising the issue had the opportunity to raise the same in a Court of competent jurisdiction but had failed to do so. It is necessary to state that the aforesaid principles only provide objective reasons to enable the courts to refuse a request to decline enforcement of foreign award; the courts are not compelled to accept the same. As indicated above, the question whether such principles should be applied would depend on the facts of each case.

51. In ***Dallah Real Estate*** (*supra*), the U.K. Supreme Court considered a case where the enforcement of a foreign award was resisted by a party on the ground that it was not a signatory to the arbitration agreement and, therefore, was neither compelled to submit to arbitration nor was the award binding. The Court held that in the circumstances, the person resisting enforcement of the foreign award had no obligation to recognise the jurisdiction of the tribunal or seek recourse for setting aside the arbitral award. The Court further held that the scheme of New York Convention as reflected in Sections 101 to 103 of the English Arbitration Act may give a limited *prima facie* credit to an apparently valid arbitration award by throwing on the person resisting enforcement the onus of proving one of the matters as set out in Article V(1) of the Convention but that was the only advantage that the person in whose favour the award was issued would have.

52. It stands to reason that where the inherent jurisdiction of the arbitral tribunal to render an award is challenged, the enforcing Court would have to examine the challenge raised and it would not be open for the Court to

simply rely on the finding of the arbitral tribunal. Where the authority of the arbitral tribunal to make an award is challenged, its decision would not have any evidential value. However, once it is accepted that the arbitral tribunal had the jurisdiction and was competent to decide the issues between the parties, no challenge to the merits of the decision ought to be entertained. In such cases, the arbitral tribunal's decision on the issues having a bearing on the grounds set out in Section 48 (1) of the Act also cannot be ignored.

53. In ***Renusagar Power Co. Ltd. v. General Electric Co***. (*supra*), the Supreme Court had observed as under:-

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

54. Thus, the question whether Unitech ought to be permitted to raise the grounds urged must be considered in the light of the aforesaid principles.

Re: challenge to the enforcement of the Award under Sections 48(1)(b)and 48(1)(c)of the Act.

55. There is no dispute that Unitech had proper notice of the appointment of the Arbitral Tribunal and the arbitral proceedings. Thus, the questions to be addressed are: (i) whether there is any merit in Unitech's claim that it was unable to present its case; (ii) whether the Award is beyond the scope of reference; and (iii) whether Unitech should be permitted to raise these grounds.

56. Admittedly, in terms of Clause 2(a) and (b) of the Keepwell Agreement, Unitech had undertaken to cause Burley to make timely payments as specified under the SHA and to make sufficient funds available to Burley to meet its payment obligations. In terms of Clause 4 of the Keepwell Agreement, Cruz City was expressly entitled to take any action available in law or in contract, against the Unitech without having to first enforce the obligations of Burley.

57. Clause 2(a) and (b) of the Keepwell Agreement are set out below:-

> "2. Obligations of Unitech Holdco. (a) The parties hereto acknowledge that, with the prior written consent of LBREP (i) Unitech Ltd may extend the benefit of this Keepwell Agreement to other businesses undertaken by Unitech Holdco, and (ii) provide funds to Unitech Holdco, from time to time to enable Unitech Holdco to meet other obligations undertaken by it. Unitech Ltd and Unitech Holdco further acknowledge that as of the date hereof, the obligations set forth in this Keepwell Agreement are the only obligations undertaken by Unitech Holdco.
>
> (b) Unitech Ltd hereby undertakes to LBREP and its successors, indorsees, transferees and assigns, to (i) cause Unitech Holdco to timely make the payments specified in Clause 15.3.3 of the Shareholders Agreement (such amounts collectively, the "Obligations"), and (ii) to make sufficient funds available to Unitech Holdco, no later than five (5) Business Days after receipt of notice from LBREP requiring payment of any Obligations, to enable Unitech Holdco to timely satisfy the Obligations."

58. Cruz City exercised its Put Option under the SHA by issuing the notice dated 13.09.2010 addressed to Unitech, Burley and Arsanovia. The said notice, *inter alia,* stated as under:-

> "Accordingly, pursuant to Clauses 3.9.2, 15.3.3 and 15.3.4(ii) of the Shareholders' Agreement, we hereby

> exercise the Put Option and require Unitech [Arsanovia] and Unitech Holdco [Burley], jointly and severally, to purchase all Equity Shares in the Company [Kerrush] issued and allotted to LBREP [Cruz City]. Pursuant to Clause 2(b) of the Keepwell Agreement, we further require Unitech Ltd. [Unitech] to cause Unitech Holdco [Burley] to make the payments due in respect of such purchase.
>
> In accordance with Clause 3.9.2 of the Shareholders' Agreement, the amount due pursuant to the exercise of the Put Option as of the date of this Put Option Notice is USD 275,587,066.85 (the "Put Option Amount"). Please transfer the Put Option Amount to LBREP's bank account, without making any deduction or withholding for taxes or otherwise, by wire transfer of immediately available cleared funds, according to the following instructions:"

59. Thus, Unitech was duly put to notice of Cruz City's demand for payment of the consideration for the subject shares of Kerrush. Cruz City had unequivocally demanded that the said consideration be remitted to its bank account, the details of which were provided in the said notice.

60. Admittedly, the said notice was not complied with and consequently, Cruz City filed a request for arbitration, *inter alia,* indicating that it was seeking the following reliefs:-

> "31. Accordingly, in this arbitration, Cruz City seeks:
>
> (a) a declaration that no Bankruptcy/Dissolution Event has occurred in relation to Cruz City under the Shareholders' Agreement;
>
> (b) an award ordering Burley to purchase all of Cruz City's Equity Shares in Kerrush and to pay the Put Option Amount, calculated as at the date of payment, to Cruz City;

(c) an award ordering Unitech Limited to make sufficient funds available to Burley to enable Burley to pay the Put Option Amount to Cruz City pursuant to Clauses 3.9.2, 15.3.3 and 15.3.4(ii) of the Shareholders' Agreement;

(d) an award ordering Unitech Limited to take all steps necessary to cause Burley to pay the Put Options Amount to Cruz City pursuant to Clauses 3.9.2, 15.3.3 and 15.3.4 (ii) of the Shareholders' Agreement;

(e) alternatively, an award for damages against Burley and Unitech Limited for breach of their obligations under the Keepwell Agreement, in an amount equal to the Put Option Amount; and

(f) an award of costs against Burley and Unitech Limited in respect of Cruz City's costs and expenses in this arbitration."

61. In the Statement of Claims filed subsequently, Cruz City sought the following reliefs:-

"102. In Arbitration 2, Cruz City seeks:

(a) an award ordering Unitech Ltd to make sufficient funds available to Burley to enable Burley to pay the Put Option Amount, pursuant to Clause 2(b) of the Keepwell Agreement;

(b) an award ordering Unitech Ltd. to cause Burley to pay the Put Option Amount, calculated as at the date of payment, to Cruz City pursuant to Clause 2(b) of the Keepwell Agreement;

(c) alternatively, an award for damages against Unitech Ltd. for breach of its obligations under the Keepwell Agreement, in a amount equal to the Put Option Amount, calculated as at the date of payment.

(d) an award ordering Burley to take all steps necessary to enforce its right to receive funds from Unitech Ltd. under the Keepwell Agreement to enable it to pay the

Put Option Amount alternatively damages for breach of contract;

(e) a declaration that any sums received by Burley from Unitech Ltd. under the Keepwell Agreement are to be held by it on trust for Cruz City and are to be transferred to the Cruz City in satisfaction of Burley's obligation to it; and

(f) an award of costs against Unitech Ltd and Burley in respect of Cruz City's costs and expenses in this arbitration."

62. In its Statement of Claims, Cruz City specifically alleged that Arsanovia and Burley had failed to purchase the equity shares in Kerrush or to pay the original Put Option Amount, in breach of their obligations under the SHA. Cruz City also alleged that Unitech had failed to cause Burley to make payment of the Put Option Amount in breach of its obligations under Clause 2(b) of the Keepwell Agreement.

63. Cruz City further asserted that it was entitled to recover from Unitech, a sum equal to the Put Option Amount by way of damages for breach of contract.

64. Arsanovia, Burley and Unitech filed a joint Statement of Defence. In their Statement of Defence, they questioned the maintainability of the arbitral proceedings as they claimed that the proceedings were premature. It was asserted that Unitech's obligation would arise only when it was found that Burley's obligation under the SHA had become due and Burley had failed to honour such obligation. It was contended that since Burley was disputing its obligation under the SHA, there was no occasion for Unitech's obligation to be "due". In response to the specific pleadings regarding Unitech's breach of the obligations under the Keepwell

Agreement and the claim of damages, the main defence taken was (i) that the Put Option sought to be exercised by Cruz City, was invalid on account of a prior event of default and (ii) that the initial or extended period for commencement of construction had not expired on account of *force majeure* events.

65. It is apparent from the above that the issue whether Burley and Unitech had breached the obligations under the Keepwell Agreement and whether Unitech was obliged to make payment equivalent to the put option price was squarely the subject matter of arbitration.

66. The Arbitral Tribunal examined the merits of the disputes as well as objection as to the maintainability of the arbitration. The contention that unless a decision regarding Burley's obligation had been rendered, no amount could be considered as due and payable by Unitech, was rejected. The Arbitral Tribunal held that if *"funds are due under the Shareholders' Agreement, Unitech Ltd's obligations under the Keepwell Agreement will have arisen and have been breached (as it is not disputed that those funds have not been paid by Burley).*" The *force majeure* defence was rejected by the Arbitral Tribunal.

67. Unitech also raised other contentions including that 15% post tax IRR constituted a punitive rate of interest; that Cruz City had not established that it had any alternative use of the money invested or would have earned the return of 15% IRR; and that the contributions made after 13.09.2010 were not capital contributions. The same were also considered and rejected by the Arbitral Tribunal.

68. The Arbitral Tribunal held that Cruz City would be entitled to USD 171,332,006.64 being the capital contribution made by Cruz City along

with IRR of 15% up to the date of the Award, which was computed at total of USD 298,382,949.34. The aforesaid conclusion is founded on the basis that Burley and Unitech had breached their obligations under the Keepwell Agreement. In the aforesaid context, Unitech insisted that the payment of the Put Option price of Kerrush's shares, be matched by equivalent delivery of the share certificates, free from all encumbrances. This is noted by the Arbitral Tribunal in paragraph 4.19 of the Award, which is set out below:-

> "4.19 It seems clear, as Unitech asserts, that payment of the purchase price of the Equity Shares by Unitech much be matched by the equivalent delivery by Cruz City of the share certificates free and clear of all liens and encumbrances. The parties are instructed to make the necessary arrangements to do so forthwith. In case of any disputes relating to such arrangements, the Tribunal stands ready to assist them to do so."

69. The relevant part of the Award reads as under:-

> "6.2 Against delivery of all of Cruz City's Equity Shares in Kurresh, free and clear of all liens and encumbrances, Arsanovia and Burley shall pay Cruz City USD 298,382,949.34 as the purchase price of those shares. In case of any dispute as to the mechanism for delivery of Cruz City's Equity Shares in Kurresh, any party shall have the right to seek a further Award from this Tribunal resolving the dispute."

70. The Arbitral Tribunal also awarded costs of arbitration at £165,000 and further other costs and expenses quantified at $2,900,000. In addition, the Arbitral Tribunal awarded post award interest at 8% p.a. compounded quarterly. It was also directed that Unitech and Burley would pay any tax payable on the amount received by Cruz City.

71. In view of the aforesaid, it is apparent that Unitech was not only aware and had notice of Cruz City's claim for the Put Option Amount against it but had also contested the said demand. Unitech's contention that its obligations were not concurrent with Burley, was advanced and was rejected by the Arbitral Tribunal. The Award directing delivery of share certificates to match with payment of put option price was made at the insistence of Unitech.

72. Cruz City's claim was founded on breach of obligations on the part of Burley and Unitech and the relief for payment of the put option price was also premised on the aforesaid basis. In the aforesaid circumstances, the contentions that Unitech did not have an opportunity to meet the case set up against it and that the Award is beyond the scope of reference, are unmerited.

73. Unitech's contention that it had no opportunity to meet the relief awarded or that the Award is beyond the reference, is premised on the basis that (a) Unitech has been called upon to purchase the shares held by Cruz City in Kerrush; (b) Unitech had no obligation under the Keepwell Agreement to purchase the said shares; and (c) Unitech had no notice that any such relief would be granted to Cruz City as no such relief was claimed.

74. The premise that the Award requires Unitech to purchase the shares of Kerrush, is fundamentally flawed. The Arbitral Tribunal, having found that Unitech had breached its obligations, directed Unitech to pay the purchase price (Put Option Amount). The Arbitral Tribunal accepted that such payments must be made against the delivery of shares. However, there is no stipulation that the shares must be delivered only to Unitech.

Although, the Award requires Burley and Unitech to pay the purchase price, it does not require that the delivery of shares of Kerrush be made to Unitech and not Burley.

75. Plainly, the payment of purchase price for the subject shares would be on behalf of Burley. This is in conformity with the obligations that were undertaken by Unitech and were found to be breached.

76. Unitech also understood the Award in the manner as indicated above and this is plainly clear from the notes to the consolidated financial statements forming a part of the Annual Report for the year ended 31st March, 2014. The relevant extract of which reads as under:-

> "IV) The Company received an arbitral award dated 6th July 2012 passed by the London Court of International Arbitration (LCIA) wherein the arbitration tribunal has directed the Company to invest USD 298,382,949.34 (Previous year USD 298,382,949.34) equivalent to Rs.17,830,768,286 (Previous year Rs. 16,218,605,211) in Burley Holdings Ltd. (Mauritius) so as to enable it to purchase the investments of Cruz City 1 Mauritius Holdings (Mauritius) in the joint-venture company, Kerrush Investments Ltd. (Mauritius). The High Court of Justice, Queen's Bench Division, Commercial Court London has confirmed the said award.
>
> Based on the legal advice received by it, the Company believes that the said award is not enforceable in India on various grounds including but not limited to lack of jurisdiction by the LCIA appointed arbitral tribunal to pass the said award. Nevertheless, in case the Company is required to make the aforesaid investment into Burley Holdings Limited, its economic interest in the SRA project in Santa Cruz Mumbai shall stand Increased proportionately thereby creating a substantial asset for the Company with an immense development potential."

77. Further, in its reply to the rejoinder filed by Cruz City, Unitech has affirmed as under:-

> "14. In reply to para 6(d).....
>
> i) It is submitted that for the purpose of satisfying the Second Award, the Respondent requires to provide funds to Burley for the purpose of purchasing the Kerrush shares held by Cruz City by way of investing into Burley or by providing loans to Burley, or alternatively, by making direct payment to Cruz City for the Kerrush shares held by Cruz City. In all three of the aforementioned scenarios, the Respondent is required to make a "direct investment outside India" in terms of Regulation 2(e) of the Foreign Security Regulations"

78. This also indicates that Unitech had rightly construed the Award as requiring it to provide funds for purchase of Kerrush's shares held by Cruz City.

79. Mr Chidambaram, contended that the said notes to accounts were not relevant as the Annual Report for the subsequent year (the year ended 31st March, 2015) had corrected the same.

80. In view of this Court, the notes to accounts in the Annual Report for the year ended 31st March, 2014, correctly reflected Unitech's understanding of the Award. The said notes were amended in the Annual Report of the subsequent year; that is, after the present petition had been filed. This is plainly an afterthought and, *prima facie*, less than honest.

81. As mentioned above, the direction that the payment of purchase price be matched with delivery of shares was at the instance of the Unitech. More importantly, directing Burley and Unitech to pay the purchase price

of Kerrush's shares held by Cruz City matched by delivery of share certificates, does not mean that the share are required to be delivered to Unitech or that Unitech is directed to purchase the same.

82. The contention that Unitech had been called upon to make payment directly to Cruz City implies that it is being directed to make investment in Kerrush's shares is also unmerited. The payments made must be accounted for against the purpose for which they are made. Concededly, Unitech's obligation was to ensure that Burley discharged its obligation to Cruz City and to fund Burley for the same. Thus, it is elementary that the payment of the purchase price for Kerrush's shares must be accounted for as payment made to or on behalf of Burley.

83. In view of the above, this Court finds that the contentions advanced on behalf of Unitech that it had no opportunity to meet the case set up or that the Award is beyond the scope of reference, are bereft of any merits and, plainly, an afterthought.

Re: Challenge on grounds of FEMA:

84. There are four limbs to Unitech's challenge to the enforcement of the Award on the ground that it violates FEMA and is, thus, contrary to the Public Policy of India. The first is that the Award directs Unitech to invest in the shares of Kerrush and therefore violates Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004. The second is that Unitech's obligation under the Keepwell Agreement is in the nature of a guarantee by Unitech on behalf of Burley and such guarantee violates the Foreign Exchange Management (Guarantees) Regulations, 2000. The third is that in terms of Foreign

Exchange Management (Permissible Capital Account Transactions) Regulations, 2000, the shares of Kerrush are required to be valued and purchase of those shares can only be made at the fair market value of those shares. And, the fourth is that the SHA contemplates an assured exit at a pre-determined rate to Cruz City in respect of its investment in the Santacruz Project and this, according to Unitech, violates the mandatory circulars issued by RBI. Another facet of this argument is that the SHA is a device to circumvent the provisions of FEMA and the Regulations issued thereunder, which proscribe an assured exit from a foreign direct investment (FDI) at a pre-determined rate. Unitech claims that the SHA was structured in a manner so as to provide an assured exit to Cruz City from its investment in an overseas company (Kerrush) which had the effect of providing an exit option to Cruz City's FDI in the Santacruz Project.

85. The first and foremost question to be addressed is whether violation of any regulation or any provision of FEMA would *ipso jure* offend the public policy of India. The question whether enforcement of a foreign award violates the public policy of India must be considered in the context that India is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 and therefore, it is India’s sovereign commitment to honour foreign awards with the exception of those that fall foul of any of the grounds as expressly provided under Article V of the New York Convention. Section 48(2) of the Act provides statutory expression to Article V(2) of the New York Convention which enables a signatory country to refuse enforcement of a foreign award, if it is in contravention of its national public policy.

86. As observed in ***Renusagar Power Co. Ltd. v. General Electric Co***. (*supra*), the term "*public policy is somewhat open-textured and flexible*".

The said term encompasses a broad spectrum of acts and its contours also change and evolve with the passage of time. In ***Central Inland Water Transport Corporation Ltd. v. Brojo Nath Ganguly*****: 1986 3 SCC 156**, the Supreme Court had sought to explain the meaning of public policy as "some matter which concerns public good and public interest". The Supreme Court had also observed that the expressions “public policy”, "opposed to public policy" or "contrary to public policy" are incapable of precise definition.

87. Plainly, it would be difficult if not impossible to exhaustively define what is encompassed within the expression ‘public policy’. The broad and somewhat undefined and unpredictable scope of the expression public policy had prompted the court in ***Richardson v. Mellish***: **(1824) 2 Bing 229** to observe that *“it is a very unruly horse, and when you get astride it you never know where it will carry you”*.

88. Notwithstanding, the broad sweep of the expression ‘public policy’, the courts have attempted to interpret the scope of "public policy" or what is "contrary to public policy" in different contexts. In the context of enforcement of a foreign award, the Supreme Court in ***Renusagar Power Co. Ltd. v. General Electric Co***. (*supra*) had observed as under:-

> 66. Article V (2)(b) of the New York Convention of 1958 and Section 7(1)(b)(ii) of the Foreign Awards Act do not postulate refusal of recognition and enforcement of a foreign award on the ground that it is contrary to the law of the country of enforcement and the ground of challenge is confined to the recognition and enforcement being contrary to the public policy of the country in which the award is set to be enforced. There is nothing to indicate that the expression “public policy” in Article V (2) (b) of the New York Convention and Section 7 (1)(b)(ii) of the Foreign Awards Act is not used in the same

> sense in which it was used in Article 1(c) of the Geneva Convention of 1927 and Section 7(1) of the Protocol and Convention Act of 1937. This would mean that "public policy" in Section 7 (1)(b) (ii) has been used in a narrower sense and in order to attract the bar of public policy the enforcement of the award must invoke something more than the violation of the law of India. Since the Foreign Awards Act is concerned with recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression "public policy" in Section 7(1)(b)(ii) of the Foreign Awards Act must necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law. Applying the said criteria it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality."

89. In ***Shri Lal Mahal Ltd. v. Progetto Grano SPA*** (*supra*), the Supreme Court once again reiterated the legal position that the defence of public policy as contemplated under Section 48(2)(b) of the Act would have to be given a narrow meaning and enforcement of a foreign award would be refused if such enforcement would be contrary to (i) the fundamental policy of Indian law; (ii) the interests of India or (iii) justice or morality.

90. Article V of the New York Contention provides for grounds for a member State to refuse enforcement of a foreign award and this finds statutory expression in Section 48 of the Act. Similarly, in United States of America, the grounds for refusal of recognition and enforcement of a foreign award under the New York Convention is incorporated in the federal statute (Federal Arbitration Act, 9 USC§ 207) which mandates that "*the court shall confirm the award unless it finds one of the grounds for*

refusal or default of recognition or enforcement of the award specified in the convention".

91. The courts in United States have construed the defence of public policy under the New York Convention very narrowly and such enforcement of a foreign award on the ground of public policy is refused only where it is "*contrary to the most basic notions of morality and justice"* or is "*repugnant to the fundamental notions or what is dissent and justice in the United States"*. In ***Parsons and Whittemore Overseas Co. Inc. v. Societe Generale De L' Industrie Du Papier (Rakta)***: **508 F 2 D 969,** the United States Court of Appeals considered a case regarding enforcement of an arbitral award arising out of a contract entered into between a U.S. Company (Overseas) with an Egyptian entity (Rakta) for construction and management of a paper board mill in Alexandria Egypt. In the wake of Arab - Israeli conflict (the six day war), the Egyptian Government broke diplomatic ties with the United States and expelled all Americans from Egypt except those who applied and qualified for a special visa. In the circumstances, Overseas abandoned the project at a stage when the construction phase was near completion and sought excuse from performance on the ground of a *force majeure* clause in the agreement. Rakta disputed the same. The said disputes were referred to an arbitral tribunal constituted under the Rules of International Chambers of Commerce. The arbitral tribunal held that the unilateral decision of Overseas to abandon the project was not justified and entered an award in favour of Rakta. An action for enforcement of this foreign award was filed in United States of America. In the aforesaid context, the court noted that the public policy defence must be construed narrowly and enforcement of a foreign award may be denied only where enforcement would violate the

State's most basic notions of morality and justice. While dismissing the objection to enforcement, the court observed as under:-

> "[1] [2] 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. Cf. 1 Restatement Second of the Conflict of Laws 117, comment c, at 340 (1971); Loucks v. Standard oil Co., 224 N.Y. 99, 111, 120 N.E. 198 (1918).
>
> (3) & (4) Under this view of the public policy provision in the Convention, Overseas' public policy defense may easily be dismissed. Overseas argues that various actions by United States officials subsequent to the severance of American-Egyptian relations— most particularly, AID's withdrawal of financial support for the Overseas-RAKTA contract— required Overseas, as a loyal American citizen, to abandon the project. Enforcement of an award predicated on the feasibility of Overseas' returning to work in defiance of these expressions of national policy would therefore allegedly contravene United States public policy. In equating 'national' policy with United States 'public' policy, the appellant quite plainly misses the mark. To read the public policy defense as a parochial device protective of national political interests would seriously undermine the Convention's utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of 'public policy.' Rather, a circumscribed public policy doctrine was contemplated by the Convention's framers and every indication is that the United States, in acceding to the Convention, meant to subscribe to this supranational emphasis. Cf. Scherk v. Alberto-Culver Co., 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974).
>
> (5) To deny enforcement of this award largely because of the United States' falling out with Egypt in recent years would mean converting a defense intended to be of narrow scope into a major loophole in the Convention's

> mechanism for enforcement. We have little hesitation, therefore, in disallowing Overseas' proposed public policy defense".

92. Similarly, in the case of ***Ameropa A.G. v. Havi Ocean Co., LLC***: **(2011) WL 570130**, the defendant claimed that the arbitral award violated US sanctions and therefore, its enforcement was contrary to public policy. This contention was rejected by the Federal Court for Southern District of New York and the court held that implications of foreign policy disputes did not satisfy the condition of offending the "*most basic notions of morality and justice*".

93. The aforesaid decisions have been referred only to emphasise that the width of the public policy defence to resist enforcement of a foreign award, is extremely narrow. And, the same cannot be equated to offending any particular provision or a statute.

94. Section 7(1) of the Arbitration (Protocol & Convention) Act, 1937 *inter alia* mandated that the enforcement a foreign award *"must not be contrary to public policy or the law of British India*". By Indian Independence (Adaption of Central Acts and Ordinances) Order, 1948, the words "British India" were replaced by the words "the Provinces". These words were, by virtue of the Adaption of Laws Order, 1950, substituted by the words "the States". And, by Part B States (Laws) Act, 1951, the words "the States" were replaced by "of India". In ***Renusagar's*** case, the Supreme Court considered the above and held that:

> "This means that even in the Protocol and Convention Act of 1937 the legislature had used the words "Public Policy" only and by the said words it was intended to mean "the public policy of India". The New York

> Convention has further curtailed the scope of enquiry by excluding contravention of law of the court in which the award is sought to be enforced as a ground for refusing recognition and enforcement of a foreign award. The words "law of India" have, therefore, been omitted in Section 7(1)(b)(ii) of the Foreign Awards Act"

95. The Supreme Court further observed as under:-

> "65...In this context, it would also be of relevance to mention that under Article I(e) of the Geneva Convention Act of 1927, it is permissible to raise objection to the enforcement of arbitral award on the ground that the recognition or enforcement of the award is contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon. To the same effect is the provision in Section 7(1) of the Protocol & Convention Act of 1937 which requires that the enforcement of the foreign award must not be contrary to the public policy or the law of India. Since the expression “public policy” covers the field not covered by the words “and the law of India” which follow the said expression, contravention of law alone will not attract the bar of public policy and something more than contravention of law is required."

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

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

98. In ***Oil and Natural Gas Corporation Limited v. Western Geco International Limited*****: (2014) 9 SCC 263**, the Supreme Court sought to explain meaning of the expression "fundamental policy of Indian Law" in the following words: "*the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country*". The court further indicated three fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental policy of Indian law: (i) judicial approach, (ii) principles of natural justice and (iii) reasonableness on the touchstone of *Wednesbury* principle.

99. The explanations to Section 48(2)(b) of the Act as amended/ introduced by the Arbitration and Conciliation (Amendment) Act, 2015

have brought about a material change and further narrowed the scope of the public policy defence: first, Explanation 1 has sought to replace the inclusive scope of the pre-amendment provision by an exhaustive one; second, interest of India is no longer included in the scope of public policy; and third, it has been expressly provided - although the same was authoritatively settled by the Supreme Court in ***Renusagar Power Co. Ltd. v. General Electric Co***. (*supra*) - that examination of whether the arbitral award offends the Fundamental Policy of Indian law, does not entail a review on merits.

100. In ***Renusagar Power Co. Ltd. v. General Electric Co***. (*supra*), the Supreme Court referred to its earlier decisions in ***Life Insurance Corporation of India v. Escorts Ltd. and Ors.****(supra)* and ***M.G. Wagh v. Jai Engineering Works Limited*****: (1987) 1 SCC 542** and noted that Foreign Exchange Regulation Act, 1993 (FERA) was a statute enacted in "*National Economic Interests*" and the object of various provisions was to ensure that the nation did not lose foreign exchange which was very much essential for "*the economic survival of the nation*". Keeping the aforesaid objects underlying FERA, the Supreme Court held that violation of the provisions of FERA would be contrary to the public policy of India. It is on the strength of the aforesaid decision that it has been earnestly contended on behalf of Unitech that violation of any provision of FEMA would also fall foul of the public policy of India.

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

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

102. Section 8 of FERA expressly proscribed any person, other than an authorized dealer, to purchase or otherwise acquire or borrow from, or sell, or otherwise transfer or lend to or exchange with, any person not being an authorised dealer, any foreign exchange without the general or special permission of the Reserve Bank of India. All persons were prohibited from entering into any transaction which provided for conversion of Indian currency into foreign currency or *vice versa*. In terms of Section 26 of FERA, no person was permitted to give guarantee in respect of any debt or other obligation or liability (i) of any person resident in India and due or owing to a person resident outside India, or (ii) of a person resident outside India. FERA provided severe penalties and prosecution for contravention of provisions of FERA. It is material to note that FERA was also placed in the Ninth Schedule to the Constitution of India.

103. With the liberalization of our economy, it was felt that FERA must be repealed and new legislation must be enacted. The Statement of Objects and Reasons of FEMA indicate that FEMA was enacted in view of significant developments that had taken place since 1993: there was substantial increase in the foreign exchange reserves, growth in foreign trade, rationalisation of tariffs, current account convertibility, liberalisation of Indian Investments abroad, increased access to external commercial borrowings by Indian corporates and participation of foreign institutional investors in our stock markets. There was a paradigm shift in the statutory policy. The focus had now shifted from prohibiting transactions to a more permissible environment. The fundamental policy of FEMA no longer proscribes or prohibits Indian entities from expanding their business overseas and accepting risks in relation to transactions carried out outside India. And, as the title of FEMA suggests, the policy now is to manage foreign exchange. Under FEMA, all foreign account transactions are permissible subject to any reasonable restriction which the Government may impose in consultation with the RBI. It is now permissible to not only compound irregularities but also seek *ex post facto* permission. Thus, the question of declining enforcement of a foreign award on the ground of any regulatory compliance or violation of a provision of FEMA would not be warranted.

104. A Division Bench of this court in the case of ***SRM Exploration Pvt. Ltd v. N & S & N Consultants S.R.O.***: **2012 (129) DRJ 113**, after referring to various provisions of FEMA and FERA, held that although provisions of FERA prohibited entering into transactions/contracts which are in violation of the said Act, FEMA did not contain any provision which voided the

transaction entered in contravention thereof. The relevant extract of the said judgment reads as under :

> "11. We have perused the provisions of FEMA, 1999 Section 3 thereof prohibits dealing in or transferring of any foreign exchange save as otherwise provided therein or under the Rules & Regulations framed thereunder without general or special permission of RBI. We are unable to find any provision therein voiding the transactions in contravention thereof. We may mention that the predecessor legislation to FEMA namely FERA 1973 vide Section 47 prohibited entering into any contract or agreement directly or indirectly evading or avoiding any operation of the said Act or any provision thereof. However Sub Section (3) thereof also provided that such prohibition shall not prevent legal proceedings being brought in India for recovery of a sum which apart from the provision of FERA would be due. However the legislature while re-enacting the law on the subject has chosen to do away with such a provision. We are of the view that the same shows a legislative intent to not void the transaction even if in violation of the said Act. Thus we are of the opinion that the plea of the appellant Company in this regard is without any force."

105. The Bombay High Court in the case of ***POL India Projects Limited and Ors. v. Aurelia Reederei Eugen Friederich GmbH Schiffahrtsgesellschaft & Company KG and Ors.***: (**2015) SCCOnline Bom 1109** held that no prior permission was required to be taken before the execution of a letter of guarantee. The court further held that even if such permission was required, the execution of letter of guarantee would not be contrary to the fundamental policy of Indian law. The relevant extract is provided as under:

> "164. In my view since no prior permission of the Reserve Bank or any other authority was required under the

> provisions of Foreign Exchange Management (Guarantees) Regulation, 2000 or there was no prohibition from issuing such letter of guarantee under the said regulation and the petitioner not having raised any such issue prior to the date of filing their objections before the arbitral tribunal from the date of execution of such letter of guarantee, the recognition and enforcement of foreign award in question cannot be denied. In my view even if prior permission of the Reserve Bank would have been required which was admittedly not obtained by the petitioner before execution of such guarantee, the recognition and enforcement of such foreign award based on such guarantee would not be contrary to fundamental policy of Indian law and would also not be contrary to the interest of India or justice of morality."

106. In ***Penn Racquet Sports v. Mayor International Ltd***: **177(2011) DLT 474**, a coordinate bench of this court held that enforcement of a foreign award cannot be denied if it merely contravenes the law of India. The relevant extract of the judgment reads as follows:

> "44. As held by the Supreme Court, the recognition and enforcement of a foreign award cannot be denied merely because the award is in contravention of the law of India. The award should be contrary to the fundamental policy of Indian law, for the Courts in India to deny recognition and enforcement of a foreign award. The other grounds recognized by the Supreme Court to refuse recognition and enforcement of a foreign award are that the award is contrary to the interests of India, or justice or morality. Merely because a monetary award has been made against an Indian entity on account of its commercial dealings, would not make the award either contrary to the interests of India or justice or morality,"

107. Having held that a *simpliciter* violation of any particular provision of FEMA cannot be considered synonymous to offending the fundamental policy of Indian law, it would also be apposite to mention that enforcement

of a foreign award will invariably involve considerations relating to exchange control. The remittance of foreign exchange in favour of a foreign party seeking enforcement of a foreign award may require permissions from the Reserve Bank of India. There may also be a question whether the initial agreement pursuant to which a foreign award has been rendered required any express permission from RBI. However, as indicated earlier, the policy under FEMA is to permit all transactions *albeit* subject to reasonable restrictions in the interest of conserving and managing foreign exchange. India has not accepted full capital account convertibility as yet. Thus, there are transactions for which permission may not be forthcoming. Whereas certain transactions are permitted under FEMA and regulations made thereunder without any further permissions; other transactions may require express permission from the RBI. However, these considerations can be addressed by ensuring that no funds are remitted outside the country in enforcement of a foreign award, without the necessary permissions from the Reserve Bank of India. This would adequately address the issue of public interest and the concerns relating to foreign exchange management, which FEMA seeks to address.

108. As discussed hereinbefore, this Court while considering the question whether to decline enforcement of a foreign award on the ground of public policy, is also required to consider the nature of the policy that is alleged to have been contravened. The approach that this Court would bear is one that favours enforcement of a foreign award and if the public policy considerations can be addressed without declining recognition of the foreign award, the Court would lean towards such a course.

109. The contention that enforcement of the Award against Unitech must be refused on the ground that it violates any one or the other provision of

FEMA, cannot be accepted; but, any remittance of the money recovered from Unitech in enforcement of the Award would necessarily require compliance of regulatory provisions and/or permissions.

110. The second question to be considered is whether it is open for Unitech to raise a plea that the investment made by Cruz City was violative of the provisions of FEMA and Indian Law. In this regard, it is necessary to refer to some of the terms and representations made by Unitech under the Keepwell Agreement, which are set out below:-

> A. Unitech Ltd. [Unitech] has established Unitech Holdco [Burley] as a subsidiary to engage in business offshore, and to enable Unitech Holdco [Burley] to attract business partners offshore and to induce them to enter into business within Unitech Holdco [Burley], Unitech Ltd. [Unitech] has agreed to fund Unitech Holdco [Burley] from time to time to meet obligations undertaken by Unitech Holdco [Burley].
>
> B. LBREP [Cruz City] has agreed to enter into business with Unitech Holdco [Burley], Unitech Ltd. [Unitech], Arsanovia Limited [Arsanovia] ("Unitech"), an entity jointly owned and controlled by Unitech Ltd. and Mr Harresh N. Mehta, Mr Ramakant R. Jadhav, Mr.Prakash V. Ajgaonkar, Mr Vivek Jadhav and certain of their Affiliates and has, to this end, entered into a Shareholders Agreement dated as of the date hereof by and among LBREP [Cruz City], Unitech Ltd. [Unitech], Unitech Holdco [Burley], Unitech [Arsanovia] and certain of their Affiliates (the "Shareholders Agreement") and certain Related Agreements with respect to the investment in, and the construction, development and disposition of, the Santa Cruz Project;
>
> C. LBREP [Cruz City] has entered into the Shareholders Agreement and agreed to invest in the Santa Cruz Project in reliance upon, among other things, the obligation of Unitech Holdco [Burley] and Unitech [Arsnovia] to

jointly and severally pay LBREP [Cruz City] (i) an amount determined pursuant to the Shareholders Agreement upon exercise by LBREP [Cruz City] of the Put Option and (ii) certain tax indemnity amounts; and

D. Unitech Ltd. [Unitech] and Unitech Holdco [Burley] (the "Unitech Entities") acknowledge that they will benefit from LBREP's [Cruz City's] investment in the Santa Cruz Project and to induce LBREP [Cruz City] to make such investment, the Unitech Entities [Unitech and Burley] have agreed to enter into this Keepwell Agreement.

**** **** ****

8. **Representations and Warranties**. The Unitech Entities [Unitech and Burley] hereby represent and warrant to LBREP [Cruz City] that, as of the date hereof;.....

(b) Authorization. The execution, delivery and performance of this Keepwell Agreement and the transactions contemplated hereby (i) are within the respective corporate authority of the Unitech Entities [Unitech and Burley], (ii) have been duly authorized by all necessary corporate proceedings by the respective Unitech Entities [Unitech and Burley], (iii) do not conflict with or result in any breach or contravention of any provision of any Law to which the Unitech Entities [Unitech and Burley] are subject, and (iv) do not conflict with any provision of the respective corporate charter or bylaws of, or any agreement or other material instrument binding upon, the Unitech Entities [Unitech and Burley]. This Keepwell Agreement has been duly executed and delivered by the Unitech Entities [Unitech and Burley].

(c) Enforceability. The execution and delivery of this Keepwell Agreement will result in valid and legally binding obligations of the Unitech Entities [Unitech and Burley] enforceable against them in accordance with the terms and provisions thereof, except as enforceability is limited by bankruptcy, insolvency, reorganization, receivership, moratorium or other laws affecting creditors'

rights and remedies generally and general principles of equity.

(d) Government Approvals. The execution, delivery and performance by the Unitech Entities [Unitech and Burley] of this Keepwell Agreement and the transactions contemplated hereby do not require the approval or consent of, or filing with any governmental agency or authority.

**** **** ****

(k) Potential Liability. To the extent that any applicable Law imposes limits on the liabilities or the obligations which Unitech Ltd [Unitech] is permitted to incur, the potential liability of Unitech Ltd [Unitech] under this Keepwell Agreement, when taken together with all other obligations or liabilities of Unitech Ltd. [Unitech] which are to be taken into account for the purpose of determining compliance with such limits, is within such limits.

**** **** ****

(m) Bona fide Business. Unitech Ltd. [Unitech] has established Unitech Holdco [Burley] for the purpose of undertaking a bona fide business and activities in pursuit thereof in compliance with applicable Law.

9. **Covenants**. The Unitech Entities [Unitech and Burley] hereby covenant and agree with LBREP [Cruz City] that, from and after the date of this Keepwell Agreement and for so long as this Keepwell Agreement shall remain in force:

(g) Compliance with Laws, Contracts, Licenses and Permits. The Unitech Entities [Unitech and Burley] will comply with (i) the Laws applicable to them wherever their business is conducted, (ii) the provisions of their respective charter documents and by-law, (iii) all agreements and instruments by which they or any of their properties may be bound, and 9iv) all decrees, orders, and judgments applicable to them, except where in any such case the failure to comply with any of the foregoing would not materially adversely affect their respective business,

> property and financial condition. If any authorization filing consent, approval, permit or license from any officer, agency or instrumentality of any government shall become necessary or required in order that a Unitech Entity [Unitech/Burley] may fulfil any of its obligations hereunder, then such Unitech entity [Unitech/Burley] will immediately take or cause to be taken all necessary steps within its power to obtain or make such authorization, filing, consent, approval, permit or license and furnish LBREP [Cruz City] with evidence thereof.
>
> (l) Potential Liability. To the extent that any applicable Law imposes limits on the liabilities or obligations which Unitech Ltd. [Unitech] is permitted to incur, Unitech Ltd. [Unitech] will not undertake any liabilities or obligations which would cause the potential liability under this Keepwell Agreement, when taken together with all other liabilities and obligations of Unitech Ltd. [Unitech] which are to be taken into account for the purpose of determining compliance with such limits, to exceed such limits (and in this regard LBREP [Cruz City] may from time to time request, and Unitech Ltd. [Unitech] shall provide, evidence that Unitech Ltd.'s [Unitech's] liabilities and obligations are within such limits).
>
> (n) Bona Fide Business. Unitech Ltd. shall cause Unitech Holdco [Burley] to continue to undertake and be engaged in a bona fide business and activities in pursuit thereof as a governing concern in compliance with applicable Law.

111. Unitech had made unambiguous representations to the effect that the obligations undertaken by Unitech under the Keepwell Agreement were valid, legally binding and enforceable against Unitech; that the transactions did not require any approval, assent or filing with any Government agency or authority; that all applicable laws had been complied with; that Unitech had complied with the limits on the liabilities and obligations imposed; and that the business of Burley and Unitech was *bona fide*. The contentions

now advanced are to the effect that the said representations were false. It is now contended that Burley and Kerrush are not engaged in any bona fide business activity and therefore fall outside the scope of Regulation 6 (2) (ii) of the Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004. Similarly, whereas it was expressly represented and acknowledged by Unitech that both Burley and Unitech would benefit from Cruz City's investment in the Santacruz Project, it is now contended that Burley had no connection with the business of Kerrush and, in fact, has no business at all, therefore, the obligations of Unitech, in the nature of a guarantee, are not in connection with the business of Burley. Whereas express representations were made that the transactions were in compliance with the applicable laws, it is now contended that the SHA was only a device to circumvent the provisions of FEMA.

112. In view of the aforesaid, the conduct and the stand of Unitech can most charitably be described as plainly dishonest. This court is of the view that permitting Unitech to prevail on such contentions to resist the enforcement of Award would plainly amount to rewarding dishonesty and would be manifestly unjust.

113. Curiously, no such contentions were advanced by Unitech before the Arbitral Tribunal. Further, Unitech has also failed to indicate any credible explanation for not urging the same before the Arbitral Tribunal. Thus, Unitech cannot be permitted to raise such contentions at this stage. It is also necessary to bear in mind that the present proceedings are for enforcement of *inter se* rights between Cruz City and Unitech and Cruz City cannot be precluded from enforcing its rights which fall within the ambit of private international law.

114. The only remaining issue now to be addressed is whether enforcement of the Award would violate the provisions of FEMA.

115. As indicated above, the contention that the Award requires Unitech to purchase the shares of Kerrush from Cruz City, is palpably erroneous. Thus, the line of argument that the provisions of Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004 would be violated by implementation of the Award, is bereft of any merit. The Award only seeks to enforce Unitech's obligations to secure Burley's performance of obligations undertaken under the Keepwell Agreement.

116. The next contention to be considered is whether the Award or the Keepwell Agreement violates the Foreign Exchange Management (Guarantees) Regulations, 2000.

116.1 Section 5 of FEMA permits all current account transactions, however, provides that the Central Government may, in public interest and in consultation with the Reserve Bank, impose such reasonable restrictions for current account transactions, as may be prescribed.

116.2 Section 6 of FEMA concerns capital account transactions and the relevant extract of the said Section as in force at the material time, when the Keepwell Agreement was entered into (i.e., in 2008), is set out below:-

> "**6. Capital account transactions.**—(1) Subject to the provisions of sub-section (2), any person may sell or draw foreign exchange to or from an authorised person for a capital account transaction.
>
> (2) The Reserve Bank may, in consultation with the Central Government, specify—

(a) any class or classes of capital account transactions which are permissible;

(b) the limit up to which foreign exchange shall be admissible for such transactions:

Provided that the Reserve Bank shall not impose any restriction on the drawal of foreign exchange for payments due on account of amortization of loans or for depreciation of direct investments in the ordinary course of business.

(3) Without prejudice to the generality of the provisions of sub-section (2), the Reserve Bank may, by regulations, prohibit, restrict or regulate the following—

(a) transfer or issue of any foreign security by a person resident in India;

(b) transfer or issue of any security by a person resident outside India;

(c) transfer or issue of any security or foreign security by any branch, office or agency in India of a person resident outside India;

(d) any borrowing or lending in foreign exchange in whatever form or by whatever name called;

(e) any borrowing or lending in rupees in whatever form or by whatever name called between a person resident in India and a person resident outside India;

(f) deposits between persons resident in India and persons resident outside India;

(g) export, import or holding of currency or currency notes;

(h) transfer of immovable property outside India, other than a lease not exceeding five years, by a person resident in India;

(i) acquisition or transfer of immovable property in India, other than a lease not

exceeding five years, by a person resident outside India;

(j) giving of a guarantee or surety in respect of any debt, obligation or other liability incurred—

(i) by a person resident in India and owed to a person resident outside India; or

(ii) by a person resident outside India...."

116.3 In terms of Section 6, the Reserve Bank of India has framed the Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000. Regulation 3 of the said regulations reads as under:-

"**3. Permissible Capital Account Transactions.-** (1) Capital account transactions of a person may be classified under the following heads, namely :-

(a) transactions, specified in Schedule I, of a person resident in India;

(b) transactions, specified in Schedule II, of a person resident outside India.

(2) Subject to the provisions of the Act or the rules or regulations or direction or orders made or issued thereunder, any person may sell or draw foreign exchange to or from an authorised person for a capital account transaction specified in the Schedules;

Provided that the transaction is within the limit, if any, specified in the regulations relevant to the transaction."

[emphasis supplied]

116.4 Schedule I of the said regulations pertains to capital account transactions of persons resident in India. Entry (a) and (d) of the said

schedule pertain to “investment by a person resident in India in foreign securities” and “security issued by a person resident in India in favour of a person resident outside India”.

116.5 In so far as guarantees are concerned, the relevant regulations are the Foreign Exchange Management (Guarantees) Regulations, 2000. Regulation 5 of the said regulations specifically permits the giving of guarantees in certain circumstances, including by a company in India for and on behalf of a wholly owned subsidiary.

116.6 Regulation 5(b) Foreign Exchange Management (Guarantees) Regulations, 2000 as in force prior to 27.05.2011 is set out below:-

> “(b) a company in India promoting or setting up outside India, a joint venture company or a wholly-owned subsidiary, may give a guarantee to or on behalf of the latter in connection with its business:
>
> > Provided that the terms and conditions stipulated in Foreign Exchange Management (Transfer and Issue of Foreign Security) Regulations, 2000 for promoting or setting up such company or subsidiary are continued to be complied with:
> >
> > Provided further that the guarantee under this clause may also be given by an authorised dealer in India;”.

116.7 The Foreign Exchange Management (Guarantees) Regulations, 2000 were amended by a notification dated 08.05.2013, with retrospective effect from 27.05.2011. Post amendment Regulation 5(b) reads as under:-

> "**5. Guarantees which may be given by persons other than an authorised dealer :-**
>
> (a) xxxx xxxx xxxx

(b)(i) An Indian Party promoting or setting up outside India, a Joint Venture (JV) or a Wholly Owned Subsidiary (WOS), may give a guarantee to or on behalf of the latter in connection with its business:

Provided that the terms and conditions stipulated in Foreign Exchange Management (Transfer and Issue of Foreign Security) (Amendment) Regulations, 2004 for promoting or setting up such company or subsidiary are continued to be complied with:

Provided further that the guarantee under this clause may also be given by an authorized dealer in India;

(ii) An Indian Party promoting or setting up outside India, a Joint Venture (JV) or a Wholly Owned Subsidiary (WOS), may give a guarantee to or on behalf of the first generation step down operating company in connection with its business:

Provided that the terms and conditions stipulated in Foreign Exchange Management (Transfer and Issue of Foreign Security) (Amendment) Regulations, 2004 for promoting or setting up such company or subsidiary are continued to be complied with.

Explanation: 'Indian Party' shall have the same meaning as assigned to it in Foreign Exchange Management (Transfer or Issue of any Foreign Security) (Amendment) Regulations, 2004."

116.8 In terms of the proviso to Regulation 5(b)(i) of the Foreign Exchange Management (Guarantees) Regulations, 2000, providing guarantees for obligations of a wholly owned subsidiary are permissible provided the conditions stipulated in Foreign Exchange Management

(Transfer or Issue of any Foreign Security) Regulations, 2004 for promoting and setting up a subsidiary are continued to be complied with.

116.9 In terms of the Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000, Unitech could establish a wholly owned subsidiary provided it complied with the limits specified in the relevant regulations. The relevant regulations in this regard is the Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004.

116.10 Regulation 6 of the Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004, permits an Indian party to make a direct investment in a wholly owned subsidiary subject to the conditions specified in Regulation 6 (2) of the said Regulations being met. The relevant extract of Regulation 6 of the said regulations is set out below:-

> "6. **Permission for Direct Investment in certain cases**.—(1) Subject to the conditions specified in sub-regulation (2), [(and Regulation 7 in case investment in financial services sector) an Indian party may make direct investment in a joint Venture or Wholly Owned Subsidiary outside India.
>
> (2) (i) The total financial commitment of the Indian Party in Joint Ventures/Wholly Owned Subsidiaries shall not exceed 400% of the net worth of the Indian Party as on the date of the last audited balance sheet.
>
> **** **** ****
>
> (ii) The direct investment is made in an overseas Joint Venture or Wholly Owned Subsidiary engaged in a *bona fide* business activity.

(iii) The Indian Party is not on the Reserve Bank's Exporters caution list/list of defaulters to the banking system circulated by the Reserve Bank or under investigation by any investigation/enforcement agency or regulatory body.

(iv) The Indian Party has submitted its Annual Performance Report in respect of all the overseas investments in the format given in Part III of the Form ODI.

(v) The Indian Party routes all transactions relating to the investment in a Joint Venture/Wholly Owned Subsidiary through only one branch of an authorised dealer to be designated by it.

Explanation.- The Indian party may designate different branches of authorised dealers for different joint Ventures/Wholly Owned Subsidiaries outside India.

(vi) The Indian Party submits Part I of the Form ODI, duly completed to the designated branch of an authorised dealer.

**** **** ****

(3) Investment under this Regulation may be funded out of one or more of the following sources, namely:-

(i) **** **** ****

(ii) drawal of foreign exchange from an authorised dealer in India shall not exceed 400% of the net worth of the Indian Party as on the date of last audited balance sheet.

Explanation:-For the purpose of the limit of 400% of the net worth the following shall be reckoned, namely:-

(a) cash remittance by market purchase;

(b) capitalisation of export proceeds and other dues and entitlements as mentioned in Regulations 11 and 12;

(c) [hundred per cent of the amount of guarantees] issued by the Indian party to or on behalf of the Joint Venture company or Wholly Owned Subsidiary.

[Explanation:-An Indian Party may offer to a person resident outside India any form of guarantees, that is, corporate or personal/primary or collateral/guarantee by promoter company in India/guarantee by group company, sister concern or associate company in India, provided that:

(a) total "financial commitment" including all forms of guarantees remains within the overall ceiling stipulated for overseas investment by an Indian Party; and

(b) no guarantee is "open ended";

(d) utilisation of the amount raised by issue of ADRs/GDRs by the Indian party;

(e) External Commercial Borrowing in conformity with other parameters of the ECB guidelines;

**** **** ****

(4)(i) An Indian Party may extend a loan or a guarantee to or on behalf of the Joint Venture/Wholly Owned Subsidiary abroad, within the permissible financial commitment, provided that the Indian Party has made investment by way of contribution to the equity capital of the Joint Venture.

**** **** ****

(6)(a) For the purposes of investment under this regulation by way of remittance from India in a existing company outside India, the valuation of shares of the company outside India shall be made, -

(i) where the investment is more than USD 5 [five] million, by a Category 1 Merchant Banker

registered with Securities and Exchange Board of India [SEBl], or an Investment Banker/Merchant Banker outside India registered with the appropriate regulatory authority in the host country; and

(ii) in all other cases, by a Chartered Accountant or a Certified Public Accountant."

116.11 Regulation 9 entitles an Indian party who does not satisfy the eligibility norms under Regulation 6, *inter alia*, under Regulation 6,7 or 8 to apply to the Reserve Bank for approval.

117. Indisputably, Burley is a wholly owned subsidiary incorporated by Unitech in Mauritius and, therefore, by virtue of Regulation 5 (b) of Foreign Exchange Management (Guarantees) Regulations, 2000, Unitech was entitled to give guarantees for Burley's business to stand as surety for obligations undertaken by Burley within the prescribed limits.

118. It is contended by Unitech that Burley has no business and, therefore, Regulation 5 (b) of the Foreign Exchange Management (Guarantees) Regulations, 2000 would not be applicable. Plainly, Unitech cannot be heard to urge this contention.

118.1 First, it runs contrary to the express representations made by Unitech. Secondly, as per the representations of Unitech, Burley's business was to attract business partners off shore to induce them into entering into business with Burley. It was also acknowledged in the Keepwell Agreement that Burley would benefit from Cruz City's investment in the Santacruz Project. Thus, Burley is plainly Unitech's off shore arm and was used as a vehicle to induce Cruz City to make an investment in Kerrush for

the Santacruz Project. Admittedly, Unitech has a vital economic interest in the Santacruz Project and, therefore, the assertion that the obligations undertaken by Unitech were not for Burley's business, cannot be readily accepted.

118.2 Second, the contentions advanced by Unitech are plainly an afterthought as no such contentions were advanced before the Arbitral Tribunal. Indisputably, the Arbitral Tribunal was the forum of choice and had jurisdiction to decide all disputes between the parties. The Keepwell Agreement was subject to Indian laws and Unitech had full opportunity to challenge the validity of the Keepwell Agreement before the Arbitral Tribunal. However, Unitech having failed to do so, this court finds no reason to entertain such contentions to resist enforcement of the Award. There is also much merit in Mr Mukopadhaya's contention that Unitech had deliberately refrained from taking any such plea before the Arbitral Tribunal as that may have entitled Cruz City to claim further damages. It is apparent that Unitech has also not provided any reason why such defences were not raised before the Arbitral Tribunal. In the circumstances, this court has little hesitation in finding that the contentions now raised are an abuse of the process of this court and, therefore, must be rejected. This is a fit case where principles of issue estoppel ought to be applied notwithstanding the grounds available under Section 48(1) of the Act.

118.3 Third, even if it is accepted that Burley's business was not *bonafide*, Unitech would be liable to suffer the consequences that would follow under FEMA, but Unitech cannot escape its liability to Cruz City. Insofar as the public policy of India is concerned, the same can be adequately addressed while considering the question of regulatory compliances at the

time of remitting the funds recovered from Unitech. When considered in the context of public policy, it would be more pernicious and destructive of the rule of law to permit Unitech to escape its obligations and avoid the Award in comparison to enforcing it.

119. Unitech's contention that structure contemplated under the Keepwell Agreement read with the SHA provided an assured return at a pre-determined rate to Cruz City and this was a flagrant violation of FEMA and Regulations made thereunder, is also bereft of merit. The Put Option provided to Cruz City under the Keepwell Agreement could be exercised only within a specified time and was contingent on the Santacruz project not being commenced within the prescribed period. This was not an open ended assured exit option as is sought to be contended by Unitech. Cruz City had made its investment on a representation that the construction of the Santacruz Project would commence within a specified period. Plainly, if the construction of the Santacruz project had commenced within the specified period - that is, by 17.07.2010 - Cruz City would not be entitled to exercise the Put Option for exiting the investment. Further, the Put Option could only be exercised within a fixed time period of 180 days and the said option would be lost thereafter.

120. The reliance placed by Unitech on the RBI circulars dated 09.01.2014 and 14.07.2014 is also misplaced. In terms of RBI's circular dated 09.01.2014 optionality clauses granting assured returns on FDI are proscribed. However, it is doubtful whether the said circular would be applicable to cases where a foreign investor founds its claim in breach of contract. Plainly, if an investment is made on representations which are breached, the investor would be entitled to its remedies including in

damages. The aforesaid circulars proscribe assured return instruments brought in India under the guise of equity. However, in the present case, Cruz City is only seeking to enforce its obligations against Burley, an overseas entity.

121. Even if it is accepted that the Keepwell Agreement was designed to induce Cruz City to make investments by offering assured returns, Unitech cannot escape its liability to Cruz City. Cruz City had invested in Kerrush on the assurances held out by Unitech and notwithstanding that Unitech may be liable to be proceeded against for violation of provisions of FEMA, the enforcement of the Award cannot be declined.

122. It has also been argued that the Keepwell Agreement and the SHA were only a device to overcome the provisions of FEMA. As stated above, first of all, Unitech is not entitled to raise this plea for the reasons as stated hereinbefore. No such plea was raised before the Arbitral Tribunal. It is plainly an afterthought and an abuse of the process of this court. Secondly, the contention is premised on an erroneous assumption that the Keepwell Agreement provides for an assured return in violation of FEMA. As stated above, the Put Option was relevant only if the construction of the Santacruz Project was not commenced within the specified period of two years. Cruz City had no assurance of exit at a pre-determined return under the Keepwell Agreement in the event the execution of the project was commenced on schedule. And thirdly, if Cruz City has been induced to make an investment on a false assurance of the Keepwell Agreement being legal and valid, Unitech must bear the consequences of violating the provisions of Law, but cannot be permitted to escape their liability under the Award.

123. In view of the above, the objections raised by Unitech under Section 48 of the Act against enforcement of the Award are rejected.

124. List for further consideration on 20.04.2017.

VIBHU BAKHRU, J

APRIL 11, 2017
MK/RK/pkv