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Judgment Sheet

IN THE LAHORE HIGH COURT AT LAHORE
JUDICIAL DEPARTMENT

ICA No.210640/2018

Orient Power Company (Private) Limited

Versus

Sui Northern Gas Pipelines Limited through its Managing Director, Lahore

J U D G M E N T

Date of Hearing	**17.6.2019**
Appellant By the following Advocates:	Mr. Salman Akram Raja Mr. Faisal Islam Mr. Umer Akram Chaudhary Mr. Ahsan Mahmood, Advocate Mr. Usman Ali Bhoon Mr. Majid Jehangir Mian Ahmad Hammad Mr. Shabbir Hussain and Ms. Mehrunissa Sajjad
Respondent By the following Advocates:	Khawaja Ahmad Hosain Chaudhry Muhammad Usman Ms. Faryal Nazir Mr. Zaheer Cheema Mr. Shahzad Ahmad Cheema and Mr. Munawar Karim along with Imran Javed, Senior Law Officer in the office of Respondent SNGPL

Ayesha A. Malik J: The Appellant has impugned order dated 4.4.2018 passed by the learned Single Judge in COS No.16/2017 as the suit filed for the recognition and enforcement of a foreign arbitral award was allowed by the Court on 4.4.2018 in favour of the Respondent.

2. The basic facts of the case are that the Respondent filed COS No.16/2017 before the learned Single Judge of this Court under Section 6 of the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 ("**Act**") for the recognition of award dated 27.2.2017 and 13.6.2017("**the Award**"). The Appellant was given several opportunities to file objections against the Award, failing which the right to

file objections was closed on 21.3.2018. On 4.4.2018, an application under Section 6 of the Act, filed by the Respondent was allowed, such that the Award was recognized and enforced as the Court declared the Award binding on the parties. The matter is now pending in proceedings for execution of the Award.

Arguments on the preliminary objection of jurisdiction of the High Court

3. The Appellant has impugned the order of 4.4.2018 as it was an ex-parte order. The Appellant contends that it has been denied a fair hearing in the case. Mr. Salman Akram Raja, on behalf of the Appellant argued that the Appellant's counsel was on an approved general adjournment from 12.3.2018 to 7.4.2018 during which dates the case should not have been fixed for hearing, yet the case was fixed for 21.3.2018 on which date the learned Single Judge closed the Appellant's right to file written objections against the Award. The case was then fixed for 4.4.2018, again during the general adjournment period when the impugned order was passed. Consequently the Appellant is aggrieved as the case proceeded without giving the Appellant a fair hearing or an opportunity to raise objections against the Award. Learned counsel further argued that the Appellant has a right to file objections under the Act and also has a right to invoke remedy under the Arbitration Act, 1940 ("**1940 Act**"). As per the Counsel arguments, this right has been recognized in the case cited at *Taisei Corporation v. A.M. Construction Company (Pvt.) Ltd*. (**PLD 2012 Lahore 455**) ("**Taisei Case**"), however the learned Single Judge without considering the aforementioned case held that the Court has no discretion in its power to recognize and enforce foreign arbitral awards under the Act except if a ground is made out under Article V of the Schedule of the Act, which basically means Act V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards dated 10.6.1958 ("**the Convention**"). Learned counsel further argued that by doing so, the learned Single Judge proceeded with the matter without considering the issue of concurrent jurisdiction as decided in the Taisei Case in which it is held that 1940 Act is also applicable to foreign arbitral awards as there are no

provisions equivalent to Section 14, 30 and 33 of the 1940 Act under the Act. Mr. Salman Akram Raja argued that the Court must harmoniously construe both the laws to ensure that the Appellants are not denied any right that is available under the law. It was also argued that the findings of the learned Single Judge that the Award is enforceable under the Act and objections should be filed in accordance with Article V of the Schedule to the Act is contrary to the earlier view taken in the Taisei Case. Under the circumstances, it is the case of the Appellant that the learned Single Judge could not have deviated from the earlier view and should have at least discussed the Taisei Case and explained why he disagreed with the findings, if at all, before proceeding to enforce the Award under Section 6 of the Act.

4. Learned counsel for the Respondent SNGPL, Khawaja Ahmad Hosain argued that the Award is a foreign arbitral award and this fact has been conceded to and accepted by the learned counsel for the Appellant during his arguments. He argued that in terms thereof the High Court has exclusive jurisdiction to recognize and enforce foreign arbitral awards under the Act. He also argued that under the Act, *foreign arbitral award* is defined in Section 2(e) to be an award made in a Contracting State, in this case being London which was the seat of the arbitration. Hence the relevant Court for enforcement is the High Court and as per Section 6 of the Act, the enforcement of foreign arbitral award is such that it is to be recognized and enforced in the same manner as a judgment or order of the Court. He argued that in terms of Section 7 of the Act, the recognition and enforcement of foreign arbitral award must be in accordance with Article V of the Convention and further that in terms of Section 8 of the Act, in the event of any inconsistency between the Act, the law or any Judgment of the Court, Article V of the Convention shall prevail to the extent of the inconsistency. Therefore, as per the arguments of the counsel for the Respondent, the Act is the relevant law and that the 1940 Act is totally irrelevant for the purposes of enforcement of the Award. Learned counsel also argued that reliance on the Taisei Case is totally misconceived because in that case the Court found that the award in question was a domestic award while relying on the "*Hitachi Limited and another v. Rupali Polyester and others"* (**1998 SCMR 1618**)

whereas in this case it is a foreign arbitral award. Khawaja Ahmad Hosain argued that the learned Single Judge in the Taisei Case failed to take into consideration the fact that the law laid down in 1998 SCMR 1618 (*supra)* was based on the interpretation of Section 9 of the Arbitration (Protocol and Convention) Act, 1937 ("**1937 Act**"), which specifically provided that where an agreement is governed by the laws of Pakistan then for the purposes of the 1937 Act such an award is not a foreign award. He explained that the 1937 Act specifically provided that if the governing law of a contract was Pakistan then an award under such a contract would not be a foreign award and in such cases the award would be enforced as a domestic award. However, as per his contentions the 1937 Act is not relevant, the relevant law is the Act and there is no such provision under this Act. Further that the definition of *foreign arbitral award* under the Act has specifically provided that a foreign award is one made in a Contracting State meaning thereby that the governing law of contract is not relevant. Hence, the only law that is applicable for the purposes of recognition and enforcement of the Award is the Act. Learned counsel also addressed arguments related to requiring a harmonious construction whereby he stated that no such construction is required because no provision of the Act has been challenged by the Appellant nor is there any ambiguity in the law. As per his contentions, the 1940 Act caters to domestic awards and there is no right available to Appellant to raise objections under the 1940 Act. He further argued that simultaneous remedies where one party seeks enforcement under the Act and the other party files objections under the 1940 Act before different forums totally defeats the mandate of the Act.

5. We have heard the learned counsel for the parties and have also gone through the record. The preliminary objection raised is with respect to the jurisdiction of the High Court to recognize and enforce foreign awards. The basic question before the Court is whether the High Court has exclusive jurisdiction to recognize and enforce a foreign arbitral award under the Act and whether for the purposes of raising objections against the enforcement of a foreign arbitral award, the 1940 Act is relevant giving the civil courts concurrent jurisdiction.

Opinion on the Preliminary Objection

6. The Act provides for the recognition and enforcement of arbitration agreements and foreign arbitral awards. It is based on the United Nation Convention on the Recognition and Enforcement of Foreign Award signed in New York on 10.6.1958 to which Pakistan is a signatory. Section 2(e) of the Act defines *foreign arbitral awards* to mean an award made in a Contracting State and such other State as may be notified by the Federal Government in the official gazette. In this case, both parties accept that the Award is a foreign arbitral award and the dispute is with respect to jurisdiction of the High Court and the manner in which the foreign arbitral award has to be recognized and enforced.

7. In terms of Section 3 read with Section 2 (d) of the Act, the High Court has exclusive jurisdiction to adjudicate and settle matters related to or arising from this Act for the purposes of enforcement of a foreign arbitral award. Section 6 of the Act requires an application to be filed before the High Court and the Court shall recognize and enforce it as a judgment or order of a Court in Pakistan. Section 6 of the Act is subject to Section 7, wherein enforcement cannot be refused except on the grounds given in Article V of the Convention. Therefore the Court can refuse recognition and enforcement of foreign arbitral award under Section 7 of the Act in terms of the grounds available in Article V of the Convention, which is appended to the Schedule of the Act. So far as the Act is concerned, it clearly provides that the High Court has exclusive jurisdiction for recognizing and enforcing a foreign arbitral award and also provides for the grounds on which any objection can be made. The dispute on jurisdiction has arisen due to the judgment given in the Taisei Case which gives concurrent jurisdiction to the civil court.

8. In the Taisei Case the basic facts were that a dispute arose under the contract and the matter was referred to arbitration. The governing law of the contract was Pakistan. It was an ICC arbitration and the seat of the arbitration was Singapore. The award was delivered on 9.9.2011 in favour of Taisei. The respondents moved an application under Section 14 of the 1940

Act before the Civil Judge to challenge the award and also filed objections under the 1940 Act. Taisei moved an application under Order 7 Rule 10 of the Civil Procedure Code, 1908 on the ground that the civil court lacked jurisdiction as the award is a foreign award for which the Act has exclusive jurisdiction. The civil court rejected the application filed by Taisei and the order was challenged before the High Court in a civil revision. The question addressed by the High Court was with reference to the provisions of the 1940 Act, which as per the judgment have not been specifically repealed by the Act, hence are available in cases where the arbitration agreement is governed by Pakistan law. The Court after hearing the petition dismissed the case of Taisei and proceeded on the objections under Section 14 of the 1940 Act for the following reasons:

(i) There are no specific provisions under the 2011 Act equivalent to the remedies available under Section 14, 30 and 33 of the 1940 Act for the respondents. Therefore the Legislature having not specifically repealed the provisions of the 1940 Act, under the 2011 Act means that the remedies under Section 14, 30 and 33 are available to the respondents.

(ii) Any objection under Section 14, 30 and 33 of the 1940 Act must be made before the civil court as the court constituted under Section 2(d) of the 2011 Act has been created with the limited power of giving recognition and enforcement to a foreign arbitral award. The general power conferred on the civil court under Section 14, 30 and 33 remains available to a party affected by an award before the civil court.

(iii) The question as to whether an arbitration agreement where the governing law of the contract is Pakistan law has any implication on the determination of the question where the award is domestic or foreign, has been decided by the august Supreme Court of Pakistan in the case cited at 1998 SCMR 1618 (*supra*).

(iv) In the light of the judgment of the august Supreme Court of Pakistan, it was held by the Court that since in this case the governing law of the contract was Pakistan law the award in question was domestic award and could be dealt with in accordance with Pakistan law, meaning could be dealt with under the 1940 Act.

(v) Finally the moving of an application under Section 6 of the 2011 Act does not divest the civil court of its jurisdiction to entertain and adjudicate upon the controversies moved through an application under the 1940 Act which otherwise are not entertain able by the court constituted under Section 2(d) of the 2011 Act.

9. Learned counsel for the Appellant has raised the same issues before us in this case. The relevant facts of this case are that on 18.10.2016 parties entered into a Gas Supply Agreement ("**GSA**") for supply of gas to the Appellant for its power generation complex. Differences arose between the

parties and the matter was referred to the London Court of International Arbitration ("**LCIA**") for arbitration in terms of Clause 18.3 of the Agreement. After hearing both the parties the Award was passed on 27.2.2017 and subsequent Award was made with respect to costs on 13.6.2017. The Appellant moved an application under Section 14(2) of the 1940 Act raising objections against the Award before the civil court whilst the Respondent filed an application under Section 6 of the Act for the recognition and enforcement of the Award before the learned Single Judge. In the meantime, proceedings before the civil court under Section 14 of the 1940 Act were stayed on 12.12.2017 by the learned Single Judge of this Court. The impugned order proceeds to recognize and enforce the Award without adverting to the issue of the pending application or objections before the civil court under the 1940 Act after finding that no objections were filed before the High Court and that the High Court has exclusive jurisdiction to enforce foreign arbitral awards.

10. The question before us is whether there is concurrent jurisdiction between the High Court and civil court to enforce a foreign arbitral award under the Act and the 1940 Act. The relevant provision of the Act is Section 3 which provides for the jurisdiction of the Court which has been defined in Section 2(d) of the Act, meaning the High Court or any other Superior Court as notified by the Federal Government in the official gazette. In this case there is no dispute with reference to the fact that the High Court is the relevant Court as per Section 2(d) of the Act. Section 3 of the Act categorically provides that the High Court shall exercise *exclusive jurisdiction* under the Act, leaving little room for any other interpretation. The Act was enacted to give effect to the Convention which requires international awards to be recognized and enforced expeditiously, so as to prevent undue delay in settling disputes of contracting parties. In terms of Article I of the Convention, a Contracting State is obligated to recognize awards as binding and enforce them as per the procedure laid down in Article III in order to give effect to the terms of the Convention. The Act sets out the requirements to have a foreign arbitral award recognized and enforced. The purpose of the Act is to facilitate recognition and enforcement

of foreign arbitral award in order to curtail litigation related to foreign arbitral awards which in turn delays the enforcement of awards and negates the very purpose for using arbitration as a dispute resolution mechanism. The Convention is based on a pro-enforcement policy which sets out to facilitate and safeguard the enforcement of foreign arbitral awards which is the mandate of the Act. The emphasis on pro-enforcement is highlighted by the inclusion of Section 8 of the Act which provides that in the event of any inconsistency between the Act and the Convention, the Convention shall prevail to the extent of the inconsistency. Section 8 of the Act endorses the mandate of the Convention and the commitment of Contracting States to encourage enforcement of foreign arbitral awards. Hence Section 3 grants exclusive jurisdiction to the High Court to fulfill the objective of the Act and the Convention. Section 3 of the Act has also been interpreted by a learned Division Bench of the Hon'ble Sindh High Court in *Taisei Corporation v. A.M. Corporation Company (Pvt.) Ltd*. (**2018 MLD 2058**) wherein it has declared that the High Court has exclusive jurisdiction to adjudicate and settle matters related to and arising from the Act. The Court also held that these words are clear and broad enough to encompass the question whether an award is foreign arbitral award or not as well as with reference to objections under Article V of the Convention. Therefore the Court found that Section 3 of the Act leaves little room to argue that recognition and enforcement of foreign arbitral award does not fall exclusively within the jurisdiction of the High Court and that there is a concurrent jurisdiction between the High Court and the civil court. Finally the Court noted that this is not a new concept because under the 1937 Act, the High Courts in Pakistan had exclusive jurisdiction to enforce and recognize foreign arbitral awards. This issue was directly addressed in *G.M. Pfaff A.G. v. Sartaj Engineering Co. Ltd., Lahore and 3 others* (**PLD 1970 Lahore 184**), *Nan Fung Textiles Ltd. v. Sadiq Traders Ltd*. (**PLD 1982 Karachi 619**) and *Marines Limited v. Aegus Shipping Co. Ltd and 4 others* (**1987 CLC 1299**) with reference to the 1937 Act which has been repealed by the Act giving the High Court exclusive jurisdiction under the Act.

11. We are of the opinion that the Act leaves little room for interpretation on the issue of exclusivity of jurisdiction of the High Court. Section 3 of the Act is clear and applicable to foreign arbitral awards, which has been clearly interpreted by division bench of the Sindh High Court in PLD 1982 Karachi 619 (*supra*). We also note that the Taisei Case relied upon 1998 SCMR 1618 (*supra)* which case interpreted the provisions of the 1937 Act which was repealed under Section 10 of the Act in 2011 where after for the purposes of the enforcement of a foreign award the Act is relevant, even if the arbitration takes place in a foreign country and the governing law of the agreement is of Pakistan, in such cases the 1937 Act will not apply. With the repeal of the 1937 Act, a foreign arbitral award under the Act is one made in a contracting state regardless of the governing law of the contract. The Act being the relevant law in terms thereof the High Court has exclusive jurisdiction. That being so, we find that it is totally impractical to allow a party to seek enforcement of a foreign arbitral award before the High Court while at the same time allow the parties remedy before the civil court to enforce the same award. The outcome will not only cause conflicting judgments but also create uncertainty so far as the award is concerned. For instance the High Court may decide to enforce the award whereas the civil court may decide to set it aside under the 1940 Act. It could also mean that one party invokes the jurisdiction of the civil court to file objections against the foreign award, whilst the other party invokes the jurisdiction of the High Court for recognition and enforcement of an award, as in this case. This results in absurdity running contrary to the intent and purpose of the Act. Learned counsel for the Appellant, during the course of arguments through its partial written arguments on the issue of jurisdiction, has categorically stated that the Appellant's position is that the Award is a foreign arbitral award within the definition set out in Section 2(e) of the Act and for the purposes of the present case the Appellant accepts that the High Court has jurisdiction over the foreign arbitral award for recognition and enforcement of the award. Although this is a departure from the original arguments made before us, nonetheless the Appellant has conceded to the fact that the High Court has exclusive jurisdiction to recognize and enforce foreign arbitral awards.

Therefore in view of the aforesaid, we find that the High Court has exclusive jurisdiction to recognize and enforce foreign arbitral awards which means it has exclusive jurisdiction to recognize and enforce the Award. Hence the preliminary objection is without merit.

Objections against the Award under Article V of the Schedule of the Act

12. The basic dispute before us is with respect to the recognition and enforcement of a foreign arbitral award and the procedure of the Court to hear objections filed by the Appellant under Article V of the Convention as contained in the Schedule of the Act, since they were not considered by the learned Single Judge. In terms of the impugned order, no objections were filed before the Court, hence it proceeded to recognize and enforce the Foreign Arbitral Award under Section 7 the Act. Although the manner in which the case proceeded is under dispute by the Appellant, both the Counsel ultimately agreed and requested that the case be decided on its merits. Hence we proceed to examine the objections raised by the Appellant under Section 7 of the Act read with Article V of the Schedule of the Act. Section 7 of the Act reads as follows:

> Unenforceable foreign arbitral awards. The recognition and enforcement of a foreign arbitral award shall not be refused except in accordance with Article V of the Convention.

Article V of the Schedule of the Act which basically means Act V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards dated 10.6.1958 reads as follows:

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

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

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

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

In terms of Section 7 of the Act, the grounds for refusing to recognize an award are given in Article V of the Act. The Appellant relies on Article V Clause 1(c) and 2(b) as its grounds for objections to the recognition and enforcement of the Award.

The first objection against the first claim: Article V (1)(c) of the Schedule to the Act

13. The Award deals with two claims; the first claim requires payment of Rs.104,133,296/- due under the Payment Agreement dated 11.1.2010. With respect to the first claim, the case of the Appellant is that the Sole Arbitrator had no jurisdiction over this claim as there was no arbitration clause under the Payment Agreement, hence the Award deals with matters beyond the jurisdiction of the Sole Arbitrator. Learned counsel for the Appellant argued that the parties entered into the GSA on 18.10.2006 with a dispute resolution mechanism contained in Clause 18. It was argued that the dispute resolution mechanism contained in the GSA was not applicable to or relevant for the purposes of the Payment Agreement which is a separate agreement from the GSA, with no dispute resolution clause and even if the dispute resolution mechanism of the GSA is to be made relevant, the prerequisites under the dispute resolution clause were not satisfied. He further argued that the dispute under the Payment Agreement was a fresh dispute which was not related to the findings of the Expert, Mr. Khalid Ibrahim under the GSA.

Hence the first claim did not arise under or in relation to the GSA. The learned counsel argued that the Sole Arbitrator did not have jurisdiction to entertain any claim with respect to the Payment Agreement. He explained that the dispute between the parties was with respect to non-payment of Rs.104,133,296/- under the Payment Agreement which does not contain an arbitration agreement nor makes any express or specific reference to the arbitration clause in the GSA. He argued that pursuant to the laws of Pakistan, there must be a specific arbitration clause in order for the matter to be referred to the arbitration. Reliance is placed on *Messrs MacDonald Layton & Company Limited v. Messrs Association Electrical Enterprises Limited and another* (**PLD 1982 Karachi 786**), *Syed Arshad Ali v. Sarwat Ali Abbasi* (**1988 CLC 1350**) and *Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan* **[2010] UKSC 57**. Therefore the basic argument of the Appellant is that there is no arbitration clause under the Payment Agreement and there is no agreement between the parties that the dispute resolution clause contained in the GSA is relevant to the Payment Agreement. Consequently the Sole Arbitrator did not have jurisdiction in this matter.

14. On behalf of the Respondents, it was argued that there was a dispute between the parties with respect to payment under Clause 3.6 of the GSA. This is the *take or pay* clause on the basis of which, for a given period, the Appellant is to make payment and either take the gas supplied by the Respondent or else defer the taking of the gas to a subsequent date. Consequently the Appellant is entitled to take *make up gas* in terms of Clause 3.6(c) of the GSA if it does not take gas in any given month. The dispute pertaining to amounts owed under Clause 3.6 of the GSA were decided in favour of the Respondent SNGPL by the Expert and payments had to be made within fifteen days. However, the Appellant was unable to make the required payments within the stipulated time, hence it sought extension of time which was ultimately resolved by executing the Payment Agreement. Learned counsel argued that the settlement is recorded in the Payment Agreement and in terms of Clause 2.2(b) of the Payment Agreement payment was to be made in three equal installments by

11.5.2010, thereby extending the fifteen day period considerably. Furthermore Khawaja Ahmad Hosain argued that the Payment Agreement in Clause 4 provides that the provisions of the GSA shall prevail and are applicable to the Payment Agreement. Hence he argued that the arbitration clause of the GSA was applicable and the Sole Arbitrator has jurisdiction in the matter. He further argued that under the GSA, the dispute was referred to the Expert under Clause 18.2 for a determination which was a binding determination as per Clause 18.2(h) of the GSA. Since the Expert's decision was binding, arbitration was no longer available to the parties to resolve that dispute and the Appellant was to make payment as per the determination of the Expert. Learned counsel stated that once the parties had submitted to a binding decision of the Expert, they could not resubmit the matter before another expert questioning the first expert's determination. He also relied upon a decision taken in another case (appended in CM No.5/2018) where the parties were the same in some other arbitration as before this Court, in which the Appellant contended that the expert's determination under the GSA is not a pre-condition to any arbitration. Having argued this as the legal position, Khawaja Ahmad Hosain argued that the Appellant is now estopped from arguing a different legal position to suit its convenience.

15. In order to appreciate the issues raised by the parties with reference to the first claim, it is necessary to set out the facts on the basis of which the first claim arises:

(a) The parties executed a GSA on 18.10.2006 under which the Respondent is required to supply natural gas to the Appellant for use as fuel at the Appellant's power generation facility. As per the GSA the Respondent is obligated to supply 38 MMSCF of gas per day during the Firm Delivery Period. The Appellant can take the delivery of the gas or can invoke the *take or pay* clause and defer delivery of the gas.

(b) Differences arose between the parties with respect to the Commissioning Period Start Date ("**CPSD**"), the Commercial

Operating Date ("**COD**") and the Appellant's obligation to *take or pay* under clause 3.6 of the GSA during the CPSD and COD.

(c) Vide letter dated 1.7.2009, the parties agreed to appoint Mr. Khalid S. Ibrahim as the Expert under clause 18.2(g) of the GSA to resolve the dispute.

(d) The Expert heard the matter and issued his Determination on 19.12.2009 holding that some amounts are due from the Appellant to the Respondents in terms of the *take or pay* clause calculated on the basis of the declared CPSD and COD. The Appellant was directed to make payment in fifteen days.

(e) On 11.1.2010 the parties executed the Payment Agreement on the basis of which the Appellant was to make payment in three installments. The dispute pertaining to payment of Rs.104,133,296/- arises under the Payment Agreement specifically and is not related to the Expert's Determination as the parties agreed under the Payment Agreement that late payment surcharge shall be paid until full payment is made under the Agreement.

Hence the first claim relates to the demand for late payment surcharge under the Payment Agreement. The controversy revolves around the jurisdiction of the Sole Arbitrator with respect to amounts stated to be due under the Payment Agreement. In terms of the dispute referred to the Expert, Mr. Khalid Ibrahim, the CPSD was an issue, hence the Expert was required to decide on what date CPSD occurred or when will it occur. The Expert concluded that CPSD occurred on 30.9.2008. The Expert was also required to decide on what date does Orient (the Buyer) have an obligation under Clause 3.6(b) of the GSA to ensure that the *take or pay* quantity is 15% of the Daily Contract Quantity. The Expert concluded that there is no obligation on SNGPL to supply gas during the As Available Period and no obligation on Orient to *take or pay* 15% during the As Available Period as there is no guaranteed delivery during the As Available period. The *take or pay* clause was applied on the months of November 2008 and March 2009

for 61 days and Rs.88,486,671.43 was stated to be payable by Orient for this period along with late payment surcharge. Another issue before the Expert was the date on which Orient was obligated to ensure that the *take or pay* quantity is 50% of the Daily Contract Quantity as per Clause 3.6(a) of the GSA. The Expert gave his findings on this issue calculating the obligation to pay from the COD being 1st April 2009 in the amount of Rs.1,218,408,469/- along with late payment surcharge. Amounts were calculated for April, May, June, July and for the month of November 2009 amounts were not calculated as the Expert did not have the required data. Therefore as per the Appellant's contention, the first claim does not arise from the Expert's Determination as it pertains to late payment surcharge as agreed between the parties under the Payment Agreement.

16. At the heart of the dispute is the Payment Agreement which was executed on 11.1.2010 in the following terms:

> THIS PAYMENT AGREEMENT (this "Agreement") is made at Lahore this 11th day of January 2010:
>
> BETWEEN
>
> Sui Northern Gas Pipelines Limited, a company existing under the laws of Pakistan, with its principal office located at 21 Kashmir Road, Lahore (hereinafter referred to as the "Seller" which expression shall, where the context permits, be deemed to mean and include its successors-in-interest and permitted assigns) of the one part;
>
> AND
>
> Orient Power Company (Private) Limited, a company existing under the laws of Pakistan, with its principal office located at 10 Ali Block, New Garden Town, Lahore (hereinafter referred to as the "Buyer" which expression shall, where the context permits, be deemed to mean and include its successors-in-interest and permitted assigns) of the other part.
>
> Each a "Party" and collectively the "Parties".
>
> WHEREAS
>
> (1) The parties entered into a Gas Supply Agreement dated 18 October 2006 ("the "GSA").
>
> (2) Dispute arose on certain issues (the "Issues") between the Parties with regards to interpretation of occurrence of Commissioning Period Start Date, applicability of 15% and 50% Take or Pay, Force Majeure claim by the Buyer and applicability of surcharge on late payments, in accordance with the executed GSA and the Parties vide side letter dated 01.07.2009 agreed appointment of local Expert for determination on the Issues and it was mutually agreed between the Parties that the determination of the Expert shall be binding on both the Parties.

(3) The Parties, by mutual consent vide side letter dated 01.07.2009, referred the Issues to a jointly appointed Expert, Mr. Khalid Ibrahim (the "Expert"), for determination pursuant to the provisions of the GSA.

(4) The Expert delivered his determination on the Issues on 19 December 2009 (the "Determination").

(5) The Parties as per side letter dated 01.07.2009 are bound by the Expert's Determination and shall implement the same in letter and spirit as follows.

NOW, THEREFORE, the Parties hereby agree as follows:

1. Definition: For the purposes of this Agreement, the definitions and the capitalized terms not otherwise defined herein (including Recitals) shall have the respective meanings set forth in the GSA and the Determination.

2. Settlement: The Parties acknowledge and agree as follows:

2.1 CPSD:

(i) The Commissioning Period has started on 1 October 2008 and ended on 31 March 2009 for purposes of payment of Take or Pay Quantity equal to fifteen percent (15%) of the Daily Contract Quantity as provided in Section 3.6(b) of the GSA; (ii) no payment regarding fifteen percent(15%) Take or Pay Quantity as per Section 3.6(b) of the GSA is required to be made by the Buyer to the Seller during the As-Available Period of December 2008 and January and February 2009; (iii) The Buyer is only required to pay fifteen percent (15%) Take or Pay Quantity as per Section 3.6(b) of the GSA for the months of November, 2008 and March 2009 in the amount of Rupees Forty Million, Seven thousand One Hundred Ninety Seven only (Rs.40,007,197.00) (for the month of November 2008) and Rupees Forty Eight Million Four Hundred Eighty Five Thousand Seven Hundred Seventy Five only (Rs.48,485,775.00) (for the month of March 2009), (collectively, the "Commissioning Period Payment"); and (iv) the Buyer is required to pay compensation for late payment of the Commissioning Period Payment in the amount of Rupees Nine Million One Hundred Forty Two Thousand Nine Hundred Twenty Four Only (Rs.9,142,924) upto 31.12.2009 together with interest from 31.12.2009 upto 03.01.2010 (the date on which the payment had to be made in accordance with side letter dated 01.07.2009 i.e 15 days from Expert's determination) (the "Compensation") and late payment surcharge at Delayed Payment Rate from 04.01.2010 till date. The Parties agree that the Commissioning Period Payment shall be paid immediately on execution of this Agreement.

2.2 COD:

(a)(i) the COD has already commenced as of 1 April 2009 for purposes of payment of Take or Pay Quantity equal to fifty percent (50%) of the Daily Contract Quantity as provided in Section 3.6(a) of the GSA; (ii) no payment regarding fifty percent (50%) Take or Pay Quantity as per Section 3.6(a) of the GSA is required to be made by the Buyer to the Seller during the As-Available Period of December 2009, January 2010 and February 2010; (iii) The Buyer is required to pay fifty percent (50%) Take or Pay Quantity as per Section 3.6(a) of the GSA for the months of April 2009 to November 2009 in the amount of Rupees One Billion Two Hundred Eighteen Million Four Hundred Eight Thousand Four Hundred Sixty Nine Only (Rs.1,218,408,469) (the "COD Payment"); and (iv) the Buyer is required to pay compensation on late payment of the COD Payment as per Expert's determination upto 03.01.2010 (the date on which the payment had to be made in accordance with side letter dated 01.07.2009 i.e 15 days from Expert's determination) (the

> "Compensation") and late payment surcharge at Delayed Payment Rate from 04.01.2010 upto the date of full payment.
>
> (b) The Parties agree that payment against 50% Take or Pay (the "COD Payment") shall be paid in three equal installments: 1st installment equal to 50% of the COD Payment not later than 11.03.2010, the 2nd installment on or before 11.04.2010 and the 3rd installment one month following the 2nd installment i.e on or before 11.05.2010. However, Delayed Payment Rate shall apply on outstanding amount of COD Payment till its full payment is received by the Seller.
>
> 3. Make up Gas: The Parties acknowledge that the Buyer can take the Make up gas against the COD Payment in any month as per the GSA until 31.03.2011 based on the COD determined by the Expert.
>
> 4. Effectiveness: This Agreement shall come into effect from upon its execution and after settlement of the Issues as per Agreement; the provisions of the GSA shall prevail and stand applicable.
>
> IN WITNESS WHEREOF, the Parties have executed this Agreement as of the date first written above.

17. In terms of Clause 1 and 4 of the Payment Agreement, the parties agreed that the definitions set forth in the GSA are applicable to the Payment Agreement and that the provisions of the GSA shall not only apply but shall prevail, meaning that the settlement recorded in the Payment Agreement is part and parcel of the obligations under the GSA. The terms of the Payment Agreement establish that the parties intended to remain within the confines of the GSA as the purpose of the Payment Agreement was to give effect to the Expert's Determination. The Recitals to the Payment Agreement clarify this purpose. The Payment Agreement was executed as the Appellant was unable to make the required payments within the fifteen day directed by the Expert, hence they settled their payments under the Payment Agreement. Since the payment schedule was changed the Appellant was required to make late payment surcharge until full and final payment. The Appellant's contention that the parties deviated from the Experts binding determination, hence created an independent new arrangement by way of the Payment Agreement is totally without force as the intent of the Payment Agreement was to give effect to the Expert Determination which held the Appellant liable to certain payments. Under the GSA, we note that in pith and substance the Payment Agreement reflects the Appellant's acknowledgement that amounts are due to SNGPL under the GSA, however since payments could not be made at the prescribed time as per the GSA, the

parties agreed to make the payments as per the Payment Agreement. The obligation to pay arises under the GSA and not under the Payment Agreement which agreement was entered into essentially to facilitate the Appellant. The Appellant has relied on letter dated 1.7.2009 on the basis of which the parties agreed to appoint a local expert. The said letter also establishes the fact that the Appellant intended to resolves a dispute pertaining to obligation under the GSA as the list of issues annexed with the letter are all related to the Appellant's obligation under the GSA which required resolution. Through this letter the parties agreed that the decision of the local expert shall be binding on the parties and that the Appellant shall pay any amount within fifteen days failing which the Respondent SNGPL can draw on the security amounts deposited under the GSA. Hence the Experts Determination was related to disputes under the GSA and consequently the Payment Agreement gave effect to the enforcement of the Expert's Determination keeping the parties compliant of their obligations under the GSA.

18. We are fortified with our view by the fact that as per the findings of the Expert, Mr. Khalid Ibrahim both parties acknowledged that they will continue to perform under the GSA, pending resolution of the dispute referred to the Expert. Hence they never intended to enter into a new or fresh agreement. Neither party showed any intent to deviate from the GSA and the statement to continue under the GSA pending a resolution on the dispute amplifies this point. The Appellant has also contended that Payment Agreement does not contain an arbitration clause nor does it make specific reference to the arbitration clause in the GSA, hence the dispute under the Payment Agreement could not be referred to arbitration as the Sole Arbitrator lacked jurisdiction on the issues under the Payment Agreement. In this regard, we are not in agreement with the contentions raised by the Appellant's counsel. The Payment Agreement was not an independent contract outside of the GSA. It was an agreement to make payment *pursuant to obligations* under the GSA, that too on account of the Appellant's default of making payments within the fifteen days mandated by the Expert Mr. Khalid Ibrahim. In this regard, the judgments relied upon are distinguishable

and not relevant to the facts of the case. In the case 1988 CLC 1350 (*supra*), the court held that by mere implication an arbitration clause cannot be incorporated in another agreement and there must be specific mention of the arbitration clause. This judgment does not help the Appellant because the Payment Agreement specifically provides in Clause 4 that the provisions of the GSA shall apply and prevail. Hence not only is there a specific mention of the provisions of the GSA but they have been made applicable by the parties. Consequently the arbitration clause in the GSA is applicable to the parties.

19. Clause 18.3 in the GSA covers disputes, disagreements or default of the seller and buyer in connection with or arising out of this Agreement. The Respondent argued that the arbitration clause covers all disputes in connection with the GSA and since the Payment Agreement is a consequence of obligations under the GSA, hence it is in connection with and arises out of the GSA. This is why the parties agreed in Clause 1 of the Payment Agreement that the *definition and capitalized terms* shall have same meaning set forth in the GSA and that the provisions of the GSA are to prevail and be applicable. In our opinion the parties *never intended* to move out of the contractual obligations under the GSA. A dispute arose which was ultimately referred to the Expert under Clause 1.1 of the GSA. Once the Expert gave his binding determination the Appellant was obligated to comply with the Determination. However, it failed to do so, hence settled the matter by essentially acknowledging its obligations under the GSA and taking some time to make payment. In essence the parties never intended to go outside the GSA and the Payment Agreement reflects upon a settlement pursuant to the obligations under the GSA. The entire purpose of the Payment Agreement was to ensure that the parties fulfill their obligations under the GSA. Therefore we conclude that the dispute resolution mechanism under the GSA was applicable to the Payment Agreement and that the Sole Arbitrator was well within his jurisdiction to make determination in terms thereof.

The second objection against the second claim: Article V(2)(b) of the Schedule to the Act

20. The second claim of the Appellant against the Award is that the amount of Rs.603,202,083/- stated to be due against six invoices, for the period May to October 2011, under Clause 3.6 of the GSA is against the provisions of Section 74 of the Contract Act, 1872 ("**Contract Act**") and the public policy of Pakistan. The Appellant's case as argued by Mr. Salman Akram Raja is that the Respondent is not entitled to this amount because the Appellant was under an obligation to take gas from the Respondent under Clause 3.6(a) of the GSA for the relevant period. By not taking gas, the Appellant is in breach of Clause 3.6(a) of the GSA, for which the Respondent is entitled to reasonable compensation and not Rs.603,202,083/. Section 74 of the Contract Act provides that a party complaining of breach of contract can only claim reasonable compensation not exceeding the amount stipulated in the contract. Consequently reasonable compensation requires a finding on the facts of the case to establish actual loss suffered. The Appellant relies on cases decided by the Superior Courts of Pakistan to urge the point that the Respondent SNGPL has to establish the loss it suffered on account of breach of Clause 3.6(a) by the Appellant before it is awarded any amounts. It is his case that the Sole Arbitrator failed to consider the laws of Pakistan on reasonable compensation and also failed to consider the admitted loss of Rs.356,104,346.25/- suffered by the Respondent. Hence in this case, since the loss is admitted the Respondent could not be awarded an amount greater than Rs.356,104,346.25/-. In support of this argument, the Appellant has relied upon law laid down by the Superior Courts on Section 74 of the Contract Act being *Province of West Pakistan v. Messrs Mistri Patel & Co. and another* (**PLD 1969 SC 80**), *Syed Sibte Raza and another v. Habib Bank Ltd*. (**PLD 1971 SC 743**), *Saudi-Pak Industrial and Agricultural Investment Company (Pvt.) Ltd., Islamabad v. Messrs Allied Bank of Pakistan and another* (**2003 CLD 596**), *The Bank of Punjab v. Dewan Farooque Motors Limited* (**2015 CLD 1756**) and *Atlas Cables (Pvt.) Limited v. Islamabad Electric Supply Company Limited and another* (**2016 CLC 1833**). Mr. Salman Raja argued that the Sole Arbitrator failed to

consider the law of damages in Pakistan and in doing so defeated the purpose of Section 74 of the Contract Act and awarded amounts which run contrary to the laws of Pakistan.

21. The Sole Arbitrator's findings on the second claim are that Pakistani case law does not address the manner in which the *take or pay* clause should be interpreted and that there is a lacunae in Pakistani Law with regards to interpretation and validity of *take or pay* clause. However as per international cases the *take or pay* clause creates an obligation for payment against making the gas available but does not create an actual obligation to take the gas. He concluded that the parties entered into a contract and are bound by their commitment even if the terms of their agreement are deemed harsh by the Appellant. The Sole Arbitrator held that at best this situation calls for intervention by the Government of Pakistan but does not suggest that it is against Pakistan's public policy. The Appellant is aggrieved by these findings and has raised two issues before us with respect to the second claim. First being whether the *take or pay* clause is governed by the law of damages under Section 74 of the Contract Act and second, whether the award of Rs.603,202,083/- is against the public policy of Pakistan.

22. The facts leading up to this dispute are that the Appellant made payments of around Rs.1478 Million under the *take or pay* clause for April to November 2009, March to April 2010 and March 2011. Payments were to be made only for the Firm Delivery Period being March to November and not for December, January and February. The Appellant made payments in April, May, June, July and August 2009 which were adjusted as per the *take or pay* clause. However, payments made in September, October and November 2009 and March to April 2010 were not adjusted under the *take or pay* clause, meaning that even though payment was made Make Up Gas was never taken by the Appellant under Clause 3.6(c) of the GSA. As per the Respondent's contention the cutoff date for taking Make Up Gas was before March 2011. Learned counsel for the Appellant argued that since the price of gas is paid for, the Respondent's forfeiture of paid amounts, without supply of gas offends Section 74 of the Contract Act and unjustly enriches

the Respondent. The thrust of the dispute therefore is whether Make Up Gas could be taken for the period May to October 2011 being the period after the cutoff date of March, 2011 for exercising make up gas rights. SNGPL's position is that Orient is entitled to take Make Up Gas under Clause 3.6(c) of the GSA till the *next agreement year* which in this case expired on March 2011. Consequently SNGPL was not obligated to provide Make Up Gas after March 2011. The Appellant did not pay for gas received May to October 2011 and instead called for adjustment against lapsed Make Up Gas entitlement. The Sole Arbitrator accepted this argument and awarded Rs.603,202,083/- as amounts due for May to October 2011 and did not agree with the Appellant's contentions that the Respondent had unjustly received payment from the Appellant without providing any Make Up Gas.

23. In this context, Mr. Salman Akram Raja argued that amounts demanded under the six invoices are not due to the Respondent because the Respondent has received excess amounts from the Appellant for the months in which payment was made but gas was not supplied. Mr. Raja argued that the Respondent admits that gas was not supplied to the Appellant during this period and that it was delivered and sold to other consumers, hence the Respondent suffered minimum loss so far as consumption of gas is concerned. He argued that as a result of this diversion and sale, the loss suffered by SNGPL is limited to the cost of diversion of gas and to the default in the applicable tariff. In this regard, the learned counsel relied upon the statement of the Chief Billing Officer Mr. Liaqat Ali Nehra who admitted that the actual loss suffered is Rs.356,104,346.25 for the period April to November 2009 and March to April 2010 and March 2011. Hence he argued that the Respondent is entitled to Rs.356,104,346.25 and no more and any amounts over and above this amount would unjustly enrich the Respondent and is not reasonable compensation as mandated in Section 74 of the Contract Act.

24. Essentially the dispute between the parties is with respect to the taking of Make Up Gas. On behalf of the Appellant it is argued that when the price of gas has been paid for, the Respondent must supply the gas and the

Appellant must take the gas. If the supply is deferred to a later date and the Appellant does not take the gas, even within the make up gas period, it is in breach of its obligation to take gas under the GSA. In the event of breach caused by the Appellant, the Respondent SNGPL is entitled to reasonable compensation and cannot forfeit the amounts paid. Hence Mr. Raja argued that the *take or pay* clause is in fact a penalty clause which entitles the seller, SNGPL to a greater sum of money than reasonable compensation without establishing the loss incurred by SNGPL. Learned counsel also argued that the Appellant's conduct of not taking gas from the Respondent tantamounts to breach under Clause 3.6(a) of the GSA. This breach of the GSA does not automatically lead to termination of the contract and may allow the innocent party to recover damages for the breach. Accordingly it is the Appellant's case that the breach caused by the Appellant by not taking gas does not *ipso facto* result in termination of the GSA but gives the Respondent the right to choose either to terminate the contract or to recover damages for the loss suffered. The Appellant has relied upon the Determination dated 11.6.2014 made by Mr. Justice Khalil-ur-Rehman Ramday in which the expert held that the Appellant's default in not taking gas from the Respondent amounts to breach under Clause 3.6(a) of the GSA because Clause 3.6(a) of the GSA imposes an obligation on the Appellant to take minimum quantity of gas from the Respondent in the relevant period. The Appellant's conduct in not taking that minimum quantity of gas amounts to breach for which, in terms of Section 74 of the Contract Act, the party complaining of breach is entitled to reasonable compensation, not exceeding the amount stipulated in the contract. In support of their contention, the Appellant has also relied upon PLD 1969 SC 80 (*supra*) in which it is held that in the case of a penalty, the court shall grant reasonable compensation which is dependent upon the facts and circumstances of the case subject to proof and the aggrieved party can only recover reasonable compensation and no more. The Appellant has also relied upon 2016 CLC 1833 (*supra*) in which the Court has held that damages require evidence on details of loss actually suffered. Liquidated damages as a rule requires positive evidence to show the actual loss suffered by the parties claiming charges. The Court also held that if the fixed amount

is stipulated in a contract as liquidated damages, it cannot be recovered until the actual loss suffered is not proven through sufficient evidence. The Appellant Counsel therefore argued that the Respondent has admitted a loss of Rs.356,104,346.25/- on account of Appellant's breach of Clause 3.6(a) of the GSA, hence they are not entitled to, in the first instance any amount without proving reasonable loss and secondly at best the amount they have admitted and no more. Consequently the Sole Arbitrator's award of Rs.603,202,083/- is in disregard of the provisions of Section 74 of the Contract Act and the law settled by the Superior Courts of Pakistan. It is their contention that the *take or pay* provisions are governed by the general law of damages as embodied in Section 74 of the Contract Act and it is a case of unjust enrichment which is against the public policy.

25. On behalf of the Respondent, Khawaja Ahmad Hosain argued that the *take or pay* clause is the contractual mechanism agreed to between the parties with respect to payment for gas and the delivery and supply of gas. As per his arguments, the *take or pay* clause gives the buyer two options, either to pay and take the gas or else to pay and defer taking the gas. The exercise of either option is valid under the GSA and will not be considered as a breach. He argued that breach can only occur if a party fails to comply with its obligation under either of the two options. So far as the Appellant is concerned, the *take or pay* clause obligates the Appellant to pay for the gas. The taking of gas is not an obligation rather entitles the Appellant to choose taking gas or deferring the taking of gas. Therefore the *take or pay* clause is not a penalty clause and the question of being entitled to reasonable compensation as per Section 74 of the Contract Act does not arise. Learned counsel for the Respondent argued that courts of many common law jurisdictions have found the *take or pay* clause to be a valid and enforceable clause and have found that the *take or pay* clause is not a penalty clause. He further argued that the parties negotiated and agreed to the terms of the GSA and the Appellant now, at its own convenience has declared breach and on the basis thereof built a case that amounts due to the Respondent under the GSA are contrary to public policy as they are excessive and harsh. He further argued that the *take or pay* clause is a common clause in energy

sector agreements and both parties are well aware of this provision, its rationale and the fact that it is part and parcel of the terms of a gas supply agreement whether executed in Pakistan or internationally. Learned counsel argued that if the contention of the Appellant is accepted, it would lead to undoing the contractual arrangement between the parties and would have a serious impact on all *take or pay* clauses which exists in every gas supply agreement. He explained that such an interpretation would be contrary to the terms agreed upon between the parties and would adversely impact the commercial interest where such agreements are executed. Khawaja Ahmad Hosain argued that there is no question of unjust enrichment given that the payment due to the Respondent is under the agreed terms of the GSA. He argued that the *take or pay* payment is not intended to be payable as a penal consequence of failure of the buyer to take delivery of the given quantity of gas rather it is a commitment to pay for the gas with the option to take delivery of gas at a later date. Consequently not taking delivery of the gas is not breach of the terms of the GSA and does not fall within the ambit of a penalty clause nor does it result in unjust enrichment.

26. This issue was referred to an expert by the parties being Mr. Justice (Retd) Khalil-ur-Rehman Ramday in an effort to resolve the matter pertaining to Make Up Gas. The specific issue before the expert was that if the entire Make Up Gas has not been taken by the buyer under Clause 3.6(c) of the GSA, can the seller retain payments made by the buyer as of right, without any obligation to provide gas and if the seller has the right to keep the payment made with no obligation to provide gas, whether this is in fact a penalty. The expert discussed the wisdom of the *take or pay* clause and concluded that it was a penalty clause for the following reasons:

> A reading of this provision would reveal that the opening part thereof casts an obligation on the Buyer to take the stipulated minimum quantity of Gas every day during every month in the FDP. If the Buyer does not take the said minimum quantity and does not comply with this obligation, then obviously it commits a breach of this provision (the contract). The later part of the said opening sentence talking about paying for the said quantity of Gas if not taken, only tells us of the consequences of the said breach. Therefore, to say that no breach of the contract had occurred if the minimum quantity of Gas was not taken and paid for by the Buyer, would not be sustainable in law. In such a situation, the contract does get broken and the provisions of section 74 would come into play.

> It may be clarified at the outset, as mentioned above, that section 74 of the Contract Act does not inter-alia, recognize any distinction between a sum of money named as payable on account of a breach of the contract (liquidated damages) or the forfeiture of an already paid amount of money by way of penalty (as in the present case). Both these situations have to be treated alike and what the aggrieved party is entitled to receive from the other party, in both these cases, is only a reasonable compensation with the named amount as the outer limit. Therefore, the question whether the TOP amount is retainable by the Seller as penalty or otherwise, is not really relevant in this country.
>
> Thus the question whether the amount in question of the un-taken M.U. Gas could be retained by the Seller or had to be returned to the Buyer, would have to be answered in the light of the applicable provisions of section 10, 14, 16 and 74 of the Contract Act as interpreted, explained and elucidated by our Superior Courts through their judgments which have been discussed, in some detail, above. Through the said judgments, the Superior Court have been pleased to identify some basic standards, and norms to determine the enforceability of the provisions like the one in hand and the resultant determination of a reasonable compensation and the further determination of its payability or otherwise to the aggrieved party.

The Sole Arbitrator also considered this issue and concluded that:

> Take or pay clauses (with or without the provision for Make-Up Gas) are recognized and utilised internationally and are to be found most commonly in large scale energy projects because of the heavy cost of infrastructure involved and the cost of financing undertaken by the Seller and a need to have some certainty with regards to a minimum purchase of the commodity. The Buyer too "commits" to pay for a minimum quantity to guarantee a regular but flexible supply.
>
> Having considered the case law with regards to take or pay clauses (which is predominantly English and US), I find that one of the key reasons why most courts in these jurisdictions have found take or pay clauses to be valid and enforceable when a buyer challenges the clause as being an unenforceable penalty is that the take or pay payment is not due as a result of a contract breach or default but rather, it flows from the Buyer's valid choice/decision not to take the take or pay quantity. The Courts having come to that finding have then gone on to conclude that where there is no breach there can be no penalty.

He also held that:

> I agree with this save that I find that the word "shall" imposes on the Respondent the obligation to take a minimum quantity of gas and the obligation, if the gas is not taken, to pay for that minimum quantity of Gas, that is, the Take or Pay Quantity. The Respondent has a choice: "take or pay". It is when the Respondent fails to take and then fails to pay for the Take or Pay Quantity that a breach occurs. The GSA does not provide for any damages to be paid in this instance.
>
> A take or pay clause in essence thus requires the Buyer to pay for a minimum quantity of the commodity whether or not the Buyer exercises its right to take the commodity either then or later.

> The obligation to pay for this minimum quantity of the commodity is not a secondary obligation triggered by a breach but is a primary obligation.
>
> The Take or Pay clause (with the attendant Make-Up Gas provision) was agreed upon by the parties. The Claimant was obliged to provide the Gas to the extent of the Daily Contract Quantity on each day during the Firm Delivery Period. This would have entailed initially the construction and thereafter the regular maintenance of the transmission lines an undoubtedly huge infrastructure exercise. The Respondent on the other hand was obliged to pay for a minimum quantity (50% of the Daily Contract Quantity) if it chose not to take the Daily Contract Quantity that the Claimant was obliged to provide on a daily basis during the Firm Delivery Period. Both parties had their respective guarantees: The Claimant, the payment of a minimum amount and the Respondent, the provision of a daily supply of Gas. The payment of the minimum amount by the Respondent still entitled the Respondent to Gas for that minimum amount paid, the only condition being that it had to be taken- up within a given period of time. The question of time was a matter for negotiation between the parties before the GSA was signed.
>
> For the reasons outlined above and having construed the Take-or-Pay clause in the GSA with the attendant Make-Up Gas provision I hold that a breach does not occur when the Respondent fails to take the Take or Pay Quantity.
>
> I also hold that the obligation to make the Take or Pay payment flows from the Buyer's decision not to take the Take or Pay Quantity of Gas. The Respondent thereafter has the period stipulated in Section 3.6(c) of the GSA to Make-Up Gas for which it has paid. The minimum amount paid by the Respondent thus cannot be a penalty as it could be effectively reduced (to nothing) by the Respondent's taking of the Make-Up Gas. I thus do not find the Take or Pay clause to be a clause in *terrorem.*

Effectively he concluded that there was no breach by the Appellant hence the provisions of Section 74 of the Contract Act are not attracted.

27. Learned counsel for the Appellant argued that since the *take or pay* clause is a penalty clause, the Respondent is not entitled to amounts over and above reasonable compensation that too which need to be proven by way of evidence. Hence the amount of Rs.603,202,083/- is against the laws of Pakistan and contrary to the public policy of Pakistan. The public policy exception is found in Article V(2)(b) of the Convention which provides that recognition and enforcement of an arbitral award may be refused in Pakistan if that award is contrary to the public policy. Therefore one of the grounds on which recognition and enforcement of a foreign arbitral award can be refused is where the award is against public policy. The term public policy is not a defined term under the Act or the Convention, hence the Appellant's counsel has relied upon various different cases and some literature from

different jurisdictions to highlight the view taken by the courts and experts on the interpretation of public policy. The material relied upon discusses public policy in the context of arbitration in the following manner:

Chief Justice Robert French AC of the High Court of Australia in the 2016 Goff Lecture delivered on 18 April 2016 titled *Arbitration and Public Policy in Hong Kong* who concluded that:

> The decisions of courts applying concepts of arbitrability and public policy have sometimes been designated as pro-arbitration or anti-arbitration depending upon the outcome. It is necessary to be cautious about those designations, which can be indicative of advocacy rather than assessment. Arbitration is not like a football code attracting the rule that if you are not for us you are against us. And while healthy competition between jurisdiction is important for the development of innovative approaches to dispute resolution, public policy should not just be about attracting business. Nor can judicial decision-making be about attracting labels such as 'pro-arbitration' or 'arbitration friendly and thereby attracting non-judicial business to the jurisdiction. Clearly, there is a lot of room for movement in the public policy judgments which inform the structure and content of legal regimes supporting and governing arbitration and their interpretation and application. There is a powerful international public policy reflected in that of many countries which strongly support arbitration as a dispute resolution mechanism. In such countries there is, for the most part of a recognition that countervailing public policy considerations may properly limit the scope of the arbitral process and require a degree of supervision of it. Coupled with that is a recognition that public policy criteria in relation to arbitrability recognition and enforcement must be applied with care and restraint.
>
> It is, of course, a responsibility of all those engaged in the practice of commercial arbitration to ensure that they and the process in which they engage not only serves its users but continues to be sensitive to and to respect the public interest. That is its greatest assurance of its long term future."

Justice Stephen Breyer of the United States Supreme Court in the book *The Court and the World (2015)* stated that:

> Again, this case concerned a judicial order, but the same problem might have arisen with an arbitration finding, which would have behind it the weight of the New York Arbitration Convention. Signed by close to 150 nations, the convention provides that 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. Because of this agreement, international arbitration awards are often easier to enforce in foreign nations than are judgments of ordinary courts. But it also provides that a nation may refuse to enforce an order on the grounds that it violates the nation's public policy. As with labor arbitration, courts that are too ready to deny enforcement of awards for arbitration procedures. At the same time, however, courts that pay little or no attention to their nation's public policies can create, out of arbitration, a

> procedural method for nullifying those policies. So what is the right balance? How much divergence among nations in appropriate? Does it matter if a party resisting arbitration can choose among three different nations with three different public policies, by (1) bringing a court action (in Nation A) to prevent arbitration from starting, (2) bringing a court action midstream (in Nation B) trying to stop the arbitration from continuing, or (3) bringing an action (in Nation C) after the arbitration trying to prevent enforcement of an award? The lower courts are already beginning to wrestle with some of these questions. And our Courts may have to confront them in due time.

Justice Sundaresh Menon of the Supreme Court of Singapore in his speech *International Arbitration: The Coming of a New Age for Asia (and Elsewhere) (2012)* stated that:

> The second development relates the willingness of at least some courts to adopt a more expansive notion of review based on public policy. The Indian Supreme Court in ONGC v *SAW* Pipes extended the concept of public policy. Holding that an award would be contrary to public policy if it were "patently illegal"**,** the Court went on to re-examine the questions of fact and law that had been considered by the arbitral tribunal. This was followed in another recent Indian decision Venture Global Engineering v Satyam Computer Services Ltd. 43 this time involving a foreign award. In similar fashion, in European Gas Turbine v Westman International Ltd, the Paris Court of Appeal said that its control over arbitration must involve in fact and in law all the elements which enable the verification of the application or not of a public policy rule, and if such a rule applies**,** the legality of the arbitration agreement.

In India, the ground of public policy had been extensively explored in the case of *Oil and Natural Gas Corporation Ltd v Saw Pipes Ltd* **(2003) 5 SCC 705** ("**Saw Pipes Case**"). The Supreme Court of India concluded at para 31 that:

> Therefore in our view, the phrase 'Public Policy of India' used in S. 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time -to time. However, the award which is, on the face of it, patently in violation of statutory provision cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term 'public policy' in Renusagar's case 1993 Indlaw SC 1441 (supra), it is required to be held that the award could be set aside if it is patently illegal. Result would be award could be set aside if it is contrary to:
>
> (a) Fundamental policy of Indian law; or
> (b) The interest of India; or
> (c) Justice or morality, or
> (d) In addition, if it is patently illegal

> Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such award is opposed to public policy and is required to be adjudged void.

In the subsequent case of *Oil and Natural Gas Corporation limited v. Western Geco International Limited* (**2014) 9 SCC 263**, ("**Geco Case**") the Supreme Court of India elaborated on the concept of the "Fundamental policy of Indian law" and held at paras 26 and 28 in the following terms:

> What then would constitute the 'Fundamental policy of Indian Law' is the question. The decision in Saw Pipes Ltd. does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression "Fundamental Policy of Indian Law", we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the Fundamental Policy of Indian law. The first and foremost is the principle that in every determination whether by a Court or other authority that affects the rights of a citizen or leads to any civil consequences, the Court or authority concerned is bound to adopt what is in legal parlance called a 'judicial approach' in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the Court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of Judicial approach in judicial and quasi-judicial determination lies in the fact so long as the Court, Tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a Court, Tribunal or Authority vulnerable to challenge.
>
> Equally important and indeed fundamental to the policy of Indian law is the principle that a Court and so also a quasi-judicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated 'audi alteram partem' rule one of the facets of the principles of natural justice is that the Court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the Court or authority is taking. The requirement that an adjudicatory authority must apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian Law.

Having explained the concept of the "Fundamental Policy of Indian Law", the Supreme Court of India proceeded to conduct a detailed factual enquiry of the case and decided to modify the arbitral award impugned before the Court to the following reasons:

> It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. What is important in the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an arbitral tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest.
>
> Inasmuch as the arbitrators clubbed the entire period between 16th October 2001 and 21st March, 2002 for purposes of holding the appellant-Corporation responsible for the delay, they committed an error resulting in miscarriage of justice apart from the fact that they failed to appreciate and draw inferences that logically flow from such proved facts. We have, therefore, no hesitation in rejecting the contention urged on behalf of the Respondent that the arbitral award should not despite the infirmities pointed out by us be disturbed.
>
> That brings us to the last submission that deduction on account of taxes not paid should have been allowed by the Respondent – arbitral tribunal. The Tribunal has, in our opinion, correctly held that no part of the work was undertaken outside Singapore which was to be executed on a turnkey basis for a price that was pre-determined. The arbitrators have, in our opinion, rightly held that no taxes were payable under the Indian Income Tax Act so as to entitle the Corporation to deduct any amount on that account by reason of non-payment of such taxes. The challenge to the award to that extent must fail and is, hereby rejected.
>
> In the result, we allow this appeal but only to the extent that out of the period of 4 months and 22 days which the arbitrators have attributed to the appellant-Corporation a period of 56 days comprising 42 days of the first interval and 14 days of the second referred to in the judgment shall be reduced. Resultantly, deductions made by the appellant-Corporation for the said period of 56 days shall stand affirmed and the award made by the arbitrators modified to that extent with a proportionate reduction in the amount payable to the Respondent. No costs.

Learned counsel for the Appellant argued that in 2016, the Indian Parliament amended the Arbitration and Conciliation Act, 1996 of India ("the Indian Act") such that Section 48 of the Indian Act which is based on Article V(2)(b) of the New York Convention, was amended and an explanation was added to section 48(2)(b) of the Indian Act that excluded the grounds of patent illegality from the concept of public policy of India. However, the

Indian Parliament retained the fundamental policy of Indian law as the constituent element of the public policy of India. Therefore he argued that the Geco Case, which is based on the concept of fundamental policy of Indian law, continues to be a binding precedent in India and a highly persuasive precedent for the Courts of Pakistan.

28. Further to the above Mr. Salman Akram Raja added that the UNCITRAL Secretarial Guide on the New York Convention (2016) ("UNCITRAL Guide") provides the following commentary on Article V(2)(b) of the New York Convention:

> Although different jurisdictions define public policy differently, case law tends to refer to a public policy basis for refusing recognition and enforcement of an award under article V(2)(b) of the New York Convention when the core values of a legal system have been deviated from. Invoking the public policy exception is a safety valve to be used in those exceptional circumstances when it would be impossible for a legal system to recognize an award and enforce it without abandoning the very fundaments on which it is based.
>
> In the words of the often-quoted judgment of the Second Circuit of the United States Court of Appeals in Parsons, "[e]nforcement of foreign arbitral awards may be denied on (the basis of public policy) only where enforcement would violate the forum state's most basic notions of morality and justice". Several jurisdictions outside the United States have relied on this passage when assessing the public policy exemption.
>
> Similarly, the Federal Court of Australia has recently decided that "it is only those aspects of public policy that go to the fundamental, core questions of morality and justice in [the] jurisdiction [where enforcement is sought] which enliven this particular statutory exception to enforcement". In the same vein, the Hong Kong Court of Final Appeal defined an award that violates public policy as an award that is "so fundamentally offensive to (the enforcement jurisdiction)'s notions of justice that, despite its being party to the Convention, it cannot reasonably be expected to overlook the objection.

Hence on the basis of the cases and literature relied upon learned counsel for the Appellant argued that public policy means matters of national interest related to national sovereignty. It means that the court should protect the fundamental notions of justice, fairness and morality and anything done in contravention of the same would offend public policy. In this case, learned counsel argued that the public policy concerns are that a party should not be permitted to recover more than what it has actually lost; that a public sector entity should not be allowed to unjustly enrich itself at the expense of a private person; that unjust enrichment offends the principles of economic

justice as embodied in the Constitution; that Section 74 of the Contract Act does not permit the Respondent to recover more than reasonable compensation; that the Respondent, can at best only recover loss that it has actually incurred and in this case admitted the amount of Rs.356,104,346.25/-. Hence the Sole Arbitrator's award of Rs.603,202,083/- cannot be maintained.

29. Learned counsel for the Respondent, Khawaja Ahmad Hosain argued that the term public policy is not defined under the law nor has any meaning been given in the context of the New York Convention. The expression public policy has been interpreted in the context of Section 23 of the Contract Act wherein the courts have held that any element of injury to public interest would fall within the domain of public policy. In the case *Nan Fung Textiles Ltd. v. Sadiq Traders Ltd* (**PLD 1982 Karachi 619**), it has been held that:

> The general head of 'Public Policy' covers a wide range of topics, such as, for example, trading with enemy in time of war, stifling prosecution, champerty and maintenance and various other matters.
>
> Scope of public policy-Objects which on grounds of public policy invalidate contracts may, for convenience, be generally classified into five groups first, objects which are illegal by common law or by legislation; secondly, objects injurious to good Government either in the field of domestic or foreign affairs; thirdly, objects which interfere with the proper working of the machinery of justice; fourthly, objects injurious to family life and fifthly, objects economically against the public interest.
>
> While determining whether the enforcement of a non-speaking foreign award will be against public policy it cannot be overlooked that the Legislature has recently amended Arbitration Act, 1940 which does not invalidate a non-speaking award unless it has been remitted by the Court and the arbitrators or umpire fail to resubmit it with reasons in sufficient detail. The fact remains that no such amendment has been made in the Act of 1937. A foreign award which does not state reasons cannot be termed to violate any provision of law governing its enforcement. Any non-compliance with the provision of Arbitration Act, 1940 will not invalidate a foreign award nor can it be set aside under the provisions of Arbitration Act. The validity of a foreign award as defined by section 2 of the Act of 1937 can be challenged on the grounds specified in section 7 of the Act of 1937. The learned counsel for the respondents contended that enforcement of award is against Public Policy but did not address how Public Policy was involved. In my view the enforcement of present awards is not against Public Policy.

The argument of injury to society as an element of public policy has also been endorsed by the august Supreme Court of Pakistan in *Haji Abdul*

Karim and others v. Sh. Ali Muhammad and others (**PLD 1959 SC 167**) in the following manner:

> Similarly, the appellants not having proved that a licence for the working of the factory was necessary because the Chief Executive Officer had formed the opinion that the running of the factory was dangerous to life, health or property or likely to create nuisance, it cannot be held that running of the factory was opposed to public policy.

In *Maulana Abdul Haque Baloch and others v. Government of Balochistan through Secretary Industries and Mineral Development and others* (**PLD 2013 SC 641**) the august Supreme Court of Pakistan has held as under:

> The processing of the matter by GOB in the above manner substantiates that public advertisements were not resorted to in the interest of transparency and to obtain the best competitive price for the disposal of public property, i.e. mineral resources in Reko Diq, and thereby denied participation to other investors of the field to the detriment of the general public, and especially the people of Balochistan. Such a handling of an issue of great public importance was against public policy as well because it certainly caused injury to the public good and, therefore, provides a basis for denying the legality of the transaction in question. It is noteworthy that section 23 of the Contract Act, 1872 provides that the consideration or object of an agreement is lawful, unless it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another; or the Court regards it as immoral or opposed to public policy.

30. Khawaja Ahmad Hosain also explained that the Appellant's reliance upon the Geco Case for interpretation of the term 'public policy' as a ground of refusal to recognize foreign arbitration awards under the Convention is misplaced because unlike in the present case, the award in Geco Case was a domestic award. He explained that in India, Arbitration and Conciliation Act 1996 ("the 1996 Act") provides for an application for setting aside of a domestic award under Section 34 of the 1996 Act. The 1996 Act also provides a distinct provision of law for application of refusal of recognition of the foreign awards, which is set out in Section 48 of the 1996 Act. Therefore, the interpretation of public policy as explained in Geco Case is irrelevant for the purposes of the present case as it does not apply to foreign awards. He argued that the entire judgment in the Geco Case pertains to interpretation of 'public policy' in the context of section 34 of the 1996 Act for domestic awards which is illustrated by the relevant paragraph reproduced for reference:

> It is true that none of the grounds enumerated under Section 34(2)(a) were set up before the High Court to assail the arbitral award. What was all the same urged before the High Court and also before us was that the award made by arbitrators was in conflict with the public policy of India, a ground recognized under Section 34(2)(b)(ii). The expression 'public policy of India' fell for interpretation before this Court in ONGC Ltd. v. Saw Pipes Ltd. and was, after a comprehensive review of the case law on the subject, explained in para 31 of the decision in following words:
>
> Therefore, in our view, the phrase 'public policy of India' used in Section 34 in context is required to be given a wider meaning. It can be stated that concept of public policy connotes some matter which concerns public good and the public interest. What is for the public good or public interest or what would be injurious or harmful to the public good or public interest has varied from time to time.

31. The learned counsel further explained that the decision calling for a wider interpretation of public policy under Section 34 of the 1996 Act in the Saw Pipes Case relied upon by the Appellant, is also not applicable to foreign awards. This case is also related to domestic awards and the concept of patent illegality which is distinguishable from the present case. This view was expressed by the Supreme Court of India in *Shri Lal Mahal Ltd. v. Progetto Granto Spa* [(**2014) 2 SCC 433 at 449**] ("**Shri Lal Mahal Case**") of which the relevant paragraph is reproduced for reference:

> We accordingly hold that enforcement of foreign award would be refused under Section 48(2)(b) only if such enforcement would be contrary to (1) fundamental policy of Indian law; or (2) the interest of India; or (3) justice or morality. The wider meaning given to the expression 'public policy of India' occurring in Section 34(2)(b)(ii) in Saw Pipes is not applicable where objection is raised to the enforcement of the foreign award under Section 48(2)(b).

32. He again distinguished the cases relied upon by the Appellant such that reliance on *Phulchand Exports Ltd. v. O.O.O. Patriot* (**2011) 10 SCC 300** ("Phulchand Case") which upheld that in case of foreign awards the wider interpretation of public policy should be adopted was overruled by the Supreme Court of India in Shri Lal Mahal Case. The relevant paragraph of Shri Lal Mahal Case is reproduced:

> It is true that in Phulchand Exports a two judge Bench of this Court speaking through one of us (R.M. Lodha J.) accepted the submission made on behalf of the appellant therein that the meaning given to the expression 'public policy of India' in Section 34 in Saw Pipes must be applied to the same expression occurring in Section 48(2)(b) of the 1996 Act. However, in what we have discussed above it must be held that the statement in para 16 of the Report that the expression 'public policy' of India used in Section 48(2)(b) has to be given a wider meaning and the award could be

> set aside, if it is patently illegal does not lay down correct law and is overruled.

The Supreme Court of India in Shri Lal Mahal Case also ruled that the public policy does not allow the review of merits of the case:

> 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.

33. Hence on the basis of the aforesaid, he argued that the objections raised by the Appellant do not fall within the ambit of Article V(2)(b) of the Convention. Section 74 of the Contract Act does not apply to the *take or pay* clause and the issues raised with respect to its interpretation, calling it a penalty clause, is incorrect and runs contrary to the understanding reached between the parties with respect to the *take or pay* mechanism as contemplated under the GSA. Learned counsel further argued that the public policy exception is to be narrowly construed and error of law or erroneous reasoning are not covered in its scope. The learned counsel argued that the Sole Arbitrator has reasoned his opinion in terms of the obligations under the GSA and as such has not rendered an opinion which can be set aside under Article V(2)(b) of the Convention. The learned counsel further emphasized that the objections raised by the Appellant call for a decision on the merits of the case which objection is not sustainable under the Convention and the Act. He argued that the public policy exception is triggered where there is an element of injury to the public, or public interest or where the enforcement of the Award is not possible since it violates the laws of Pakistan. In the present case none of these factors are prevalent, hence no Case is made out which calls for any interference under the public policy exception. He clarified that the *take or pay* clause is not a penalty clause and the Respondent is entitled to recover amounts as contemplated under clause 3.6 of the GSA.

The take or pay clause

34. In order to appreciate the arguments with respect to the *take or pay* clause, it is necessary to examine the said clause, its mandate and intent.

Clause 3.6 of the GSA is the *take or pay/make up gas* clause which reads as follows:

> (a) From and after the Commercial Operations Date and during a Month in the Firm Delivery Period, the Buyer shall take and if not taken pay for a minimum quantity of Gas (the "Take-or-Pay Quantity) equal to fifty percent(50%) of the Daily Contract Quantity multiplied by the difference between the number of days in that Month (or portion thereof) and (i) the number of days (or fractions thereof) of Force Majeure Events declared by the Seller or the Buyer in that Month, (ii) the number of days (or fractions thereof) of non-delivery of Gas by the Seller in that Month for any reason, including a breach or default by the Seller or maintenance undertaken by the Seller pursuant to Section 12.1, and (iii) the number of days of Scheduled outages in that Month notified to the Seller pursuant to Section 12.2.
>
> (b) During the Commissioning Period, the Take or Pay Quantity shall be fifteen percent (15%) of the Daily Contract Quantity multiplied by (i) the number of Days in the Commissioning Period and (ii) the actual Gas Price applicable during the Commissioning Period. The Buyer shall make this payment to the Seller at the Commercial Operations Date; provided that there shall be no Make-Up Gas for such period; provided further that if the Buyer takes Gas in excess of the fifteen percent (15%) of the Daily Contract Quantity then the Buyer shall pay to the Seller the Gas Price multiplied by the quantity of Gas actually taken by the Buyer; provided further that in no event shall the Seller's obligation to deliver Gas hereunder on any Day exceed the Daily Contract Quantity. Any reconciliation of such Take or Pay Quantity charges by the Buyer to the Seller shall be made on the Commercial Operations Date.
>
> (c) Except for the Gas taken or paid by the Buyer pursuant to Section 3.6(b) above, any Gas paid for by the Buyer pursuant to this Section 3.6(a) above during a Contract Year but not taken prior to the time of payment ("Make Up Gas") may be taken with payment by the Buyer of the different between the Gas Price prevailing at the time the Make-up Gas is taken by the Buyer and the Gas Price used to determine the payment for the Take or Pay Quantity, using the "first in, first out" method and any increase in taxes on the sale and purchase of Gas applicable to Gas sales hereunder, during the Firm Delivery Period of the immediately following one (1) Contract Year of the Term, provided that the Buyer shall have first taken and paid for a quantity equal to but not less than the Take or Pay Quantity in the applicable Contract Year and provided further that in no event shall the Seller's obligation to deliver Gas hereunder on any Day exceed the Daily Contract Quantity. At the end of the Gas Allocation, the Buyer shall be entitled to take the Make-up Gas during the immediately following twelve (12) Months on as available basis.
>
> (d) Unless agreed otherwise by the Buyer, and subject to the Buyer having placed the Gas Order, the minimum amount of Gas the Seller must supply is 9.5 MMSCFD to avoid paying any charges under Section 3.7 and the Buyer shall not be obliged to take Gas, if tendered, for any quantity less than the said quantity.

35. On the basis of this clause, known as the *take or pay* clause, the parties have agreed that the seller being the Respondent SNGPL shall make available gas for supply to the buyer being the Appellant, Orient Power Company. As per Clause 3.6(a) of the GSA, the Appellant can either *take*

the gas meaning that it will pay for the gas and take supply of the gas or it can *pay* for the gas but not take supply of the gas, meaning that it can defer the taking of the supply of gas to a later date. In terms of the *take or pay* clause, the buyer can pay for the gas and take it at a subsequent period as Make Up Gas under Clause 3.6(c) of the GSA. Therefore as per the GSA, where the buyer has paid for the gas but defers delivery of supply of gas the *take or pay* clause allows the buyer to pay for the gas and *take* the gas as Make Up Gas at a subsequent period. Consequently in terms of the GSA, there is an obligation on the Respondent to supply gas and there is an obligation on the Appellant to pay for the gas with the option to either take supply immediately or else defer taking supply to a later date. Clause 3.6(c) of the GSA provides that if the gas is not taken but is paid for by the buyer, then the buyer can take the gas as Make Up Gas during the immediately following twelve months on *as available basis*. Therefore under Clause 3.6(c) of the GSA the buyer has the option to take Make Up Gas within a specified period, after which the obligation to supply gas to the buyer finishes, meaning that the seller is no longer required to deliver gas to the buyer.

36. The *take or pay* clause is a common term in gas supply agreements, which gives the buyer the option to take supply of the gas or else pay for it but defer the taking of the gas supply. The rationale behind this clause is to allocate risk over long term contracts. It acts as a risk sharing mechanism between the supplier and buyer where the buyer seeks stability in supply and some flexibility in prices and the seller seeks assurance for guaranteed income. It also provides some comfort to the investors of natural gas projects that their investments are secure over the duration of the contract, as the risks are divided between the parties and not borne by any one party. An essential feature of the *take or pay* clause is the right to take *make up gas*. The buyer has the right to take the gas in the succeeding year or any defined period and not at the time when payment was due. The *take or pay* clause is activated when the buyer does not take delivery of the agreed quantity of gas but has paid for it. The Appellant has raised the question as to whether the *take or pay* clause is enforceable as a penalty clause in terms of Section 74

of the Contract Act and the second question is what happens where the buyer has paid for the gas but deferred taking it and then failed to take Make Up Gas during the twelve month period. In such cases can the seller forfeit amounts received for supply of gas.

37. There are two separate obligations in the *take or pay* clause. First is the obligation of the seller to supply gas during the firm delivery period and also to provide Make Up Gas under Clause 3.6(c) of the GSA on *as available basis* during the make up gas period. The second is the obligation of the buyer to pay for the gas. Clause 3.6(a) specifically provides that the buyer shall take and if not taken pay for a minimum quantity of gas. This means that the buyer shall either pay and take the gas or else pay and defer the taking of gas. Hence we are of the opinion that the obligation of the buyer under Clause 3.6(a) of the GSA is to pay for the gas and not take the gas. There is no obligation on the buyer to take a minimum quantity of gas at the time when payment is made. Clause 3.6(a) of the GSA gives the buyer the option to take or pay for the gas. Clause 3.6(c) of the GSA gives the buyer the *make up gas right* on the basis of which it can take delivery of the gas in the succeeding year. Again the supplier is obligated to make the gas available for the make up period on as available basis and correspondingly the buyer has option to exercise its make up gas right. The make up gas right is also not an obligation but a right to exercise the option to defer taking of gas at a later date. At the time if the buyer defers the taking of gas, the buyer has to satisfied its basic obligation to pay for the gas and can opt to defer taking the gas. The right to make up gas therefore is also not an obligation on the buyer but an option which can be exercised by the buyer. The period within which the make up gas right can be exercised is also stipulated in Clause 3.6(c) of the GSA. Hence the buyer has agreed to defer taking gas and has agreed to avail the option to take Make Up Gas within a stipulated period. In all situations the gas has been paid for and the buyer is left within the right to exercise its make up gas right within the stipulated period. If the buyer fails to exercise this right in a timely manner the obligation to supply gas finishes.

38. Accordingly the *take or pay* clause is the contractual mechanism agreed to by the parties which clearly sets out two possible options available to the Appellant with respect to the taking of gas pursuant to the GSA. Under Clause 3.6(a) the Appellant can pay and take the gas or else pay for a minimum quantity of gas being the take or pay quantity. We again reiterate that the obligation under Clause 3.6(a) is to *pay* for the gas and there is no obligation to take gas since the buyer can defer taking the gas. Consequently due to *take or pay* clause a breach cannot be triggered on account of failure to take gas. The buyer has the right to exercise the option to take gas or invoke the *take or pay* clause. Hence the exercise of either option is valid under the GSA and would not constitute a breach thereof. Therefore we find that the *take or pay* payment is not due because of a breach or default rather it flows from the contracting party's valid choice to invoke the right to invoke the *take or pay* clause.

39. The commercial rationality of *take or pay* clauses has been addressed in the case of *Port of Tilbury (London) Ltd. v. Store Enso Transport & Distribution Ltd*. (**2009) EWCA Civ 16**) wherein the England and Wales Court of Appeal (Civil Division), observed, in the context of a contractual arrangement for a supply of paper and the investment in the supply facilities that the supplier, i.e. that appellant port, needs to make, as follows:

> There is nothing absurd about a take or pay minimum obligation. Such provisions are common, and they are particularly used where, as here, one party has to expend significant sums of money for the purposes of the contract and needs to look to the contract for a secure annual income stream which will pay the ongoing financial cost of its investment. The minimum payment obligation does not override the Port's service obligations; it merely provides, together with a no set-off provision, for a situation where the investor is assured its income stream, despite disputes, on the basis of "pay now, dispute later.

40. In the case of *M&J Polymers Ltd v. Imerys Minerals Ltd* (**2008) EWHC 344 (Comm)**, which has also been cited by the Sole Arbitrator in the Award, the England and Wales High Court (Commercial Court), observed, in regards to a chemical supply contractual dispute, that a *take or pay* clause is a familiar provision in commercial contracts. The Court went on to observe that the parties freely entered into the contract after free

negotiations and that they were aware of the arrangement that they were getting into. The Court went on to hold as follows:

> On the facts of this case, I am entirely satisfied that the take or pay clause was commercially justifiable, did not amount to oppression, was negotiated and freely entered into between parties of comparable bargaining power, and did not have the predominant purpose of deterring a breach of contract nor amount to a provision "in terrorem". The evidence was wholly clear. The negotiations took place between extremely well qualified, able and savvy commercial men against a very significant commercial background, including a background of previous dealings. At the time when they were negotiating there was, on the one hand, an extreme scarcity of acrylic acid, a willingness on the part of the Claimant to commit supply to the Defendant, notwithstanding the requirements of their other customers, but in return expecting an absolute commitment to take a minimum quantity of the product to be manufactured with that acid, and, on the other hand, a clear recognition of the difficult commercial position in which the Defendant found itself, a desperate need to secure supplies of the product and desire to keep the contract as short as possible; with the result that there was give and take on both sides, a shorter term than the Claimant desired and a longer one than the Defendant desired, but so far as the Defendant was concerned, the significant advantage, as it then saw it, of a get out clause via the meet or release provision in Article 5.6."

The Court concluded that the *take or pay* clause did not offend the rule against penalties and that the claimant in the case was entitled to recover the price of the shortfall pursuant to the said provision.

41. In the most recent case titled *Cavendish Square Holding BV v. Talat El Makdessi* (**2015) UKSC 67**, the Supreme Court of the United Kingdom discussed the issue of courts interfering in contracts freely entered into by parties and giving new meanings to the *take or pay* clause which is common in commercial contracts. Citing the case of *Philips Hong Kong Ltd v. Attorney General of Hong Kong* (**1993) 61 BLR 41**, where it was observed that the court has to be careful not to set too stringent a standard and bear in mind that what the parties have agreed should normally be upheld, not least because any other approach will lead to undesirable uncertainty especially in commercial contracts. The Supreme Court of the United Kingdom observed as follows:

> There is a fundamental difference between a jurisdiction to review the fairness of a contractual obligation and a jurisdiction to regulate the remedy for its breach. Leaving aside challenges going to the reality of consent, such as those based on fraud, duress or undue influence, the courts do not review the fairness of men's bargains either at law or in equity. The penalty rule regulates only the remedies available for breach of a party's primary obligations, not the primary obligations themselves.

The Court observed in regards to what constitutes a penalty:

> This means that in some cases the application of the penalty rule may depend on how the relevant obligation is framed in the instrument, ie whether as a conditional primary obligation or a secondary obligation providing a contractual alternative to damages at law. Thus, where a contract contains an obligation on one party to perform an act, and also provides that, if he does not perform it, he will pay the other party a specified sum of money, the obligation to pay the specified sum is a secondary obligation which is capable of being a penalty; but if the contract does not impose (expressly or impliedly) an obligation to perform the act, but simply provides that, if one party does not perform, he will pay the other party a specified sum, the obligation to pay the specified sum is a conditional primary obligation and cannot be a penalty.

The Court further observed in regards to interpreting certain clauses as "penal" provisions, as follows:

> Modern contracts contain a very great variety of contingent obligations. Many of them are contingent on the way that the parties choose to perform the contract. There are provisions for termination upon insolvency, contractual payments due on the exercise of an option to terminate, break-fees chargeable on the early repayment of a loan or the closing out of futures contracts in the financial or commodity markets, provisions for variable payments dependent on the standard or speed of performance and "take or pay" provisions in long-term oil and gas purchase contracts, to take only some of the more familiar types of clause. The potential assimilation of all of these to clause imposing penal remedies for breach of contract would represent the expansion of the courts' supervisory jurisdiction into a new territory of uncertain boundaries, which has hitherto been treated as wholly governed by mutual agreement.

The Supreme Court of the United Kingdom held that such rules on interpretation, which are an inroad upon the freedom of contract, should not be extended by the judiciary, but by the legislature.

42. The courts of the United States of America have also upheld the validity of *take or pay* clauses and their industry recognized purpose and have ruled that it is not to be considered a penalty provision. In the case of *Prenalta Corporation v. Colorado Interstate Gas Company*, **944 F.2d 677 (199)**, the Tenth Circuit of the US Court of Appeals with reference to a dispute regarding payment that was due under a series of gas purchase agreements, held as follows:

> We have previously recognized in International Minerals and Chem. Corp. v. Liano, Inc., 770 F.2d 879, 885 (10th Cir.1985), cert. denied, 475 U.S. 1015, 106 S.Ct. 1196, 89 L.Ed.2d 310 (1986) that a take-or-pay contract provides for performance in the alternative: "Since this is a 'take or pay' contract, the buyer can perform in either of two ways. It can either (1) take the minimum purchase obligation of natural gas (and pay) or (2) pay the

> minimum bill."ld. See also PGC Pipeline v. Louisiana Intrastate Gas, 79\ F.2d 338, 340 (5th Cir. 1986): Resources Investment Corp. v. Enron Corp., 669 F.Supp. 1038, 1041 (D.Colo. 1987); Superior Oil Co. v. Transco Energy Co., 616 F.Supp. 98, 107 (IV.D.La. 1985): Hanover Petroleum Corp. v. Tenneco, Inc., 521 So.2d 1234, 1241 (La.Ct.App.1988), writ denied, 526 So.2d 800 (La. 1988): Pogo Producing Co. v. Sea Robin Pipeline Co., 493 So.2d 909, 915-16 (La.Ct.App.1986), writ denied, 497 So. 2d 310 (La. 1986). Because one of the alternative performances in a take- or-pay contract is the payment of money, courts have distinguished the "pay" provision from a liquidated damages provision. Universal Resources, 813 F.2d at 80 n. 4; Sabine Corp. v. ONG Western, Inc., 725 F.Supp. 1157, 1184 (W.D.Okla. 1989); Enron, 669 F.Supp. at 1041. This distinction is particularly necessary because the payments made pursuant to the take-or-pay provision, the pay alternative of Contracts 422 and 516, are not payments for the sale of gas. Kaiser-Francis Oil Co. v. Producer's Gas Co., 870 F.2d 563, 570 (10th Cir. 1989) (quoting ANR Pipeline Co. v. Wagner & Brown, 44 FERC ∪ 61,057, 61,158 (1988) ("[T]he take-or-pay payment for gas is not intended to be a payment for gas and is not a part of the price of gas until it is applied at the time of sale.")); Diamond Shamrock Exploration Co. v. Hodel, 853 F. 2d 1159, 1167-68 (5th Cir. 1988). The difference between alternative performance and liquidation of damages is lucidly explained in § 1082 of Corbin on Contracts:
>
> It is evident that some alternative contracts giving the power of choice between the alternatives to the promisor can easily be confused with contracts that provide for the payment of liquidated damages in case of breach, provided that one of the alternatives is the payment of a sum of money.... If, upon a proper interpretation of the contract, it is found that the parties have agreed that either one of the two alternative performances is to be given by the promisor and received by the promisee as the agreed exchange and equivalent for the return performance rendered by the promisee, the contract is a true alternative contract. This is true even though one of the alternative performances is the payment of a liquidated sum of money; that fact does not make the contract one for the rendering of a single performance with a provision for liquidated damages in case of breach.

The Court went on to hold that in regards to the facts of the case at hand:

> Under the terms of Contracts 422 and 516. CIG could elect either to purchase the contract quantity or to pay the value of the contract quantity (the "minimum bill") in exchange for Prenalta's tender of the contract quantity of gas or any make-up gas due CIG for past deficiencies. This is clearly an alternative contract which allows CIG to perform either alternative, to "take" or "pay" for the gas, in exchange for Prenalta's return performance, rather than a contract which requires CIG to "take" the contract quantity of gas with a triggering liquidated damages provision if CIG fails to do so.″

43. In the case of *Universal Resources Corporation v. Panhandle Eastern Pipe Line Company* **813 F.2d 77 (1997**), the Fifth Circuit of the US Court of Appeals, in a similar dispute over non-payment under a gas

purchase and sale agreement, made the following observations in the context of *take or pay* clauses:

> The purpose of the take-or-pay clause is to apportion the risks of natural gas production and sales between the buyer and seller. The seller bears the risk of production. To compensate seller for that risk, buyer agrees to take, or pay for if not taken, a minimum quantity of gas. The buyer bears the risk of market demand. The take-or-pay clause insures that if the, demand for gas goes down, seller will still receive the price for the Contract Quantity delivered each year.

The Court further went on to hold that the terms of the *take or pay* clause are unambiguous and common to the gas industry and fully enforceable.

44. The validity and enforceability of *take or pay* clauses in contracts is recognized in other common law jurisdictions as well, such as New Zealand. In the case of *Miraka Limited v Milk New Zealand (Shanghai) Co. Limited*, [**2017] NZHC 2163**, the High Court of New Zealand, adjudicating a dispute arising out of a milk supply contract which contained a minimum supply *take or pay* provision, made the following observation with reference to take or pay clause:

> The rational for take or pay minimum obligations, is relatively routinely commercial. It means issues regarding quality and service do not override obligations to make payment if as much is clear from the contract terms. If a definite sum of money is required to engage the services of another then that obligations must be met within the timeframe required. Indeed, even if service has not been provided—if a contract anticipates that outcome, and even if the provider suffered no loss if claims as to damage and mitigation of loss are clearly excluded by contract terms.

45. *Take or pay* clauses are also accepted as valid and enforceable in jurisdiction such as Canada. For example, in the case of *Churchill Falls (Labrador) Corporation Limited v. Hydro Quebec* **2018 SCC 46 (CanLII)**, involved a dispute arising out of the interpretation of a take or pay undertaking regarding the purchase of electricity before the Supreme Court of Canada. The case itself did not revolve around the legality of *take or pay* provisions but rather about whether there was a price adjustment clause that was implied in the terms of the agreement. The Supreme Court held that there was no ambiguity in the contract to merit the reading in of a provision that allowed for price adjustments in light of price fluctuations. However, the reason behind mentioning this precedent, is to show that even in

common law jurisdictions, such as Canada, *take or pay* clauses in contracts are common and considered valid.

46. After considering the foregoing cases, we are of the opinion that the *take or pay* clause being a common provision in commercial contracts, especially gas purchase agreements is valid and enforceable and cannot be considered as a penalty provision. Further that the *take or pay* clause is designed to provide the supplier of a product (in this case gas), especially in large scale energy projects, such as the one involving the Respondent, with a guaranteed revenue stream so as to secure its significantly sizeable investment in setting up the infrastructure and facilities necessary for making the supply of the product (i.e. gas in this case) by ensuring a rate of return. It is important to clarify that "paying" for the product is the primary obligation and taking the product is the option which can be exercised by the buyer. The *take or pay* provision is activated if the buyer *does not take the gas*. Hence not taking the gas is an option available to the Appellant and cannot form the basis of a breach. Clause 3.6(c) of the GSA provides that if the gas is not taken but is paid for by the buyer, the Appellant can take Make Up Gas during the immediately following twelve months, on as available basis. Hence under Clause 3.6(c) the buyer has the option to take Make Up Gas during a specified period, after which there is no obligation on the seller, SNGPL to provide Make UP Gas even if available. Hence not taking the gas as such cannot be considered as breach of the terms of the GSA even if the buyer has paid for the gas but deferred its delivery.

47. Furthermore the terms of the GSA were negotiated and agreed to between the parties. The Appellant has not challenged the *take or pay* clause nor payments made under this clause. The Appellant is aggrieved by its inability to take Make Up Gas within the stipulated time for which it claims that since it has paid for the gas and it could not be delivered then the Respondent cannot forfeit the agreed to price under the GSA, rather it can at best recover damages from the Appellant. This argument is premised on the fact that the gas is paid for yet the Respondent does not have to supply it simply because the Appellant missed the cutoff point for taking delivery. We

find that the basic premise of the Appellant's argument negates the very term it agreed to in the *take or pay* clause. We find that not only was the Appellant aware of the fundamentals of the *take or pay* clause, it was also aware of the fact that this clause gave it an alternate means of performance which it has exercised repeatedly over the years. Having done so, the Appellant cannot lock in on a few invoices and justify its attempt to set off payment obligations under the GSA. *Take or pay* clauses are a common feature of gas supply arrangements and both parties opted to have this clause in the GSA. Having done so the entire case of the Appellant that the mechanism agreed to under the GSA is unfair and unreasonable is without basis. Hence we find that the *take or pay* clause does not offend Section 74 of the Contract Act.

The Public Policy Exception

48. The second part of the objection against the Second Claim raised by Mr. Salman Akram Raja is that even though the parties agreed to the *take or pay* clause, the fact that the Respondent has not supplied gas but has received payment for it, is unfair and unjust and the sum of Rs.603,202,083/- and does not reflect the loss suffered by the Respondent. As per the arguments made it amounts to unjust enrichment which offends the public policy of Pakistan. Therefore the issue is whether unjust enrichment, as argued in this case amounts to a violation of public policy under Article V(2)(b) of the Convention. Article V(2)(b) of the Convention provides that a court may refuse to enforce an arbitral award if the competent authority in the country where recognition and enforcement is sought finds that the recognition and enforcement of the award would be contrary to the public policy of that country. The term 'public policy' has not been defined in the Convention or under the Act. Both Counsel have relied upon cases from different jurisdictions to show the manner in which courts of different jurisdictions have interpreted the term *public policy* to give effect to the enforceability of foreign awards. In terms of the cases cited, both parties agreed that public policy means and includes moral, social or economic principles which are sacrosanct and require protection without any

exception. Article V therefore gives the Contracting State the ability to decide whether a foreign arbitral award can be or should be enforced in that State by bringing the award within the ambit of the public policy exception.

49. In order to give some meaning to public policy under Article V(2)(b) of the Convention, it is important to note that the Convention does not refer to any universally accepted definition, concept or interpretation of public policy. This has been left totally at the discretion of the Contracting State in which the award is to be recognized and enforced. Consequently Contracting States are free to determine as per their own law and concepts as to what public policy should mean. In order for us to give meaning to the public policy exception we examined the Convention, which is a multilateral treaty that places an obligation on the courts of Contracting States to enforce foreign arbitral awards. Hence we are cognizant of the fact that the intent of the Convention is pro-enforceability of foreign awards and that it cannot achieve this mandate without domestic legislation. The Convention itself is not a self-executing treaty, therefore it requires implementing legislation by the Contracting States. Signatories to the Convention have promulgated their own legislation which enables the enforcement of foreign arbitral awards in terms of the general standards agreed to in the Convention. Hence the Act is the direct result of Pakistan being signatory of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958. Section 6 of the Act clearly provides that the enforcement of foreign arbitral award is binding on the parties and can only be refused if the court declares, pursuant to Section 7 that the award is unenforceable. Section 7 of the Act provides for the grounds as provided in Article V of the Convention as being the grounds for refusing to recognize and enforce a foreign arbitral award. The scope of Article V is limited yet the language of Article V(2)(b) allows the local forum to mold the public policy exception as per its own understanding and national public policy. Consequently the public policy exception is invoked to prevent enforcement of a foreign award and has been referred to as a *very unruly horse which once you astride, you will not know where it will take you*. We are of the opinion that violation of public policy must be compelling in order for us to justify

setting aside a foreign arbitral award. In this regard, we have considered the decisions from the courts of several different jurisdictions which have given meaning to the word *public policy* in the context of the cases before them under Article V (2)(b) of the Convention.

50. In the United States Court of Appeals for the Second Circuit in *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de I'Industrie du Papier RAKTA and Bank of America*, (**508 F.2d 969, 974 (2d Cir. 1974**), the Court held that enforcement of foreign arbitral awards may be denied only where enforcement would violate the forum state's most basic notions of morality and justice. In arriving at this conclusion, the Court was conscious of the Convention's pro-enforcement bias, its supersession of the Geneva Convention, and the principle of reciprocity, lest foreign courts frequently accept it as a defense to enforcement of arbitral awards rendered in the United States. In this case, the United States Corporation against which enforcement of an ICC award was sought contended that, due to certain actions taken by the Government of the United States and the severance of relations between the United States and Egypt, it was required as a loyal citizen to abandon its contractual obligations in Egypt. It was argued that, therefore, enforcement of the award requiring performance under the contract would be contrary to public policy of the United States. The Court rejected this contention and noted that to read the public policy defense as a parochial device protective of national political interests would seriously undermine the Convention's utility.

51. The Court of Final Appeal in Hong Kong in *Polytek Engineering Co. Ltd. v. Hebei Import & Export Corp.*, (**23 Y.B. COMM. ARB. 666, 666-84**) (**Hong Kong Ct. App.) (1999**) relied on the standards established in *Parsons and Whittemore* and held that in order to refuse enforcement under the Convention, an award must be so fundamentally offensive to that jurisdiction's notions of justice that, despite being a party to the Convention, it cannot reasonably be expected to overlook the objection. The Court emphasized on the language 'of that country' in Article V(2)(b) to hold that public policy of the seat would differ from the public policy of the

enforcement State. However, to refuse recognition and enforcement, the violation must be compelling and go beyond the minimum that would justify setting aside a domestic judgment or award.

52. The English Courts have also adopted a strong pro-enforcement policy and are reluctant to set aside an award on grounds of public policy. In the context of enforcement of an arbitral award, the English Court of Appeal in a decision cited at *Deutsche Schachtbau-und Tiefbohrgesellschaft m.b.H. v. Ras Ali Khaimah National Oil Co., Shell International Petroleum Co. Ltd. Court of Appeal, Not indicated, 24 March 1987* (**13 Y.B. COMM.ARB. 522, 534-35 (1988**) held that considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution. It has to be shown that there is some element of illegality or that the enforcement would be wholly offensive to the ordinary, reasonable and fully informed member of the public on whose behalf the powers of the State are exercised. In the case of *Limited v. Nigerian Nat'l Petroleum Corp.*, (**31 YB COMM. Arb. 853, 856)** the High Court of Justice Queens Bench Division, noted that the public policy exception in Section 103(3) of the English Arbitration Act, 1996, is confined to the public policy of England (as the country in which enforcement is sought) in maintaining fair and orderly administration of justice.

53. The Indian Supreme Court has a split view on the public policy exception. In the Shri Lal Mahal Case, the Supreme Court of India reviewed the earlier decisions on public policy and cleared the confusion created on interpreting the concept of public policy with reference to enforcement of foreign awards in India. The Supreme Court held that a wider meaning as opined in the *Saw Pipes Case* is not applicable when interpreting the public policy exception. The Supreme Court explained that the meaning of the term 'public policy of India' means the fundamental policy of India, the interests of India or justice or morality. The court concluded that a narrower interpretation was required in cases of enforcement of foreign arbitral awards so as to encourage enforcement of foreign awards. This view is a departure from the view relied upon by the Appellant Counsel in the Geco

Case where the Indian Supreme Court explained the meaning of the fundamental policy of India with reference to domestic awards to include all fundamental principles which provide basis for the administration of justice and enforcement of law. While agreeing with the decision given in the *Saw Pipes Case* which called for a wider interpretation of public policy in domestic arbitration, the Indian Supreme Court held that public good, public injury are part of the public policy of India. Both these judgments created ways to invoke the public policy exception whereas the Shri Lal Mahal Case is specifically with reference to foreign awards and requires a narrow approach thereby discouraging interference through the public policy exception.

54. The European Court of Justice in *Allsop Automatic Inc. v. Tecnoski snc, Corte di Appello*, **22 Y.B. COMM.ARB. 725, 725-26** (**Ct. App. Milan**) held that the public policy defence should be possible in exceptional circumstance, where there is non-conformity to basic principles of morality and justice. In other cases the French Courts have held that the public policy should be invoked when the enforcement of the award would be contrary to French Legal Order.

55. The judgment of the Court of Appeals, Milan in *Allsop Automatic Inc. v. Tecnoski Snc, Corte di Appello*, **22 Y.B. COMM.ARB, 725, 725-26 (Ct. App. Milan**) refers to international public policy the body of universal principles shared by nations of similar civilizations, aiming at the protection of fundamental human rights, often embodied in international declarations or conventions. The Highest Arbitrazh Court of the Russian Federation in *Ansell S.A. v. OOO Med Bus, Serv*., **Ruling No.VAS-8786/10, at 2 (2010**) (**Highest Arbitzah Ct., Russian Federation**) has also stated that an award would be contrary to public policy, if it produces results contrary to universally recognized moral and ethical rules or threatening the citizens' life and health, or the State's security. However, both the decisions are obscure and do not go beyond holding that the award in those cases were not contrary to public policy.

56. Even under our own jurisdiction, public policy has been interpreted in the context of the 1937 Act in PLD 1982 Karachi 619 (*supra*) as being objects which are illegal under law, which are injurious to good government, which are adverse to justice, family life or public interest. Likewise in the context of Section 23 of the Contract Act, public policy would invoke some element of public injury or illegality, such that to hold a contract as illegal it must cause injury to society. Reliance is placed on *Sultan Textile Mills (Karachi) Ltd., Karachi v. Muhammad Yousuf Shamsi* (**PLD 1972 Karachi 226**).

57. A review of the decisions given in different jurisdiction establishes that non-interference or the pro-enforcement policy is in itself a policy of Contracting States which is not easily persuaded by the public policy exception argument. It is also representative of the fact that Courts perceive that defining public policy under Article 2(V)(b) is the prerogative of each of the Contracting States and is based on the public policy of the State where enforcement is sought. By and large the application of the public policy exception is restrictive and limited to exceptional circumstances that affect the most fundamental values of a State. Accordingly *public policy* under Article V(2)(b) of the Convention is kept fluid and adaptive and can be invoked in cases of patent illegality or matters which are fundamental for a State. We are of the opinion that the public policy exception allows a Contracting State to safeguard its core values and fundamental notions of morality and justice which may change over time. The public policy exception acts as a safeguard of fundamental notions of morality and justice, such that enforcement of a foreign award may offend these fundamentals. However the Act requires the recognition and enforcement of foreign awards. In this way the Act encourages parties to an alternate dispute resolution mechanism for quicker and less costly resolution of disputes. It makes the foreign arbitral award binding on the parties and *prima facie* as of right, calls for recognition and enforcement of foreign arbitral awards. Consequently we find that the public policy exception should not become a back door to review the merits of a foreign arbitral award or to create grounds which are not available under Article V of the Convention as this

would negate the obligation to recognize and enforce foreign arbitral awards. Such kind of interference would essentially nullify the need for arbitration clauses as parties will be encouraged to challenge foreign awards on the public policy ground knowing that there is room to have the Court set aside the award.

58. In the case before us, the Appellant has argued that not only does the *take or pay* clause offend Section 74 of the Contract Act but it also results in unjust enrichment which is also against the public policy. Unjust enrichment means that a person is able to retain a benefit, be it money or otherwise, which it is not entitled to as it was received unfairly, unjustly, without legal justification. So a party is enriched at the expense of another party, which has lost something of value. The Appellant argues that retaining an amount greater than the actual loss suffered by the Respondent, for gas not consumed by the Appellant is far less than what was awarded by the Sole Arbitrator. We are not persuaded by the arguments made with respect to unjust enrichment as the liability of the Appellant to pay the Respondent for gas is under the GSA. The amount of Rs.603,202,083/- pertains to invoices raised for the months May to October 2011 for gas consumed by the Appellant. This is neither denied nor disputed by the Appellant. Hence the payment of this amount cannot be termed as unjust or unfair as it is the amount due under the GSA for gas consumed. The GSA is a contractual arrangement between the parties, freely negotiated and executed by the parties. The contract is enforceable and in its entirety as is not offensive to the public policy of Pakistan. As such, we find that the argument of unjust enrichment is misplaced as the payment obligation is contractual, made under a valid and enforceable contract with respect to a payment mechanism agreed to by the Appellant. Furthermore remedy against unjust enrichment is in the form of restitution which in this case would mean that the Respondent returns amounts that it is lawfully entitled to under the GSA. Hence the Respondent has not benefited unfairly or unjustly at the expense of the Appellant. In fact the Respondent has been awarded amounts due to it under the GSA.

59. The Appellant Counsel Mr. Salman Akram Raja has stressed on the unjust enrichment argument to emphasize his case that the unjust enrichment argument goes to the root of the public policy exception being the fundamental policy of law. However, we are not persuaded by this argument either because the Appellant is obligated under the GSA to pay for gas, and if it defers taking the gas, then under Clause 3.6(c) of the GSA it has agreed to take Make Up Gas within the succeeding years. The disputed period arises after the lapse of the make up gas period. Resultantly while the Appellant has agreed to pay and take gas within the make up gas period, it failed to do so. This failure of the Appellant to invoke its make up gas right within the stipulated time does not render the *take or pay* clause as offensive to the fundamental or core values of Pakistan. Having agreed to the *take or pay* mechanism it hardly lies in the mouth of the Appellant to allege unjust enrichment pursuant to this clause. Furthermore the Appellant has attempted to set off payments for gas consumed by it against payments it claims have been retained in excess by the Respondent against gas not supplied after the March 2011 cutoff date under Clause 3.6(c) of the GSA. For the payment of actual gas consumed, there can be no argument regarding actual loss or unjust enrichment as the Appellant has consumed the gas supplied. The entire defense of the Appellant with respect to the Respondent claim for payment of Rs.603,202,083/- is an attempt to justify its efforts to set off amounts due against amounts paid for which the Appellant did not take make up gas within stipulated time. Even this effort cannot be justified as the GSA creates specific obligations on both parties. The Appellant has not challenged any of its obligations, any terms of the GSA or even payments made under the *take or pay* clause. Notwithstanding the same, the Appellant seeks interference in the Sole Arbitrator findings through the public policy exception which would in fact impact the entire mechanism contemplated under Clause 3.6 of the GSA and cannot be isolated to the disputed transactions. We also find that the Sole Arbitrator has interpreted Clause 3.6 of the GSA by holding that the primary obligation is to pay for the gas and that there is no obligation to take gas on the Appellant. Hence he has dispelled the damages payable on breach argument. This contractual

interpretation by the Sole Arbitrator goes to the merits of the dispute and is with reference to the performance required under the GSA. No injury is caused in the performance of the GSA to the public, no loss is caused to the public and no fundamental policy is adversely impacted by requiring the parties to make good on their contractual commitments. Resultantly the public policy exception is not made out even as per the Appellant's own case.

60. To conclude, we find that the *take or pay* clause was freely negotiated and agreed to by the Appellant; that the Appellant's primary obligation under the *take or pay* clause is to pay for the gas; that the Appellant has the option to take gas at the time of payment or to take it as Make Up Gas at a subsequent date; that the Appellant is not in breach of its obligation to take gas or Make Up Gas under Clause 3.6(a) and (c) of the GSA. We also find that *take or pay* clause is not a penalty clause; that payments of Rs.603,202,083/- are due to the Respondent for gas actually consumed under the GSA; that the *take or pay* clause does not offend Section 74 of the Contract Act nor has a case of unjust enrichment been made out. Consequently no ground is made out under Article V(2)(b) of the Convention calling for interference in the Award.

61. In view of the aforesaid, the instant ICA is **dismissed** and impugned order dated 4.4.2018 passed by the learned Single Judge in COS No.16/2017 is maintained.

62. One of us (Shahid Jamil Khan, J.) though agree with the result of appeal, being dismissed, has given his observations through a separate note which is part of this judgment.

(SHAHID JAMIL KHAN)
JUDGE

(AYESHA A.MALIK)
JUDGE

Approved for Reporting

JUDGE JUDGE

*Announced in an open Court on **01.08.2019**.*

*Allah Bakhsh***

JUDGE JUDGE

Shahid Jamil Khan, J., Though I agree with the result of appeal, being dismissed, for which, with respect, my reasoning is different. Yet, I am unable subscribe to the observations and reasons by the Sole Arbitrator, as recorded in Paragraphs 22 and 27 of main judgment.

2. The Sole Arbitrator ignored the spirit and words of the New York Convention while observing that '*there are lacunas in Pakistan Law*' regarding the concept of '*Take or Pay*' clause, which being predominately English and US, is recognized and utilized internationally. Agreed that purpose of the Convention is pro-enforcement of arbitral awards, made in a territory of State other than the State where recognition and enforcement is sought, nonetheless it is strange, *per se,* to say that it shall be recognized and enforced, despite being in conflict with the law of that State, on declaration by an Arbitrator that the law of enforcing State carries lacunas or is defective.

Article II (3) of the Convention, (reproduced below) asks the Court of Contracting (enforcing) State to '*refer the parties to arbitration*', unless such agreement is found *null* and *void*, inoperative or incapable of being performed. Needless to say that the Court of a Contracting State can find the agreement as *null* and *void* under its indigenous law and not a foreign or internationally accepted law.

ARTICLE II

> "3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article shall, at the request of one of the parties, *refer the parties to arbitration*, ***unless it finds that the said agreement is null and void, inoperative or incapable of being performed.***"
>
> [emphasis supplied]

Article VII also recognizes the law or the treaties of the country where such award is sought to be relied upon. Article V provides the grounds, in presence of which the recognition and enforcement can be refused;

Its Section 1(a) (reproduced below) recognizes the law to which the agreement is subjected by the parties. It is not the case of either party that GSA was subjected to a foreign law.

ARTICLE V

"1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought. Proof that:-

(a) The parties to the agreement referred to in article II were, *under the* ***law applicable*** *to them*, under some incapacity, or the *said agreement is* ***not valid under the law*** to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or"

[emphasis supplied]

Under Section 2(b) of Article V, recognition and enforcement can also be refused, if the award would be contrary to "Public Policy".

3. In my opinion, the argument and grounds on validity of '*Take and Pay*' clause and '*unjust enrichmen*t' were irrelevant. In light of the facts noted in Paragraph No.14 of main judgment, I agree with the finding that Payment Agreement dated 11.01.2010 was not an independent agreement, therefore, absence of arbitration clause in this agreement was of no consequence. The amounts agreed to be paid under this agreement were essentially agreed on a dispute under the '*Take or Pay*' clause 3.6 of the GSA. After accepting to pay the amount under dispute, the appellant was estopped from challenging vires of the clause, at least to the extent of these payments.

For the second claimed amount, appellant's attempt to set off payment of the gas, supplied and consumed, for period May to October 2011, against the payments for which gas was not received is unjustified and that too on self-assumed interpretation. The appellant could not unilaterally decide that the payments not returned, for default in receiving the gas under clause 3.6, is against the provisions of Section 74 of the Contract Act, 1872. Appellant's act necessarily raised a dispute under GSA, therefore, respondent rightly resorted to its arbitration clause.

4. I subscribe to the finding that High Court has exclusive jurisdiction to recognize and enforce a foreign arbitral award under the Act of 2011. By dismissing appeal, I also agree to the extent of recognition of award by learned Single Bench without subscribing to the reasons and observations

given by the Sole Arbitrator, relating to application of Pakistan's Law and Public Policy.

(SHAHID JAMIL KHAN)
JUDGE