

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Enrox Energy and Mining Group v.
Saddad*,
2022 BCSC 285

Date: 20220224
Docket: S2012062
Registry: Vancouver

Between:

Enrox Energy and Mining Group

Petitioner

And

Nader Saddad

Respondent

Corrected Judgment: The text of the judgment was
corrected on March 2, 2022.

Before: The Honourable Mr Justice Cramer

Reasons for Judgment

Counsel for the Petitioner, appearing via
videoconference:

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Place and Date of Hearing:

Vancouver, B.C.
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Vancouver, B.C.
February 24, 2022

Table of Contents

I. INTRODUCTION	3
II. FACTS.....	4
A. The parties	4
B. The Agreements and business relationship	5
C. The seizure of the Shares and the Equipment	7
D. The Swiss Arbitration Award	8
E. Dubai and other proceedings	10
F. Mr Saddam's "with prejudice" offer.....	11
G. These British Columbia proceedings.....	11
III. DECISION AND DISCUSSION.....	11
A. Should this Court recognise and enforce the Award?	11
1. Law.....	11
2. Discussion and decision	17
B. Should this Court grant a stay of execution?	28
IV. CONCLUSION.....	31

I. INTRODUCTION

- [1] The petitioner seeks an order recognizing and enforcing an arbitral award dated January 28, 2020, made in Geneva, Switzerland (the “**Award**”), under the *International Commercial Arbitration Act*, RSBC 1996, c 233, ss. 1 and 35 (the “**Act**”) and the *Foreign Arbitral Awards Act*, RSBC 1996, c 154, articles III, IV, and V (the “**FAAA**”).
- [2] The dispute between the parties dates back to April 2015, with active proceedings from November 2017. This Court is at least the third forum, and the third continent, where these parties have litigated the unraveling of their business relationship, which aspired to carry out oil and gas enterprises in Turkmenistan, the Middle East, and beyond. The respondent Mr Saddam participated fully in the Swiss arbitration; he also initiated two proceedings in Dubai against the petitioner.
- [3] The petitioner points to well-established common law and statutory principles that a Canadian court will recognise and domesticate a foreign arbitral award unless the party resisting enforcement can acquit its onus of establishing that one of certain narrow exceptions applies.
- [4] The respondent argues that he has satisfied one of those narrow exceptions: breach of public policy. Specifically, he argues that the petitioner has already executed against Equipment and Shares (as described below) in which he has an immediate interest and entitlement to use as a set-off or credit. The petitioner is obliged, as a matter of contract as well as common law, to value and account for those assets prior to recognition and enforcement of the Award; to recognise the Award would be tantamount to double recovery: public policy cannot sanction such commercial unconscionability.
- [5] Alternatively, the respondent seeks a stay of execution pending such a valuation and accounting process; he argues that the equities favour valuation of the assets before the petitioner be allowed to enforce the

judgment against the respondent's primary British Columbia asset: his West Vancouver home. He argues that this Court, either directly or *via* a reference to the Registrar under Rule 13-2(24), ought to embark upon a valuation of the Shares and Equipment.

- [6] For the reasons that follow, in spite of the vigorous arguments advanced by Mr Bradshaw on behalf of his client, the Court grants the orders sought, and domesticates the Award as an enforceable judgment of this Court. The Court also declines to exercise its jurisdiction to order a stay or direct an accounting or valuation. The respondent could and should have raised these substantive issues in the Swiss Arbitration, or, alternatively, in the two years since the issuance of the Award.

II. FACTS

- [7] The facts of this dispute, as set out in the voluminous petition record, are complicated. The following seeks to provide a brief overview of the key facts. As is appropriate in a petition proceeding, there are no significant disagreements on the primary facts.

A. The parties

- [8] The respondent is a dual Canadian and Iranian national. He is an engineer in the oil and gas industry. He co-owns a West Vancouver home with his wife, who is not a party to these proceedings. Up to around January 2020, he also maintained a residence in Dubai.
- [9] Michael Pacha is a French national, resident in Geneva and the United Arab Emirates. He is a businessman, with an education in law. He is the sole shareholder and director of the petitioner, Enrox Energy and Mining Group, and its related and subsidiary companies.
- [10] Mr Saddam and Mr Pacha met in 2013. In early 2014 they began developing a business relationship with the aim of creating a group of companies to

operate in the upstream oil and gas sector. Speaking broadly, Mr Pacha would provide the funds, while Mr Saddam would provide the experience, expertise, and contacts.

- [11] The two incorporated a company, Caspian Energy Solutions (“**Caspian**”), in the Cayman Islands in May 2014. At first, Mr Saddam was the sole shareholder and sole director of Caspian.

B. The Agreements and business relationship

- [12] On May 21, 2014, Messrs Pacha and Saddam signed four related agreements:

- a) a Memorandum of Understanding (the “**MOU**”);
- b) a Loan Agreement (the “**Loan Agreement**”);
- c) a Letter of Undertaking (the “**LOU**”);
- d) a loan agreement wherein Enrox loaned USD \$4.4 million to Caspian; Mr Pacha signed on behalf of Enrox and Mr Saddam signed on behalf of Caspian (the “**Caspian Loan Agreement**”).

(collectively, the “**Agreements**”).

- [13] All four agreements contain a forum selection and choice of law clause, requiring all disputes to be arbitrated in Switzerland, according to Swiss law:

... [This agreement] shall exclusively be governed by and construed in accordance with the substantive laws of Switzerland. Any dispute, controversy or claim arising out of or in relation to this contract, including the validity, invalidity, breach or termination thereof, shall be resolved by way of arbitration in accordance with Swiss Rules of International Arbitration of the Swiss Chambers of Commerce in force on the date when the Notice of Arbitration is submitted in accordance with these Rules. There shall be one sole arbitrator [sic] and the place of arbitration shall be Geneva.

- [14] The MOU provided, *inter alia*:

- a) Enroxxs would hold all companies in the envisioned business group;
- b) Mr Pacha would put in place the loans and raise funds for the envisioned steps;
- c) Mr Saddam would use his connections and expertise to manage and staff the companies, and secure contracts;
- d) in order to finance the first phase of the business development, Enroxxs would advance a personal loan to Mr Saddam;
- e) the parties would at a later date negotiate and enter into a partnership or shareholders agreement, based on the MOU;
- f) the parties would execute a number of agreements, including the Loan Agreement and the LOU;
- g) Mr Saddam would be the initial sole shareholder of Caspian but would transfer the Caspian Shares (the “**Shares**”) to Enroxxs “in compensation of the loan which has been granted.”

[15] The Loan Agreement provided, *inter alia*:

- a) Enroxxs would loan USD \$2 million to Mr Saddam;
- b) upon default, Enroxxs could demand payment;
- c) in the case of default “any goods and/or materials purchased by the Borrower in the name of the Lender after his consent, will be imputed against the amounts due by [Mr Saddam] to [Enroxxs] under this Loan Agreement”;
- d) if the loan becomes past due, Enroxxs would have the right to pay the loan from any deposit or security that Mr Saddam had with Enroxxs, without previous notice.

- [16] Under the LOU, Mr Saddam agreed to resign and forfeit Caspian and other shares upon a breach:

In case of any breach or violation to this letter of Undertaking, I hereby irrevocably commit myself to resign from all my positions related to the Oil & Gas Business, and immediately waive, assign and transfer the benefit of all contracts, deals, transactions, joint ventures, etc....., as well as ***all the shares owned or held by myself*** or my Family members to **ENRROXS ENERGY GROUP**.

[emphasis added]

- [17] The Caspian Loan Agreement provided a means of valuating defaulted shares:

...in case of default, should lender exercise its rights under the “Deed of Undertaking” signed between the parties simultaneously with this loan agreement, then the value of the company based on the evaluation of 3 Experts (one appointed by each party and one by the 2 Experts) shall be considered against the amounts due [sic] by the Borrower to the Lender under this loan agreement.

- [18] Although the MOU contemplated a partnership or shareholders agreement, none was ever concluded between the parties.

- [19] After the execution of the Agreements, the parties took initial steps in the envisioned business relationship. Mr Pacha, through Enroxxs, advanced the funds under the loan agreements, as well as other amounts, to the respondent. In late 2014, Mr Saddam purchased certain oil and gas equipment (the “**Equipment**”), as contemplated by the Agreements.

C. The seizure of the Shares and the Equipment

- [20] Mr Pacha perceived that the project was not proceeding in the manner agreed. In April 2015, Mr Pacha transferred the Caspian Shares to himself, as security, citing the provision in the LOU.
- [21] In August 2015, Mr Saddam proposed selling the Equipment. He exported the Equipment from Dubai to Kish, Iran. Mr Pacha took the position that it was useless to move the Equipment without a buyer. He expressed anger that Mr

Saddad had moved the Equipment without his prior approval. He demanded that the Equipment be returned to Dubai. Mr Saddam did so.

[22] Angered about the removal of the Equipment, Mr Pacha filed numerous civil and criminal claims against Mr Saddam in Dubai. In the criminal complaint, Mr Pacha alleged that Enrox was the sole owner of the Equipment, and that Mr Saddam had committed a breach of trust by exporting the Equipment. This led to the September 2015 arrest and six-month imprisonment of Mr Saddam.

[23] In February 2017, the Court dismissed the charges, directing that it was a civil, rather than a criminal matter. After reviewing the allegations, the civil court ordered Mr Saddam to repay the petitioner some \$57,000, representing an improperly-cashed cheque.

D. The Swiss Arbitration Award

[24] On November 6, 2017, the petitioner initiated arbitral proceedings against the respondent in Switzerland, according to the dispute resolution clause in the Agreements. Professor Dr Jean-Paul Vulli  ty, a lawyer and professor of international business law at the University of Geneva, served as sole arbitrator.

[25] The respondent participated fully at all stages of the arbitration proceedings. He was represented by Swiss counsel throughout. The Award confirms that the respondent filed no objection as to how the proceedings were conducted, or to the jurisdiction of the Arbitrator.

[26] The petitioner sought repayment of 13 individual loan components, based upon the agreements between the parties.

[27] The respondent argued that he was not liable for the loans, as the parties were engaged in a form of joint venture or partnership. The parties used the term “loan agreements” not because they reflected loans, but rather “because these documents did not have other names or reference numbers when the

- parties communicated”: see Award, p. 22. The respondent said that he purchased the Equipment with the advanced funds for the benefit of the venture, and that the Equipment now belonged to the petitioner.
- [28] On January 28, 2020, the Arbitrator issued his Award. The Arbitrator rejected the respondent’s joint venture or partnership concept, and found the respondent liable for the amounts under the Loan Agreement. He also held that loans made to a related Enroxs company, Enroxs DMCC, to purchase the Equipment, constituted indirect loans to the respondent. In the result, the Award directed that the respondent pay the petitioner approximately \$4.8 million.
- [29] At the end of the arbitration, in his post-hearing brief, the respondent raised in effect an alternative argument: if the advances were in fact loans, the amounts he paid for the Equipment ought to be imputed or set off against the amount due under the loans.
- [30] The Arbitrator declined to resolve this issue, or the issue of who presently owns the Equipment, as those issues did not affect the respondent’s obligation to repay the loans. At para. 110, the Award appears to leave it open to the respondent to pursue this issue in the future:

Therefore, the value of that [E]quipment (to the extent it was “*purchased by the Borrower in the name of the Lender*”) ***could possibly have been “imputed against the amounts” due by Mr Saddam to the Claimant under the Private Loan Agreement. However, no evidence of that value has been adduced in the present proceedings, and no contention/claim has been made in this respect by the Respondent, for whom such an imputation would have been a way to reduce his exposure/indebtedness vis-a-vis the Claimant.*** Be it as it may, in light of the foregoing and in the absence of relevant evidence and proper claims, this issue of guarantee/pledge/ownership of the [E]quipment shall be disregarded. Correlatively, the fifth misconception flagged by the Respondent in his Post Hearing Brief, on pp.11-12, is duly noted but will not have to be dealt with any further, in light of the above.

[italic emphasis in original, bolded emphasis added]

- [31] The respondent contemplated an appeal of the Award to the Swiss Federal Supreme Court. He at first opted not to do so, based on the advice of a Swiss lawyer that the “chances of success of an appeal are close to none, since the grounds are limited to the violation of public policy.”¹ The lawyer also confirmed that the Award was presently “enforceable.”
- [32] After consulting with his Dubai counsel, the respondent then changed his mind and sought to file an appeal. The filing was rejected in May 2020, as it was not made in an official language of Switzerland. Thus the Swiss Award remains unimpeached by appeal or otherwise.
- [33] Mr Saddam has paid neither the Award nor his share of the Arbitrator’s fee.

E. Dubai and other proceedings

- [34] On August 30, 2020, Mr Saddam commenced a claim in the Dubai Court against the petitioner, among others. He sought a declaration that he owned the Equipment, which he valued at approximately CAD \$2.56 million. He also sought compensation for roughly CAD \$2.42 million for lost profits whilst the petitioner held the Equipment (the “**Dubai Action**”).²
- [35] On June 16, 2021, the Dubai Court confirmed that Mr Saddam was the owner of the Equipment, but dismissed his claim for damages. The Dubai Court also declined to order the return of the Equipment, finding the issue to be premature. It found that the petitioner had seized the Equipment to secure payment of the Award. The Court confirmed that the petitioner could retain the Equipment until and unless Mr Saddam pays the full Award: *Saddad v. ENRROXS Energy & Mining Group and ENRROXS DMCC and Michael Pacha*, 20/2020/780 at p. 15 (translation).
- [36] Mr Saddam appealed the Dubai Court decision up two levels of the Dubai judicial system. Both the Court of Appeal (October 4, 2021) and then the Dubai Court of Cassation³ (January 17, 2022) confirmed the original Dubai Court decision.

- [37] The ruptured relationship resulted in further proceedings. For example, in January 2019, Mr Pacha sued Mr Saddam in defamation: a claim ultimately dismissed in December 2019.

F. Mr Saddam's "with prejudice" offer

- [38] On October 19, 2021, Mr Saddam made a "with prejudice" settlement offer to the petitioner. In it, he calculates that the amount he owes under the Award, once the value of the Equipment and associated expenses is taken into consideration, totals USD \$266,562. He proposes a valuation of the Caspian Shares by a single business valuator. He indicates that he was amenable to arriving at a payment plan according to his proposed calculations and methodology. The petitioner has not responded to that offer.

G. These British Columbia proceedings

- [39] The petition was filed on November 16, 2020.
- [40] On November 26, 2020, Marzari J granted the petitioner an *ex parte Mareva* freezing order against the respondent. On January 28, 2021, A. Ross J declined to set aside or vary the *Mareva* order: *Enroxs Energy and Mining Group v. Saddam*, 2021 BCSC 291.

III. DECISION AND DISCUSSION

A. Should this Court recognise and enforce the Award?

1. Law

- [41] Decisions rejecting recognition and enforcement of a foreign arbitral award (or, for that matter, the final order of a foreign court) are rare this century.
- [42] Subsection 35(1) of the *Act*, which is modelled after the *UNCITRAL Model Law on International Commercial Arbitration*, requires this Court to recognise an arbitral award, unless the award debtor can establish that a specific s. 36 exception applies:

...an arbitral award, irrespective of the state in which it was made, **must be** recognized as binding and, on application to the Supreme Court, **must be enforced**.

[emphasis added]

- [43] Article III of the *FAAA*, which incorporates the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* as domestic law, has mandatory wording to the same effect:

Each Contracting State **shall recognize arbitral awards as binding and enforce them** in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

[emphasis added]

- [44] The jurisprudence echoes with confirmation that comity, coupled with the parties' own agreement to resolve their disputes through private arbitration, means that an arbitral award will be domesticated and enforceable unless the party resisting registration can point to exceptional circumstances. As stated by Gibbs JA in *Quintette Coal Ltd. v. Nippon Steel Corporation* (1990), [1991] 50 BCLR (2d) 207 (CA) at 217:

... It is important to parties to future such arbitrations and to the integrity of the process itself that the court express its views on the degree of deference to be accorded the decision of the arbitrators. The reasons advanced in the cases discussed above for restraint in the exercise of judicial review are highly persuasive. The "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes" spoken of by Blackmun, J. are as compelling in this jurisdiction as they are in the United States or elsewhere. It is meet therefore, as a matter of policy, to adopt a standard which seeks to preserve the autonomy of the forum selected by the parties and to minimize judicial intervention when reviewing international commercial arbitral awards in British Columbia. That is the standard to be followed in this case.

- [45] Writing in the context of a *Mareva* freezing order, the Court of Appeal noted that the merits of the applicant holder of an international arbitral award were "very strong, approaching certainty given the limited grounds upon which the

claim could be defended”: *Sociedade-de-fomento Industrial Private Limited v. Pakistan Steel Mills Corporation (Private) Limited*, 2014 BCCA 205 at para. 47.

- [46] J. Kenneth McEwan QC and Ludmila B. Herbst QC state in *Commercial Arbitration in Canada: A Guide to Domestic and International Arbitrations*⁴ at 12-38:

The Ontario Court of Appeal [in *Popack v. Lipszyc*, 2018 ONCA 635 at para. 35] has noted that ‘[i]nternational and provincial instruments have established, in Ontario, a strong ‘pro-enforcement’ legal regime for the recognition and enforcement of international commercial arbitration awards.’ The same can be said of other jurisdictions in Canada.

- [47] McEwan and Herbst further note (at 12-45) that:

....while enforcement of domestic awards may be easier than enforcement of international awards, it is also still easier for states to recognize international arbitral awards than it is to recognize judgments of foreign courts. This is primarily because arbitral awards are based on contractual agreement between the parties.

- [48] In *Assam Company India Limited v. Canoro Resources Ltd.*, 2014 BCSC 370 at para. 42, Kent J summarised the role of the court in reviewing petitions to enforce international arbitration awards:

1. Broad deference and respect is to be accorded to international arbitration tribunals;
2. This Court is generally not empowered to scrutinize the arbitrator’s findings on matters of jurisdiction but rather it should accept the arbitrator’s decision on its face and ought not go behind it;
3. It is not the role of the court on this type of application to consider the merits of a substantive issue that was the arbitrators’ to decide;
4. Nor is it proper for the respondent to try and re-litigate these issues here; if the respondent wanted to challenge the jurisdiction or composition of the arbitral tribunal or any of its decisions on the merits, the respondent ought to have taken steps to do so in another forum;
5. The fact that the respondent’s initial objections to the jurisdiction, composition or procedures of the arbitral tribunal were unsuccessful does not give rise to a basis for refusing recognition or enforcement of the arbitral award in this jurisdiction; ...

[49] Under the common law, the grounds for a court to refuse to domesticate a foreign judgment, and, by extension, a foreign arbitral award, are narrow:

- a) fraud going to the jurisdiction of the issuing adjudicator;
- b) breach of natural justice;
- c) where registration would offend public policy.

See generally, *Beals v. Saldanha*, 2003 SCC 72 at paras. 43-77. The Supreme Court's discussion of public policy as a ground for declining to recognise a foreign judgment also informs the similar judicial consideration of enforcement of a foreign arbitral award: *Bad Ass Coffee Company of Hawaii Inc. v. Bad Ass Enterprises Inc.*, 2007 ABQB 581 (Master) at paras. 66-67.

[50] The respondent urges the Court to refuse domestication of the Award based on s. 36(1)(b)(ii) of the Act:

36 (1) Recognition or enforcement of an arbitral award, irrespective of the state in which it was made, may be refused only

...

(b) if the court finds that

...

(ii) the recognition or enforcement of the arbitral award would be contrary to the public policy in British Columbia.

[51] The parties agree that the respondent bears the onus of establishing that an exception or defence should prompt the court to decline to adopt the Award: *CE International Resources Holdings LLC v. Yeap Soon Sit*, 2013 BCSC 1804 at para. 22.

[52] *Assam* at para. 42 confirms that the public policy exception is to be narrowly construed:

- 6. The "contrary to public policy" ground for refusing recognition or enforcement is to be narrowly construed and requires fundamental breaches of justice and fairness and conduct of a sort that could not be tolerated or condoned by our courts.

- [53] In *CE International* at para. 41, Fisher J, as she then was, cited approvingly the high standard set out in the oft-cited *Schreter v. Gasmac Inc* (1992), 7 OR (3d) 608 (Gen Div) at 623:

The concept of imposing our public policy on foreign awards is to guard against enforcement of an award which ***offends our local principles of justice and fairness in a fundamental way, and in a way which the parties could attribute to the fact that the award was made in another jurisdiction where the procedural or substantive rules diverge markedly from our own, or where there was ignorance or corruption on the part of the tribunal which could not be seen to be tolerated or condoned by our courts.***

...

However, ***if this court were to endorse the view that it should re-open the merits of an arbitral decision on legal issues decided in accordance with the law of a foreign jurisdiction and where there has been no misconduct, under the guise of ensuring conformity with the public policy of this province, the enforcement procedure of the Model Law could be brought into disrepute.***

[emphasis added]

- [54] In other words, the public policy exception generally focuses not on the post-arbitral domestic enforcement phase, as the respondent does in the present instance, but on the integrity and fairness of the foreign arbitral process, and the laws on which the award was based. In *Assam*, for example, the respondent alleged, *inter alia*, that the Indian arbitration panel was biased and that thus enforcement of its award would offend public policy. In *CE International*, the alleged breach of public policy was the arbitrator's direction to add the respondent as a party to the arbitration. In the end, neither of these allegations met the stringent test for the public policy exception. See also *Consolidated Contractors Group S.A.L. (Offshore) v. Ambatovy Minerals S.A.*, 2017 ONCA 939, leave to appeal ref'd [2018] SCCA No 46, discussed below, and *Depo Traffic v. Vikeda International*, 2015 ONSC 999 at paras. 46–48, both focussing the public policy inquiry on the circumstances of the original award, rather than its domestic execution.
- [55] *Beals* also reflects this principle, albeit in the context of the enforcement of a foreign court judgment, rather than an arbitration award:

(3) The Defence of Public Policy

71 The third and final defence is that of public policy. This defence prevents the enforcement of a foreign judgment which is contrary to the Canadian concept of justice. The public policy defence turns on whether the foreign law is contrary to our view of basic morality. As stated in Castel and Walker, *supra*, at p. 14-28:

... the traditional public policy defence appears to be directed at the concept of repugnant laws and not repugnant facts... .

72 How is this defence of assistance to a defendant seeking to block the enforcement of a foreign judgment? It would, for example, ***prohibit the enforcement of a foreign judgment that is founded on a law contrary to the fundamental morality of the Canadian legal system. Similarly, the public policy defence guards against the enforcement of a judgment rendered by a foreign court proven to be corrupt or biased.***

73 The appellants submitted that the defence of public policy should be broadened to include the case where neither the defence of natural justice nor the current defence of public policy would apply but where the outcome is so egregious that it justifies a domestic court's refusal to enforce the foreign judgment. The appellants argued that, as a matter of Canadian public policy, a foreign judgment should not be enforced if the award is excessive, would shock the conscience of, or would be unacceptable to, reasonable Canadians. The appellants claimed that the public policy defence provides a remedy where the judgment, by its amount alone, would shock the conscience of the reasonable Canadian. It was argued that, if the respondents and their witnesses were truthful in the Florida proceeding, it must follow that the laws in Florida permit a grossly excessive award for lost profits absent a causal connection between the acts giving rise to liability and the damages suffered. Such a result, the appellants submitted, would shock the conscience of the reasonable Canadian. I do not agree.

....

75 ***The use of the defence of public policy to challenge the enforcement of a foreign judgment involves impeachment of that judgment by condemning the foreign law on which the judgment is based. It is not a remedy to be used lightly.*** The expansion of this defence to include perceived injustices that do not offend our sense of morality is unwarranted. The defence of public policy should continue to have a narrow application.

76 The award of damages by the Florida jury does not violate our principles of morality. The sums involved, although they have grown large, are not by themselves a basis to refuse enforcement of the foreign judgment in Canada. ***Even if it could be argued in another case that the arbitrariness of the award can properly fit into a public policy argument, the record here does not provide any basis allowing the Canadian court to re-evaluate the amount of the award.*** The public policy defence is not meant to bar enforcement of a judgment rendered by a foreign court with a real and substantial connection to the cause of action for the sole reason that

the claim in that foreign jurisdiction would not yield comparable damages in Canada.

77 *There was no evidence that the Florida procedure would offend the Canadian concept of justice. I disagree for the foregoing reasons that enforcement of the Florida monetary judgement would shock the conscience of the reasonable Canadian.*

[underline emphasis in original, italic emphasis added]

- [56] That said, these are parenthetical observations. No authority was cited that would categorically limit the public policy defence to corruption or illegality in the foreign arbitration, or the foreign law on which the award is based, and not extend it to a scenario such as that argued in the present: where the domestication and local enforcement would offend public policy. The broad wording of subsection 36(1)(b)(ii) of the *British Columbia Act* may well give the unruly horse⁵ of public policy a larger corral, to also apply where the effect of local enforcement offends public policy:

36 (1) Recognition or enforcement of an arbitral award, irrespective of the state in which it was made, may be refused only

...

(b) if the court finds that

...

(ii) the recognition or enforcement of the arbitral award would be contrary to the public policy in British Columbia.

- [57] Given the conclusions below, however, these reasons will decline to pronounce definitively on this important issue.

2. Discussion and decision

- [58] The respondent argues that the petitioner has, in a pre-arbitration execution process, seized the Equipment and the Shares. It would be unconscionable, and contrary to Canadian commercial public policy, for the petitioner to seek to register and enforce the Award without first conducting an accounting to ensure that any local assets realised in satisfaction of the Award, plus the assets in hand, do not exceed the value of the Award-*qua*-judgment. The respondent notes that by Article III of the *FAAA*, a domesticated award must

- be enforced "...in accordance with the rules of procedure of the territory where the award is relied upon," and that local enforcement law would not countenance double recovery, or would insist upon an accounting and valuation prior to execution.
- [59] The respondent falls short of establishing that the present facts meet the high threshold of establishing that registration of the Award would offend public policy, in that it would shock the conscience of the reasonable Canadian. In any case, he has not shown that enforcement of the domesticated Award would in fact result in double recovery.
- [60] As an initial response, the petitioner reassures the Court that it will return the Equipment to the respondent once the Award is paid in full. In this, the petitioner confirms that it will adhere to the Dubai judgment, in the manner imposed by the Dubai judgment, in the process commenced by the respondent himself. There will be no double recovery vis-à-vis the Equipment.
- [61] The issue of the Shares is less clear, both in terms of the respondent's entitlement to those Shares, or to a credit for the value of those Shares, or the value of the Shares themselves. Given the early implosion of the parties' business relationship, those Shares may well be worthless.
- [62] Nor is it mathematically clear that enforcement in British Columbia would result in double recovery. It is not clear that the total amount owed by the respondent to the petitioner, under the Award or otherwise, would be wholly satisfied by enforcement. To illustrate this challenge, and to add a further complication, the petitioner asserts that the respondent owes a further USD \$3.8 million in addition to the Award.
- [63] These latter two issues are not resolvable, nor appropriately resolved, on this application. They further illustrate the primary difficulty with the respondent's position. It is not unusual for two business people, whose relationship has broken down, to possess a list of claims and potential claims against one

another. The existence of actual or potential counterclaims or set-offs does not in itself serve as an impediment to execution or registration of a judgment or award. To bar registration in the face of potential counterclaims or set-offs would particularly undermine the policy objectives of efficiency and certainty exemplified in the international arbitration regime and jurisprudence. It would be especially egregious in a scenario such as the present, where almost seven years have passed since the breakdown of the relationship, where the respondent has participated in no less than three proceedings in which he could have sought to obtain a valuation and confirmation, and where two years have passed since the issuance of the Award, the registration of which he now resists on the basis of a lack of valuation and an accounting. Again, the respondent accepts that the Swiss arbitral process was fair, and that he had the opportunity to present his case.

[64] The petitioner provides two useful Ontario cases where courts specifically rejected arguments seeking to block registration on the basis that alleged double recovery, or, conversely, an alleged failure to credit the respondent the value of a set-off, would evoke the public policy exception.

[65] In *Consolidated Contractors Group, supra*, the respondent had forfeited certain tranche payments after missing construction deadlines. In the subsequent arbitration, it was directed to pay liquidated damages for the same contractual delay. The respondent argued that registration of the liquidated damages award would constitute double recovery and offend public policy. Both the Ontario Court of Appeal and the trial court rejected this argument, and registered the award. The Court of Appeal reiterated the high standard needed to prompt judicial rejection of recognition based upon the narrow public policy exception:

[96] Before the application judge, the appellant argued that the award resulted in double recovery. The respondent was compensated twice for the delay – once by the forfeiture of the tranche payments and again by the award of liquidated damages. This, it said, offended Ontario public policy.

[97] The application judge rejected this submission. He noted the high threshold to set aside an arbitral award as contrary to public policy. He held, at para. 146, ***that to be set aside, an award “must fundamentally offend the most basic and explicit principles of justice and fairness in Ontario or evidence intolerable ignorance or corruption on the part of the arbitral tribunal.”***

[98] The application judge agreed with the Tribunal’s analysis. The liquidated damages and the forfeiture of the tranche payments performed different functions and achieved separate ends. The fact that both were triggered by the same or similar events did not mean there was double recovery.

[99] The court may set aside an arbitral award under Article 34(2)(b)(ii) if it is in conflict with the public policy of the state. The leading statement of Ontario law under this provision is found in *Schreter v. Gasmac Inc.*, at p. 623:

The concept of imposing our public policy on foreign awards is to guard against enforcement of an award which offends our local principles of justice and fairness in a fundamental way, and in a way which the parties could attribute to the fact that the award was made in another jurisdiction where the procedural or substantive rules diverge markedly from our own, or where there was ignorance or corruption on the part of the tribunal which could not be seen to be tolerated or condoned by our courts. [Emphasis added.]

[100] This statement was cited with approval by this court in *Corporacion Transnacional de Inversiones S.A. de C.V. v. STET International S.p.A.* (2000), 49 O.R. (3d) 414 (C.A.), at para. 2, and in *United Mexican States v. Karpa*, at para. 66.

[101] Suffice to say that I respectfully agree with the application judge for the reason he gave. ***The Tribunal’s award does not come close to meeting the test.***

[emphasis added]

[66] A similar result was reached in *Abener Energia, S.A. v. Sunopta Inc.*, (2009) 61 BLR (4th) 313 (Ont SCJ), appeal dismissed by consent 2010 ONCA 57, the closest case to the present. The applicant Abener applied for recognition and enforcement of a Spanish arbitral award against the Canadian respondent; the respondent, as here, resisted the application for recognition and enforcement and sought a stay until the completion of an arbitration concerning certain claims asserted by the respondent against a company related to the applicant.

[67] Justice Perell rejected the respondent's arguments for three reasons. He first refused to pierce the corporate veil and treat the two associated companies as one. For the purpose of considering the domestication of the award, and the stay application, however, he assumed, *arguendo*, that the pending arbitration was directed against the applicant, that the claim in the pending arbitration was sufficiently connected to the circumstances of the arbitral award, and that an award in favour of the respondent in the pending arbitration, if successful, could be set off against the Spanish arbitral award: at paras. 21-22. Even with these assumptions, the Court saw no reason to refuse to recognise the Spanish arbitration award, or to delay execution through the issuance of a stay:

[24] Assuming that SunOpta has a viable set-off from the American Arbitration, I do not see how that in any way taints the Spanish arbitral award and makes it contrary to principles of justice and fairness in Ontario or makes the award contrary to the essential morality of Ontario. It follows that there is a third reason for rejecting SunOpta's best argument.

[25] SunOpta's weaker argument that it is just and fair in all the circumstances to temporarily stay the enforcement of the Spanish arbitral award also fails for similar reasons. I see no unfairness in enforcing the Spanish award.

[26] Moreover, accepting SunOpta's weaker argument would be contrary to the public policy advanced by the *International Commercial Arbitration Act* and the case law that establishes that arbitral awards are to be recognized and enforced by the courts unless the statutorily defined criteria for a refusal have been satisfied. SunOpta has not met the test of Article 36 (1)(b)(ii) and accordingly its Application should be dismissed and Abener's Application should be granted.

[68] The words of Perell J speak even more resoundingly to the present respondent. The *Abener* respondent was in the process of actively pursuing its potential set-off against a company affiliated with the applicant. In contrast, the present respondent has had a remarkable number of opportunities and *fora* in which to establish his entitlement to the Shares, and the value of those Shares, and a declaration of whether they could be set off against the amounts sought in the arbitration leading to the Award. The respondent similarly could have established full clarity about the Equipment and its value. The respondent could and should have raised these issues in the Swiss

arbitration, or, alternatively, in the Dubai Court, or, further alternatively, in the two years since the issuance of the Award.

- [69] The respondent argues that under the *Act* and the *FAAA*, the arbitration creditor must still comply with local procedure in enforcing an international arbitration Award. That may be true, but the process sought by the respondent goes beyond mere procedural issues, to the issue of entitlement to the Equipment and Shares, or to a credit for their value. On a fundamental level, this Court can not and, given the forum selection clauses, should not determine, at this execution phase, the meaning and entitlement of the critical phrase relied upon by the respondent in the loan agreement:

In case of default, any goods and/or materials purchased by the Borrower in the name of the Lender after his consent, will be imputed against the amounts due by the Borrower to the Lender under this Loan Agreement.

- [70] To sum up, to paraphrase Cole Porter, the respondent's argument comes in the wrong place, at the wrong time.⁶
- [71] First, the parties have contractually agreed to have disputes, generally, and specifically with respect to the Shares, determined in other *fora*. Each agreement, including the Caspian Loan Agreement, identifies a Swiss Arbitration, applying Swiss law, as the appropriate means of resolving "any dispute, controversy or claim." The Caspian Loan Agreement, more specifically, requires, upon default, three experts to determine the value of the company.
- [72] Second, the appropriate time to raise these issues was before the Arbitrator, or the Dubai Court, both engrossed in the entire complicated history and commercial and legal relationship between the parties. The respondent ought to have raised and sought determination of these issues at or soon after the Arbitration. Over a year has passed since this petition was filed, accompanied by the *Mareva* freezing order. The respondent could have been under no misapprehension that the petitioner would persevere to the hearing before the

Court today: he has taken no steps to confirm, prove, value, or enforce, his alleged ownership of the Shares, or a credit for their value.

- [73] Finally, the facts in the present case resemble somewhat those in *Assam*. There, the respondent award debtor had at first participated in the Indian arbitration leading to the award. It walked away from the arbitral process after it claimed that the three-person panel, consisting of two retired judges, each nominated by one of the parties, who then picked a third arbitrator, would not have provided a fair hearing. Justice Kent noted the lack of evidence of any unfairness, and rejected the respondent's attempt to relitigate, at the recognition and enforcement stage, matters that should have been raised before the foreign arbitration:

[53] Canoro took a high risk strategic decision when it opted to abandon both its petition to the Supreme Court of India and its further participation in the arbitration. Having done so, it now seeks to re-litigate before this Court the same objections raised in India, labeling them as "triable issues" of the sort that warrant rejection of Assam's petition in favor of further discovery and ultimately a full trial here in British Columbia.

[54] I find, however, that in accordance with the legal principles articulated above, Canoro is not entitled to re-litigate its case in British Columbia. It could have and should have pursued the procedural and legal options available to it in India. It did not do so and it must live with the consequences.

- [74] In the present case, Mr Saddam specifically opted not to raise the issue of an imputed value of the Equipment (or the Shares) before the Arbitrator. Instead, he staked his whole defence on his assertion that the parties were in partnership, and that the loans were but provisional arrangements. That was his decision to make, but not one without consequences. It appears that there would have been no procedural impediment to making the value imputation argument as an alternative argument in his primary arbitration memorandum, rather than at the end of the hearing. As noted by A. Ross J in the *Mareva* decision in these proceedings:

[45] The petitioner submits that Mr. Saddam had the opportunity to provide the evidence of the value of the equipment in the Swiss arbitration proceeding but chose not to do so. That was a strategic decision. Mr. Saddam's setoff claim is one which would be covered by the loan agreement

and was arbitrable. The Swiss arbitration decision is clear: Mr. Saddam chose not to argue that issue. He cannot now use that strategic decision as a shield to this proceeding.

- [75] The preceding points also address the respondent's lengthy expert report, of Mr Pierre-Yves Gunter, a leading Swiss attorney in the field of arbitration, which these reasons shall briefly address. The expert report opines that the MOU and the Loan Agreement, as interpreted under Swiss law, mandate a sequence of execution: while the petitioner may seize the Equipment, the value of that Equipment must be offset against the debt. The expert does not, however, indicate which of the parties bears the responsibility of valuating the Equipment, in order to quantify the offset, nor the process to do so. If anything, he seems to indicate that the onus lies on the respondent:

... Indeed, I am of the opinion that such provision is an accounting provision which could still be relied upon by Mr Nader Saddam even after the determination by the Sole Arbitrator of the amounts due by the Borrower under the "Loan Agreement". The fact that such imputation was not part of a claim and/or request of Mr Nader Saddam in the arbitration does not prevent Mr Nader Saddam from bringing such claim and/or request in a new arbitration since, as explained above, the issue is not *res judicata*.

- [76] Later in the opinion, he notes that "any party to the 'Loan Agreement' could initiate on the basis of the arbitration clause contained in such agreement a new arbitration in Switzerland and ask the Arbitral Tribunal to deal with issues relating to the ownership and entitlement to the equipment." He does not categorically state that the petitioner bears the duty of seeking such a valuation, or, importantly, that such a determination or valuation must occur before the Award becomes enforceable. In his reply opinion filed on behalf of the petitioner, Mr Rocco Rondi, another Swiss attorney, confirms that the legal issues opined on by Mr Gunter would have no effect whatsoever on the petitioner's present ability to enforce the award in Switzerland.
- [77] Mr Gunter also opines that the petitioner is not entitled to hold the Equipment as a pledge or guarantee of future payment under Swiss law; he notes that the Swiss Arbitration did not determine this issue. Although the Arbitration did

not confirm the petitioner's ability to hold the Equipment pending payment, the Dubai Courts have confirmed that right, in proceedings initiated by the respondent himself. To be fair to the expert, that Dubai final conclusion was not reached until after the expert report was completed; in any case, the expert does not consider the effect of the Dubai decision on his sequential theory of execution, or the ability of the petitioner to hold the Equipment pending payment, except to say that the Dubai proceedings would not serve as *res judicata* if the matter were to be considered by a future Swiss arbitrator.⁷

- [78] The respondent was unable to provide any authority on all fours with the current facts, where a court declines to domesticate an arbitration award. He points to two decisions for the proposition that double recovery is commercially repugnant, and contrary to public policy.
- [79] The respondent's first case is *Re. Lambert* (2001), 26 CBR (4th) 235 (Ont SC), where the Court declined to enforce in Ontario two US state default judgments. The judgment creditor had already seized and disposed of assets in execution, and enjoyed the fruits of those sales, without providing to the debtors the statutorily required notice of sale. The judgment creditor then sought to collect the full amount of the original indebtedness against the debtors, without accounting for the amounts it had already recovered. At para. 76, the Court noted that such double recovery would not be available to the judgment creditor either in Ontario or the US, and that to allow such actions would offend public policy.
- [80] *Lambert* is distinguishable on four key points.
- [81] First, *Lambert* turned on affirmative evidence from an expert in the relevant US law that the consent judgments leading to the default judgments sought to be domesticated in Ontario would themselves not be enforceable due to the judgment creditor's failure to provide statutory notice. In the present case, there is no evidence that the Swiss Award would be unenforceable. Rather

- the respondent himself provides affirmative evidence, in the opinion of a Swiss attorney, that the award is enforceable. Further, the respondent himself recognises that the Award is enforceable, in his “with prejudice” settlement letter.
- [82] Second, in contrast to the *Lambert* judgment creditor, the petitioner has not disposed of or profited from the Shares or the Equipment, let alone breached any laws in doing so. In contrast to *Lambert*, the petitioner has not seized the Equipment or Shares as a means of satisfying the debt, but rather as security for that debt. As stated, the petitioner will return the Equipment to the respondent upon satisfaction of the Award, as per the Dubai Court decision. With respect to the Shares, the petitioner has not profited from those Shares, and has not indicated that it would not honour any decision concerning the value of the Shares, or its obligation to provide them or credit or compensation reflecting their value, to the respondent.
- [83] Third, *Lambert* pre-dates the strong statements in *Beals* (and, in this Court, *CE International* and *Assam*) inclining the public policy exception to foreign procedure or laws that would shock the Canadian commercial conscience. On this point, however, again, the *Lambert* basis for the public policy exception is not so much at the domestic execution phase but rather on the judgment creditor’s improper actions in the foreign jurisdiction with respect to the order sought to be enforced domestically.
- [84] Finally, *Lambert* was appealed: *Buth-na-bodhiaga Inc. v. Lambert* (2002), 216 DLR (4th) 330 (Ont CA). Abella JA (as she then was) upheld the decision, but in a manner that rendered the trial court’s discussion of the public policy defence to enforcement of foreign judgments, on which Mr Saddam relies, *obiter dicta*:
- [34] ***It is important to note that the Body Shop is not seeking to have the foreign default judgments obtained against the Lamberts in the United States enforced in Ontario, but instead is seeking receiving orders against the Lamberts, using those foreign judgments as evidence of their debt. As a result, the applicable law in this case is the***

law of bankruptcy, not the law relating to the enforcement of foreign judgments.

[35] While the trial judge undoubtedly found that the foreign default judgments would be unenforceable on the grounds of public policy, he also clearly and independently found that the conduct which led him to conclude that the default judgments were unenforceable, constituted "sufficient cause" under s. 43(7) of the BIA.

[36] That means, among other things, that this court's subsequent decision in Beals is not relevant to whether Cameron J. properly exercised his discretion to dismiss the petitions for "sufficient cause" under s. 43(7) of the BIA. Moreover, an application for a receiving order under bankruptcy law necessarily engages matters of domestic policy that go well beyond the principles of international comity relevant to the enforcement of foreign judgments.

[37] I am not aware, in any event, of any case in bankruptcy suggesting that when a foreign judgment is tendered to prove a debt for the purpose of a receiving order, the court is obliged, automatically, to accept that judgment as proof of the debt. (See Houlden and Morawetz, [infra] p. 2-33). In *Re General Broadcasting Ltd.* (1985), 45 Sask. R. 72, 59 C.B.R. (N.S.) 99 (Q.B.), for example, the court held that while a petitioner in bankruptcy may prove his or her claim by establishing the existence of a foreign judgment, the question whether a foreign judgment can be enforced in Canada is an issue distinct from whether there is a debt owing.

[38] We need not decide, therefore, whether Cameron J. erred in his application of the public policy defence relating to the enforcement of foreign judgments. He was entitled to take the same factors that informed his "enforceability" conclusion into consideration when undertaking his analysis to dismiss the petitions under s. 43(7).

[emphasis added]

- [85] The respondent's second case is *Subway Franchise Systems of Canada Ltd v. Laich*, 2011 SKQB 249. There the Court, citing *Lambert*, declined to recognise and enforce an arbitrator's award against the respondent franchisee. Notwithstanding the arbitrator's finding that the franchise agreement was terminated, the parties continued to operate under the original franchise agreement, with the franchisee operating the restaurant. The franchisee continued to make required payments to the petitioner, who was found ultimately to have suffered no loss. While the Court found that registration of the award would result in double recovery, the essence of the decision is that the applicant, by continuing to profit from the franchisee, had waived the arbitrator's termination decision: para. 38.

- [86] On the facts before the Court, the respondent has not acquitted his heavy burden of showing that recognition and enforcement would result in double recovery, let alone that execution in these circumstances would reach the high level required under the public policy exception.

B. Should this Court grant a stay of execution?

- [87] The respondent alternatively seeks a stay of execution pending valuation. He cites four legal bases upon which the Court may grant a stay:

- (a) the Supreme Court Civil Rules, Rule 13-2(31);
- (b) the *Court Order Enforcement Act*, RSBC 1996, c 78, s. 48;
- (c) the *Law and Equity Act*, RSBC 1996, c 253, ss. 8(2), 8(30), and 8(10); and/or
- (d) its inherent jurisdiction to control its own processes, specifically guided by the three-part inquiry set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311 at 347-348:
 - 1. there is a serious question to be tried;
 - 2. the respondent will suffer irreparable harm if the relief is not granted;
 - 3. the balance of inconvenience, with a view to all factors, weighs in favour of the stay.

- [88] The respondent provides no authority or precedent on analogous facts for such an order under the first three enactments. The parties and the Court agree that the Court's discretion under those enactments is broad, as it is under the general *RJR-MacDonald* analysis, and that the same considerations in the *RJR-MacDonald* analysis will guide the Court with respect to those statutory stays.

- [89] On this issue of the stay, the respondent relies on many of the same arguments advanced to resist domestication, as discussed and resolved above. The respondent also points to the inconvenience that execution would inflict upon his wife and two children. His wife co-owns his West Vancouver residence. One child lives in that residence with them, and the university tuition of the other child would be imperilled by execution.
- [90] This Court reaches the same conclusion, for the same reasons, as that reached by Perell J in *Abener*. A judgment or arbitral award creditor is generally entitled to enforce an award or judgment in its favour: *lululemon athletica canada inc. v. Industrial Color Productions Inc.*, 2021 BCCA 108 at para. 47. A stay, like an injunction employing the same test, is an extraordinary remedy. As noted above, there is nothing unusual in the existence of potential claims or set-offs. What is unusual in this case, and which weighs against an injunction with respect to all three prongs of the *RJR-MacDonald* test, is the opportunity and, indeed, requirement that the respondent raise those issues earlier and elsewhere. Apart from the parties' agreements, it would neither be appropriate nor judicially economical to ask this Court, directly, or as referred to the Registrar, to oversee a valuation of Equipment held in Dubai, or Shares issued in a Cayman Islands company designed to conduct business in the Middle East. The respondent provides not authority applying Rule 13-2(24), or otherwise, for such an exercise.
- [91] Nor is it unusual for execution of an award or judgment to inflict significant financial hardship on a debtor and his family.
- [92] It is true that the respondent's assets are subject to a freezing order. But that order contains typical provisions authorising the respondent to apply to set it aside on short notice.
- [93] The balance of convenience, including considerations of the integrity of the international arbitral regime to which these parties specifically agreed, militates against a stay.

- [94] I have considered the respondent's cited authority of *Canada Mortgage and Housing Corporation v. 447136 B.C. Ltd.*, 2014 BCSC 480 ["**CMHC**"], where the Court granted a stay of execution of six months in order to provide the defendants with an opportunity to satisfy the judgment, and to permit them to potentially retain their home. The *CMHC* facts differed considerably from the present. The judgment debtors indicated that they would pay the judgment, and proposed periodic payments: paras. 43, 125. There was evidence that the family home held sufficient equity to satisfy the judgment in question; the debtors also appeared to have other assets available to satisfy the judgment. The decision also turned on the fact that the debtors were elderly, such that execution against the family home would inflict particular hardship. Here, there is no proposal by the respondent to immediately pay the Award, and he has evaded payment to date. And no other means of payment is apparent: he indicates that the house is his only asset of note in this jurisdiction.
- [95] I have also considered, by analogy, the recent decision in *lululemon*, where the arbitration award debtor successfully obtained a stay of execution pending appeal. The prospects for that appeal appeared stronger than the respondent's present position: a challenge to the arbitrator's jurisdiction, which, due to unsettled law, might be subject to a standard of correctness: para. 33. Further, there was an issue about the award creditor's ability to repay the award if unsuccessful on appeal, an inapplicable issue here: para. 43. Further, importantly, the award debtor had paid the full amount of the award into a lawyer's trust account: ready for collection if and when the appeal is dismissed: para. 46. In the present case, the respondent has neither paid nor deposited as security any amount towards the award debt: not even the amount offered in his settlement letter. As the residence is co-owned, its extrication will be complicated and perhaps contested. All of these facts further tilt the balance of convenience away from a stay.
- [96] The respondent's application for a stay is denied.

IV. CONCLUSION

[97] The Court accordingly issues the following orders, based on those pronounced by Kent J in *Assam*, at para. 71:

- a) The award of Dr. Jean-Paul Vulli  ty, Sole Arbitrator, made on January 28, 2020, in Geneva, Switzerland (the “**Award**”) shall be recognised as binding and enforceable in British Columbia;
- b) The monetary portion of the Award shall carry interest of 10% per annum commencing January 28, 2020 and continuing until the date of payment or recovery as the case may be;
- c) The monetary portions of the Award and accrued interest from January 28, 2020 to the date of judgment shall be converted into Canadian currency pursuant to the provisions of the *Foreign Money Claims Act*, RSBC 1996, c. 155 and the *Foreign Money Claims Regulation*, BC Reg. 165/96;
- d) Judgment based on the Award shall be signed and entered as a judgment of the Supreme Court of British Columbia and be enforceable in British Columbia in the same manner as any other British Columbia judgment of the same effect.

[98] The Court did not have the benefit of detailed submissions on the form of order, in light of the Award’s baroque conclusions with respect to some 14 bases for repayment, including the various advances, contractual interest, and legal costs, directed in five different currencies.⁸ Accordingly, if the specific nuances of the Award require modification of the above orders, the parties may seek clarification, via written or oral submissions, via communication to the Registry, within four weeks of today’s date.

[99] The respondent is adamant that the Shares and Equipment be valued, and that he receive credit for those assets. As indicated above, if he wishes to

pursue those claims, including seeking a confirmation of his ownership, the value of those assets, or the return of those assets, he should pursue those claims. Again, it would appear to the Court that such claims fall fully within the forum selection clause of the Agreements, being a “dispute, controversy or claim arising out of or in relation to” the relationship set out in the Agreements, and would thus be subject to “arbitration in accordance with Swiss Rules of International Arbitration of the Swiss Chambers of Commerce.” With respect to the Shares, the contractually-mandated three expert valuator approach would appear to be the appropriate means. But those next steps, and the questions of whether they would be barred in any manner by *res judicata*, or *laches*, or otherwise, will be left to that other forum.

[100] The petitioner seeks costs at Scale C.

[101] Ordinarily, arbitration proceedings award full indemnity costs to the successful party: *Allard v. The University of British Columbia*, 2021 BCSC 60 at paras. 65-82; *Goel v. Sangha*, 2019 BCSC 1916 at para. 67; *Teal Cedar Products Ltd. v. British Columbia (Ministry of Forests)*, 2011 BCSC 360 at paras. 72-84 (varied on other grounds, 2012 BCCA 70); BCICAC *Domestic Commercial Arbitration Rules of Procedure* (September 2016), Rule 41; *Arbitration Act*, SBC 2020, c. 2, s. 50(2). That principle, coupled with the convoluted facts and voluminous evidence alluded to above, indicate that the present matter is well beyond the usual complexity, warranting an order for costs at the higher Scale C.

“Crerar J”

¹ The respondent voluntarily waived legal advice privilege, and attached this correspondence to his affidavit.

² The parties participated in several proceedings in Dubai. In August 2020, Mr Saddam initiated a further and separate claim in the Dubai Court against Mr Pacha and Enrox and others for damages arising out of the criminal complaints. That claim was heard by the Dubai Court and the Dubai Court of Appeal, and a petition for review was recently filed with the Dubai Court of Cassation. In December 2020, the petitioner also initiated enforcement proceedings in Dubai seeking to have the Award recognised and enforced in that jurisdiction.

³ The highest Dubai Court.

⁴ (Toronto: Thomson Reuters, 2017) (loose-leaf updated November 2020, release 17).

⁵ "I, for one, protest, as my Lord has done, against arguing too strongly upon public policy; -it is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law." *Richardson v. Mellish* (1824), 2 Bing. 229 at 252, 130 E.R. 294, per Burrough J.

⁶ "It's All Right With Me."

⁷ Mr Gunter also opined at length with respect to whether para.110 of the Award would bar the respondent from arguing, before a future Swiss arbitrator, that the value of the equipment should be set off against the amount owing under the loan and the Award. The petitioner does not take that position before this Court, and the Court defers that issue to the forum chosen by the parties themselves: a future Swiss arbitrator.

⁸ Euros, United Arab Emirates dirhams, US dollars, pounds sterling, and Swiss francs.