IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL ARBITRATION PETITION NO. 441 OF 2017
WITH
INTERIM APPLICATION (L) NO. 27655 OF 2024
WITH
CONTEMPT PETITION IN COMMERCIAL DIVISION MATTERS (L) NO.212 OF 2025
WITH
COMMERCIAL ARBITRATION PETITION NO.508 OF 2017

Trammo DMCC
(Formerly known as Transammonia DMCC))Petitioner

Versus

Nagarjuna Fertilizers and Chemicals Ltd.)Respondents

Mr. Darius Khambata, Senior Advocate *a/w. Omar Ahmad, Arun Siwach, Suraj Iyer, Adv.Vikram Shah, Adv. Vidhi Shah, Adv. Ritik Rath, Adv. Gauri Joshi, i/b Ganesh & Co. for the Petitioner.*

Mr. Prateek Seksaria, Senior Advocate *a/w. Mr Pratik Poojary, Adv. Divyam Agarwal, Adv. Harsh Agarwal i/b Pratik Amin Associates for the Respondents.*

CORAM : SOMASEKHAR SUNDARESAN, J.
RESERVED ON : FEBRUARY 17, 2026
PRONOUNCED ON: MARCH 5, 2026

JUDGEMENT:

Context and Factual Background:

1. Commercial Arbitration Petition No. 441 of 2017 is a petition filed under Part II of the Arbitration and Conciliation Act, 1996 (**"*the Act*"**), seeking recognition and enforcement of five foreign arbitral

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awards (***"Foreign Awards"***) in which the Petitioner, Trammo DMCC (***"Trammo"***), is the judgement creditor while the judgement debtor is the Respondent, Nagarjuna Fertilizers and Chemicals Ltd. (***"Nagarjuna"***), a company whose shares are listed on Indian Stock Exchange.

2. The Foreign Awards are :- i) First Interim Final Award dated December 4, 2015 (***"First Award"***), as amended on July 4, 2016; ii) First Cost Award dated February 5, 2016 (***"First Cost Award"***), as amended on July 4, 2016. iii) Costs of Costs Award dated March 10, 2016 (***"Second Cost Award"***), as amended on July 4, 2016; iv) Second Interim Final Award dated September 20, 2016 (***"Second Award"***); and v) Third Interim Final Award dated December 14, 2016 (***"Third Award"***).

3. The Learned Arbitral Tribunal that passed the Foreign Awards was an *ad-hoc* Arbitral Tribunal seated in London. The Learned Arbitral Tribunal was constituted by the parties with Trammo's nominee, Sir Simon Tuckey, a former Judge of the Court of Appeal; Nagarjuna's nominee Lord Collins, a former Justice of the Supreme Court of England and Wales; and Sir Mark Waller, a former Judge of the Court of Appeal, acting as the Presiding Arbitrator. The *ad-hoc* arbitration agreement between the parties is dated January 21, 2014

(***"Arbitration Agreement"***), by which the parties agreed to form the Arbitral Tribunal.

4. It would be appropriate to summarise the relevant history to the Arbitration Agreement and the formation of the Learned Arbitral Tribunal as follows:

A) Between April 2011 and January 2012, Trammo and Nagarjuna entered into various spot contracts for supply of two types of fertilizer, namely Di-Ammonium Phosphate (***"DAP"***) and Nitrogen Phosphorus Sulphate (***"NPS"***). Each spot contract would be backed by confirmation notes and agreements being executed through correspondence, containing the main terms of supply, such as the identification of the product, quantity, and price. In each case, the communications exchanged between the parties would be supplemented by written confirmations with more detailed terms being executed between the parties;

B) Between April 12, 2012 and February 2013, the parties entered into a long-term contract. The general terms and conditions appended to that contract provided that disputes between the parties would be referred to arbitration in London under the Rules of the London Court of International Arbitration (***"LCIA"***);

C) On May 17, 2013, representatives of Trammo and Nagarjuna met in Dubai and wrote down by hand an instrument indicating the essential terms of supply of DAP

and NPS by Trammo to Nagarjuna. Trammo claims that during this meeting, it was orally agreed that the general terms and conditions last used by the parties in the long-term contract would apply (***"Dubai Claimed Contracts"***);

D) On May 27, 2013, Trammo sent an email to Nagarjuna, attaching three confirmation notes, setting forth the general terms and conditions governing the supplies agreed upon between the parties (***"Emailed Purported Contracts"***). These three confirmations contained provisions governing the sale of cargo by Trammo to Nagarjuna, with arbitration to be conducted in London. However, one contract for supply of NPS provided for the LCIA Rules to be applicable, while two contracts for supply of DAP referred to Rules of London Maritime Arbitrators Association (***"LMAA"***) as applicable;

E) The Emailed Purported Contracts provided for a deemed acceptance of the general terms and conditions governing them. Trammo claimed to have kept the cargo ready for shipment and pressed Nagarjuna to open the requisite letters of credit to enable the shipment of the cargo as purportedly agreed between the parties. Nagarjuna did not respond, and on August 22, 2013, Trammo accused Nagarjuna of repudiating the contracts and incurring damages;

F) On August 29, 2013, Nagarjuna denied the very existence of the contracts, which eventually led to arbitration. It is in this backdrop that the parties entered

into the Arbitration Agreement, which recorded that the following issues would be referred to arbitration:

> *1. The Tribunal shall:*
>
> *a. **firstly**, determine **whether the Dubai Claimed Contracts or the Emailed Purported Contracts** were entered into by the Parties;*
>
> *b. **secondly**, **if the Tribunal finds that either the Dubai Claimed Contracts or the Emailed Purported Contracts were entered into by the Parties**, determine **whether the Parties entered into valid arbitration agreements in respect of disputes arising under the Dubai Claimed Contracts or the Emailed Purported Contracts** (as the case may be); and*
>
> *c. **if, and only if**, the **Tribunal finds that the Dubai Purported Contracts or the Emailed Purported Contracts were entered into** by the Parties and that the **parties entered into valid arbitration agreements in respect of disputes** arising under the Dubai Claimed Contracts or the Emailed Purported Contracts (as the case may be), **hear and decide upon the substantive merits of Trammo's claims against Nagarjuna for breach of contract and damages**.*
>
> ***[Emphasis Supplied]***

5. The *ad-hoc* Arbitration Agreement dated January 21, 2014 recorded that the laws of England would apply to it.

Contentions of the Parties:

6. Against this backdrop, I have heard Mr. Darius Khambata, Learned Senior Advocate on behalf of Trammo and Mr. Prateek Seksaria, Learned Senior Advocate on behalf of Nagarjuna. With their assistance, I have examined the material on record and assessed the Foreign Awards, bearing in mind the scope of jurisdiction of this Court under Part II of the Act.

7. Mr. Khambata would submit that the Foreign Awards meet the six-fold test set out in ***Gemini Bay***[1], with particular reference to paragraph 30, indicating that the awards pertain to differences arising out of legal relationships under the Dubai Claimed Contracts said to have been entered into in Dubai on May 17, 2013 by a manuscript, and the Email Claimed Contracts, emailed on May 27, 2013. He would submit that the contracts and the relationship between the parties were commercial in nature and that all five Foreign Awards were made after October 11, 1960, and would be governed by the New York Convention.

8. Mr. Khambata would submit that it is undisputed that the United Kingdom is a territory to which the New York Convention would apply. He would submit that the deemed acceptance of terms sent by email and the approach of confirming the terms of supply entered into

1 *Gemini Bay Transcription (P) Ltd. v. Integrated Sales Service Ltd .- (2022) 1 SCC 753*

between the parties were consistent with past practice of other similar confirmations that had been sent by Trammo to Nagarjuna in the past, with Nagarjuna not raising any objection thereto and instead acting consistently with the existence of a contract.

9. The Arbitration Agreement, he would submit, clearly evidences the commitment to arbitrate. Indeed, as a preliminary issue, the Learned Arbitral Tribunal was to first establish whether the Dubai Claimed Contract or the Emailed Purported Contracts had been entered into by the parties. Thereafter, if it was found that an agreement had indeed been entered into, the Learned Arbitral Tribunal would determine whether the parties had entered into a valid arbitration agreement for reference of disputes thereunder. If this was held in the affirmative and the reference to arbitration were to be affirmatively ruled upon, the Learned Arbitral Tribunal would hear and decide the merits of Trammo's claims against Nagarjuna for breach of contract and damages. Therefore, the parties agreed to confer on the Learned Arbitral Tribunal the power to determine the existence of the arbitration agreement and the power to adjudicate on merits. Therefore, he would submit that the parties had indeed a commitment to arbitrate with the aforesaid framework, and nothing contained in the Foreign Awards could be said to be in violation of the framework to which the parties had agreed. There is no basis to deny enforcement of

the Foreign Awards, he would submit, to contend that the Foreign Awards may be recognised as a decree of an Indian court for enforcement.

10. In contrast, Mr. Seksaria on behalf of Nagarjuna, would submit that the Foreign Awards purport to be '*interim*' in nature, and since the First Award had not been presented for recognition and enforcement by Trammo, it would not be open to Trammo to seek enforcement of the Second Award or the Third Award, or for that matter, the First Cost Award or the Second Cost Award.

11. The *Ad-hoc* arbitration agreement was assailed by Mr. Seksaria, indicating that if and only if the Dubai Claimed Contracts or the Emailed Purported Contracts were found to be validly executed, could the Learned Arbitral Tribunal have proceeded to adjudicate the merits. Mr. Seksaria would submit that the Learned Arbitral Tribunal had rendered a perverse finding about the existence of these contracts, and therefore, the awards in question would not be enforceable at all as a matter of Indian law. He would submit that the arbitration agreement is not valid under the law of England, to which the parties had agreed to subject the Arbitration Agreement. He would submit that the Dubai Claimed Contracts did not at all contain an arbitration agreement, while the Emailed Purported Contracts were based on deemed

acceptance which, as a matter of English law, could never be considered as concluded contracts.

12. Mr. Seksaria would submit that there has to be an unequivocal and absolute acceptance of an offer made by one party to the other party for a contract to come into existence. The unilateral issuance of the Emailed Purported Contracts could never lead to a binding contract coming into existence by the mere silence of the offeree. Towards this end, he would rely on judgements of the Supreme Court in ***Rickmers***[2] and ***Bhagwandas***[3]. Therefore, he would submit, enforcement must be refused in reliance upon Section 48(1)(a) of the Act since the agreement itself was invalid.

13. In reliance on Sections 48(1)(c) and 48(1)(d) of the Act, Mr. Seksaria would contend that the Foreign Awards sought to be enforced deal with matters beyond the scope of submission to arbitration because the very composition of the Learned Arbitral Tribunal was not consistent with the purported agreement found to be in existence between the parties.

14. The Arbitral Tribunal under the Emailed Purported Contracts was to be governed by LMAA terms and any Tribunal that was constituted outside the scope of the LMAA terms would be invalid. He

2 Rickmers Verwaltung GMBH v. Indian Oil Corpn. Ltd. - (1999) 1 SCC 1

3 Bhagwandas Goverdhandas Kedia v. Girdharilal Parshottamdas & Co. - 1965 SCC OnLine SC 38

would submit that the Tribunal has written a speculative finding in the First Award by recording that there was a likelihood that the parties having agreed to the essential terms, would have agreed that the last of the general terms and conditions would constitute the terms of the contract. Therefore, he would attack the findings of the Learned Arbitral Tribunal suggesting that the previous trading and negotiation history of the parties had all contained a provision for arbitration in London, and the reference to the last spot contract could have been an error in pleading.

15. The Learned Arbitral Tribunal had held that there is no reason to reject Trammo’s witness' evidence that the last used terms should apply. Mr. Seksaria would submit that the Learned Arbitral Tribunal's finding as to what would be the *likely* thing for the parties to do, is a speculative finding. At the time of the First Award, the Learned Arbitral Tribunal concluded that as of May 17, 2013, under the Dubai Claimed Contracts, the parties had agreed that the terms applicable in the last used terms would bind the parties. He would submit that this is a perverse finding because Nagarjuna had not accepted this position anywhere, either orally or in writing. The Tribunal would necessarily have had to bring to bear three separate contracts along with the three separate confirmations sent in the email on May 27, 2013 and

necessarily reject all of them since these were based on a deemed acceptance clause.

16. Mr. Seksaria would also contend that the Tribunal's acceptance of Trammo's witness's evidence that there had been an error in attaching the wrong set of terms and conditions in relation to the supply of DAP would negate its own earlier findings that the last of the terms and conditions would bind the parties. He would submit that if the last of the three Emailed Purported Contracts were to be accepted, then that arbitration clause and the rules of arbitration applicable to the same would need to be applied by the Learned Arbitral Tribunal.

17. In short, Mr. Seksaria would submit that the Dubai Claimed Contracts were held to have been overridden by the Emailed Purported Contracts, and the Emailed Purported Contracts contained varying arbitration clauses which by itself is a factor that vitiates the arbitration with contradictory arbitration clauses. Therefore, the Learned Arbitral Tribunal proceeding to pronounce upon the merits without affirmatively holding as to which of the terms and conditions would actually be applied to the parties, brings the Foreign Awards within the scope of rejection under Section 48(1)(a), Section 48(1)(c) and Section 48(1)(d) of the Act. On this premise alone, he would submit that the enforcement of the Foreign Awards ought to be refused since no

Arbitral Tribunal could generically hold that the parties had generally agreed to arbitration in London without reference to which institutional arbitration centre's rules ought to govern the conduct of arbitration. He would also submit that the Dubai Contracts did not refer to any incorporation of general terms and conditions by reference, while the Email Contracts contained varying institutional references.

18. That apart, Mr. Seksaria would submit that the Foreign Awards are contrary to public policy of India because admittedly, Trammo has supplied no fertilizer under the purported agreements that are said to have been entered into. The award of damages is on the basis of estimated losses of fertilizers that were meant to have been supplied but did not get supplied due to letters of credit not being opened. The damage suffered is not attributable directly and naturally in the ordinary course of events from Nagarjuna's alleged breach, Mr. Seksaria would contend.

19. The Foreign Awards also ought to shock the conscience of this Court because the admitted position is that the meeting is said to have been held in Dubai on May 17, 2013 for supply of DAP; the loading dates were spread between second half of May 2013 to June, 2013; but damages have been granted by reference to the full optimal quantity of DAP referred to even while Trammo had paid only a sum of USD 6

million to the entity from whom it had correspondingly placed a contract for purchase of DAP. As regards the supply of NPS, the Learned Arbitral Tribunal has conducted a reasonable estimate of market price during the relevant period. He would submit that it is unconscionable that Trammo had entered into a supply contract with a third party one day prior to the Dubai meeting, and admittedly did not have the material in its own possession, and yet, it is permitted to enforce an award of damages without supplying even one gram of such material.

Analysis and Findings:

20. Initially, this matter was heard with Trammo pressing for re-visiting the absence of interim relief in Commercial Arbitration Petition No. 508 of 2017, which is a petition filed under Section 9 of the Act, citing change in circumstances. After a couple of hearings, the consensus built was that Commercial Arbitration Petition No. 441 of 2017, the main Petition under Part II of the Act, may be taken up for final hearing and disposal. The parties were heard at length. Due to efflux of time, by consent of the parties, the Part II Petition was re-heard to get clarifications and refresh the submissions made, and judgement in the Petition filed under Part II of the Act was reserved afresh on the date mentioned above.

Core Issues:

21. Contentions on behalf of Nagarjuna need to be tested on the anvil of the provisions of Section 48 of the Act. While Nagarjuna has raised an issue of the awards all being labelled as “interim” and the First Award not having been presented for recognition and enforcement, Nagarjuna’s core contentions for purposes of Section 48 of the Act may be summarised thus:

a) The Arbitration Agreement is invalid under the laws of England, which is the law to which the parties have subjected it, thereby attracting Section 48(1)(a) of the Act;

b) The Foreign Awards sought to be enforced deal with matters beyond the scope of submission to arbitration and therefore cannot be enforced in view of Section 48(1)(c) of the Act;

c) The Learned Arbitral Tribunal had no jurisdiction to pass the Foreign Awards since the composition of the Tribunal was not in accordance with the agreement between the parties, thereby attracting Section 48(1)(d) of the Act; and

d) The Foreign Awards are unenforceable since their enforcement is contrary to public policy of India for purposes of Section 48(2)(b) of the Act.

22. At the threshold, the relevant provisions of Section 48 of the Act sought to be relied upon for resisting enforcement of the Foreign Awards would bear reproduction and are extracted 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*
>
> *****
>
> *(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*
>
> *****
>
> *(2) Enforcement of an arbitral award may also be refused if the Court finds that;*
>
> *****

(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****.*

[Emphasis Supplied]

23. The Arbitration Agreement was consciously executed by the parties. They agreed on a three-tier layered approach – *first*, the Learned Arbitral Tribunal would consider the validity of execution of the Dubai Claimed Contracts and the Emailed Purported Contracts; *second*, if either of these were found to have been validly executed, the Learned Arbitral Tribunal would consider if the parties had entered into valid arbitration agreements to govern disputes arising under them; and *third*, if both these were answered in the affirmative, the parties agreed that the Learned Arbitral Tribunal would deal with the disputes under them, on merits.

24. Therefore, the Arbitration Agreement was a comprehensive reference to arbitration and the parties conferred on the Learned Arbitral Tribunal, the scope and jurisdiction of the adjudication. This was a conscious exercise of party autonomy. The parties empowered the Learned Arbitral Tribunal to consider the existence of the agreement, the existence of an arbitration agreement, and upon finding such existence, the power to resolve the disputes by arbitration. Each party nominated its arbitrator, and the Learned Arbitral Tribunal was formed. The parties wholeheartedly participated in the arbitration, and the Learned Arbitral Tribunal conducted the proceedings in terms of the Arbitration Agreement.

English Law and Invalidity of Deemed Acceptance:

25. Upon examination of the record and the Foreign Awards, it is indeed apparent that the Learned Arbitral Tribunal considered the evidence led by the parties, appreciated it, and returned findings of fact about Dubai Claimed Contracts having been contracted. The Learned Arbitral Tribunal found that the parties agreed that confirmation emails would follow, consistent with past practice. The Learned Arbitral Tribunal found that Nagarjuna had consistently accepted this process of contract formation in the past and therefore the deemed

acceptance process by way of exchange of emails was a positive finding of fact rendered upon appreciation of evidence.

26. The Learned Arbitral Tribunal found that there was a commitment to refer disputes to arbitration in London. Therefore, the Learned Arbitral Tribunal found that the first two layers of the Arbitration Agreement led to conclusions of existence of valid agreements and a commitment to arbitrate. The Learned Arbitral Tribunal then went on to consider the matter on merits and returned findings on merits upon appreciation of evidence.

27. In doing so, the Learned Arbitral Tribunal also factored in the absence of the key personnel of Nagarjuna who was present at the meeting in Dubai and also the person communicating on email that led to the formation of the Emailed Purported Contracts, but did not lead evidence or provide a written statement in lieu of evidence. The Learned Arbitral Tribunal was entitled to draw inferences and appreciate the evidence as it did.

28. Having examined the record, I am unable to accept the absolute proposition advanced on behalf of Nagarjuna that, applying English law, there was simply no scope for the Learned Arbitral Tribunal to have held that the "deemed acceptance" approach led to valid contract formation. The Learned Arbitral Tribunal has applied its mind to this

facet of the matter and relied upon English case law to hold that the binding nature of an agreement that envisages a formal contract to be formally executed in future would not stand eroded because the formal contract did not get executed in future.

29. This is a matter of assessment of evidence and application of English law by three former English law judges. Nagarjuna has not obtained any declaration of English law in interpreting the Foreign Awards from English Courts. In these circumstances, it is not for this Court to sit in judgement on a matter of English law without anything more than the submissions made in India to show that the Learned Arbitral Tribunal has taken a view that is so manifestly arbitrary and perverse and cuts to the root of the matter in such a manner as to shock the conscience of this Court.

30. The law on Section 48 of the Act is now well declared in multiple iterations by the Supreme Court, in particular, in two judgements rendered by three-judge benches of the Supreme Court in ***Shri Lal Mahal***[4] and ***Vijay Karia***[5]. The scope of jurisdiction of the Section 48 Court is narrow and it would not be open to this Court to conduct a second innings, wading into the merits. In ***Shri Lal Mahal***, the Court held thus:

4 Shri Lal Mahal Limited Vs. Progetto Grano SPA – (2014) 2 SCC 433
5 Vijay Karia and others Vs. Prysmian Cavi E Sistemi SRL and others – (2020) 11 SCC 1

> *45. Moreover,* ***Section 48 of the 1996 Act does not give an opportunity to have a "second look" at the foreign award in the award enforcement stage. The scope of inquiry under Section 48 does not permit review of the foreign award on merits****. Procedural defects (like taking into consideration inadmissible evidence or ignoring/rejecting the evidence which may be of binding nature) in the course of foreign arbitration do not lead necessarily to excuse an award from enforcement on the ground of public policy.*
>
> ***[Emphasis Supplied]***

31. *Likewise, in* **Vijay Karia***, the Supreme Court held thus:*

> *83.* ***Having said this, however, if a foreign award fails to determine a material issue which goes to the root of the matter or fails to decide a claim or counter-claim in its entirety, the award may shock the conscience of the Court and may be set aside, as was done by the Delhi High Court in Campos (supra) on the ground of violation of the public policy of India, in that it would then offend a most basic notion of justice in this country****. It must always be remembered that* ***poor reasoning, by which a material issue or claim is rejected, can never fall in this class of cases. Also, issues that the Tribunal considered essential and has addressed must be given their due weight - it often happens that the Tribunal considers a particular issue as essential and answers it, which by implication would mean that the other issue or issues raised have been implicitly rejected.*** *For example, two parties may both allege that the other is in breach. A finding that one party is in breach, without expressly stating that the other party is not in breach, would amount to a decision on both a claim and a counter-claim, as to which party is in breach. Similarly, after hearing the parties, a certain sum may be awarded as damages and an issue as to interest may not be answered at all. This again may, on the facts of a given case, amount to an implied rejection of the claim for interest.* ***The important point to be considered is that the foreign award must be read as a whole, fairly, and without nit-picking. If read as a whole, the said award has addressed the basic issues raised by the parties and has, in substance, decided the claims and counter-claims of the parties, enforcement must follow.***
>
> ***[Emphasis Supplied]***

32. Importing the aforesaid principles, in my view, the contention about English law not permitting deemed acceptance clauses does not inspire confidence. When as a matter of fact, it has found, on appreciation of evidence, that these very parties have, in the past, taken part in contract formation activity in the very same manner as seen in the instant case, and English case law has been cited by the Learned Arbitral Tribunal in support of its findings, it is not for the Section 48 Court to re-visit this issue at the recognition and enforcement stage.

33. On the existence of a commitment to arbitrate, the Learned Arbitral Tribunal's findings again appear logical and reasonable. It is apparent that the Learned Arbitral Tribunal has explained that under English law, an agreement in writing would be discernible from exchange of correspondence and reduction to writing even if not signed by the parties. Even as a matter of Indian law, indeed the law on the need for a signature on an arbitration agreement has moved forward, with even non-signatories being considered veritable parties to an arbitration agreement; or for that matter, arbitration agreements contained in invoices or contract notes leading to binding arbitration. The issue of whether the parties had, by past conduct, established a precedent of accepting terms that included arbitration clauses, and whether or not they actually ended up in arbitration, are all matters that fall within the domain of appreciation of evidence and within the

jurisdiction of the Learned Arbitral Tribunal. In the Arbitration Agreement, the parties agreed that the Learned Arbitral Tribunal would decide this issue and it has done so in application of English law. It is not open to this Court to second-guess this issue and sit in judgement over it at the Section 48 stage.

Emailed Purported Contracts and scope of Arbitration:

34. The next two grounds are inter-connected. According to Nagarjuna, the Learned Arbitral Tribunal did not have jurisdiction to pass the Foreign Awards since they deal with matters outside the scope of submission to arbitration and since the composition of the Learned Arbitral Tribunal was not in conformity with the Emailed Purported Contracts, which have been held by the Learned Arbitral Tribunal to be valid arbitration agreements. The upshot of the submission is that Trammo cannot have it both ways – either the Emailed Purported Contracts are in existence and therefore, the parties ought to adhere to them; or they ought to be held as non-existent. This issue would deal with Section 48(1)(c) and Section 48(1)(d) of the Act.

35. To my mind, this issue is rather straightforward. Mr. Seksaria is right that on the face of it, if the Emailed Purported Contracts are held to be validly executed, it would follow that the rules governing arbitration contained in the respective general terms and conditions

cannot be wished away. However, to my mind, the parties solved this problem in the Arbitration Agreement they executed to constitute the Learned Arbitral Tribunal. In clause (c) of the scope of reference in the Arbitration Agreement (extracted above), the parties positively agreed that if it is found that the Dubai Claimed Contracts and the Emailed Purported Contracts existed, and it is also found that the parties had an arbitration agreement, then the Learned Arbitral Tribunal would hear the matter on merits. The only logical way to read this would mean that the parties agreed that upon the Learned Arbitral Tribunal finding that there was an agreement to arbitrate discernible from the Emailed Purported Contracts, the dispute resolution would switch to the Learned Arbitral Tribunal.

36. That apart, even otherwise, the worst that can be said about the varying rules of arbitration referred to in the email attachments would be that two competing forums for arbitration would be discernible and the parties would otherwise have had to fragment their disputes across two forums. Another way to read this position would be that the same Learned Arbitral Tribunal would conduct the arbitration but apply varying rules of LCIA and LMAA to adjudicate the deeply-interconnected issues across the Emailed Purported Contracts. However, there is a simpler and more benign, commonsensical and logical way to reconcile the same. That would be to read the scope of

arbitration created by the parties themselves, by constituting the Learned Arbitral Tribunal on an *ad hoc* basis, and empowering it to adjudicate the disputes under one roof as one forum. This is what the Learned Arbitral Tribunal has held and that is a logical, reasonable, commercially commonsensical and rational finding.

37. The Learned Arbitral Tribunal having returned a reasonable view that the commitment to arbitrate having been discerned, and the parties also having agreed that the Learned Arbitral Tribunal appointed in the Arbitration Agreement would adjudicate on merits, the Foreign Awards do not stand vitiated. The parties consciously agreed that the Learned Arbitral Tribunal would adjudicate the dispute on merits. At worst, the conflicting references in the email attachments lead to ironing out a seemingly unworkable clause, which the Supreme Court has held ought to be ironed out. The following extracts from ***Enercon***[6] would be noteworthy:

> *88. In our opinion, the courts have to adopt a pragmatic approach and not a pedantic or technical approach while interpreting or construing an arbitration agreement or arbitration clause. Therefore, when faced with a seemingly unworkable arbitration clause, it would be the duty of the court to make the same workable within the permissible limits of the law, without stretching it beyond the boundaries of recognition. In other words, a common sense approach has to be adopted to give effect to the intention of the parties to arbitrate. In such a case, the court ought to adopt the attitude of a reasonable business person, having business common sense as well as*

6 *Enercon (India) Ltd. v. Enercon Gmbh. – (2014) 5 SCC 1*

being equipped with the knowledge that may be peculiar to the business venture. The arbitration clause cannot be construed with a purely legalistic mindset, as if one is construing a provision in a statute. *We may just add here the words of Lord Diplock in Antaios Compania Naviera S.A. v. Salen Rederierna A.B. [1985 AC 191 : (1984) 3 WLR 592 : (1984) 3 All ER 229 (HL)] , which are as follows: (AC p. 201 E)*

> ***"... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.***

We entirely agree with the aforesaid observation.

89. *This view of ours is also supported by the following judgments which were relied upon by Dr Singhvi:*

89.1. *In Visa International Ltd. [Visa International Ltd. v. Continental Resources (USA) Ltd., (2009) 2 SCC 55 : (2009) 1 SCC (Civ) 379] , it was inter alia held that: (SCC pp. 64-65, paras 25-26)*

> *"25.* ***) No party can be allowed to take advantage of inartistic drafting of arbitration clause in any agreement as long as clear intention of parties to go for arbitration in case of any future disputes is evident from the agreement and material on record including surrounding circumstances***.
>
> *26.* ***What is required to be gathered is the intention of the parties from the surrounding circumstances including the conduct of the parties and the evidence such as exchange of correspondence between the parties***.

89.2. *Similar position of law was reiterated in Nandan Biomatrix Ltd. [Nandan Biomatrix Ltd. v. D1 Oils Ltd., (2009) 4 SCC 495 : (2009) 2 SCC (Civ) 227] , wherein this Court observed inter alia as under: (SCC pp. 501-02, paras 28-30)*

> *"28. This Court in Rukmanibai Gupta v. Collector [(1980) 4 SCC 556] has held (at SCC p. 560, para 6) that what is required to be ascertained while construing a clause is*
>
> > *'whether the parties have agreed that if disputes arise between them in respect of the subject-matter of contract such dispute shall be referred to arbitration, then such an arrangement would spell out an arbitration agreement'.*

29. In M. Dayanand Reddy v. A.P. Industrial Infrastructure Corpn. Ltd. [(1993) 3 SCC 137] this Court has held that: (SCC p. 142, para 8)

'8. ... an arbitration clause is not required to be stated in any particular form. If the intention of the parties to refer the dispute to arbitration can be clearly ascertained from the terms of the agreement, it is immaterial whether or not the expression arbitration or arbitrator or arbitrators has been used in the agreement.'

30. ***The Court is required, therefore, to decide whether the existence of an agreement to refer the dispute to arbitration can be clearly ascertained in the facts and circumstances of the case. This, in turn, may depend upon the intention of the parties to be gathered from the correspondence exchanged between the parties, the agreement in question and the surrounding circumstances. What is required is to gather the intention of the parties as to whether they have agreed for resolution of the disputes through arbitration****. What is required to be decided in an application under Section 11 of the 1996 Act is: whether there is an arbitration agreement as defined in the said Act."*

(emphasis in original)

92. Further, we find support in this context from the following extract of Halsbury's Laws of England (Vol. 13, 4th Edn., 2007 Reissue):

"The words of a written instrument must in general be taken in their ordinary or natural sense notwithstanding the fact that such a construction may appear not to carry out the purpose which it might otherwise be supposed the parties intended to carry out; but ***if the provisions and expressions are contradictory, and there are grounds, appearing on the face of the instrument, affording proof of the real intention of the parties, that intention will prevail against the obvious and ordinary meaning of the words; and where the literal (in the sense of ordinary, natural or primary) construction would lead to an absurd result, and the words used are capable of being interpreted so as to avoid this result, the literal construction will be abandoned****."*

93. Mr Rohinton Nariman had very fairly submitted that it is permissible for the court to construe the arbitration clause in a

__particular manner to make the same workable when there is a defect or an omission in it. His only caveat was that such an exercise would not permit the court to rewrite the contract. In our opinion, in the present case, the crucial line which seems to be an omission or an error can be inserted by the Court__. In this context, we find support from judgment of this Court in Shin Satellite Public Co. Ltd. [Shin Satellite Public Co. Ltd. v. Jain Studios Ltd., (2006) 2 SCC 628] , wherein __the "offending part" in the arbitration clause made determination by the arbitrator final and binding between the parties and declared that the parties have waived the rights to appeal or an objection against such award in any jurisdiction. The Court, inter alia, held that such an objectionable part is clearly severable being independent of the dispute that has to be referred to be resolved through arbitration__. By giving effect to the arbitration clause, the Court specifically noted that

> *"__it cannot be said that the Court is doing something which is not contemplated by the parties or by 'interpretative process', the Court is rewriting the contract which is in the nature of 'novatio'. The intention of the parties is explicitly clear and they have agreed that the dispute, if any, would be referred to an arbitrator. To that extent, therefore, the agreement is legal, lawful and the offending part as to the finality and restraint in approaching a court of law can be separated and severed by using a 'blue pencil'"__. (SCC p. 637, para 26)*

__[Emphasis Supplied]__

38. To my mind, the aforesaid discourse squarely covers the multifarious strands of contentions about the seeming incongruity in the finding of existence of the Emailed Purported Contracts and the Arbitration Agreement. In the instant case, the Learned Arbitral Tribunal has not even had to supply some material to fill any gaps. The parties had agreed that if the first two layers were covered, then the Learned Arbitral Tribunal would have jurisdiction to adjudicate on

merits. Therefore, on these two grounds too, no reason is found to invoke the provisions of Section 48(1)(c) and Section 48(1)(d) to not enforce the Foreign Awards.

Public Policy Considerations:

39. Finally, the public policy considerations are to be dealt with. Nagarjuna contends that the Foreign Awards are unenforceable since their enforcement is contrary to public policy of India.

40. Initially, the Foreign Awards were assailed on the premise that they were in conflict with Indian exchange controls made under the Foreign Exchange Management Act ("***FEMA***") and copious submissions had been made on this count verbally and in written submissions. However, on a later date, this was withdrawn. When the matter was re-argued, it was again confirmed by Nagarjuna, on a specific query from the Bench, that the alleged violation of FEMA is not being pressed. This was the main plank of the public policy objection, and having been given up, it need not be dealt with. In any case, the law in this regard is well declared by the Supreme Court, and Indian exchange controls ought not to stand in the way of Arbitral awards and court orders. In any case, Nagarjuna itself is not invoking exchange controls against the Foreign Awards.

41. The core issue under this head is therefore what Nagarjuna would submit ought to shock the conscience of this Court. Specifically, this is based on the fact that Trammo placed a back-to-back order for supply of DAP one day before the Dubai Claimed Contracts i.e. on May 16, 2013 when the parties met in Dubai on May 17, 2013. The assessment of damages is based on the optional supply order placed by Trammo for DAP and on the difference between market price and contracted price in relation to NPS. The upshot of the submission is that insofar as DAP is concerned, it is shocking that a party that has not supplied "one gram" of DAP has been granted damages and that large amounts would flow out of the country on such awards.

42. As stated above, the facet of exchange controls is not being pressed any more. That apart, the contention about the back-to-back supply having been contracted one day before the meeting in Dubai is a bit incoherent when seen from the perspective of Nagarjuna always being aware that Trammo was a trader in fertilisers. Just prior to the Dubai Claimed Contracts, the parties had executed a long-term contract too and in any case, a trading supplier would need to place an order at some point of time or the other. The dispute between the parties is that despite the orders having been agreed upon, Nagarjuna resiled from the commitment to place an order, which led to Trammo losing out and suffering damage. This is the subject matter of the

adjudication based on evidence, and the findings of the Learned Arbitral Tribunal cannot be revisited by the Section 48 Court.

The 'Interim' Contention:

43. Finally, the contention that all the orders are "interim" and that Trammo had not sought recognition of the First Award, giving the foundation a go-by, calls for a mention. The Foreign Awards are all presented and covered by the Petition filed under Part II. They are one composite whole. Each deals with one element or the other of a larger resolution of all disputes and differences between the parties. Therefore, the contention that the Foreign Awards ought not to be enforced does not inspire confidence. Each of the Foreign Awards speaks for itself and none of the grounds pressed into service invoking Section 48 are meritorious in a manner that enforcement must be denied.

44. The following summary from ***Vijay Karia*** would be instructive:

> *58. **When the grounds for resisting enforcement of a foreign award under Section 48 are seen, they may be classified into three groups** - **grounds which affect the jurisdiction** of the arbitration proceedings; **grounds which affect party interest alone**; and **grounds which go to the public policy of India**, as explained by Explanation 1 to Section 48(2). **Where a ground to resist enforcement is made out, by which the very jurisdiction of the Tribunal is questioned -** such as the arbitration agreement itself not being valid under the law to which the parties have subjected it, or where the subject-matter of difference*

*is not capable of settlement by arbitration under the law of India, **it is obvious that there can be no discretion in these matters. Enforcement of a foreign award made without jurisdiction cannot possibly be weighed in the scales for a discretion to be exercised to enforce such award if the scales are tilted in its favour**.*

*59. **On the other hand, where the grounds taken to resist enforcement can be said to be linked to party interest alone**, for example, that a party has been unable to present its case before the arbitrator, **and which ground is capable of waiver or abandonment, or, the ground being made out, no prejudice has been caused to the party on such ground being made out, a court may well enforce a foreign award, even if such ground is made out. When it comes to the "public policy of India" ground, again, there would be no discretion in enforcing an award which is induced by fraud or corruption, or which violates the fundamental policy of Indian law, or is in conflict with the most basic notions of morality or justice**. It can thus be seen that the expression "may" in Section 48 can, depending upon the context, mean "shall" or as connoting that a residual discretion remains in the court to enforce a foreign award, despite grounds for its resistance having been made out. What is clear is that the width of this discretion is limited to the circumstances pointed out hereinabove, in which case a balancing act may be performed by the court enforcing a foreign award.*

[Emphasis Supplied]

45. I have dealt with above, the grounds pressed into service. For the reasons set out above, the ground of jurisdiction has been rejected. The grounds of party interest have been woven into the ground of public policy of India, but considering the scope of how public policy is to be examined, for the reasons set out above, there is no merit in the objections raised by Nagarjuna.

46. In the result, the Petition filed under Part II being Commercial Arbitration Petition No. 441 of 2017 deserves to be ***allowed*** in terms of prayers clauses (a) to (c) which read thus:

> *(a). That this Hon'ble Court be pleased to enforce and execute the Monetary Awards viz.- Awards B, C, D and E (at Exhibits 'C' to 'F' hereto), In which the Arbitral Tribunal awarded to Trammo the aggregate principal sums of USD 16,427,310.80 and GBP 606,628.29 together with interest on those amounts;*
>
> *(b) That this Hon'ble Court be pleased to order and direct the Respondent/ Judgment Debtor to pay the aggregate principal sums of USD 16,427,310.80 and GBP 606,628.29 together with interest on those amounts as awarded by the Arbitral Tribunal in full and final satisfaction of the Monetary Awards viz.- Awards B, C, D and E (at Exhibits 'C' to 'F' hereto);*
>
> *(c) That this Hon'ble Court be pleased to order and direct the Respondent/ Judgment Debtor to deposit the· aggregate principal sums of USD 16,427,310.80 and GBP 606,628.29 together with interest on those amounts as awarded by the Arbitral Tribunal under the Monetary Awards viz.- Awards B, C, D and E (at Exhibits 'C' to 'F' hereto), with this Hon'ble Court;*

47. After the pronouncement of this Judgement, a request for stay of this Judgement has been made. Considering the sheer length of time for which the matter has gone on, the request is rejected.

48. All actions required to be taken pursuant to this order shall be taken upon receipt of a downloaded copy as available on this Court's website.

[SOMASEKHAR SUNDARESAN, J.]